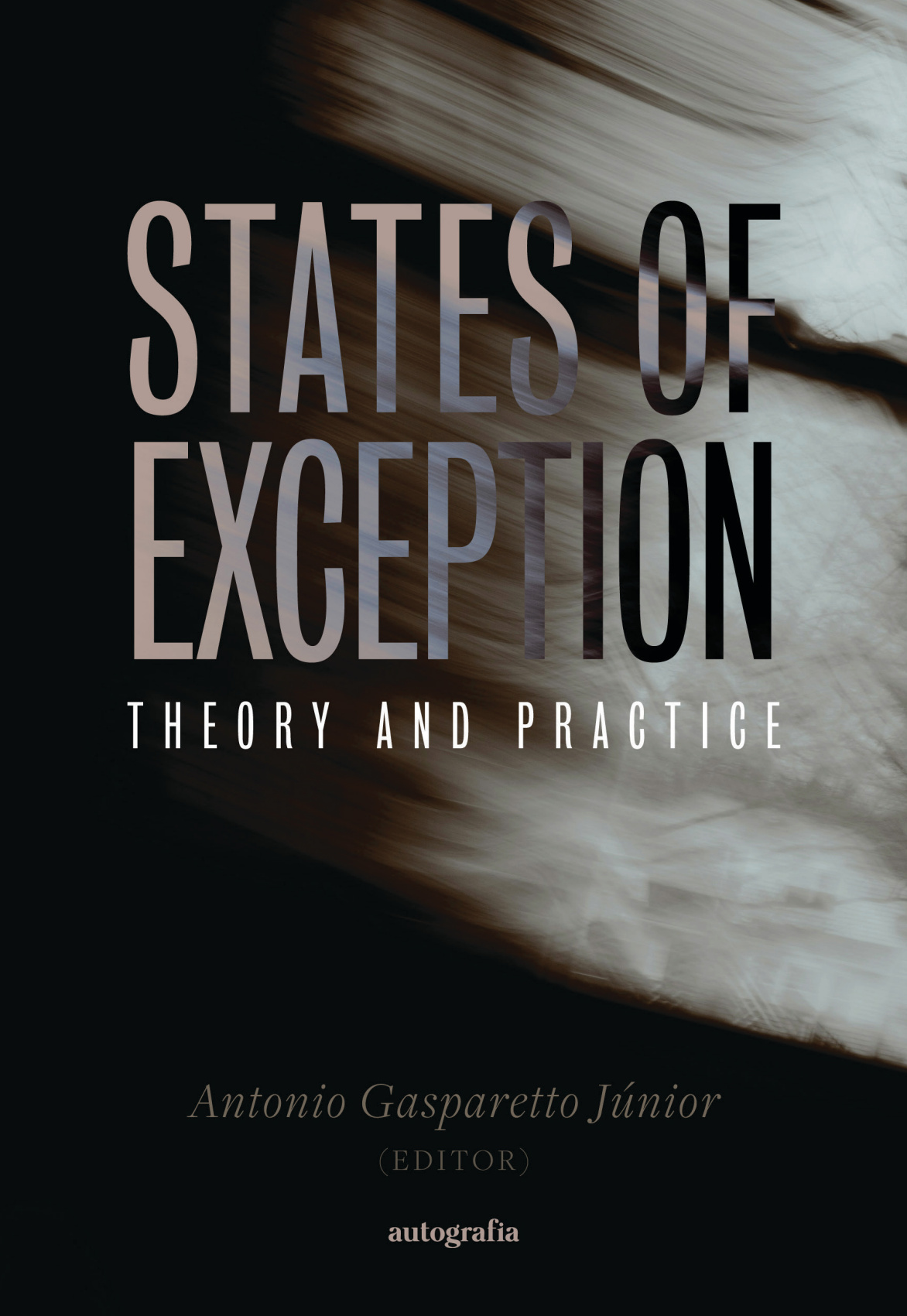
STATES OF EXCEPTION
THEORY AND PRACTICE
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SUMÁRIO

INTRODUCTION

The concept of "state of exception" has a rich historical background and has become increasingly prevalent in contemporary discourse. This term is commonly used to draw attention to the current political and legal conditions, emphasizing an extraordinary event or process. However, behind this expression lies a complex concept and a detailed historiography.

Throughout history, the state of exception has been utilized as a means to safeguard the threatened sovereignty of the State and its institutions, sometimes even leading to the suspension of certain rights and guarantees. This state exists at the intersection of a crisis and enduring governmental practices, with the potential to evolve into dictatorships in extreme cases.

In essence, the state of exception represents a delicate balance between maintaining order and protecting individual freedoms. It serves as a critical tool for governments to navigate through times of uncertainty and crisis, while also posing significant challenges to the principles of democracy and rule of law.

This book endeavors to provide a comprehensive examination of the term "states of exception" and its significance in various fields such as politics, law, history, philosophy, and sociology. By offering a conceptual analysis of the term, its historical application, and implications, as well as an international historiographical perspective, this book aims to shed light on the complexities surrounding this topic.

The genesis of this book can be traced back to a seminar organized at Federal University of Juiz de Fora (UFJF) in July 2023, which sought to delve into the theory and practice of states of exception within liberal democracies. The seminar's curriculum encompassed a broad overview of the concept of exception and its manifestations in Europe, the United States, and South America. Through engaging discussions and debates, involving a global network of researchers specializing in states of exception, this book emerged as a culmination of the collective insights and perspectives shared during the seminar.

In essence, this book serves as a testament to the collaborative efforts of scholars and experts from diverse backgrounds, coming together to explore and analyze the intricate dynamics of states of exception in contemporary societies.

The book is structured around two main themes: theoretical approaches to states of exception and analyses of exceptional practices. It is important to note that theory and practice frequently intersect in their respective explorations.

Commencing with theoretical and conceptual reflections, the first chapter titled "The Changing State of Exception" by François Saint-Bonnet delves into the evolving nature of exceptionality. Following this, Anna Migliorini revisits the conceptual perspective in her chapter "Walter Benjamin's (Two) States of Exception". Additionally, Matthias Lemke explores contemporary emergency regimes and their typologies in his essay titled "A Dangerous Thing".

In her analysis of authoritarian liberalism, Marie Goupy delves into the concept of "The Economic State of Emergency, or the Role of Crisis Law in Liberal Democracies", taking a more focused approach within the realm of emergencies. Meanwhile, in the subsequent chapter titled "States of Emergency and Human Rights". Mary Luz Tobón Tobón examines the various ways in which exceptionality was utilized and exploited during the Covid-19 pandemic.

Sébastien Le Gal examines the development of the state of siege in France, from a military device to an exceptional legislation. Le Gal seeks a historical understanding of the effects of emergency legislation in the country. In turn, in his exploration of exceptionality practices, Antonio Gasparetto Júnior delves into the characteristics of exceptions during the Brazilian First Republic (1889-1930), focusing on the frequent implementation of the state of siege.

Lisandro Cañón shifts the focus to the latter half of the 20th century, examining what he terms the "Terrorist State in Latin America". Juan Fernando Romero Tobón, on the other hand, delves into the "Sprains of the Exception in Colombia" during the initial years of the 1991 constitution. Lastly, István Szilágyi offers a theoretical and historical analysis on "Geopolitical Changes, the States of Exception, and Modernization Models in Latin America". Each of these scholars provides valuable insights into the complexities of exceptionality in Latin American history.

In summary, the book offers updated analyses and reflections on exceptional circumstances, with the goal of contributing to both conceptual discussions and opening dialogues on potential approaches to verifiable state of exception practices. This book is a valuable addition to the international debate, facilitating the exchange and connection of ideas and perspectives to enhance our comprehension of crisis management mechanisms that are both envisioned and implemented.

Antonio Gasparetto Júnior

First semester of 2025

THE CHANGING STATE OF EXCEPTION

François Saint-Bonnet

France experienced 1,153 days under a state of emergency regime between 2015 and 2021, while it only experienced 1,062 days between 1955 and 2006. Furthermore, the recent state of emergency covered the entire territory, including overseas, while the oldest ones were limited to more specific areas: the departments of Algeria (1955), an island (New Caledonia in 1984-1985), and peripheral districts of certain cities (2005)[1]. We have changed scale. But have we witnessed a metamorphosis? In other words, has the state of exception become an almost normal mode of government as some maintain?[2]

We can answer this question by suggesting that, in a world where everything would be fixed, particularly the level of protection of rights and freedoms, the longer derogatory measures are implemented, the more the rule of law would decline in favor of the state of exception. This presentation of things would lead us to lament and bitterly deplore the end of a world of peace and law in which States

1. An exception to this logic is the state of emergency decreed on May 13, 1958 which ends on June 1.

2. For example, Giorgio Agamben, who estimated in 2002 that "the state of exception increasingly tends to present itself as the dominant paradigm of government in contemporary politics. Once the state of exception has become the rule, it is to be feared that this drift from a provisional and exceptional measure in the technique of government will lead to the loss of the traditional distinction between the forms of Constitution" (Le Monde, Wednesday December 11, 2002).

had become accustomed, at the end of the 20th century, to seeing their actions firmly channeled within narrow legal boundaries.

We can argue, on the contrary and in a Hobbesian vein, that no freedom can be truly effective in a state of maximum insecurity. This insecurity is indeed significant due to terrorist and health threats. It is therefore right that states of emergency last or even end only with the incorporation into common law of measures that were previously reserved for exceptional circumstances, such as the law of October 30, 2017. This law allows the administration to adopt equivalent measures, at any time, to those that were previously only authorized by the law of April 3, 1955.

The first response can be described as idealistic in that it considers the increasing difficulty of debating new threats that affect our country to be negligible, like deaths linked to terrorist attacks or contracting a viral disease. The second presents itself as realistic on the grounds that the threats are not imaginary. However, it can be objected to consider only physical security (the integrity of bodies) at the expense of another security, no less essential, legal security (this peace of mind which comes from the opinion that everyone has of its safety, to use Montesquieu's famous definition of freedom) (MONTESQUIEU, 2011).

These two responses describe not so much the current evolution of the concept of a state of exception as the evolution of our contemporary democracies. The first describes, lamentably, a disastrous turning point in security, fearing that the mitigation of threats will not lead to a full regime of respect for freedoms due to a certain habituation to the state of exception. The latter notes, joyfully, a beneficial reflex of "self-defense of the State", for the greater benefit of society, thanks to which it can maintain itself as best it can despite the storms. These presentations only reflect a reality as old as political modernity, or even beyond (SAINT-BONNET, 2001): when threats increase, the State becomes more invasive, powers are more concentrated, and

freedoms decline. Human rights advocates suggest either that the threats are not as dangerous as people make them out to be, or that the state must get into the habit of doing a lot to guarantee the security of citizens with few means to achieve it. This would be the very honor of the government in states governed by the rule of law. Supporters of the security orientation may tend to exaggerate the threat so that public authorities are offered a lot of power even if they use it very little. This is evidenced by the low use of the means permitted by the state of security emergency from January 2016 until October 2017[3], or the request made to the French parliament for a sort of state of health emergency reserve from October 2021 until July 2022[4]. To reassure, to protect, to give the State a lot, and to live with peace of mind knowing that it uses little.

Behind such a presentation, we see political camps emerging. At least we can clearly identify ideological orientations. But have we talked about the state of exception, what it is, and what it is becoming? Hardly.

To do this, it is important to remember what the state of exception was before. It will thus be possible to identify more precisely the metamorphosis which affects it. In the past, the pressure of circumstances led to "except" (that is, not to include) the norms of normal times so that the action of public authorities could be freed, freed from the legal constraints that weighed on them. It must also be said that the complete eradication of the threat seemed possible and achievable. Under these conditions, either we acted outside the confines of any normativity, being guided only by necessity, or we adopted exceptional legislation which allowed the security forces to act

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3. Thirty searches per month between January and December 2016, ten per month from December 2016 to October 2017. Does this justify keeping the entire country in a "state of emergency"?

4. Bill establishing various health vigilance provisions, under discussion in the Senate at the time of writing.

within a very undemanding legal framework and to almost completely sheltered from the judges' gaze. (I) Today, we intend to defend here and there that the state of exception is not only not incompatible but deeply anchored, rooted in the rule of law (CONSEIL D'ÉTAT, 2021: 13-14) so that it becomes more difficult to distinguish it from what a "normal state" is. This metamorphosis is paradoxically explained by the "progress" of the rule of law and by the new form that the threats have taken. (II) The fact remains that this absorption of the state of exception into the rule of law is a source of disorder, confusion, normative inflation and sometimes operational impotence.

The state of exception as suspension of normal legality

The situations of danger in which the State could once have been plunged led it to set aside, to sweep away, to reject all rules aimed at limiting power which would be likely to harm the effectiveness or speed of its action. Like an impetuous river in flood, we left the bed of normal legality, we overturned the dikes, we reached an agreement wherever this was deemed necessary. The catastrophe hypotheses were all political in nature. Foreign policy when the borders were threatened by enemy armies; domestic politics when rebels or seditious people intended to seize state power through an insurrection, barricades, a revolution, a coup d'état. To put an end to these movements, the authorities in place often sought military power, including against their own fellow citizens (insurgents) suddenly seen as enemies, and tried to resolve the crisis by force: on the battlefield between regular armies, in towns and its suburbs, by the national guard or by the line infantry. The fighting was hard, very cruel, and extremely lethal too. They were also brief and the outcome was known quickly: we retained or lost territory, we put down the insurrection or we left power. For foreign war, from 1791, we will have the law of July 8-10 on places of war which organizes the transfer

of power from civil authorities to military authorities (so-called real state of military siege). For the fight against the insurrection, this law was interpreted extensively until the adoption of that of 10 Fructidor Year V (August 27, 1797). But it was not until the major text of August 9, 1949 that we had a solid legal basis for the so-called fictitious state of political siege. At the time when these laws were adopted, the parliamentarians were well aware that they were breaking down the ramparts that the constituent had intended to oppose to the constituted bodies, but they invoked the ancient maxims: *necessitas facit legem* (necessity is law), which suggests that necessity is another law but a law all the same or *salus populi suprema lex esto* (the salvation of the people is the supreme law[5]), which establishes the protection of the political community as a superior legal principle[6]. Those who opposed the adoption of these kinds of laws were not in favor of inaction. For them, there was no question of accepting into the law what could not, we therefore preferred the logic of absolution: *necessitas legem non habet* (necessity has no law), in other words, the necessary measures may well have been illegal and remain so, it was necessary to act in this way for good political reasons[7].

The logic of resorting to exceptional legislation dates back to the Revolution. As we turn our backs on the arbitrariness which, for revolutionaries, characterizes the Ancien Régime, the idea that public authorities can act while ignoring legality is unthinkable. If extraordinary measures are obviously sometimes necessary, no one denies it. It is important to be anticipated in laws specially provided for this

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5. Pierre-Athanase Torné, during the debate in July 1792, adopted this position: it does not matter that the extraordinary measures are contrary to the text of the constitution: "the true Constitution of a nation on the verge of perishing is entirely in these words: salvation of the people is the supreme law" (Parliamentary archives, session of July 5, 1792, p. 140)

6. States of siege implemented against internal enemies ("political" state of siege) suffered, until the law of 1849, from a virtual absence of legal basis, other than the very imprecise law of 10 Fructidor Year V (August 27, 1797). See Sébastien Le Gal (2011: 275-).

7. This is the position of Duguit in his *Traité de droit constitutionnel* (1923: 700).

purpose. These texts must regulate the special powers available to the Executive, in particular the army. Ideally, these texts should be adopted before the storm brews, during periods of calm[8]. However, this will almost never be the case[9] because the legislator will often be caught off guard by events, hastily improvising texts with fiery tirades and fatalistic hyperboles, unfortunately ruining any quality controversy. When danger is present, when the enemy is at the gates, when the insurgents sound the alarm, when the epidemic has claimed its first victims, rational deliberations have no place: the imperative need for action, like a tsunami, takes everything away. In the articles published in the Revue du Droit Public during the First World War, Joseph Barthélémy had listed all the deviations committed by the government and, in one paragraph, as if embarrassed by the idea of seeming to criticize it, he mitigates them by recalling that these "excellent measures" [10] were undoubtedly necessary and justified although perfectly illegal.

When it results in the implementation of special legislation, the state of exception is analyzed as a "derogation", that is to say as a legislative duplication – two rules – and not as an exception stricto sensu[11] — a rule and a nothingness. The conditions allowing the implementation of the alternative rule must be both precise (in order to avoid any abuse) and sufficiently vague (because future crises are, by definition, unpredictable). We identified the imminent danger to internal or external security (1849 version of the law relating to the state of siege) or resulting from a foreign war or an armed

8. This is the almost unique case of the great debate of 1849, announced in November 1848 in article 106 of the constitution ("A law will determine the cases in which a state of siege can be declared, and will regulate the forms and procedures effects of this measure").

9. The examples are numerous, let us only remember here the law of April 3, 1955 relating to the state of emergency, discussed hastily while the "events" in Algeria took on the appearance of a real civil war. On the genesis of this text, see Olivier Beaud and Cécile Guérin-Bargues (2018).

10. See our article (SAINT-BONNET, 2016: 87-105).

11. From *ex capere*, that which is "out of reach".

insurrection (revised version of 1878, and article L. 2121-1 of the Defense Code in force). The 1955 law relating to the state of emergency, modeled on the state of siege but without transfer of police powers to the military authorities, takes up this logic by identifying, but in a much more vague manner, an imminent danger resulting from "serious breaches of public order" and natural disasters. In either case, the Executive decides in the Council of Ministers when to switch to this other legality. It must also indicate the areas placed under such regimes. But it is the national representation which is entrusted, after 12 days, with the possible extension (extension law). Article 16 of the constitution in 1958 envisages four material hypotheses[12] to which must be added, cumulative condition, the interruption of the "regular functioning of constitutional public powers". Despite the 2008 revision[13], the President of the Republic decides alone on the entry and maintenance in force of his special powers[14].

This process of anticipating different types of disasters has the undeniable advantage of prompt and legal action by the authorities, even if they infringe on the rights and freedoms of citizens during normal times. This helps prevent any risk of disobedience from state agents or resistance from citizens who may argue that such actions are unjustified. However, in practice, it is never guaranteed that both officials and the general public will agree on the necessity of these measures. If Charles 14 of the Constitutional Charter of 1814

12. Serious and immediate threats to: 1/ the institutions of the Republic, 2/ the independence of the Nation, 3/ the integrity of its territory or 4/ the execution of its international commitments.

13. During which a fifth paragraph was introduced as follows: "After thirty days of exercise of exceptional powers, the Constitutional Council may be seized by the President of the National Assembly, the President of the Senate, sixty deputies or sixty senators, for the purposes to examine whether the conditions set out in the first paragraph remain met. It decides as quickly as possible through a public notice. It carries out this examination as of right and pronounces under the same conditions after sixty days of exercise of exceptional powers and at any time beyond this duration".

14. See our article (SAINT-BONNET, 2016).

were in danger and not supported, he would be overthrown within three days.

However, it is not without its drawbacks. In modern constitutionalism, the protection of rights and freedoms is analyzed as an injunction addressed to the constituted powers. If they believe they can free themselves from it – even if it is because of the obvious necessity (admitted however by Locke) – by adopting such laws, they replace the constituent. Otherwise, we are forced to consider these rights and freedoms as only being imposed on the condition that the State is not in danger, a condition which the constituted powers decide is achieved. (The debates of 1849 are very interesting in this regard: between those who thought that the law on the state of siege should not and could not infringe constitutionally guaranteed rights - notably that of being brought before their natural judge — and those who considered that this law made it possible to suspend such rights, the discussions were lively[15]).

The second disadvantage is practical. Since these laws infringe on rights and freedoms, their interpretation, like that of criminal law, should be strict and restrictive. Article 11 of the law of 1849 perfectly illustrates this logic: "Citizens continue, notwithstanding the state of siege, to exercise all those rights guaranteed by the Constitution whose enjoyment is not suspended by virtue of the preceding articles". However, to deal with situations that the exceptional legislator would not have envisaged, it often happens that the public authorities read the text very extensively to the point of twisting[16] it or that they act outside the legality but that the state of necessity to be sought

15. See (SAINT-BONNET, 2001: 362-366).

16. In a Delmotte and Senmartin judgment of August 6, 1915 (concl. Corneille, rec. p. 275), the Council of State thus admitted that the closure "until further notice" of a drinking establishment on the grounds that meetings "likely to excite or maintain disorder" could be prohibited under the law relating to the state of siege, was legal, at the cost of a very extensive interpretation of the text.

to justify it[17]. Whether it is insufficient or does not cover the entire spectrum of necessary measures, the exceptional legislation has been pragmatically supplemented by the administrative judge who has developed the so-called jurisprudence of exceptional circumstances, which is supposed to fill its "gaps" [18]. Thus, the administrative judge admits that in certain circumstances *necessitas facit legem* even though we can imagine that, if the hypothesis was not covered by the text, it was entirely on purpose. In short, the judge would disregard the hierarchy of norms by replacing the legislator. Lucien Nizard, in his thesis published in 1962 about the jurisprudence of exceptional circumstances, does not say anything else: "It is enough, for necessity to assume a revolutionary function with regard to the established legal order, that it replaces to the regular system of modification of the legal order a system not provided by it" (NIZARD, 1962: 282).

Exceptional legislation only offers degraded and incomplete legality in the event of danger. This is why, once the situation was restored, people hastened to return to normal legality. Two legalities certainly, but in principle impervious to each other; no one would have thought of affirming that "the law" could find its place in the second. This is no longer the discourse today. It is argued that the state of exception is not incompatible with the rule of law.

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17. The *Général de division Verrier* judgment of July 30, 1915 (rec. p. 257 et seq.) admits the automatic retirement of a general without having notified him of the reasons, despite this being a legal requirement. The measure, explains the Council of State, being "ordered by the circumstances".

18. The theory of gaps was developed by André Mathiot (1956: 413-428). He justifies this jurisprudence by explaining that the legislator having not been able to envisage all the dangers which the country would face, the administrative judge only comes to fill these deficiencies, which would certainly have been covered by parliament if it had been able to foresee them. We can also consider that there is not the slightest insufficiency since there is indeed an applicable law: it is in reality created by the judge who then comes to fill it. He would only replace the legislator, which is in no way his office.

Can the state of exception be said to be "anchored" in the rule of law?

The most commonly received definition of the rule of law consists of considering, on the one hand, that all acts of public authorities, whatever their rank in the hierarchy of norms, must be in conformity with the law, and therefore, from near to far, to the constitution. On the other hand, this conformity must be able to be assessed by a judge acting as an independent and impartial third party. Even if it is impossible to maintain that all acts are capable of being assessed by a judge today in France[19], it is certain that the possibility offered to citizens to challenge certain administrative acts in summary proceedings on the grounds of the infringement extended to their fundamental freedoms (law of June 30, 2000) and to citizens to raise the argument based on the violation of their rights and freedoms by a law in favor of a Priority Question of Constitutionality (constitutional law of July 23, 2008) found a particularly appropriate field of choice during periods of state of emergency, since 2015. Quite naturally, both the administrative judge and the constitutional judge admitted the admissibility of the appeals: they were required to assess the justification of the attacks committed to rights and freedoms due to the security and health threats that weighed on the country.

The state of emergency under the 1955 law underwent several extensions and modifications between 2015 and 2017. On five occasions, citizens challenged its constitutionality through QPCs related to house arrests, police measures for meetings, and searches and seizures[20]. Similarly, the laws extending the state of health emergency resulting from the law of March 23, 2020, also led to a number of QPCs[21]. Human rights protection associations, who initiated these

19. See (Manouguian, 2021: 193-).

20. See (Montgolfier, 2017).

21. See the decisions n° 2020-846 QPC of June 26, 2020, n° 2020-808 DC November 13, 2020, n° 2020-866 QPC November 19, 2020, and n° 2020-869 QPC December 4, 2020.

procedures, were able to present their arguments because parliamentarians did not always fully understand the Constitutional Council's decisions, especially since the Prime Minister had requested their approval on November 20, 2015[22]. While it is expected for the majority to comply, it may be surprising for the opposition to do the same. There were even instances where the President of the Republic himself requested the Constitutional Council's opinion[23], not with the intention of having the law censored, but rather to strengthen its legitimacy with the approval of the Council. This marks a significant milestone for the rule of law, as citizens can now request the Constitutional Council's review in a deferred manner when political leaders fail to do so, provided that the Court of Cassation or the Council of State deems the question worthy of referral.

We have also witnessed a massive and rapid increase in disputes before the administrative jurisdiction, which has demonstrated its ability to maintain, in all circumstances, the rule of law," it assures (CONSEIL D'ÉTAT, 2021: 113). The figures given in its annual study show that in a state of emergency (security or health), citizens very willingly take advantage of the legal remedies to which they are now entitled.

Much in demand, does the judge consider, as in the past, that security necessity or health necessity is law? His way of proceeding is today more precise, more technical, and formally more scrupulous.

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22. Manuel Valls declared before the Senate on November 20, 2015: "I am extremely doubtful about the idea of referring the matter to the Constitutional Council. [There] is always a risk in referring the matter to the Constitutional Council. If the Council responded that the revised law is unconstitutional on a certain number of points, on a certain number of guarantees provided, this could bring down 786 searches and 150 house arrests already made. There are including measures which were voted on yesterday in the National Assembly – I am thinking of the one on the electronic bracelet, I am in transparency – which have a constitutional fragility" (our emphasis).

23. May 9, 2020. See the decision n° 2020-800 DC of May 11, 2020 - Law extending the state of health emergency and supplementing its provisions.

Its control, known as proportionality, consists of carrying out a test by verifying that the provision is suitable, necessary, and proportionate to the objective sought. However, it turns out that the mechanism specific to this control is in no way reserved for measures adopted within the framework of the state of emergency: it is used each time a police measure reduces the scope of the exercise of freedom, which tends to significantly reduce the difference between a normal state and a state of exception. The difference is less in nature than in degree, with the judge being less demanding in exceptional circumstances.

The question deserves a brief detour into the realm of theory. The control of proportionality, of Thomist inspiration, gives precedence to the purpose of the act carried out by the public authorities over the will expressed by the body author of this norm, of positive law, aimed at limiting power. Freedoms are therefore reduced to the state of a variable adjustment[24]. However, if we follow such logic – state of emergency or not – the pressure of events can overcome all freedoms if the public authorities convince the judge of the necessity of its resolute action. It must be remembered that under the scholastic (or finalist) theory according to which the ultimate criterion of validity of the norm can only be the satisfaction of the common good or the general interest, the rights and freedoms of individuals are reduced to be only what the public authorities have not deemed useful to seize in order to satisfy the purposes it serves.

Modern liberal constitutionalism, at the time of the Revolution, opposed precisely this approach which, whether liked or not, allowed the temperate royalty of the late Middle Ages to metamorphose into absolute monarchy under the Ancient Regime[25]. From now on, the limits that the constituent assigns to the constituted bodies are so

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24. This is also what the Council of State assumes in its study when it ensures that "the law serves public action and not the other way around" (CONSEIL D'ÉTAT, 2021: 13).

25. See (SAINT-BONNET, 2001: 181-).

many orders, commandments, injunctions to which they are absolutely required to comply. This is precisely why only a real shift into a state of exception makes it possible to reverse priorities: making the protection of the State prevail over respect for the rights and freedoms of citizens. The cases which justify it must necessarily be extreme, extremely rare, and ephemeral. According to this positivist and liberal logic, the rule of law and the state of exception are strictly opposed; there is no question of seeing the second "anchored" in the first. No continuum but a clear, obvious, and absolutely consensual break[26]. In periods of calm, the primacy of freedoms conceived as orders that society addresses to rulers invited to provide for the general interest with the limited means at their disposal; in times of danger, the sacrifice of freedoms, the momentary mourning of the rule of law, to restore the conditions for its flourishing.

The control of proportionality that prevails today, whether in a state of emergency or not, directly contradicts the positivist and liberal conception of law inherited from modern constitutionalism. The convergence, superimposition, or even confusion between a state of exception and a normal state that we are currently experiencing, as evidenced by the prolonged application of exceptional legislation and the incorporation of emergency measures into common law, is a direct consequence of this. Similar to scholastic philosophy, the normal state and the state of necessity blend together in a way that closely resembles what we are experiencing today when we assert that the state of emergency is rooted in the rule of law - a very flexible, malleable rule of law that pays little attention to freedoms at times.

The contemporary state of emergency, in these conditions, has less of an objective of allowing the authorities to combat a considerable danger than of authorizing them to restrict freedoms without risking illegality. Urgency (from Lat. urgere = to press) refers to the

26. See (SAINT-BONNET, 2001: 377-).

idea of pressure, of pushing. But the meaning of this push is not always the same: it is a question of exerting pressure on those in power so that they act with force and speed to save the country or it is a question of exerting pressure on the freedoms of citizens so that they can act with freer hands. Everything suggests that pressure, from the bottom up, was once exerted on those in power because threats could be quickly averted (war, sedition), that it is exerted today, from the top down, on freedoms to justify rigorous, long-term action when we know perfectly well that we will not be able to overcome the threats as they are long-lasting, diffuse and varied. The departure from the norms of normal times was a mean when the end remained the dazzling eradication of what constituted a danger (enemies at the borders, seditious centers). Today, the sincere motivation of the authorities, when they declare a state of emergency, is less the total elimination of the threat which we know is distant (terrorism, the Covid-19 virus) than to "secure" legal norms that tend to be liberticidal.

This observation is true for both the state of security emergency and the state of health emergency. The attacks of March 2012 (Toulouse and Montauban) like the attacks of January 2015 (Charlie Hebdo and the kosher hypermarket) had an unmistakable terrorist character. The excitement was considerable and national. The criminals died in these actions, hoping to be recognized as chouhada (martyrs) by their own people. Almost no one thought of declaring a state of emergency. It would have been useless. Why carry out administrative searches, place house arrest, or limit the right to demonstrate if the protagonists were "on the path of Allah"? During the massacres of November 13, 2015, organized and coordinated by a structured group, it was feared that terrorists who had escaped would repeat their crimes, in the presence of numerous heads of state, during the upcoming COP 21. The declared state of emergency was not intended to put an end to the terrorist threat,

which we know, unfortunately, is a long-term policy, but to legally secure drastic operations in the four corners of the country (3000 administrative searches) with the aim of disrupting the sectors. The general confinement decreed on March 16, 2020, was very fragile legally, as evidenced by the in no way subliminal message addressed to the judge which appears in his visas mentioning the "exceptional circumstances arising from the covid-19 epidemic". An invitation to apply the eponymous case law, which was done.

If the reason for the existence of states of emergency is more the pressure exerted on norms than the danger which strikes the nation, why would the process not be requisitioned as often as normal law seems to prevent, slow down, or hinder the conduct of public policies which suppose that the scope of the exercise of certain freedoms is restricted? The conduct of these policies goes well beyond the state of emergency in other areas. This is the case of the law of July 24, 2015, relating to intelligence which, outside of a state of emergency, has proven to be very useful in tracking down jihadists. The hypotheses of a state of climatic, technological emergency in the event of a cyber-attack or migratory in the event of a wave of massive and uncontrolled population displacement become easily conceivable. However, assuming that the legislator designs and declares them, one could only imagine the *terminus ad quem* for such a device. When will climate change stop? When will the web become a civilized and peaceful space? When will migratory pressure disappear?

The pressure on standards is a side effect of progress in the rule of law. Hence, this paradox: the more it progresses, the more the deployment of exceptional legislation risks being both frequent, lasting, and materially varied. Even more, it risks giving rise to an exponential increase in standards, an uncontrolled growth which, in turn, exposes us to legal insecurity due to their illegibility... not to mention the risk of paralysis of the actors.

States of emergency and, more generally, exceptional legislation must remain measures implemented in extreme circumstances. Once the time of astonishment has passed - since the new threats are more durable, more diffuse, and more varied - they must be faced by having recourse to the law. If these laws reduce the scope of our freedoms, this can be explained during rational and peaceful debates in a serious democratic framework. We can change in one direction or another the balance, always questionable and uncertain, between physical security and legal security. But we really must avoid the inconsiderate use of states of emergency, which are often based on arguments from authority appealing to reflexes of fear or the need to be reassured. Faced with new threats – security, health, climate, technology, migration – we must stop reacting feverishly with states of exception that are both reassuring and anxiety-inducing, but be able to reaccustom ourselves to a form of normality of uncertainty, to be ready to face it.

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WALTER BENJAMIN'S (TWO) STATES OF EXCEPTION

Anna Migliorini

> "The tradition of the oppressed teaches us that the 'state of [exception]' in which we live […] is the rule. We must attain to a [concept] of history that [corresponds to] this insight. Then we will [have before us as] our task to bring about [the true] state of [exception], and this will improve our position in the struggle against fascism. [The] reason fascism has a chance is that [its opponents confront it in the name of progress] as a historical norm. – The current amazement that the things we are experiencing are 'still' possible in the twentieth century is not philosophical. This amazement is not [at] the beginning of [a] knowledge[, if not that] the view of history [from which it derives] is untenable".
>
> Walter Benjamin, VIII thesis *On the concept of history* (1940: 392)

Introduction. Why Benjamin and the state of exception (SoE)

a) Not a main topic but in a crucial position in 1940 theses On the concept of history

When Benjamin in 1940 in the theses *Über den Begriff der Geschichte* writes about a state of exception "as rule" (*als Regel*) and of another one, which would be "true" (*wirklich*), he seems to be naming something he never mentioned. At the same time, especially when speaking of exception as rule, he is referring to something unsurprising, also given the historical moment. This applies both from the point of view of the narrower contingency – the Third Reich

– and from the more general point of view of an awareness that has been widespread since the end of the First World War, both among the intellectual classes and in common opinion. Indeed, the exception-as-rule refers both to the period of the proliferation of emergency governmental measures and to the perception of a permanent crisis, in respect of which much ink had already been spilt, and some of it already by Benjamin, as, for example and emblematically, in the context of the work *Einbahnstraße* (1923-28). But the exception as rule also relates back to the concept of the permanent state of exception, in itself less vague and general than that of crisis, which can be found in some thinkers preceding Benjamin, and of which Benjamin himself to some extent is aware.

b) As just named once and poorly defined as "true" SoE, in the particular context of 1940

The true state of exception, for its part, appears like a flash in Benjamin's writings: a hapax that at first glance remains suspended in the text of the Theses, known as Benjamin's intellectual testament. In this pre-eminent textual, contextual, and temporal position, the true state of exception represents a singular element that can neither be ignored nor dealt with quickly. From a textual point of view, its relevance lies precisely in the fact that it appears expounded – rather than being explained – in Benjamin's last text. From a contextual point of view, it lies at an extremely relevant historical, philosophical, and political crossroads.

Historically, we are situated on the narrow contingency of the shock and disappointment resulting from the Molotov-Ribbentrop pact of 1939, the non-belligerence pact between the Third Reich and the Soviet Union. Far from limiting the Theses' motif to this, the event is to be seen as the concrete excuse for the definitive putting down on paper of ideas that Benjamin himself claims to have had in

mind for some twenty years[27]. Therefore, the historical plan must be placed in a broader time frame, ranging from the First World War and the economic crises of that time onwards, and which reconnects with the economic, political, and ideological assumptions that precede and cause them.

On the philosophical level, in terms also of political philosophy and philosophy of law, the relevance is first and foremost grafted onto an axis of discussion that was already well established at the time, and which saw Carl Schmitt and his paradigmatisation of the state of exception as *Ausnhamezustand* as the natural and hegemonic protagonist or starting point. It is precisely from this context that Benjamin, through his analysis of the *Ursprung des deutschen Trauerspiels* (1916-26), and by referring back to a discourse of analysis and critique of the concept of sovereignty, begins, long before the Theses, his direct concertation with the state of exception as such, especially through Schmitt's *Die Diktatur*, he declares[28], and, *de facto*, through *Die politische Theologie*. However, even then, by adding spaces and elements on the semantic level, by handling the concept in a heterodox way, he removes it from the installing Schmittian monopoly in particular, and on the theoretical and political levels, by the recuperation we make today, from the historical right-wing monopoly in general. At the same time, he makes it fertile beyond the field of political and state theories, by bringing it also in the domain of metaphysics.

The political level is both the cause and the consequence of the declination taken by the other levels mentioned above – the historical and the philosophical – in that the critical analysis and the proposal linked to the exception also arise as a necessity of the sphere of concrete political action, in what Benjamin (2003: 667) defines as one of

27. Letter from Benjamin to Gretel Adorno, April or May 1940, in GB VI, p. 435, our transl.

28. Letter from Benjamin to Schmitt, 9th December 1930, in W. Benjamin, *Gesammelte Briefe*, ed. by Christoph Gödde and Henri Lonitz, Frankfurt am Main: Suhrkamp, 1995, vol. III, p. 558.

the (greatest) moments of danger. This, for a generation which, on the one hand, unequivocally experiences "that capitalism will not die a natural death". On the other hand, having crucially gone through unimaginable atrocities, appearing in Benjamin's eyes as the "generation, which will have been one of the most tried that history has ever known" (BENJAMIN, 1995: 441). Moreover, the issue sits in the context of a paradigm shift – and a crisis too – concerning experience, to the point that, according to some commentators, the situation would result, (not only) under the Third Reich, in a so-called ontological state of exception (CHOI, 2018: 23). The de-ontologisation of life is thus used as a label to define the already ongoing change within experience, which, through the fragmentation associated with technical progress, goes from a transmissible experience to a fragmented one (from *Erfahrung* to *Erlebnis*)[29]. Although this paradigm is famously Benjaminian, the specific label 'ontological' is not one of his. Furthermore, it is Benjamin himself who points out tracks where to trace the origins of the crisis: quoting K. Korsch on K. Marx, he points out how "*t*he process of atrophy of experience is already underway within manufacturing. In other words, it coincides, in its beginnings, with the beginning of the commodity production" (BENJAMIN, 2003: 804), thus indicating the material origins of a so-called (a posteriori) ontological state of exception.

As far as the temporal factor is concerned, which obviously connects to the others, the question forcefully interrogates the criticalities of 1940, as well as typical problems of a broader historical period, ranging from authoritarianism, fascism and dictatorship of the historical moment, to wider questions concerning the very nature of the so-called modernity or, through the Benjaminian lens, the era of capitalism, and, in particular, of the advanced capitalism, and of its essential correlate, which Benjamin identifies in the ideology or

29. Cf. W. Benjamin (1933).

phantasmagoria of progress[30]. Although, therefore, the true state of exception (and the state of exception as rule) appears *as such* only once in Benjamin's entire literary production (1913-1940), what has been said so far, along with several studies that have already demonstrated the close link to other themes and issues he addressed in previous years, points to its central and transversal scope.

c) Necessity to get back to retrace meanings, differentiations, and sources.

Therefore, Benjamin's exception analysis cannot and should not be limited to the surroundings of 1940, understood as a moment of unequivocal expression and as the only moment of a clear written distinction into *two* states of exception. Rather, it traces a path, which turns out to be in itself intricate and often karstic, in connection to which, on the one hand, more elements emerge that can explain the state of exception as rule than the 'true' one. On the other hand – but only by cross-referencing with other concepts and deducing from other Benjaminian proposals – these elements also shed light on the true state of exception, albeit *ante litteram*, i.e. anticipating the direct theme of 1940 in the form of traces scattered in the weave of earlier writings, which it is the task of criticism to unearth.

Several exceptions are involved

a) Transversal sources, starting from Origin of German Trauerspiel

As one may have already sensed, the theme of the exception in Benjamin cannot be ascribed to a specific or defined bibliographical context or disciplinary field and it has more to do with his scope than is due to coincidences. In the review of 'his' states of exception, one does indeed come across many, if we allow a non-restrictive analysis

30. Cf. i.a. W. Benjamin, *The Arcades Project*, Cambridge-London: The Belknap Press of Harvard University Press, 2003, § m3a, 3, N13, 1, p. 478.

which is not limited to the legal-political question. The sources thus concern both states of exception that Benjamin finds in the history of thought and arts, states of exception that he encounters as an individual situated in a precise historical epoch and context, as well as states of exception found in theoretical sources more closely related to the world of contemporary political, legal and state theory. Lastly, there are the exceptions, such as the example of the ontological state of exception, that scholars identify around Benjamin and his thought, which, if not always philologically unobjectionable, are nevertheless useful concepts in unfolding Benjamin's thought.

As predictable, it is indeed from the study of the origin of Baroque drama (*Trauerspiel*) and of its era that different types of exception readily emerge. In the narrow context of Baroque sovereignty, a direct analogy is established between the political-governmental exception of sovereign authority and the individual dimension, and for two reasons. On the one hand, the analogy is established between the authority and the individual who embodies it, in other words, the protagonist is the sovereign. On the other one, there is the analogy with the state of exception of the soul of the Stoic matrix, which, tracing from a domain of inner turbulences and passions, would reflect the task of the sovereign who must deal with the instability of a historical succession that does not correspond to a linear procedural movement. In the context of the present study, such an analogy not only perfectly renders the idea of the uncertain *navigatio* that befalls the sovereign in the political realm, but also relates to the creaturely nature of the sovereign as an individual and, indirectly, points to the question inherent in the king's two bodies[31]. Far from representing a merely descriptive element, the creaturely component is emphasised and hyperbolised by Benjamin, through philologically grounded justificatory pieces, such as some eminent examples of *Trauerspiel* in

31. Cf. Kantorowicz (1957).

general and baroque dramas in particular, allowing for a contextual but above all general – albeit indirect – critique of sovereignty, authoritarianism, subjectivism, as well as of Schmitt[32].

From the baroque sovereign who, swamped by events and sensations that require interpretations and stances in series, falls into crisis and fails to make up his mind, comes a strong critique of decisionism that, while in the first instance overwhelms Schmitt as a representative author, also corresponds to an evergreen intent – albeit known under other guises – in the reflections of a Benjamin repeatedly confronted with the risks and consequences of authoritarianism. Through these two states of exception, closely resonating, which are that of the soul and that of the sovereign, Benjamin also adds a potential piece to the project of defining a "true politics", and a "true politician", begun as early as the dawn of the 1920s, never finished, but never really set aside[33].

b) Findings: several kinds of exceptions: stoic/of the soul; baroque; permanent crisis and exception; (existential); exception as rule, true SoE.

While it is true that the work on the Baroque has the advantage of being a straightforward treatment of the subject, it is beyond the already crisscrossed Baroque (sovereign) and Stoic (soul) states of exception that other relevant exceptions emerge now and then from the texts. First, the state of exception of the soul is neither a Stoic nor a Baroque prerogative and came to the fore, even independently of Benjamin, during the 20th century. The phenomenon of the so-called *Innere Emigration*, which characterised the reaction to censorship especially in the German context after the First World War, is an emblematic example – or actualisation – of this[34].

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32. For a more detailed analysis, cf. A. Migliorini (2024), par. "Creaturalità: psiche, linguaggio e corpo".

33. Cf.: Steiner (2000); Marramao and Gentili (2016).

34. Cf. G. Guerra (2015).

In an attempt to dominate the conflicting, dangerous, and life-threatening inner feelings, but perhaps above all in an attempt to veil their true political and cultural positions and identities, several German authors, who were considered unwelcome by the government and decided not to leave the country, took the path of a silence that was sometimes actually expressive. It will be the style and content of their works to externalise this sort of self-censorship, in an effort to ensure the survival of the authors themselves. However, it is depending on the actual intentions and the depth of the reading made of such works, that the mechanism of the internal migration is also capable of representing a form of political resistance, if the reading reaches the esoteric and metaphorical level, concerning themes that seem to distance the texts and their authors from political or generally thorny issues or those too critical for the time. Benjamin does not belong to this group: at first, he travelled a lot and often lived abroad, in various European countries, and then, immediately after the *Reichstag* fire, he was able to leave Germany for good, becoming stateless first, and lacking one of the visas, essential for expatriation, at the end of the race.

The early 20th century, however, presents him with another opportunity to be part of an individual exception, which Benjamin again seems to decline. As an intellectual, as a Jew, as a precarious researcher *ante litteram*, as an outsider to schools of thought and academic affiliation, but also to canonised styles of interpretation and expression, Benjamin lived for several years in an objective state of material and logistical precariousness. Direct and unquestionable proofs of this are in many of his letters, in which he does not mince his words about financial difficulties and funding searches. Equally proof of this, though less immediate, are several editorial collaborations and various work projects, sometimes merely aimed at making a living. Some commentators have spoken of a state of existential exception, assuming that Benjamin perceived his precariousness as

such, yet Benjamin, who never speaks of his experience in terms of exceptionality, does not even seem to attribute the situation to a mere poverty that would be reductive for the intellectual level. This is both in the light of his positioning regarding the concept of exception, which it is better not to confuse with anything else and not to apply extensively except in macroscopic critical heuristic terms, which are in any case never individual-based, and in the light of his conception of poverty, which is anything but merely negative and indeed represents a place of high philosophical production.

Given these parentheses of existential exceptions, which in themselves demonstrate their relative relevance to the theme as Benjamin approaches it, several other states of exception intersect him throughout his life, his written production and his posthumous influence. First, we can speak of the historical states of exception that characterised the first part of the 20th century. In this context, we enumerate the political and economic, the normative and the legal states of exception. For all these cases we are dealing with the level of measures: these labels do not so much correspond to phenomena as to definitions. These are therefore definitions that establish differentiations more on the formal than on the real field, and label situations that in reality often overlap and, in some contexts and junctures, coincide, or that, in their interpolation, increase the escalation towards exceptional measures, down to minimum levels of maintenance and respect for democratic principles and individual freedoms.

Benjamin does not make direct use of these labels, yet his view of contingent political issues shines through on several occasions in his writings. Thus, in the context of *Einbahnstraße*, the economic state of exception, which exists in nomenclature[35], peeps out without being named as such. It emerges under the guise of a critique of the optimistic and fatalistic bourgeois stance that, in the face of

35. Cf. Choi (2018: 23).

soaring inflation and other phenomena attributable to the economic crisis, especially that of the 1920s, confidently waits for the storm to pass and, complementarily, is surprised that "certain things are still possible" but reacts in the same way in both cases: with wait, expectation[36]. Far from being a contextual theme, it finds its meaning in more general terms within the great Benjaminian strand of criticism levelled against anyone sailing in the stream of the current, which is that of progress[37].

Benjamin, for reasons that are also partly precautionary, in his letters does not talk much about the specific historical events of the period of the end of the Weimar Republic (1929-33) which would be directly and extremely relevant to the topic of exception. This historical phase has been defined as a normative and political state of exception, due to a normative vacuum on different levels, which would have made it impossible to overcome the moment through ordinary norms[38]. "Papen's coup d'état (the removal of the Braun government in Prussia), the results of the *Reichstag* elections of 1930-32, the *Reichstag* fire of 27 February 1933 are not specifically mentioned, and the names of Hindenburg or Hitler do not appear" (JANZ, 1982: 260). However, this does not amount to silence, and his political position emerges instead in his public writings and unequivocally (RANCHETTI, 2013: 220).

Although he never takes a direct philosophical and political stance against specific concrete forms of political and legal exception, a large part of all his intellectual work is aimed at a political-philosophical critique of what can be gathered under the broad concept of "fascism" and its manifestations. To this concept, for him but also widely in that historical period, can be ascribed all right-wing authoritarian

36. Cfr. Migliorini (2022: 172).

37. Theses VIII and XI, in W. Benjamin (2003: 391, 393).

38. Cf. Choi (2018: 23).

governments, which through this general label are harshly criticised. Benjamin finds many avenues for this criticism, be it in the work on *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit* (1935-40), or in reviews, such as *Theorien des deutschen Faschismus* (1930) of the collected volume edited by Ernst Jünger entitled *Krieg und Krieger*, or the project for the journal "Krise und Kritik" (1930-31) or, again, on the non-immediate level, the analysis of works and techniques of dramatic art – on this the Baroque already offers a clue – especially those of Bertolt Brecht. Moreover, the fact that they do not always appear as direct should not as much be attributed to an attempt – which would be analogous to that of the *Innere Emigration* – to veil or bypass the most dangerous points of certain expositions, but rather corresponds to the intention to ground the critique in the depths of theory, offering not only solid foundations for it but also new structural elements to rethink past, present and future, in a long-winded encounter and elaboration, where theory and concreteness are woven together as warp and weft.

Further emphasis could be placed on the terminologies that have arisen from the cast of Benjamin's reflections or from the context of studies on his thought, and that have been used to interpret backwards contemporary moments in Benjamin's life and studies. Still, the example already given of the ontological state of exception, which is particularly significant, is sufficient for all. Alongside this, the coeval bibliography of exception also undoubtedly speaks of a civil state of exception, or rather of siege, to refer to the post-*Reichstag* fire (FRAENKEL, 2017: 4-5). To delve into such an analysis would risk confusing terminologies and planes, merging Benjamin's critique with studies on it, indeed deviating from the focus of the present analysis, which aims at the *two* states of exception, which, in other words, are those which involve the theoretical and political domains.

c) The important ones are just the "true" and, by deduction and by opposition, a "false" one, which is the SoE as rule.

The hermeneutical division between two states of exception identified in 1940 leads to the establishment of a terminological and conceptual division that does not easily translate the words used by Benjamin in German into pairs such as "true" versus "false", or "actual" or "effective" versus "regular" or "permanent" states of exception. We choose, for philosophical effectiveness, the distinction between a true state of exception – to some extent consistent with the author's *wirklicher* – and a false state of exception – derived from the former and not corresponding to the original terminology, but which works as a denotative label, that re-comprehends the negativity as permanence and the non-extra-ordinariness.

Through this opposition, and in short, Benjamin argues that there is a false and enduring state of exception, which had not shown itself as such, but by appearing as a progressive continuity tainted by unforeseeable and superficial adverse events – exceptions that confirm the rule – (pretending) being capable of resolving themselves without invalidating the path on the road to infinite improvement. This false state, semantically and logistically contradicting the characteristics proper to an exception, namely brevity and extraordinariness, is conceptually disqualified through the proposal of a "true" state of exception, which is supposed to be: programmatic, desirable, and unheard-of. It is in itself clear how the semantic use transcends the juridical context: Benjamin does not intend to propose a measure to resolve the false contingent exception, much less in conditions of an unchanged legal apparatus, but rather aims to revise an entire philosophy of history, where the true exception and the new concept of history appear as two sides of the same coin or, better, as two wagons of a same train.

The true-false dichotomy, in itself faithful to Benjamin's philosophical-political intentions, is linguistically above all functional for

the understanding of the final concepts. In the first place, it stresses the role of the deactivation of the liability of any existent state of exception, permitting an interpretational shift. Secondly, it eliminates the potential relationship with ambiguous or analogous constellations, such as the (French) historical distinction between fictitious and effective states of exception[39]. At the same time, it represents one way to avoid a philosophical problem concerning the status of the real, as the *wirklicher* has not yet been, but hopefully will be – and, in fact, it has to be understood as a task, but not an infinite one[40]. However, there is a tradition to translate it as "real" and "rule", as well as a habit of translating *"Ausnahmezustand"* into "state of emergency": the matter being philosophical, words are important, but they have to be accepted in their semantic limits and imperfections, especially when working among different languages.

Furthermore, a distinction that instead uses the terms true and permanent – where this time permanent is derived from the original *"als Regel"* – makes it easier to place the Benjaminian question within the framework of the analysis, critique, and description of the so-called permanent exception, of which he is certainly not the father. It thus allows it to be integrated into a supposed critical historiography of the permanent exception – which would deserve further investigation. The subject matter does not change, but the critique thus gains in power and roots, bringing the false exception back into the history of the crisis, and reassembling it with the Marxist critique of the preceding decades. On this level Benjamin undoubtedly encounters several sources, but, in general, the opinions of many intellectuals of the time are at stake, at a moment when the crisis, of course even (long) before the Benjaminian project "Krise und Kritik" (1930-31), was perceived on all fields, and widely debated in various texts and intellectual circles. But

39. Cf. Kervégan (1996: 231).

40. Cf.: Migliorini (2024); Tagliacozzo (2018).

neither this represents a novelty, being the crisis already "a hallmark of the modern era" (KOSELLECK, 2006: 372)[41].

If, following the 1940 VIII thesis, the state of exception in which we live is the rule, the false state thus appears to be a structural and non-contingent, non-random, recursive when not a permanent element. It, while on the surface appears as a negativity that hinders the magnificent fortunes of the modern, bourgeois, and capitalist society, is, in fact, an instrument for the maintenance of bourgeois society itself, of its material conditions, and of established class relations. While Benjamin does not say this in such explicit and concentrated terms, it does however undoubtedly emerge from the cross-reading of several of his texts, where theoretical leitmotifs appear alongside scattered illuminations, which can make the case that the state of exception, albeit in disguise, was in the air of Benjamin's thoughts both long before the authoritarian drifts of Nazi Germany, and regardless of the contingent approach alone.

Textual references for the State of exception as rule

a) Crisis as exception. Primary sources: esp. One-Way Street, Crisis and Critique. Crisis as double-faced: crisis and exception as temporary and self-solving vs crisis as symptom and instrument for critique and change and crisis as an anticipatory lexicon for the true SoE.

The false state of exception can therefore be found in some texts. With *Einbahnstraße* it has already been said that it must be glimpsed through the issue of the crisis, for example with striking statements such as: "exactly with the end of the four-year war, the inflation began in Europe. It has been raging for eight years now, it hits this country once, that country once, and only stops for months or weeks.

41. For instance, as an antithetical concept to the one of progress, and together with the underlying idea of a continuity between modernity and contemporaneity, Koselleck's analysis fits with Benjamin's standpoint.

But for the ruling class throughout Europe these months and weeks are already enough"[42]. Sufficient, we would say, to believe that the problems are not endemic, but solved from time to time, let alone that the crisis is structural. In other words, "*t*he helpless fixation on representations of security and property belonging to past decades prevents the average person from perceiving the quite remarkable stabilities of an entirely new kind that underlie the [current structure]"[43]. To this Benjamin harshly retorts that "the expectation that things cannot go on like this will have been taught one day that, for the suffering of individuals and communities there is only one limit beyond which things cannot go on: annihilation" (VANDEPUTTE, 2023: 75). In fact, "*o*nly a view[,] that acknowledges [that] the sole [ratio of] the present [state is to be found in downfall, would move from the weakening astonishment over what repeats itself daily to] perceive the phenomena of decline as stability itself and rescue alone as [something] extraordinary, verging on the [miraculous] and [the] incomprehensible" (BENJAMIN, 2016: 33).

This text from 1923 is already able to show continuity as a negative element of an enduring crisis, which for Benjamin takes on the appearance of the decline of the bourgeois world. Elsewhere the apparent continuity is denounced as the cultural violence of a philosophy of history that narrates only the winners' versions and feats. The particularity expressed in *Einbahnstraße* concerns the mode of expression of the exception too. Through the image of the bad weather, it is the bourgeois attitude that is disqualified, but not the possibility of change tout court, for "what irritates them as

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42. W. Benjamin, "Vooraf", in WuN 8, p. 174, our transl.

43. W. Benjamin, "Kaiserpanorama", in GS IV, p. 94, identique to the preparatory *Gedanken zu einer Analysis des Zustands von Mitteleuropa*, *ivi* p. 926, and almost identical to *<In dem Schatze jener Redewendungen>*, *ivi* p. 928, now in WuN 8, pp. 21 and 149, and in T. Vandeputte 2023, p. 70, transl. mod.

the constant bad weather is, in truth, the decline of *their* world"[44]. Crisis, bad weather, and stability, analysed and critically overturned, simultaneously establish the role of the ideology of progress – which is the bourgeois one – in the effort of the maintenance of existing conditions and in the factuality of the permanence of the crisis, hence, by deduction, of the false exception. At the same time, those lines indicate a way of exit that is played out entirely on the interpretative level: the end of *one* world. However, it has not to be forgotten that in 1923 there is no explicit mention of a state of exception as rule or permanent, although there is clearly the critique of crisis as a structural element, and yet there is already mention of something indeed relevant like a "state of exception that automatically restores itself"[45].

In any case, then, there is still a missing link between the crisis and the *dual* exception posited in 1940: it is "Krise und Kritik" that seems to offer a fundamental foothold in drawing the connection. One of the reports of the meetings for the homonymous journal states that "*t*he journal's field of activity is the present *crisis* in all areas of ideology, and it is the task of the journal to register this crisis or bring it about, and this by means of criticism"[46]. If in the Theses "our task [is] to bring about the [true] state of exception" (BENJAMIN, 2006: 392), in the 1930 project, an important anticipation is offered. Crisis and critique, crisis and exception, the principle of the task applies to both approaches: critique does not stop at a snapshot of the present time but traverses its criticalities in order to open up to overcome them.

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44. WuN 8, p. 174, our transl. and emphasis.

45. WuN 8, p. 149, our transl. This passage is also present, practically identical, in the version with the posthumous title "In dem Schatze jener Redewendungen", owned by G. Scholem, where the only difference is stability (*Stabilität*) instead of stabilisation (*Stabilisierung*), in WuN 8, p. 152.

46. W. Benjamin, Fragment *WBA Ts 2470*, now in Wizisla (2009: 190).

In other words, these three chosen textual passages show how not only the exception but also the crisis, following and beyond its strict historical and etymological meanings, is inherently ambiguous. On the one hand, it represents negativity on a plane of progression, on the other, irreversible decadence leading to an end. On the one hand a threat to well-being, on the other a structural mechanism that, reversed, becomes a fault line for change. The state of exception as understood in 1940 can thus be read in the watermark of these texts of the primary bibliography, when the language of the crisis is considered as an anticipatory lexicon of that of the Theses, on the basis of the aforementioned analogies.

b) Permanent SoE. Secondary sources: esp. K. Korsch, B. Brecht. The permanent SoE of course does not birth with Benjamin; inversion between exception and rule.

Of course, significant bibliographical sources, as we have seen, also include secondary ones, and both Korsch and Brecht have already been named. To delve a little further into detail, if Benjamin's philosophy has also rightly been called a philosophy of crisis (KODALLE, 1983), no less can be said to be the approach of some of his sources in general, and of Brecht and Korsch in particular. Although they express themselves through different disciplines, the two intellectuals are both unorthodox Marxists and, while one focuses on the critique of the "dark times" of politics, the other is already confronted with "the crumbling economy" (AMICO, 2023: 26) and the liberal crisis – two different modes of addressing one negative historical moment and process.

If the relationship with Brecht, in itself intense, intellectual, amicable, and of mutual influence, has the exception as one of its objects of reflection, the one with Korsch, which is, according to the studies led so far, less intimate and apparently not bi-directional on an intellectual level, works a little more on the level of the theoretical

structures that incidentally allow the exception to be thought and criticised. Hence there are traces of states of exception in the Brechtian: *Die Ausnahme und die Regel* (for the (non)validity of the norm in the exceptional sphere, the friend-enemy opposition, and the overthrow of normality); *Die Maßnahme* (for the value of the rule for the rule even in the face of its now inadequacy); the *Dreigroschen* oeuvres (where there are a long economic crisis and a corrupt normative state); *Die heilige Johanna der Schlachthöfe* (where there would be "the defeat of the economic state of exception" through the revolutionary means)[47]. These are but a few of the motifs that intersect Benjamin and Brecht, whose relationship of reciprocal influence can be summarised as an initial theoretical influence – particularly the Brechtian political extremism as a fearsome leverage according to Adorno and Scholem's judgement – and above all as a reciprocal filtering of technical-expressive instruments. It is a fertile intermediation that passes more from a theoretically grounded practice, from tools that are thought out, exchanged, assimilated and exposed therefore, than from a theory transmitted and (re)exposed. By way of examples, it is enough to think of the principle, or mechanism, of the distancing (*Entfremdung*) or the repurposing (*Umfunktionierung*). In short, the key role Brecht could have played in the structuring of Benjamin's concepts related to the exception resides in another way to detect the continuity of negativity. Better said, thanks to: the reversal between exception and rule; the accents on the limits of law and established rules valid for stable conditions; and the social impact of the economic exception.

Concerning Korsch, despite undoubted relational, theoretical, and initial analogies shared with Brecht, and which should, however, be better diachronicised, the issue is after all quite different. For it is, in this second example of 'source', a matter of mere theory, certainly not in a reductionist sense. Korsch, remembered nowadays as a somehow

47. Cfr. Choi (2018: 124).

forgotten Marxist intellectual and source, represents a fount and not the pole of a mutual exchange, at least in the current state of studies of research. In addition, he represents a more indirect and less clear contribution, even though it can be said that he is most likely the major source for Benjamin's dealing with Marxism: Benjamin reads many texts by Korsch or edited by him, and extensively quotes excerpts from them in the *Passagen-Werk*. He even cites the pages close to the one where Korsch states that: "*t*he democratic forms of the state, the liberal ideas of the ascendant [developmental] phase of capitalist commodity-production have everywhere begun to totter. […] ['States of necessity' (*Notstände*) and 'states of exception' (*Ausnahmezustände*), wars and civil wars] have become the 'normal' form of existence of [the] present [order of life]" (KORSCH, 2016: 67)[48].

Even if the passage does much by stating the structurality and functionality of the state of exception, Benjamin, for unknown reasons, omits perhaps one of the passages that, in displaying the reversal movement between exception and normality through an explicit technical vocabulary of exception, could have been the most significant for his thought of the exception as rule. A further investigation could verify if the problem of such a quotation was not much more the slippery idea that, by stating the states of exception as threats to the liberal system, which had the positive role of making justice and put attention on the dangerous authoritarian drifts, all the theoretical argument against the false exception would have not hold, and a much more complicate constellation would have appeared as too simplified.

All in all, this source, certain and uncertain at the same time, serves more as an invitation for further analysis than as proven proof of the Marxist jurist's influence on the philosopher Benjamin. And

48. The omitted part into bracket does not exist in the manuscript version Benjamin read, nonetheless at some point he declares he read the book (in English, he claimed). On Benjamin and Korsch cf. Loheit (2019).

yet it also has another merit: it clearly and symptomatically brings back to mind, without the need to dig anything up, that there is a tradition of the permanent exception to which Benjamin could have implicitly referred, and which in fact would reach back to Karl Marx and is bound up, among other things, with the concept of the tradition of the oppressed (which links, at the very least, Marx, Brecht and Benjamin). Between the tradition of the oppressed and the exception overturned into normality, room is made, without a doubt, for the significance of the tradition of the oppressed as an undercurrent discontinuity that must surface through critique, as well as for the need to overturn the continuity of the tradition of the winners. In other words, the fundamental role of critical inversion.

c) SoE as rule: typically "modern", related to the ideology of progress, structural to capitalism, against an etymological and juridical definition of exception and exceptionality.

Apart from these, which can be defined as some of the possible and actual Marxist sources of Benjamin's thought related to the exception, his other reference on the topic comes from the other side of the barricade and consists mostly of Schmitt's texts, as the analysis of Baroque exception and sovereignty already stated. To reconstruct the state of exception as rule, since Benjamin does not offer an in-depth examination of it, nor a direct one, except in the flash of the VIII Thesis of 1940, one can employ Benjamin's primary sources around the themes of violence, law and politics, just as one can – must and did – utilise secondary conservative sources, which show, even in the negative, useful pieces for the Benjaminian exception.

After an analysis of sources, texts and concepts, the state of exception as rule, since it is based at the same time on the tradition of the oppressed and on the ideology of progress, settles on a duration that corresponds to that of modernity. An epoch which for Benjamin goes on from the mid-1800s and lasts at least until his own time. The

terminus *a quo* is thus determined by the hegemonicisation of the ideology of progress as a typically bourgeois philosophy of history; the terminus *ad quem* assumes that the 1940s are an extreme version of it, but do not represent such novelties as to have produced an epochal break. As typically modern and bourgeois, the state of exception as rule is in effect capitalist – another reason, moreover, not to consider the 20th century as part of something historically new.

Moreover, if we endorse one clear definition for the state of exception, we can easily find the key parameters which set it. So "the concept of exceptionality is based at the very least on a distinction between ordinary and extraordinary situations, which is then translated on a legal-political level into positive law, or into legal or extra-legal practices" (GOUPY & RIVIÈRE, 2022: 8). As a matter of fact, if one considers the etymology associated with the exception, which wants it to be extraordinary and brief, the state of exception as rule also emerges *in negativo* from the classical definition of the exception or, put in another way, represents its abuse or exasperation, both in the application and in duration. In these terms, it has been understood that it can be definable *against* the terminology found in non-Marxist secondary sources.

True state of exception

Primary sources: On the concept of history, less directly For the critique of violence, The destructive character; reconstructed definition of the true SoE: to come; mandatory; anti-subjectivist; anti-sovereign; radical; intense; disruptive.

The same characteristics of extraordinariness and brevity should then be applied to the true state of exception in order to verify if there is a continuity between the original definition of the exception of Benjamin's proposal in this regard. What is for sure is that the ontological ambiguity intrinsic to the concept of exception – which can

be both on a phenomenal level (incommensurate event) as well as on the legal or institutionalised one (act to counteract the event), which induces so many problems to the theory of the state of exception that aims or faces normativity – becomes, to what we suppose being Benjain's eyes, a semantic field full of possibility, that widens the thinkability and applicability of (a new concept of) state of exception.

For its part, and trying to begin to answer the question by the factor of brevity, the true state of exception can be defined through a (further) oppositional movement. Contrasting the false one of the permanence of negativity, hence of the rule, it can be defined starting from a series of points of which, again, some stem from the Theses, and others, with more or less lengthy and legitimate mediations, are derived from other texts, going back as far as before 1920. Half of the operation is fully legitimate, and the other half is the best attempt at reconstruction hitherto possible, which certainly would not be detrimental to further investigation and reconstruction.

By traversing the disparate sources, it is possible to conclude that the true state of exception can be defined as corresponding to a new concept of history; mandatary (*Mandatar*); anti-subjectivist, anti-sovereign, radical, intense, and disruptive or at least dismissive. Such characteristics could indeed recall the dimension of actual extraordinariness, nonetheless the final word cannot be said.

To better explain the list of topicalities, the true state of exception would be both a theoretical and a political-practical reversal, in which the philosophy of history, having abandoned the linear and progressive ideal, and overcome, in the first instance conceptually, the blockage of the repetition *per se*, comes to correspond to a new state, breaking with the traditional view of the relationship between law (*Recht*) and justice, in other words, excluding the law from the sphere of the means for justice. As already the study on the *Trauerspiel* teaches, it comes to correspond to a new state, whose theoretical and political subject is the overcoming and negation of the concept

of sovereignty, which also includes the exclusion of all its individual, arbitrary, and decisionist manifestations. It consists then in a state that expresses the sense of a new community, in which the relationship between man, nature, environment, and technology, henceforth falls outside an instrumental and dominative power. So far, some unproblematic elements, emerging from Benjamin's reflections on core topics such as politics and violence, have been seen corresponding to a general view expressed by Benjamin in various contexts, reconducted here to a single chosen figure, that of the state of exception, which seems particularly suitable, as the last form of the politics, to incarnate and reunite them.

More controversial is the status of the rupture that this change of state represents: change of State too? Break with the rule of law? With the idea of the rule of law or with its historical manifestations that had been experienced up to then? This is related to the characteristic, which from the in-negative of the exception as rule reascends to the exception, etymologically understood, as effective rupture: how can such a messianic vision (not necessarily religious, but certainly evenemential) be reconciled with a coexisting view that considers that the change will not be represented by a single leap or reversal, and sometimes point out that "the Day of Judgment […] could not be distinguishable from other days" or to the fact that "*e*very day is a moment of judgment concerning certain moments that preceded it" (BENJAMIN, 2006: 407)?

Many questions remain to be clarified, nevertheless, the Benjaminian double state of exception can unfold its usefulness and perhaps can serve as a theoretical framework for interpreting even current phenomena which, expressing themselves as exceptions, with Benjamin's model would quickly be disqualified as false. Thus giving criticism a rapid opportunity to wedge itself into the present and to disarm in a few moves, on the level of analysis first, certain anti-democratic mechanisms. On the other side, it is as it had warned us from

an indiscriminate application of the label of the exception. By so doing, when everything is judged as an exception, discriminating, in other words, the work of critique, is dangerously quickly done and too soon left aside.

Conclusions

As seen, the polarity of the two states of exception established by Benjamin is not the first ambivalence of the exception. The (state of) exception already arises in historical and legal terms both as an event and as a measure against the event, or, rather, both as an event that poses a substantial threat to normality and as a measure aimed at re-establishing normality. But Benjamin shifts the polarity within the exception, in a way that is not unrelated to that first division between phenomenon and measure taken. In effect, as "for Benjamin, ambiguity is never simply a sign of confusion, much less of irresponsibility, but rather is a virtual condition of doing philosophy in the modern world" (EILAND & JENNINGS, 2014: 356), evoking the realm of double-sided, or polar significations opens up a space for the thinkability of an alternative alterity to that of emergency and its containment. This undoubtedly leads to a reinterpretation of the status of the state of exception, both in its connections with the state, with law, or with democratic instances and personal freedom, as well as on the political and metaphysical level, where Benjamin's reflection shifts the heart of the matter. If, instead, one keeps the focus on the characteristics of what can be defined as exceptional and, at the same time on the phenomena and the measures taken, on the validity of them for a definition of exception that well remembers its essential assumptions (which seem to have been forgotten by the dominant narrative and historiography in the unfolding of modernity), the polarity then concerns: short duration (or intensity), truly exceptional character (not subsumed by predetermined facts).

Benjamin, who refuses to embody any form of exception, thus already enacting on an existential level a more or less intentional disengagement from every existing exception, metonymically interrupting its mechanism of subsumption, embraces the exception at the moment in which he overcomes it. That is, when, by disqualifying all phenomenal and historical exceptions (the state of exception-as-rule or false), it proposes a further one, which has never yet manifested itself (the true state of exception). In so doing, without abandoning it as an interpretative tool, he removes from the right-wing tradition the acquired monopoly over the concept and the employment of the state of exception as a governmental tool. He also transforms the general concept of the state of exception from an interpretative and provvedimental (executive) element into a programmatic one, a political instance as well as a theoretical one. The latter, however, cannot exist without the former, for it would not be possible to describe the true state of exception without previously disqualifying the false one. And no true state of exception, being the inversion of the false one, could enjoin without a prior analysis of the state of things through the Benjaminian lens of the exception, which can discriminate between events and measures, disqualifying the exception that has become a structural element of the modern progressive and capitalist system.

Lastly, although we have confidently chosen to speak of two states of exception in Benjamin (be they true, false, real, permanent, as rule), and we can do so also in the light of previous studies, without too many philological and conceptual doubts, the states of exception traversed by Benjamin's body, pockets, soul and mind are in all evidence varied. The dichotomy is therefore determined by a specific intent, namely the choice, deduced from Benjamin's words, to focus on the key factors, the eminent and programmatic manifestations, of the question of exception. With the aim to render it, as the 1940 text seems to demand, not only an interpretative but also an applicative

tool in terms of both the understanding and philosophy of history and the resolution of the socio-economic and political criticalities that Benjamin identifies as being in a phase of both stalemate – from the point of view of the now phantasmagorical possibility of a (self-) resolution – and of radical worsening – from the point of view of the extreme nature of certain phenomena that are in themselves anything but new in recent decades, but which are daring (towards) the point of irreversibility. Thus, by choosing to dichotomise the classic concept of the state of exception, Benjamin not only removes it from the dominance of the right and conservatism but turns it into a potentially useful tool for both present and future generations, whether they are analysts, interpreters or actresses of society and politics. Whether they want to make it a 48, a 68, or start a new enumeration.

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A DANGEROUS THING: A PROPOSAL FOR A FRAMEWORK AND OPEN QUESTIONS FOR ANALYSING CONTEMPORARY STATE OF EMERGENCY REGIMES

Matthias Lemke

A dangerous thing[49]

In contemporary democracies, which more and more often tend to make use of a state of emergency regime, these regimes nearly always follow a similar pattern.[50] When the 'hour of the executive' is declared in response to an urgent crisis, time pressure and other legal and/or political constraints often lead to the neglect of areas of the democratic constitutional state, that are considered to be vital for its political culture.

This is true particularly with regard to the legislative processes which involve time-consuming deliberative decision-making, which are often characterised as limiting democracy's ability to act. While governments often demonstrate their power to act through accelerated decisions and hasty legislation, citizens and civil society

49. This title is inspired by Rossiter (1948).

50. The article reflects the author's presentation held online at the Universidade Federal de Juiz da Fora, Minas Gerais, Brazil, on July 25th 2023. The original title of the presentation was "State of emergency – What it means today". Due to redactional reflections, the author chose to change this title.

may experience limitations in their scope for action. This non-simultaneity in the availability of democratic power during times of crisis appears to be independent of the specific reason for the state of emergency. This leads to situations, as seen in many countries during the COVID-19 pandemic, in which it becomes more and more unclear which rules currently apply, leaving citizens unsure of how to act in accordance with the law (BJØRNSKOV & VOIGT, 2020). Therefore, the state of emergency clearly is not a time of 'embedded democracy'.

The use of a state of emergency can be a challenging time for democracy, particularly in terms of the constitutional framework for crisis intervention. In most cases, constitutions permit expanded executive powers during times of severe crisis. However, these increased decision-making and action capabilities have often led to a significant deterioration in democratic political culture. Examples of state of emergency regimes can be found in the United States, such as the US Supreme Court case Korematsu v. United States in 1944, and in Turkey in 2016.

These two brief examples illustrate why Clinton L. Rossiter, in his famous 1948 study on Constitutional Dictatorship, concluded that it should be conceived as "a dangerous thing". Rossiter examined state of emergency regimes in the Weimar Republic, the French Third Republic, and Great Britain in the first half of the 20th century. A state of emergency represents a serious intervention in the normal operation of established political and constitutional processes and institutions, particularly for democracies. It is defined as the "crisis-induced expansion of executive powers" (LEMKE, 2018). If it is explicitly regulated in the constitution, it shifts the normal responsibilities in favour of the executive. This can be seen as the dismantling or reduction of institutionalized control mechanisms, which are intended to prevent incorrect state action and ultimately arbitrariness. Now, in the second and third decades of the 21st century, democratic regimes

are in decline worldwide, while state of emergency regimes have been increasingly used. This raises the question of whether the above mentioned phenomena are related, or if one causes or accelerates the other. Political and social science research will need to address this issue, especially when they apply a normative-democratic perspective.

To tackle this issue more adequately, political and social science research needs a shared framework for a qualitative empirical approach to the conditions surrounding state of emergency applications. This article will define state of emergency and propose at least three elements for a common framework of state of emergency analysis. Following this, the article will present some research questions that have yet to be adequately addressed by political and social sciences.

Definition

Let's start with a brief definition of state of emergency. Historically, the modern state of emergency derives from the experience of being besieged and the attempt to efficiently respond to the siege. This historical reference is still reflected in the legal terms used till today, such as the German Verteidigungsfall, which literally means "State of Defence", or in the état de siège or état de siège fictif, terms to be found in Article 36 of the Constitution of the Fifth French Republic.

In a contemporary constitutional context, the term "state of emergency" refers to a variety of crisis response mechanisms that exist in different forms of (democratic) government. These mechanisms share three common elements, the first and second of which are generally undisputed in the literature.

First, provisions for a state of emergency are enshrined in the constitution. These provisions cover issues such as the grounds for declaring a state of emergency, the modalities for intervening in fundamental rights, or the institutional reorganisation during it's application.

Second, they share the common goal of increasing the government's capacity to act and make decisions, provided that the necessary conditions for declaring a state of emergency are met. The purpose of declaring a state of emergency is to restore an existing constitutional order that is threatened by a serious crisis or, in other words, to restore the pre-crisis situation as quickly as possible.

Third, and this aspect is subject of various debates, the period of application of the state of emergency is, at least in theory, limited in time. Bernard Manin (2015) summarises the functional core of the state of emergency as follows: "The institutions of the exception allow to restrict specific constitutional norms for a certain time if circumstances require it" (2015). The broad majority of constitutions, too, stipulate a time limit for the application of a state of emergency ('sunset-clause'), indicating that it is intended as a tool strictly limited to protect and recover the constitutional order during times of crisis. However, following Matthias Lemke (2017), there is an increasing tendency for governments to prolong the use of states of emergency beyond this limit. When governments opt for prolonged use of the state of emergency, they're usually offering an interpretation of the ongoing crisis that emphasises for example its severity. In this way, they turn the state of emergency into a purely political, rather than legal, instrument, which depends entirely on their interpretation of the current situation. At this point, the application of the state of emergency is no longer limited by the legal rules laid down in the constitution, but by the government's ability to justify it's actions and to find a majority that accepts these justifications. As early as 1948, Clinton L. Rossiter (1948) pointed out that the state of emergency tends to perpetuate itself, despite the constitutional safeguards: Once the powers are concentrated in the hands of the executive, there is a temptation for the government to maintain or even enlarge the extraordinary powers granted by the state of emergency. Some governments may simply try to extend the period of application of the

state of emergency; others may take advantage of the crisis situation to reform the constitution to suit their interests.

With regard to these three core elements of the state of emergency, there are two main schools of interpretation or definition. There is the classical school, which clearly adheres to the limited temporary nature of the state of emergency, as it was established for example in the Roman Republic and its institution of dictatorship. And then there is the critical school, which stresses the fact that the state of emergency, although legally limited in time, shows a clear tendency to exceed the given time limit during its application, depending on political framing used by the government. The classical school remains largely silent on this issue, while the critical school stresses the importance of counterbalancing these tendencies to self-perpetuate or normalise the state of emergency.

Analytical framework

Given the challenge of a self-perpetuating use of state of emergency regimes, contemporary political science and social science research on the state of emergency[51] requires a binding framework in order to effectively capture the empirical complexity on state intervention in crises situations. This framework should consist of – at least - three possible components to be taken into account by any analysis on state of emergency. The proposed components of this framework will be introduced in the following. Although they do not claim to represent a once and for all times fixed set of tools and/or perspectives, they, however, allow essential categorisations regarding key analytical facts, such as the type of state of emergency, the cause of the state of emergency, and the understanding of time in a state of emergency.

51. The general assumption here is that it is undisputed that contemporary political and social science research on the state of emergency, especially if it is situated in a normative-democratic way, cannot do without a qualitative analysis of the language patterns of the political public in the context of a crisis. Cf. Lemke (2017); Hegemann (2023).

Typology

To compare states of emergency, a set of criteria is necessary. A key distinction is the integration of the state of emergency into the applicable constitutional order, which is a central aspect of constitutional practice. Two options are conceivable: the extra-legal model, where the state of emergency replaces the existing constitutional order and stands outside it, and the legal model, where the state of emergency is integrated into the constitutional order. The legally integrated model defines the state of emergency in the constitution and adapts only parts of the existing legal structure for a defined period of time.

A state of emergency can be described as extra-legal if its declaration suspends the constitutional order for the duration of the state of emergency. An example of an extra-legal state of emergency is the appointment of a dictator, as occurred in the classical phase of the Roman Republic. According to the available historical sources of Roman historiography, the Senate could appoint a dictator when circumstances required it, such as to wage war or organize games. After being appointed, the dictator was able to carry out their mission without being bound by the usual legal regulations, such as the principle of collegiality. Therefore, the appointment of the dictator by the Senate suspended the validity of the constitutional order. Ideally, this suspension should be limited to a period of six months. During the Italian Renaissance, Niccolò Machiavelli argued that republics, in particular, required a streamlined decision-making process during fundamental crisis situations and exceptional circumstances. He suggested that in such situations, the institution of dictatorship should be viewed as the last resort for republics to ensure their existence.

A state of emergency is considered legally integrated if, upon its declaration, the constitutional order is only partially suspended and not completely. The constitution and subordinate laws regulate the allocation of competences to the executive, the structure of the separation of powers, and the duration of the state of emergency. They

also specify which fundamental rights may be restricted. The differentiation of a state of emergency depends on the involvement of various constitutional bodies during its declaration. It is important to consider whether the executive can declare a state of emergency independently or if it requires the cooperation of other constitutional bodies, such as parliament. Examples of executive-oriented, legally integrated variants include the state of emergency according to Article 48 of the Weimar Constitution (WRV) and the état d'urgence based on Law 358/55, as applied or applicable in France. Both are based on a clear attribution of competence to the executive, with regard to both initiative and action competence. From a historical perspective, the 'Commissary Dictatorship' is the typical example of this executive-oriented, legally integrated variant of the state of emergency, as named by Carl Schmitt.

A less common form of legally integrated state of emergency involves institutional arrangements that grant extensive powers to both the executive and the legislature. In such cases, a state of emergency can only be declared if Parliament or at least parts of Parliament agree. This is the case, for example, with the German state of emergency (Articles 35 and 91 GG). This text describes a non-executive, legally integrated state of emergency that is based on the experience of applying Article 48 WRV. The aim is to prevent an excessive concentration of power in the hands of the executive. The involvement of Parliament in fundamental decision-making processes is important, but the ultimate goal remains to create an executive branch that can act effectively.

Causes

The majority of existing literature on the state of emergency distinguishes between two triggers for its application. It refers to non-manmade causes on the one hand, and to man-made causes on the other.

Non-manmade causes for the application of a state of emergency are generally considered non-controversial when compared to man-made causes. These causes include a variety of natural disasters, such as earthquakes, floods, volcanic eruptions, forest fires, diseases, and their widespread geographical consequences. This is what makes them undoubtedly and, in the vast majority of cases, uncontroversially perceived as catastrophes. As rescue and recovery operations require a vast amount of resources, declaring a state of emergency not only achieves broad social and political consensus but also fulfils the core function of the modern nation-state: to provide safety and security to its citizens.

Man-made causes for the application of a state of emergency encompass a wide range of real-life scenarios, including terrorist attacks, civil uprisings, strikes, labour-related protests, nuclear disasters, and other widespread technical breakdowns in modern society. In contrast to these man-made causes, natural disasters are often less controversial and require less intense framing in crisis situations. Regarding for example terrorist attacks, perpetrators are often portrayed not only as criminals but also dehumanised. This was observed after 9/11 in the US and 11/13 in France, allowing for the declaration of a 'war on terror'. However, declaring a 'war on terror' is not a promising endeavour as terror is a strategy, not an actual aim that can be destroyed during an attack. Therefore, a 'war on terror', which is essentially a war on a strategy, cannot be won (RICHARDSON, 2006). So why declare it? Because it legitimises the application of a state of emergency, allowing the government to demonstrate strength in a situation where both society and the state are deeply wounded.

However, from today's perspective, the dualism of causes when it comes to describe triggers for the application of a state of emergency may no longer be sufficient. This is because it is difficult, for example, to determine whether the COVID-19 pandemic should be considered a man-made or non-man-made cause. One could argue that a pandemic

is a natural disaster caused by a virus that occurs and develops naturally. Therefore, a pandemic represents a non-man-made cause for a state of emergency. On the other hand, it could be argued that the virus may have emerged due to living conditions and customs of food consumption. Therefore, categorising the pandemic as a man-made cause for a state of emergency would seem appropriate, as its appearance is heavily reliant on human behaviour. Another example to consider in this context is climate change. For more than a decade, the Marshall Islands in the Pacific Ocean have declared states of emergency due to climate change-related issues, such as flooding, land erosion, and major losses of drinking water resources. These issues are not necessarily man-made. However, although these issues cannot be attributed to specific individuals and/or responsibilities, they are a direct result of human-induced climate change. The inhabitants and politicians of the Marshall Islands cannot ignore the real consequences of these specific, catastrophic challenges and must take immediate action. Therefore, in relation to the dualism of categorising causes for states of emergency, it is suggested that a third category be introduced, referred to as 'hybrid causes'.

Time[52]

Until now, there has been insufficient consideration of the relationship between time management and states of emergency. This is surprising, as political theory (and practice) links embedded democracy, states of emergency, de-democratization, and time through the concept of crisis. In times of crisis, prompt action is necessary, and the executive branch benefits from the additional power granted by a state of emergency. This increased power comes at the expense of democratic processes, which require time - a scarce resource in a crisis. De-democratization or even autocratization are possible consequences of the temporal regime during a crisis. With regard to

52. For a more detailed approach on this aspect, cf. Ehs / Göztepe / Lemke (2023).

a critical approach towards state of emergency research, two important aspects shall be mentioned here.

First, de-democratization during a state of emergency is caused by a scarcity of time, but it is not solely dependent on it. The acceleration of time during a crisis creates the conditions for intentional or unintentional errors in the democratic and constitutional structure, disrupting the functionality of sub-regimes and their interaction in democracy. De-democratization is not caused solely by dysfunctionality of state organs. Rather, it is caused by a confused mix of political control under pressure to react along the lines of 'executive overreach' and 'executive underreach'. This mix is based on a disruption of the roof or bracket function of the time regime. Whether such errors are due to deliberate obscurity of responsibilities, unclear or omitted communication, contradictory legal or decree situations, or the sheer opacity of the current legal situation, or the excessive demands placed on the administration in implementing the applicable or assumed applicable rules, is ultimately irrelevant to the result. The over-extension of the rule of law and de-democratization are accepted or intentionally brought about. However, the analysis of the state of emergency in political and social science cannot be limited to the consideration of temporality, which primarily refers to the acceleration or scarcity of time as a resource. It must also include an examination of the sources of error that the state of emergency opens up or forces.

Second, it is important to note that breaching the law during a state of emergency carries consequences. This includes violating both the laws specific to the state of emergency and those that apply during normal times. Violations of the law, particularly when accompanied by authoritarian-populist rhetoric, can have long-term consequences for the entire legal system, the legal obedience of those addressed by the norm, the political culture, and the process orientation of a democracy. The deeper the breaches of the law and the less resistance they face from the courts, the more challenging

it becomes to return to normality ex ante. The state of emergency is a political and legal concept that must be normatively regulated before a crisis occurs. However, there is no legal requirement to use the codified state of emergency. Politicians are free to quickly enact new emergency laws and operate beyond the state of emergency laid down in the constitution, as the results in Ehs, Göztepe and Lemke (2023) clearly show. Critical political and social science research has to take into account the times before, during and after a crisis in order to be able to consider these effects.

Questions

In contemporary political and social sciences research on state of emergency regimes, there are still several open or untouched fields of investigation. The following passages aim to briefly introduce important blind spots related to the topic of empirical state of emergency research.

Good for what?

In crisis situations, there is often a call for immediate action by a centralised body or person. This is particularly true when the political public becomes aware of the gravity of the crisis. As a result, the category of political trouble shooters has emerged, which has been attributed to only a select few political personnel, such as the former German chancellor Helmut Schmidt, for example.[53] The very idea behind this claim is that a more centralised crisis reaction mechanism, such as a state of emergency, will better cope with a crisis.

But is this really true? It seems to be important to consider the impact of a state of emergency regime on solving severe crisis

53. Whether this attribution is correct and in line with the given constitutional provisions or even the spirit of the constitution, remains another question to discuss. For the case of Helmut Schmidt, cf. Lemke (2024).

situations. Would a specific State in a specific crisis situation have been better off if it had not opted for the application of a state of emergency? Although this question may be difficult to answer[54], it is worth considering when deciding whether or not to apply a state of emergency. It may also serve as a reminder to think twice before, for example, temporarily suspending fundamental rights for only a slightly increased chance of successful crisis intervention.

Moreover, there is a dearth of empirical research on the impact of state of emergency regimes. It is still unclear whether a state of emergency truly enhances a government's crisis management capacities, and if so, to what extent and under what conditions.

Normalisation?

In political and social science literature on the application of a state of emergency, the term 'normalisation of the exception' is used to describe the fact that legal or political patterns or actions related to the state of emergency are not revoked after it has ended. In this sense, the term expresses a concern that the government's increased capacity for action and decision-making extends beyond the emergency situation and fundamentally alters the democratic political culture, institutional setting, and balance of powers. 'Normalisation of the exception' refers to the tendency for states of emergency to remain in effect even after the crisis they were issued for has been resolved.

Regarding the issue of de-democratisation or authoritarianism following a state of emergency, several important questions arise: What does the normalisation of a state of emergency regime entail? Under what conditions does normalisation occur? Are there conditions that facilitate normalisation? On the other hand: What

54. On the other hand, one could argue, that the COVID-19 pandemic has delivered that many use-cases of states of emergency, that a comparative approach to this question could have become possible.

mechanisms or provisions should be adopted to prevent the normalization of policies or regulations related to a state of emergency?

Avoiding state of emergency?

If the application of a state of emergency is per se dangerous for the democratic political culture, why should a government use it? If it is unclear, whether there has ever been a productive impact provided by or during a state of emergency regime with regard to coping with a specific crisis or catastrophe, why take the - then - additional risk of harming democracy? Or, in very general terms: Should a democracy rather have a state of emergency or should it refrain from it?

In relation to these questions, it is important to note that disaster management does not begin with the implementation of a state of emergency. It does not even commence with the onset of the disaster itself, but rather much earlier. It commences with the preparation for disaster management, which involves providing material and non-material resources and capacities for both disaster management agencies and civilians, enabling them to be prepared for appropriate action when a situation arises. It could be argued that, as disasters cannot be foreseen in every aspect, there is still a need for state of emergency provisions that allow for spontaneous government reactions if necessary or forced by a situation. In this case, two things seem to be of utmost importance: having state of emergency provisions ready before a disaster strikes, and setting strict, clear, and non-changeable limits to state of emergency actions.

Conclusion

State of emergency appears to be becoming the new norm for governing in the 21st century. This is evident not only from the events to be observed during the first six to twelve months of the COVID-19

pandemic in 2020 but also from the increasing catastrophic events related to climate change and responses given to these events. It is plausible that in the coming decade, and even beyond, democratic governments will increasingly adopt state of emergency measures. This projection raises concerns about the potential threat to democratic institutions, constitutions, and civil liberties, that goes along with an extended use of state of emergency.

Therefore, from a normative democratic perspective, critical research on states of emergency requires more attention from political and social sciences. Legal approaches often limit themselves to legal dogmatics, so it is crucial to understand the circumstances under which a state of emergency threatens democracy's existence. Understanding the destructive potential of a state of emergency requires going beyond legal dogmatics. The application of a state of emergency must consider the political conditions surrounding it.

The definition, framework and questions presented in this article can serve as a starting point for gaining a comprehensive understanding of state of emergency regimes applied to democracies. If Rossiter's estimation that 'constitutional dictatorship' was a dangerous thing in the late 1940s was true, what would he say in today's world, with the added challenges of a global pandemic and climate change?

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THE ECONOMIC STATE OF EMERGENCY, OR THE ROLE OF CRISIS LAW IN LIBERAL DEMOCRACIES: TOWARDS AN AUTHORITARIAN LIBERALISM?

Marie Goupy

In an important article published in April 2000, the political scientist William Scheuerman (2000) made the following observation: even though legal and political analyses have proliferated in recent years regarding the growing use of emergency powers in liberal democracies, most authors almost completely ignore the issue of "economic states of emergency"[55]. Since the turning point of 9/11 and the "War on Terror" initiated by the Bush administration, there has been much discussion about the increasing use of states of emergency in liberal states. The expansion of their scope, from terrorist attacks to ecological disasters, from security crises to health crises, has also been widely noted. However, while the use of exceptional legal measures for managing economic crises has been mentioned in passing, very few legal or political works have actually delved into these powers, integrating them into the discussions around the "state of exception". The 2008 financial crisis, which led to the use of exceptional powers in both the United States and Europe, did prompt some studies, occasionally reviving memories

55. For a similar observation, see John Reynolds (2017: 381.

of older economic crises[56]. Additionally, the use of exceptional means – barely concealing economic interests in other contexts – as in Brazil during the "fight against corruption", has also sparked discussions about the "economic state of exception"[57]. Nevertheless, works on economic crisis law within a broader reflection on the history of liberal law and institutions have remained few, as if the treatment of economic crises were, in the end, a separate issue with no real connection to the management of other crises. In reality, not only have economic crises led to a massive and repeated use of emergency powers throughout the 20th century, but these powers have also contributed to profound transformations in the law and institutional balances of liberal democracies. Therefore, it is hardly possible today, as we question the generalization and trivialization of such a use of crisis law – going so far as to speak of a "permanent state of exception"[58] – to separate economic emergencies from the rest of emergency law.

On this broader scale which takes into account the relationship between law and economics, William Scheuerman has proposed a particularly stimulating reading hypothesis to interpret the expansion of crisis law in recent decades and, in reality, long before in the 20th century: he argues that economic states of emergency signal a temporal inadequacy of the law in response to the transformations of the globalized world. More specifically, Scheuerman (2000) suggests that it is the social acceleration generated by the evolution of capitalism that largely explains the growing use of crisis law, and especially economic states of emergency[59]. Such a theory offers a different perspective from the widely accepted approach in the dominant works on the state of exception: rather than

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56. See in particular Jonathan White (2015: 300-318); Christian Jeorges (2015); (2014); Eugenia Kopsidi (2015).

57. See in particular Rafael Valim (2017).

58. The importance of Giorgio Agamben's writings in disseminating this idea should be stressed here, in particular Giorgio Agamben (2003).

59. See also Scheuerman (2002: 379-397).

starting from security crises to interpret the expansion of crisis powers and emergency law in liberal democracies, Scheuerman (2000) encourages us to observe the role played by economic emergency ; rather than considering the state of emergency and all emergency powers as a kind of separate law, he views the acceleration of the law through the lens of the relationship between law and economics – which does not exempt us, on the contrary, from a reflection on the possible authoritarian drift of liberal states. In this article, we would like to focus on the implications of such a change of perspective for the interpretation of the "permanent state of exception", which many authors recognize in our democracies, but which has so far remained difficult to interpret[60]. More specifically, we will address a question raised by Scheuerman's analysis itself: if crisis powers indeed serve as a tool for the law to "catch up" with the rhythms of capitalist economy, how can we explain the legal form of this "catching up", that is to say, precisely, the use of crisis law? To tackle this issue, we will draw on the work of two contemporary American jurists, Eric A. Posner and Adrian Vermeule, whose provocative theories seem to allow us to sketch a new reflection on the dual nature, both economically liberal and politically authoritarian, of crisis governments that are emerging today in liberal democracies.

Emergency Powers and Capitalist Acceleration – William Scheuerman's Hypothesis.

It is now difficult to dispute that we are living under a form of "permanent state of exception"[61]. However, the exact legal implications of such a proposition have remained somewhat unclear, as evidenced

60. On these debates about the validity of the very concept of "state of exception", see Marie Goupy (2023: 1-18).

61. For a final review of the situation in France – but the book is very enlightening for most liberal democracies that have used the state of emergency in the fight against terrorism, and later during the health crisis – see in particular Stéphanie Hennette-Vauchez (2022).

by the countless debates surrounding the very term "state of exception". Notably, however, almost all works on contemporary forms of exception, whether they accepted the concept or not, have consistently separated economic emergencies from other crises, consistently making security crises the paradigm of all crises. Nevertheless, as noted by William Scheuerman (2002: 383-), the use of crisis powers to address economic crises and other forms of economic emergency is not marginal in the governing practices of liberal democracies. Furthermore, discussions about the consequences of extending crisis powers to manage economic issues began in the interwar period in Europe and the United States. In Germany, writings on the subject date back to the 1920s, with the ultraconservative and anti-Semitic jurist Carl Schmitt, who, to some extent, is credited with introducing the concept of state of exception (*Ausnahmezustand*). However, the opposing political side also contributed, as shown in the nuanced work of the Marxist jurist Otto Kirchheimer, who was influenced, to some extent, by Schmitt[62].

The publications of these authors partly explain the relative silence that surrounds today the state of economic emergency. Emergency powers were widely used as a form of state intervention in economic matters in the 1920s and especially the 1930s, when they were almost immediately caught up in sensitive battles of interpretation. Such powers undoubtedly contributed to a profound transformation of liberal states toward a more administrative state. However, the central political question remains whether the massive use of emergency powers in economic matters in the 1920s and 1930s contributed to the authoritarian drift of regimes between the wars or, conversely, whether it contributed – as seems to be the case with the New Deal – to their resistance to fascism[63]. These sensitive interpretive battles

62. On this subject, see in particular Augustin Simard (2023).

63. For a whole tradition of neo-liberal interpretation of institutions and law, resorting to legislative delegations to respond to economic emergencies is a factor in destabilizing liberal states and law. *Conversely,* many historians see the New Deal policy as one of the factors that

were certainly reignited during the Cold War. It is also worth noting that in many states, such economic emergency powers supported, if not more, brutal neoliberal strategies of economic disengagement (SCHEUERMAN, 2004: 110)[64].

In this context, the distancing of economic emergencies in the "legal" treatment of states of emergency could be easily interpreted as an overt or covert circumvention of these sensitive and historically charged political and legal discussions. The disciplinary divide between law and economics has also contributed to obscuring these issues, justifying the treatment of crisis law as a purely legal – and essentially security-related question – while pushing the management of economic crises into the realm of economics, as if the modalities of their management, as well as their legal framework, were not only secondary but also strictly determined by the requirements of the economy. Reestablishing the central role of economic states of emergency in the analysis of the state of exception first requires not being hindered by a disciplinary divide, which, in the words of Michel Foucault (1971: 10-11), appears to serve as a tool for selecting, organizing, and redistributing discourse, with the "role of warding off its powers and dangers, mastering its random events, and dodging its ponderous and formidable materiality".

From this perspective, Scheuerman's shift in perspective regarding the state of exception is remarkable. Scheuerman not only takes the role of economic states of emergency in the legal and political practices of contemporary liberal governments seriously but also shifts the focus on the exception toward economic emergencies. He reconsiders *all* crisis law, if not the forms of government by crisis that have developed in recent decades, in the light of the relationship

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helped to prevent the coming of a fascist regime in the United States. On this point, see in particular Friedrich A. Hayek (1985: 71-). For an opposite interpretation, see in particular Karl Polanyi (1983).

64. On the same subject, see also Scheuerman (2000).

between law and economics and the changes that have affected the latter. In this context, Scheuerman's theory is clear: the social acceleration driven by capitalism has put the law in a situation of temporal inadequacy, first prompting an increasingly extensive use of crisis powers, and then a replacement of the central role of law with administrative law, better suited to the pace of capitalist societies in an increasingly globalized world. This thesis builds on the analyses of David Harvey (1990: 141-), who argues that the development of capitalism leads to the compression of both space and time (*a space time compression*), especially due to efforts to reduce production, consumption, and circulation times. For Harvey and, subsequently, Scheuerman, this process of compression, along with the acceleration of time, affects the organization of social life and all political and legal regulatory mechanisms. It is this essentially economic process that explains the gradual transition from a form of normativity embodied in the dominance of a general and stable law to an accelerated and more flexible normativity, capable of adapting to the constant changes in capitalist societies. For Scheuerman (2000), this process began in the 1920s, giving rise to strategies that delegated legislative authority to executive and administrative bodies:

> If Harvey is correct, it becomes easy to see why liberal legislatures increasingly have been overwhelmed by the tasks of economic management in our century. Given the demands of a capitalist economy that, to an ever greater extent, requires fast, constantly changing forms of state intervention in accordance with the rapid-fire dictates of economic life, it is no surprise that even liberal polities tend to delegate vast discretionary authority to executive and administrative bodies typically seen as being better suited to the tasks of quick, flexible forms of action.

The social acceleration driven by capitalist economy has gradually made the law inadequate (SCHEUERMAN, 2004: 122). This inadequacy first manifested itself in an increasing reliance on legislative

delegations and crisis powers, especially because the legislator, powerless in the face of the pace of social change, was forced to yield more and more authority to the executive and its administration, which were better equipped to respond to emergencies and acceleration in general.

With this reading of states of emergency, Scheuerman remains cautious about deterministic interpretations of the relationship between law and economics, as well as from hasty moral and political judgments about the effects of acceleration. Acceleration itself is not rigorously determined by the economy, due to the relative autonomy of the social process. Above all, Scheuerman refuses to immediately perceive acceleration, or even legislative delegations, as an inevitable threat to democratic institutions[65].

Undoubtedly, the risks that an accelerated creation of law and the constant recourse to emergencies pose to a public and transparent debate in a democracy, as well as to legal predictability and certainty, must not be ignored. However, acceleration is also linked to the development of the welfare state and economic intervention policies, which can also contribute to maintaining a social and economic context essential for democratic flourishing. In short, the political scientist refrains from drawing hasty conclusions against the acceleration of economic crisis powers or the development of administrative law to address acceleration. However, in the end, the political scientist is not particularly optimistic:

> Slow-going deliberative legislature, as well as normatively admirable visions of constitutionalism and the rule of law predicated on the quest to

65. Here, it is important to consider the profound differences in histories that have influenced the interpretation of emergency powers. In the United States, such powers were used both for the abolition of slavery during the Civil War and during the New Deal, which naturally gives them a completely different meaning or "colour" *a priori* than the use of emergency powers in the inter-war period in Germany, France or Italy, which accompanied the authoritarian shifts of the States.

> ensure legal stability and continuity with the past, mesh poorly with the imperative of social speed, whereas a host of antiliberal and antidemocratic institutional trends benefit from it (SCHEUERMAN, 2004: XIV).

The acceleration theory, as formulated by Scheuerman (1987), sheds an entirely new light on the rise of crisis law in recent decades or on this "permanent state of exception" that many authors recognize today. The increasingly massive use of states of emergency, particularly economic emergencies, reflects, for the political scientist, the global transformations of capitalist economy. With these transformations, since the first quarter of the 20th century, the law has always come too late for the "ever-changing dynamics of contemporary economics conditions". It is by taking into account the broader relationship between law and the economy that one can understand the role these emergency powers play in a general evolution of the liberal parliamentary state, which is sliding further toward an administrative state under executive control.

The analysis is particularly stimulating, but it leaves a central question unanswered: how can one explain that the use of crisis powers persists, if not accelerates, in liberal democracies, even though the "catch-up" process described by Scheuerman began in the 1920s and 1930s? Why, when crises have already led to the development of administrative law, to profound institutional and legal transformations that are particularly reflected in the domination of the executive in almost all liberal states, must these states still resort to emergency powers? In short, how can we explain the fact that the state of emergency has paradoxically, in recent decades, developed in two forms: on the one hand, in the form of administrative law that is constantly evolving to keep pace with emergencies, under the more or less exclusive control of the executive; but on the other hand, states continue to resort regularly, if not increasingly, to spectacular, noisy, sporadic crisis legislations, with the approval of the legislator.

The acceleration of crisis law or the subordination of law to the economy - the theory of Eric A. Posner and Adrian Vermeule.

Two years after the 2008 subprime crisis, two American jurists, Eric A. Posner and Adrian Vermeule, published a book dedicated to emergencies, explicitly considering the role of crisis powers not only in managing security crises but also economic crises. The two authors are well-known in the United States[66]. In 2007, the jurists had already published a controversial work in the wake of the Bush administration "War on Terror", which propelled them onto the intellectual and political stage far beyond the academic world (POSNER & VERMEULE, 2007). The main theory of *Terror in the Balance* is quite provocative: contrary to the concerns of liberal jurists[67] who question the legality of the measures taken by the American administration after 9/11[68], Posner and Vermeule (2007: 15-) argue that a crisis situation such as that of 9/11 compels all branches – Congress and the judiciary – as well as all legal actors to adopt a more or less unlimited legal deference towards the executive. Such a theory also justifies the "decrease" of the rights and legal protections granted to individuals involved in the attacks (POSNER & VERMEULE, 2007: 218), even allowing to support the possibility of legalizing torture

66. Eric A. Posner and Adrian Vermeule are central figures in American legal doctrine and theory today. Professor of law at the University of Chicago, Eric Posner is also the son of the famous Judge Richard Posner, the central theorist of the Economic Analysis of Law. From a theoretical point of view, Eric Posner has followed in his father's footsteps. He has nevertheless developed his analyses in a wide variety of directions, ranging from international law to ecological issues, including issues relating to the management of terrorism and economic emergencies. Adrian Vermeule, who now holds the Ralph S. Tyler Chair in Constitutional Law at Harvard Law School, also studied at the University of Chicago. Until his collaboration with E. Posner, he was best known for his institutionalist theory of judicial power. It should be noted that Vermeule later publicly converted to Catholicism and is now committed to defending a theological-political "fundamentalism" that is quite radical.

67. That is, liberal legalism, in the words of the authors themselves.

68. On these debates, and the different positions taken regarding the nature of executive measures, see the clearly written article by David Dyzenhaus (2006).

for intelligence purposes[69]. Not surprisingly, the book sparked discussions and concerns upon its release[70]. Thus, in the wake of their already politically charged positions, Posner and Vermeule published a new work dedicated to emergencies.

The Executive Unbound: After the Madisonian Republic was published in 2010, ten years after the 2001 attacks, and especially two years after the subprime crisis. The book's theory apparently extends that of *Terror in the Balance*: emergency situations, especially in a world as complex and rapidly changing as today's globalized space, require decisions that only the executive branch can make, which explains the deferential attitude *de facto* of other branches. However, the attention given to economic crises significantly modifies their theory.

Indeed, following in Scheuerman's footsteps, whom Posner and Vermeule (2010: 33) explicitly refer to, the two jurists interpret the expansion of emergency powers as a sign of a temporal mismatch between the law and the material and political transformations of the world[71], extending beyond just crises. But while Scheuerman is concerned about the consequences for liberal democracies of the repeated use of emergency powers and, more generally, of this adaptation of the law to the acceleration initiated by capitalism, Posner and Vermeule endorse a situation *de facto*: the Madisonian state is already dead. The old liberal state, founded on the separation of powers and the rule of law, no longer exists. From crisis powers to emergency management, from the World Wars to the 2008 economic crisis, through the Cold War and the "War on Terror", the Madisonian state

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69. From this point of view, Posner and Vermeule are in line with the radical theses of the *Office of Legal Counsel's* lawyer, John Yoo, made famous at the time by his "Memos on Torture". See Memorandum from John C. Yoo, Deputy Assistant Attorney General, U.S. Dep't of Justice, to the Deputy Counsel to the President, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them". Sept. 25, 2001. Eric A. Posner & Adrian Vermeule (2005).

70. See in particular David Cole (2008).

71. The authors cite William E. Scheuerman (2004: 124).

has been stripped of its substance (POSNER & VERMEULE, 2010: 34). Despite the analyses of proponents of "liberal legalism"[72], law is no longer truly produced by the legislature, and it often escapes the oversight of the judiciary. Now, it is primarily administrative bodies, especially agencies, that create the reality of law, under the control of the executive. In short, we are already living "After Madison" (POSNER & VERMEULE, 2010: 16).

To support this particularly controversial theory, Posner and Vermeule (2010: 33) analyze the mechanisms of legal adaptation that have led to this situation, throughout the 20th century. Although it constitutes, in a way, the culmination of the process, the management of the 2008 crisis is the keystone of their demonstration in the 2010 book. From a legal point of view, the management of the subprime crisis first confirms a constant phenomenon in all crises. In 2008, the economic crisis did indeed justify a delegation of powers to the executive and its administration, accompanied by a *de facto* deferential attitude on the part of both Congress and the judiciary. The two jurists are not unaware of the complex steps involved in passing the law that allowed these delegations of powers, nor the heated debates that accompanied the framing of such a law (POSNER & VERMEULE, 2010: 39-40). However, for Posner and Vermeule (2010: 39-40, 48-50), all these controls have actually remained ineffective, and rather than seeing it as a failure, the jurists perceive a form of tacit political decision by all branches (POSNER & VERMEULE, 2010: 104): the ongoing evolution of the economic crisis, its complexity, and its technical nature were beyond the competence and processing capabilities of Congress, let alone any judicial control. By delegating their power and by not controlling it *a posteriori*, Congress and Judge are indicating how powerless they are. And for Posner and Vermeule,

72. Presumably, Dyzenhaus is one of the main target of Posner and Vermeule here, especially his article David Dyzenhaus (2006).

this awareness of their powerlessness had already manifested itself throughout most of the 20th century, at least since the 1930s crisis.

Secondly, the study of the 2008 crisis mainly serves Posner and Vermeule to build an explanation of the mechanisms for adapting the law to economic acceleration and, in essence, to the economy – an adaptation that apparently imposed itself in the 1980s. For the management of the 2008 economic crisis did not simply result in executive dominance, according to Posner and Vermeule (2010: 58); it was largely taken over by bodies relatively independent from the executive itself, namely the Federal Reserve (Fed). The role of the Fed was so significant between 2008 and 2009 that the authors hesitate to call it a "dictatorship". Initially, the authors reject the term "dictatorship" to describe the Fed's activity as its scope was limited and as Congress maintained control (POSNER & VERMEULE, 2010). However, the argument seems almost insignificant when considering the whole work, which aimed at demonstrating that Congress had never implemented proper instruments to control emergency powers *a posteriori* and argued that the extension of economic decisions made by the Fed in 2008 was significant enough to affect almost the entire political and social landscape (POSNER & VERMEULE, 2010). Nevertheless, it is clear that Posner and Vermeule (2010: 38) believe that the normative activity of the Fed, as well as that of the executive, remained limited. However, this limitation is neither legal nor institutional; it has been imposed *de facto* by the *nature of the economy, which has dictated a form of normative production*:

> The FED and the Treasury did not simply apply general norms established by a policymaking Congress. The nature of the crisis, including the overwhelming uncertainty, forced these agencies to take an ad hoc approach.

For Posner, who is a follower of the *Cost-Benefit Analysis*, a new argument is gradually emerging: if the "nature of the crisis", which includes "uncertainty", has indeed imposed a normative mode of

production, it is not only in the sense that the specific nature of the 2008 crisis – the risk of bank failures multiplying – subjected the executive and the Fed to a certain economic policy (POSNER & VERMEULE, 2010)[73]. The proposition implies much more deeply the idea that *the very nature of economic crises is grounded on a principle of uncertainty*, which requires a certain type of normative production: an *ad hoc* production, based on a kind of continuous reevaluation, which must guarantee the continuity of the economic order (POSNER & VERMEULE, 2010: 38) – or secure the market.

From a strictly economic standpoint, the analysis of the management of the 2008 crisis by the two authors is relatively clear: since the sole objective of the bodies responsible for resolving the crisis was to guarantee market stability, the Fed, as well as the U.S. Treasury, had to recalculate their decisions at every moment, taking into account the evolution of the confidence in these very markets (POSNER & VERMEULE, 2009: 10). But the authors do not see this only as a punctual decision-making principle; more broadly, they outline the idea that *economic crises have gradually imposed a complete normative production mode, constructed to be able to adapt to "acceleration" or permanent change, but which now primarily reflects the uncertainty of the markets as the very principle of the social order to be maintained*. It is this adaptation that explains the end of the dominant model of the law as a general and stable norm. Now, the "permanent changes" in the economy – and its fundamental uncertainty, which is linked to the order of the markets – require, for Posner and Vermeule, a different form of law: an administrative law that is continually produced and rectified through cost-benefit calculation methods. These methods allow to reevaluate the situation in real-time, like the impact of each decision, in order to adapt permanently to the "uncertainty" of the world. Properly understood uncertainty – in an economic model,

73. See also Eric A. Posner, Adrian Vermeule (2009: 21).

therefore – justifies therefore a new normative production *method* that *incorporates the exception*, in the sense that each decision has to be made *ad hoc*, through cost-benefit calculation, by incorporating all contextual factors. According to them, this method has been made possible by the gradual integration of "gray holes" and "black holes"[74] deliberately created in the law during crisis situations – notably through Congressional delegations of authority – in order to give the administration the power to produce and, most importantly, constantly correct decisions supposedly made "in accordance with the law" in order to maintain the continuity of the economic order. Posner and Vermeule give such a law a name – not without provocation: *it is a "Schmittian administrative law", which is, in the strict sense, a permanent administrative law of exception*[75].

For the two jurists, it is the product of a history that has led to the "adaptation" of the law to the "acceleration" caused by the economy through crisis powers, not by subordinating the economy to state control, but almost inversely by subjecting the practice of agencies, as well as the Treasury, to the economic logic of the market. Such a law is perfectly consistent with the economic model defended by Eric Posner, which can be summed up in the idea that cost-benefit calculation can constitute a global, generalizable mode of regulation for any decision, applicable to any "subject" (including social or ecological issues) and exportable on a global scale. Such a normative

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74. "I suggest that our administrative law contains, built right into its structure, a series of legal "black holes" and "grey holes". Legal black holes arise when statutes or legal rules "either explicitly exempt the executive from the requirements of the rule of law or explicitly exclude judicial review of executive action". Grey holes, which are "disguised black holes", arise when "there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty well permit government to do as it pleases." Adrian Vermeule, "Our schmittian administrative Law", (POSNER & VERMEULE, 2010: 1096).

75. *"In this sense, American administrative law just* is *schmittian"*. Eric A. Posner & Adrian Vermeule (2010: 90).

production model is both *strongly interventionist*, in the sense that it requires administrative law to continually reassess the situation and its risks; but it is *also perfectly in line with the market order*, which it secures without directing it, *a fortiori*, without giving it a planning or social direction – except when the social dimension is included in the cost-benefit calculation. In short, Posner and Vermeule's permanent law of exception or emergency is both very *authoritarian* in its technocratic-administrative form under executive control, and very *liberal* in its economic terms with its adherence to the cost-benefit analysis model.

The Executive Unbound clearly announced it from the beginning: from crisis to emergency, the entire structure of the liberal state has been transformed, as have the general procedures of legal creation. The argument gradually becomes more specific. This emergency law, which has incorporated black holes and gray holes to allow administrations to continually reassess the effects of their own decisions to face (market) uncertainty, is neither restricted to crisis situations nor, above all, limited to the economic sphere. It is undoubtedly the economic crises that have imposed this normative production mode for Posner and Vermeule. Precisely because *economic crises have served as a vehicle to transfer a certain model of economic order management explicitly based on cost-benefit calculation into administrations and law – in other words, on a certain model of economic world management*. But then, this economic model has been transferred to other administrations for the management of any crisis. In essence, what Posner and Vermeule describe, without making it fully explicit, is a general method for creating law, which has been imposed step by step with the management of economic crises and now involves other actors, which can be described as technical or managerial – specifically, the Fed and executive agencies, whose relationship with the executive is more complex than a simple relationship of obedience or compliance. Above all, the two jurists suggest that economic crises have *already* led to the creation

of a kind of *permanent administrative law of emergency*: a schmittian administrative law produced *ad hoc*, adapted to the world accelerated pace, at the price of a specific normative model: the *economic model of cost-benefit analysis, now extended to all social, political, ecological, and health domains*.

Such an economic model precisely constitutes a well-defined model of economic theory – one that can be situated, without overstating the case, in the very wake of the University of Chicago, which Eric Posner belongs to. Therefore, if the authors argue that economic crises have indeed constituted the opportunity for a redefinition of institutional balances as well as normative production modes, it is impossible to see it solely as the result of a *necessary* adaptation of the law to the economy, let alone to "acceleration" and "complexity". Rather, what is emerging is a reinterpretation of the history of economic crises as a means of building, step by step, a method of decision-making and normative production based on the heteronomy of law in relation to the economy, and even more so in relation to a decision-making model, if not a form of purely economic rationality – that of *cost-benefit analysis*. A normative model that can be described, without much stretching, as *liberal-authoritarian* and has spread to all social and political fields, as well as on a global scale, if we follow Posner and Vermeule's interpretation, through economical emergencies.

The argument put forth by *The Executive Unbound* is thought-provoking, to say the least. While crises, particularly economic ones, have already necessitated new institutional balances and a new mode of legal production - a permanent administrative law of exception – at the heart of the agencies and all technical bodies now responsible for legal production[76], it is quite clear that each crisis still represents

76. In an article written with Matthew D. Adler, Eric Posner (1999: 167-169) stresses the recent role of *executive orders* in the development of this normative production and,

an opportunity to expand the normative model. Thus, the entire argument of the book offers a curious – and unsettling – short circuit, as the institutional history that leads to the demise of the Madisonian state appears both already accomplished and still in progress, precisely supported by crisis management. In other words, the ever-increasing reliance on emergencies, especially economic ones, is both presented as the result of a necessary adaptation of the law to the economy, which has already been imposed historically, probably in their view, in the 1980s. However, at the same time, it is quite clear that maintaining emergencies at the core of legal functioning and exercising power *today* means *extending a model of economic law management to other areas – such as health and ecology – through the management of other crises*.

Such ambivalence may shed light on the initial problem we raised in this article, following the subtle analyses of William Scheuerman: the expansion of emergency powers has certainly been a symptom of the law adapting to a form of acceleration and complexity driven primarily by capitalism, with various economic policies throughout the 20th century. But the continued maintenance, if not the acceleration and expansion of emergencies – both emergency powers and permanent emergency law – raises questions about the meaning and strategic uses of this "adaptation". The reflection of Posner and Vermeule presents *a* possible strategy, which certainly surfaces in many liberal states' administrations: while it is true that economic emergencies may have served as a foundation to impose a certain model of decision-making and normative production based on the very liberal cost-benefit analysis model, we should now be concerned about how each new crisis in other fields – health, ecology, social, security – can serve as a foundation for extending an economic management model to all political issues[77]. In other words, the writings

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beforehand, the role of economic crisis management, including the New Deal.

77. One of the few books to really tackle this question is Antonio Gasparetto Júnior (2020).

of Posner and Vermeule invite us to be wary of how crises can be the primary foundation for a model of management and production of law that could be described as liberal *and* authoritarian.

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STATE OF EMERGENCY AND HUMAN RIGHTS: UTILIZATION AND MISUSE DURING THE PANDEMIC

Mary Luz Tobón Tobón

Introduction

Throughout the constitutional history of Colombia and Latin America, various political, legal, economic, and social transformations have occurred, necessitating the declaration of a state of emergency to restore order and balance disrupted by circumstances endangering national security. The COVID-19 pandemic was not exempt from the political, social, and economic crises faced by Latin American governments, prompting the use of exceptional powers to restrict citizens' rights and freedoms.

Addressing the pandemic's differential impact is crucial, considering its tendency to foster discrimination and inequality among vulnerable individuals and groups. This article employs a reflective-descriptive analysis with a deductive methodology and a socio-legal approach, aiming to identify the uses and abuses of rules and measures adopted by Latin American governments to curb COVID-19 spread. These reflections carry significance in outlining state obligations regarding human rights respect and guarantee in Colombia and other Latin American countries. Many measures, ostensibly taken for health and public safety reasons, appear disproportionate and

unreasonable in light of international standards, human dignity, and the prohibition of discrimination against vulnerable groups during the pandemic (Mendieta & Tobón, 2019).

To fulfill this objective, the article is divided into three sections. Firstly, it addresses the COVID-19 pandemic and its impact on freedom. Secondly, it examines the right to equality and the prohibition of discrimination. Lastly, it analyzes the most severe restrictions on vulnerable groups and subjects of special protection during the pandemic, revealing which individuals or groups have experienced the greatest rights violations due to emergency measures responding to the COVID-19 crisis.

COVID-19 and Limitations on Freedoms During the Pandemic

On April 9, the Inter-American Court of Human Rights issued a Human Rights Declaration on COVID-19, addressing a range of issues and challenges arising from the pandemic. It emphasizes the imperative for states to respond from a human rights perspective, stating that emergency measures should not be a pretext for abuses and violations, and they must be limited, proportional, reasonable, and comply with other requirements established by Inter-American human rights law for states of exception. The Court explicitly states:

> "...all measures that states adopt to address this pandemic and may affect or restrict the enjoyment and exercise of human rights must be limited in time, legal, adjusted to defined objectives based on scientific criteria, reasonable, strictly necessary, and proportional, and other requirements developed in Inter-American human rights law..." (Inter-American Court of Human Rights, 2020)

Similarly, the Inter-American Commission issued a declaration with recommendations to serve as benchmarks for our states' responses. It emphasizes that measures taken by states must prioritize

full respect for human rights. The Commission acknowledges the profound impact of COVID-19 on life, health, and personal integrity, especially for vulnerable populations (Inter-American Commission on Human Rights, 2020, p. 3).

A global analysis of the pandemic reveals that in Colombia and other Latin American countries, there is a lack of ordinary legal mechanisms to address this unforeseen event. While measures implemented by governments worldwide deserve attention, underestimating the clear dangers of infection, loss of lives, healthcare system collapse, and economic turmoil would be a grave mistake. This underscores the risk of normalizing "exceptional" policies that restrict freedoms and rights in the name of crisis management and public safety, not just in the short term.

The freedom of movement also encompasses the freedom not to move and, at times, the freedom to self-isolate. For many, especially the vulnerable and deprived of rights, this fundamental freedom is not a reality. It means that even during a pandemic, solidarity is essential with those who exercise this freedom of movement – those unable to stay in inhumane camps within Europe or at its external borders, in places like Libya or Venezuela, seeking safety from war, persecution, poverty, hunger, and the pandemic.

In an era of multiplying borders, the struggle for basic freedom of movement remains both a crucial challenge and a tool in fighting global injustice, especially during a global health crisis where the rights of migrant populations are increasingly less protected. Philosopher Hannah Arendt wrote that:

> "...of all the specific liberties that may come to mind when we hear the word 'freedom', 'freedom of movement' is historically the oldest and also the most elementary. Being able to go anywhere you want is the prototypical gesture of being free, for, since time immemorial, the limitation of freedom of movement has been the precondition for enslavement. Freedom of movement is also an essential condition for

> action, and it is mainly in taking action that men experience freedom in the world..." (1968, p. 9).

During a pandemic, human mobility becomes increasingly problematic, with arguments for curtailing the fundamental freedom of movement for the common good, especially for high-risk groups like the elderly. The emphasis is on self-isolation: avoiding "non-essential" movements and contact with others.

In this context, the current restrictions on mobility pose problems for those without homes, people with disabilities lacking necessary care, and individuals, mostly women, facing insecurity and domestic abuse at home. The restrictions are particularly challenging for individuals whose fundamental freedom of movement had been restricted long before the COVID-19 outbreak but who need to move to find safety. Migrants embody the contradictions and tensions surrounding freedom of movement and its denial today and tend to become primary targets of the most restrictive measures.

With the virus, a politics of fear spreads globally, leading to increasingly restrictive measures. Beyond the harmful consequences already experienced by the most vulnerable, there is concern that many of these measures will continue to undermine rights and freedoms long after the pandemic has ceased. This aligns with Naomi Klein's concept of a "pandemic shock doctrine," enabling the enactment of dangerous ideas such as privatization, border closures, or further detention of migrants (2017). We concur that the final chapter of this story is yet to be written.

In this context, a call is made to various courts and constitutional tribunals to exercise effective control over these measures. It is emphasized that border closures, rather than offering relief, could lead to serious human rights violations. The article underscores those foreigners, even if not entered a country, possess the same fundamental rights and civil liberties as nationals, based on the ratification of international human rights treaties by all countries.

Regarding containment measures, the Inter-American Commission on Human Rights (CIDH) observes the suspension and restriction of certain rights. Declarations of "states of emergency," "states of exception," or "public health emergencies" have been made through presidential decrees to protect public health. Various measures have been introduced, restricting rights such as freedom of expression, access to public information, personal freedom, inviolability of the home, and the right to private property. Surveillance technology and mass data storage have been employed (CIDH, Resolution 1/2020, p. 4).

Therefore, the CIDH, supported by its Special Rapporteurships, adopted Resolution 1/2020 on "Pandemic and Human Rights in the Americas" on April 10, 2020. The resolution aims to provide minimum standards and recommendations for countries within the inter-American system, emphasizing that states' measures must prioritize full respect for human rights. Article 3, Section G of the resolution explicitly states that, even in extreme and exceptional cases where the suspension of certain rights may be necessary, international law imposes requirements such as legality, necessity, proportionality, and temporality. These requirements aim to prevent the illegal, abusive, and disproportionate use of measures such as the state of exception or emergency, avoiding human rights violations or disruptions to the democratic system of governance (CIDH, Resolution 1/2020, p. 9).

The Right to Equality and the Prohibition of Discrimination Amidst the Concluded Global Pandemic

In the face of a globalized world, the international community was compelled to implement specific parameters aimed at fostering the principles of democratic societies. This effort emanated from the foundational pillar of respect for human dignity, echoing Kantian principles of being treated as an end in itself, with equal

opportunities for all. It sought to actualize material justice and the principle of equality. However, achieving full enjoyment of the right to equality remained a distant goal for some, particularly in the era of the coronavirus, where the most disadvantaged and vulnerable were disproportionately affected.

Undoubtedly, individuals belonging to historically discriminated groups bore the brunt of differential treatment, often manifested in emergency measures adopted by various governments worldwide to combat the crisis caused by COVID-19. Many of these measures, however, ran counter to constitutional values of human dignity and equality, imposing legally and morally unjustifiable burdens on these groups.

For a genuine discussion on equality in a just, pluralistic, and inclusive society, we must embrace diversity. To comprehend the intricate political, social, and cultural challenges faced by different states in these unprecedented times marked by crises and economic, social, and political instability, we must recognize the existence of "the other." This recognition is not an act of submission but an active acknowledgment, understanding that we are part of a complex system permeated by inequalities.

Moreover, understanding diversity and otherness becomes a fundamental component of education for peace. This is especially crucial for societies currently on the path to peace but profoundly affected by various forms of violence, including that arising from armed conflict, sexual violence, domestic violence, and other structural forms of oppression embedded in daily life.

In this context, one must ask, what other forms of violence emerged globally due to the pandemic? Could it be structural violence stemming from societies lacking basic needs, where the rich get richer while the poor become poorer, accentuating the gap of inequity and inequality? Many faced the impossibility of telecommuting, securing a minimum livelihood, exercising the right to education,

accessing universally covered internet, or obtaining the essential tools like a desk and a computer to fulfill basic needs.

In this regard, it is crucial to remember that the principle of equality and non-discrimination is foundational in the international human rights protection system. It is a cross-cutting principle enshrined in various international instruments, from the United Nations Charter to key human rights treaties. These instruments impose on states the obligation to align domestic legislation with international norms, adopting an inclusive perspective to protect populations with special needs.

Following this framework, both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) stipulate the obligation of each State Party to respect and guarantee the rights recognized in both Covenants without discrimination based on various grounds. The Committee on Human Rights, in General Comment No. 18, defines "discrimination" as any distinction, exclusion, restriction, or preference based on specific criteria that aim to nullify or impair the recognition, enjoyment, or exercise of human rights and fundamental freedoms on an equal basis for all.

Similarly, to comply with the obligation of adapting international law to domestic law, many countries explicitly enshrine in their constitutions the principles of being a social state of law, democratic, participatory, and pluralistic. The state and state authorities are obligated to promote and ensure the effectiveness of the human rights of all citizens without discrimination based on various grounds, as expressed in the equality and non-discrimination principles enshrined in their respective constitutions.

Globally, to fulfill the responsibility of harmonizing international law with domestic legal frameworks, various legal traditions explicitly define nations as Social Rules of Law. These nations are characterized as democratic, participatory, and pluralistic entities founded on the

principles of upholding human dignity and fostering solidarity among their populations. Governments and state authorities across the world are mandated to actively promote and ensure the effectiveness of human rights for all individuals, eliminating discrimination based on factors such as sex, race, national or familial origin, language, religion, or political and philosophical beliefs. This dedication aligns with the core tenets of equality and the prohibition of discrimination, resonating with the essence found in analogous provisions, such as Article 13, present in diverse national constitutions.

Analyzing the measures promoting mandatory preventive isolation and the impossibility of exercising the right to movement within and between states, the World Health Organization, in its recommendations, has expressed that "evidence shows that restricting the movement of people and goods during public health emergencies is ineffective in most situations and can divert resources from other interventions." Furthermore, these restrictions undoubtedly have a significant economic and social impact globally, especially on sectors like tourism and hospitality, witnessing a dramatic decline in income. Hence, these measures must be based on a careful risk assessment, conducting a proportionality test to determine their adequacy, relevance, and necessity, with periodic reconsideration as the situation evolves.

Greater Restrictions on Vulnerable Groups During the Concluded Pandemic

Elderly Individuals: In the aftermath of the pandemic, the impact of inequality on accessing rights has left an indelible mark, particularly concerning older individuals. Many seniors, devoid of pensions for their dedicated years of service, faced challenges accessing healthcare and social security. The higher infection rates among the elderly led to discrimination and fatalities in residences. Mandatory isolation, while an attempt to control the virus, took a toll on their mental

health by separating them from family. Additionally, a digital divide emerged, isolating older individuals from virtual education, especially in university settings where technological adaptation lacked the necessary support and training.

It's crucial to highlight the multiple discrimination faced by older individuals from historically marginalized communities. Measures should have prevented their abandonment, ensuring connectivity with families to preserve mental health. States held a special obligation to eradicate age-based discrimination in medical access, healthcare, and diagnostic tests, rejecting any justification for condemning older individuals to vulnerability and discrimination under the guise of healthcare system limitations.

People with Disabilities: The profound inequality experienced by people with disabilities post-pandemic is deeply rooted in structural discrimination. Representing 15% of the global population, they faced challenges directly from the virus and indirectly from government measures, resulting in significant socio-economic conflicts.

Analyzing the direct impact of COVID-19 on people with disabilities is crucial, considering their higher risk due to treatment in social support institutions without adequate sanitation measures. Social distancing complexities, lack of access to health information in sign language, and living conditions increased their vulnerability. Immediate action post-pandemic is essential to address these challenges and implement policies considering the cultural context and specific needs of people with disabilities.

Indigenous Communities: The post-pandemic scenario highlights persistent inequalities experienced by indigenous communities globally, rooted in historical colonization and racial discrimination. Inadequate healthcare access due to geographical remoteness, resource limitations, and centralized health systems further exacerbated their

vulnerabilities. Immediate decentralized health policies considering cultural context are imperative.

Children and Adolescents: Post-pandemic, the rights of children and adolescents face threats, with anticipated crisis duration lasting two years. Emergency measures, such as widespread school closures, not only impeded education access but also compromised essential nutrition and the protective environment offered by educational settings.

Recognizing the pivotal role played by international human rights bodies, guidelines and recommendations from entities like the Inter-American Commission and Court are crucial in safeguarding rights. Post-pandemic, the Inter-American Court identified children, especially those from vulnerable communities, as one of the most vulnerable populations. Emergency measures should not overlook the protective role schools play, ensuring access to education, health, and protection. The right to education was severely restricted for many children, emphasizing the need for universal, free, and mandatory internet access subsidized by the state.

Gender, Identity, and Sexual Orientation Discrimination: Discrimination based on gender, identity, and sexual orientation escalated during the pandemic. Urgent efforts were made to eradicate negative stereotypes and enforce non-discrimination in educational settings. The pandemic revealed heightened discrimination, harassment, and rights violations against the LGBTI community, necessitating global policies and inclusive norms.

Collaborative efforts were crucial to prevent emergency measures from exacerbating existing inequalities. The pandemic serves as an opportunity to construct a more just and inclusive global society, safeguarding the rights of all individuals, regardless of their background or identity.

Other Vulnerable Groups: Additional marginalized groups, including refugees, asylum seekers, migrants, ethnic and religious minorities, and women facing domestic violence, experienced heightened vulnerability during the pandemic. The aftermath has exacerbated existing disparities and discrimination, demanding a comprehensive, inclusive approach grounded in human dignity, equality, and non-discrimination.

In conclusion, the post-pandemic landscape has unveiled profound inequalities and discrimination worldwide. Addressing these issues requires a collective commitment to human rights and social justice. Governments, international organizations, and civil society must collaborate to ensure that policies consider the needs and rights of all individuals, particularly the most vulnerable. Only through such a commitment can we hope to build a more equitable and resilient world in the aftermath of this global crisis.

Conclusions

Latin America, once a global hotspot for contagion, now stands as a testament to the harsh realities faced by families affected by COVID-19. The sobering statistics, while reflective of the tragedy, also underscore the disproportionate impact on various individuals and groups whose rights bore the brunt of the pandemic's impact. Among them, women and girls subjected to domestic violence, children deprived of their right to education, older adults facing discrimination in healthcare access, and migrants with limited medical care and confined in overcrowded centers stand out as poignant examples of those significantly affected.

Historically marginalized communities, including LGBTQ+ populations, Afro-descendant communities, and indigenous peoples across Latin America, experienced a disproportionate burden.

Additionally, individuals with disabilities, often overlooked, and human rights defenders, bravely risking their lives for the greater good, were also profoundly affected.

A special acknowledgment is owed to the healthcare personnel who, driven by a sense of duty, stood on the front lines daily, embodying the right to health and safeguarding the lives of the infected. These individuals, entitled to special protection during the pandemic, highlight the State's responsibility to ensure their adequate safeguarding through necessary healthcare resources.

In response to these challenges, a global debate unfolded, addressing constitutional limits on the use of exceptional powers. Particularly concerning was the exploitation of the crisis by governments to consolidate unlimited presidential power, thereby undermining democratic principles. The inefficiency of political control mechanisms to mitigate measures restricting fundamental rights and citizen freedoms contributed to the ongoing collapse of Constitutional and Democratic Rule of Law initiated by the onset of COVID-19. Each passing day witnessed the erosion of citizen guarantees, succumbing to an exaggerated hyper-presidentialism that, wielding unlimited and disproportionate power, imposed its authority above the fundamental pillars of democracy.

The aftermath of COVID-19 in Latin America not only left indelible marks on families but also revealed disparate struggles faced by individuals and groups throughout the pandemic. A noticeable surge in violations of individual freedoms became evident, encompassing increased domestic violence against women and girls confined within their homes, disruptions in children's right to education due to widespread school closures, discrimination faced by older adults in healthcare access, and challenges confronted by migrants with limited access to medical care, confined in overcrowded detention centers.

Certain communities, particularly LGBTQ+ populations, Afro-descendant communities, and indigenous peoples, bore this

burden disproportionately, experiencing accentuated structural and historical discrimination during the pandemic. Individuals with disabilities found their needs neglected, and human rights defenders faced significant challenges while risking their lives for the greater good. A special mention is due to healthcare personnel, tirelessly working on the front lines, embodying the right to health, and protecting the lives of the infected. These individuals, entitled to special protection, emphasized the State's responsibility to provide adequate safeguards through necessary healthcare resources.

Amidst these struggles, a global debate emerged on constitutional limits related to the use of exceptional powers, especially when governments sought to exploit the crisis to consolidate unlimited presidential power. The inefficiency of political control mechanisms in mitigating measures that restricted fundamental rights contributed to the erosion of the Constitutional and Democratic Rule of Law. The unchecked rise of hyper-presidentialism, wielding disproportionate power, posed a severe threat to the foundational pillars of democracy.

In conclusion, Latin America's response to the pandemic uncovered deep-seated issues of rights violations, challenging the core tenets of a democratic society. Reflecting on infringements on freedoms, the erosion of equality, and discrimination against vulnerable groups underscores the urgency for comprehensive, inclusive reforms. Governments, international organizations, and civil society must collaborate to rebuild a post-pandemic world that prioritizes human rights, ensuring the protection of every individual, irrespective of their background or identity. The lessons learned from this crisis should catalyze the creating a more equitable and resilient society. This paradoxical journey through the pandemic reveals both the fragility of our rights and the resilience of the human spirit, urging us to reshape a future where inclusivity and justice prevail.

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FROM STATE OF SIEGE TO STATES OF EMERGENCY: TOWARDS A HISTORICAL UNDERSTANDING OF THE EFFECTS OF EMERGENCY LEGISLATION IN FRANCE

Sébastien Le Gal

In June 1832, during the particularly violent attempted uprising by the Republicans that threatened Paris and the power of Louis-Philippe – it was during these events that Victor Hugo set Gavroche's death in *Les Misérables* – a state of siege is declared in the capital. In view of the decisions taken on this occasion, in particular the massive use of military tribunals to try non-military personnel, a political figure of the time, Achille de Salvandy, questioned the relevance of using such a measure. And Salvandy concluded: « *Qu'est-ce que l'état de siège ? On le sait peu. C'est un état consacré dans les imaginations. Mais sa valeur légale, quelle est-elle ? Nos écrivains politiques prouvent chaque jour qu'ils ne s'en sont pas enquis* »[78]. Naturally, Salvandy was familiar with the legislation relating to the state of siege: essentially, a law adopted by the Constituents, that of 8-10 July 1791, and a Napoleonic decree, that of 24 December 1811. In both cases, what is a state of siege?

78. "What is a state of siege? Little is known about it. It is a state of mind. But what is its legal value? Our political writers prove every day that they have not looked into it" (SALVANDY, 1832, p. 142).

It is a 'state' that only concerns places of war - and therefore does not concern open towns (villes ouvertes) - when threatened by the enemy. Initially, it was a state of affairs (the breakdown of all communication) that could then be declared by the authorities, as if the state of affairs had been materially established. However, usage shows a twofold extension: open towns (villes ouvertes) have been subjected to the state of siege regime, and the absence of enemies from outside is indisputable, since the state of siege responds to internal unrest. Double misuse. Now, through a practice that stretches back into history, it is 'enshrined in people's imaginations'.

For a long time, the theoretical hiatus held back doctrine: "Foreign war or internal disturbances create a situation in the lives of peoples that is not covered by the police powers designed for normal times. Public order is under threat, which legitimises an increase in the constraints imposed on citizens. The entire population must be subjected to a discipline similar to that which was once seen as the salvation of a besieged place. And as, for a long time, this discipline was conceived only in the image of that which reigns in the army, the idea was born of transferring police power to the military authority, which is the basis of the legislation on the state of siege" (BURDEAU, 1972, p. 51). It would therefore be an analogy - a fiction, acting 'as if' - assumed by the legislator ('we had the idea') that would explain the birth of the fictitious or political state of siege, distinct from the real or military state of siege. More cautiously, before Georges Burdeau, Maurice Hauriou (1929, p 705) had confined himself to writing that, while a state of siege is indeed *"a pre-prepared legal institution"*, *it has "complex origins"* (HAURIOU, 1929, p 705)… *which the author takes care not to explore. At the very most, it does not endorse a widely shared assertion summed up by Firmin Laferrière, an author who was an authority in the mid-19th century:* « *la première assemblée constituante avait fait une loi sur l'état de siège* [qui] *laissait d'importantes lacunes : il ne s'occupait*

ni des villes de l'intérieur ni de l'investissement par des rebelles »[79]. This assertion meant that, from the outset, the government was aware of and wanted to enshrine the fictitious state of siege as an instrument available to the government to restore order. Nothing could be further from the truth.

Moreover, such a statement left out an essential element: the declaration of a state of siege, made possible by the decree of 24 December 1811, naturally had effects to ensure this re-establishment. But what are these effects? In other words, what is the nature of the means deemed appropriate to ensure the restoration of order? And, moreover, is the restoration of order the objective of the application of this legislation? For the authors cited above, it is obvious: there is a rupture in the life of the nation, not only because of a foreign war, but also because of such internal dissension that the nation's very survival is threatened. Internal order must be *restored*. It is not certain that this objective is always the same. Now, this observation leads to a second, which will be our main concern: do the effects of the state of siege define this legislation, and, if so, what are they and do they form a permanent part of the definition of the legislation? It is necessary to consider the two main effects of a state of siege, as they are still reproduced in the Defence Code today, since it was adopted in 2004, and which incorporates the legislation under constant law, i.e. the amended Act of 9 August 1849. These two effects are, on the one hand, a principle, reproduced in article L. 2121-2, and on the other hand the exorbitant powers detailed in articles L. 2121-3 and L. 2121-7, bearing in mind that legal writers take a specific view of the provisions of L. 2121-7 because of the way the article is drafted (it is a list of powers that are distinct from jurisdictional competence):

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79. "*the first Constituent Assembly had passed a law on the state of siege* [which] *left major loopholes: it did not deal with inland towns or with investment* by rebels" (LAFERRIÈRE, 1854, I, p. 445).

Article L. 2121-2 : « Aussitôt l'état de siège décrété, les pouvoirs dont l'autorité civile était investie pour le maintien de l'ordre et la police sont transférés à l'autorité militaire. L'autorité civile continue à exercer ses autres attributions. »

Article L. 2121-3 : « Dans les territoires décrétés en état de siège en cas de péril imminent résultant d'une guerre étrangère, les juridictions militaires peuvent être saisies, quelle que soit la qualité des auteurs principaux ou des complices de la connaissance des infractions prévues et réprimées » suit une série de dispositions tirées du Code pénal.

Article L. 2121-7 : « Lorsque l'état de siège est décrété, l'autorité militaire peut : 1° Faire des perquisitions domiciliaires de jour et de nuit ; 2° Éloigner toute personne ayant fait l'objet d'une condamnation devenue définitive pour crime ou délit et les individus qui n'ont pas leur domicile dans les lieux soumis à l'état de siège ; 3° Ordonner la remise des armes et munitions, et procéder à leur recherche et à leur enlèvement ; 4° Interdire les publications et les réunions qu'elle juge de nature à menacer l'ordre public. »[80]

Are these effects cumulative, alternative, hierarchical or successive? This is the question we will address because, in our view, it explains the history of emergency legislation - or crisis legislation, whatever you want to call it - subsequently, up to the twentieth

80. "Article L. 2121-2: 'As soon as a state of siege is declared, the powers vested in the civil authorities for the maintenance of law and order and the police are transferred to the military authorities. The civil authorities shall continue to exercise their other powers."
"Article L. 2121-3: 'In territories declared to be in a state of siege in the event of imminent danger resulting from a foreign war, the military courts may be seised, regardless of the status of the principal perpetrators or accomplices, of knowledge of the offences provided for and punished' follows a series of provisions taken from the Criminal Code."
"Article L. 2121-7: 'When a state of siege is declared, the military authorities may: 1° Search homes by day and by night; 2° Remove any person who has been convicted of a felony or misdemeanour and any individuals who are not domiciled in the areas subject to the state of siege; 3° Order the surrender of weapons and ammunition, and search for and remove them; 4° Prohibit publications and meetings that it deems likely to threaten public order."
France, *Defence Code*, (created by order of 20 December 2004). The provisions relating to a state of siege are reproduced in the book on 'regimes of exceptional application'. See Le Gal (*sous presse)*.

century and into the twenty-first century, in France. Thus, the state of emergency and even the more recent state of health emergency have emerged from a single matrix, the state of siege, although the military dimension has disappeared. Although at first sight these laws differ substantially, the historical approach chosen to grasp the complexity of the issue provides a better understanding of the successive objectives of the legislator, depending on the constraints imposed, each time adjusted to the immediately preceding practice. Rather than the idea of transposing, to use Georges Burdeau's expression, the legislator found himself constantly forced to readjust the legislation to the point of breaking the initial matrix link between exceptional legislation and its military essence. The thesis is clear: it is practice that has twisted the arm of the legislator over the course of history until the moment of rupture constituted by the adoption of the state of emergency.

Between the two, a historical movement emerges that needs to be explained: the legislature first enshrined the extensive jurisdiction based on the qualities of the warlord, so it was the jurisdiction of the military authority that took precedence (I) before the jurisdiction of the public authority, conceived in an extensive way, came to the fore, by granting it exorbitant powers, these powers soon constituting the interest of such exceptional legislation (II).

I. Military jurisdiction as the initial principle for defining a state of siege

Military jurisdiction as the initial principle for characterising a state of siege was the result of the need to ensure continuity between the legacy of the Ancien Régime, prior to the Revolution of 1789, and the new principles adopted by the revolutionaries within the National Constituent Assembly who, while devoting themselves to drafting the constitution to come (the Constitution of 3 September

1791), reformed whole areas of French institutions and law, including military law. This led to the adoption of the Act of 8-10 July 1791, *concernant la conservation et le classement des places de guerre et postes militaires, la police des fortifications et autres objets y relatifs*[81]. One principle is enshrined: military jurisdiction in a place of war under siege. It remains to be determined what this entails: it concerns only places of war - it is therefore a special provision, which concerns only the law of places of war (1) - and it relates to the military nature of military command (2).

1. The military stronghold, a legacy of the defensive system of the Old Regime.

Without understanding, in law, the place of war, it is not possible to understand what the transfer of public order and policing to military authority consists of. This is the flaw in Firmin Laferrière's approach described above. Understanding the characteristics of the place de guerre during the Old Regime is therefore a necessary diversions. But was the military stronghold itself defined in law? Or was it merely a military object? It is necessary to define the place of war (1.1), then the law applicable in the place of war (1.2).

1.1 Defining the military stronghold in military doctrine and law

What is a military stronghold? At first glance, the definition is naturally military: a city surrounded by walls. The science of engineering developed from the sixteenth century onwards, which found its master in Vauban in France and was perpetuated by the engineers trained at the 'École de Mézières' in the second half of the eighteenth century, gave these places of war all their characteristics. It is beyond

81. Act of 8-10 July 1791 *"concerning the conservation and classification of military strongholds and military posts, the police of fortifications and other related matters"*.

the scope of this study to describe them in detail, but for an engineer like Vauban, a place of war is « *de grosses masses inanimées, qui n'ont de vertu que dans leur solidité et dans la disposition de leur figure* »[82]. *It is,* « *à proprement parler, qu'une grande batterie* »[83], *for Lazare Carnot, who trained at the École de Mézières before becoming a key player in the Revolution and then the Empire, in a treatise he wrote on the subject at the request of the Emperor. The engineers, as we can understand from these words, considered the technical nature of the fortress to be essential, but not sufficient. Vauban went on to point out that these fortresses were inanimate until human intervention took place:* « celle qui leur est donnée par les hommes employés à leur défense et à les faire valoir »[84]. *In addition to the science of engineering, therefore, we need the science of military command, in other words, again according to Vauban,* « la connaissance de son usage »[85]. The *military stronghold*, in military doctrine, is therefore defined by these two elements: these inanimate masses and the action of men. These two elements produce effects: protecting the integrity of national territory against enemy action. This is the definition of a defensive system in military strategy, whose « ceinture de fer »[86] again an expression coined by Vauban - was a series of places of war to ensure the security of borders. In law, during the Old Regime, military strongholds were defined by those who ensured the action: the presence of a place commander assisted by a place staff, made up of officers, to which the important ordinance of 1750 was dedicated, and whose provisions were reiterated by the ordinance of 18 March 1776 (KERALIO, 2018, p. 320) (BELIDOR, 1755, p 169). However, for

82. *"Large inanimate masses, which have virtue only in their solidity and in the arrangement of their figure"* (VAUBAN, 2007, p. 1358).

83. *"Strictly speaking, that a large battery"* (CARNOT, 1812, p. 262).

84. *"That given to them by the men employed to defend and promote them"* (VAUBAN, 2007, p. 1358).

85. K*nowledge of its use"* (VAUBAN, 2007, p. 1358).

86. "Iron belt" (VAUBAN, 1972, I, p. 189).

various reasons, mainly due to the lack of efficiency of the staffs, the revolutionaries decided to abolish these staffs[87]. How, then, should these military strongholds, to which a legal regime should be devoted, be defined in law? The Act of 8-10 July 1791 provides a twofold answer: the number and determination of military strongholds is a matter for the legislature, and this competence is expressed in a table annexed to the same law. In short, the towns considered to be such by the legislator were considered to be military strongholds. What remains to be decided are the effects of the nature of military command and how to translate them into law.

1.2 Defining the law applicable to military strongholds

There is no question of dealing with all the legislation relating to military strongholds, which is considerable[88]. However, one of the most important theorists on the subject, Antoine de Ville, a protégé of Richelieu, offers a key to understanding the subject in his work, *De la charge des gouverneurs des places*[89], published in 1639, which was authoritative until the 19th century. It teaches us that the military command of a place - which ensures its action, let us remember – « *est proprement d'avoir le soin de la conservation & défense de la place* »[90]. He defines the terms conservation and defence. According to him, « *la conservation consiste aux bons ordres, & s'empêcher d'être surpris* […] *et en la défense qui consiste à sçavoir tout ce qu'il faut faire pour s'opposer à la force de l'ennemi* »[91]. Legislation on

87. Act of 20-25 February 1791 (DUVERGIER, 1834, p. 241).

88. The great ordinance on the conservation of military strongholds of 1768 contains more than a thousand articles, more than two hundred folio pages.

89. *On the office of fortress governors*

90. *"Is properly to have the care of the conservation & defence of the place"* (VILLE, 1639, p. 1; 5; 24; ch. IX).

91. *"Conservation consists of good orders, & preventing oneself from being surprised* […] *and in defence which consists of knowing everything that needs to be done to oppose the strength of the enemy"* (VILLE, 1639, p. 17).

places of war relates to conservation. There is little mention of defence. Paradox? Not at all.

In the words of Antoine de Ville, a place of war is subject to « *l'ordre des citadelles* », in which all those who live there depend on its authority: the residents « *sont gouvernés comme soldats* »[92]. *Antoine de Ville developed a military doctrine, and it was up to the legislator, and therefore the king, to translate these imperatives into law. However, Antoine de Ville emphasised what was at stake: it was clear that it was a question of* « *une des plus importantes charges qui soit dans un État* »[93], it is therefore the political order that is at stake, as many authors have noted[1], and as the governors will also understand[94].

As the government of the place of war as a whole is entrusted to the military authority, it follows that « *le gouverneur en général commande aux soldats & aux habitants* »[95]. It is not easy to exercise (LE GAL, 2022, p. 97-121), because soldiers and civilians are not governed in the same way. Military discipline characterises the government of soldiers, which is therefore 'uniform', whereas the government of civilians is "divers" (various), in the words of the author. However, the authority of the local commander is binding on everyone -- which implies « *de tenir toujours le soldat bien discipliné, & en crainte, & le Bourgeois à son devoir* »[96]. It is easy to understand the difficult relations between the two (DU BREUIL, *1674*, p. 28) and the hatred of the latter towards the military.

This principle of military command in a place of war was upheld for a long time and, although it was modified during the 18th century to reflect the relationship between the military authorities and the

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92. *"The order of citadels"* (…) *"are governed as soldiers"* (VILLE, 1639, p. 287).

93. *"One of the most important offices in a state"* (VILLE, 1639, p. 1).

94. For example: (DU PRAISSAC, 1614, p. 50); (DU BREUIL, 1674, p. 323).

95. *"The governor in general commands the soldiers & residents"* (VILLE, 1639, p. 241).

96. *"To always keep the soldier well disciplined, & in fear, & the Bourgeois to his duty"* (DU BREUIL, *1674*, p. 369-370).

civilian authorities, it was still relevant on the eve of the Revolution. On 10 August 1789, the revolutionaries enshrined an intangible principle: the civil authorities were responsible for maintaining order and policing the towns and cities of the kingdom, without distinction between open towns (villes ouvertes) and military strongholds[97], and the great law of 14 December 1789 *relative à la constitution des municipalités*[98], which lays the foundations for municipal administrative organization of modern France, reaffirms the principle in Article 50: « *Les fonctions propres au pouvoir municipal, sous la surveillance et l'inspection des assemblées administratives, sont :* […] *de faire jouir les habitants des avantages d'une bonne police, notamment de la propreté, de la salubrité, de la sûreté et de la tranquillité dans les rues, lieux et édifices publics* »[99]. Article 52 concerns the right of requisition: « *pour l'exercice des fonctions propres ou déléguées aux corps municipaux, ils auront le droit de requérir le secours nécessaire des gardes nationales et autres forces publiques* »[100].

The law of 8-10 July 1791 revisited this point. On the basis of a report by Jean-Xavier Bureaux de Pusy, the National Assembly decided on police jurisdiction in places of war by introducing an unprecedented gradation: three states were defined by the law. During the state

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97. *"Toutes les municipalités du royaume, tant dans les villes que dans les campagnes, veilleront au maintien de la tranquillité publique ; et que, sur leur simple réquisition, les milices nationales, ainsi que les maréchaussées, seront assistées des troupes, à l'effet de poursuivre et d'arrêter les perturbateurs du repos public"*. / « *All the municipalities of the kingdom, both in the towns and in the countryside, will ensure that public peace is maintained; and that, at their simple request, the national militias, as well as the maréchaussées, will be assisted by troops, for the purpose of pursuing and arresting those who disturb public rest* » (DUVERGIER, 1834, I, p. 43).

98. *14 December 1789 Act, concerning the constitution of municipalities* (DUVERGIER, 1834, I, p. 75-84).

99. *"The specific functions of the municipal authorities, under the supervision and inspection of the administrative assemblies, are:* […] *to ensure that the inhabitants enjoy the benefits of good policing, in particular cleanliness, salubrity, safety and tranquillity in the streets, places and public buildings"* (DUVERGIER, 1834, I, p. 78).

100. *"For the exercise of their own functions or those delegated to the municipal bodies, they will have the right to request the necessary assistance from the national guards and other public forces"* (DUVERGIER, 1834)

of peace (art. 6, tit.[1]), « *la police intérieure et tous autres actes du pouvoir civil n'émaneront que des magistrats et autres officiers civils préposés par la constitution pour veiller au maintien des lois* »[101], *to put it another way, in peacetime, a place of war is above all a town characterised by the presence of a civilian population, an economic and social dynamic and municipal institutions. During a state of war, the specific nature of a war zone is recognised: it is this large battery, still lifeless, but which must be brought to life without delay by the action of the military command. For this reason, the military authorities were given the right to requisition civilian property:* « *les officiers civils* […] *pourront être requis par le commandant militaire, de se prêter aux mesures d'ordre et de police qui intéresseront la* sûreté *de la place* » (art. 9, tit. 1er)[102]. *And finally, during the state of siege,* « *Dans les places de guerre et postes militaires, lorsque ces places et postes militaires seront en état de siège, toute l'autorité dont les officiers civils sont revêtus par la constitution, pour le maintien de l'ordre et de la police intérieurs, passera au commandant militaire, qui l'exercera exclusivement sous sa responsabilité personnelle* » *(art. 10, tit. 1*er)[103]. The state of siege means that places of war are entirely devoted to their military purpose, i.e. the defence of the territory.

This is why the nature of command is characterised by constant adaptation to circumstances: it is up to the commander to « *prendre et laisser ce qu'on trouvera à propos* »[104], and that « *un chacun doit avoir ce jugement & cette discrétion de savoir connaître ce qui doit être observé & ce*

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101. *"The internal police and all other acts of civil authority shall be issued only by magistrates and other civil officers appointed by the constitution to ensure that the laws are upheld"*.

102. *"Civil officers may be required by the military commander to comply with the measures of order and police force that concern the security of the place"*.

103. *"In places of war and military posts, when these places and military posts are in a state of siege, all the authority vested in civil officers by the constitution, for the maintenance of internal order and police, will pass to the military commander, who will exercise it exclusively under his personal responsibility"*.

104. *"Take and leave as he sees fit"* (VILLE, 1639, p. 350).

qu'on peut relâcher »[105]. In short, *military strongholds* differed from open towns (villes ouvertes) in terms of their government, both militarily and legally. This distinction was valid for a long time, but it was not without misunderstanding thereafter.

2. The defence of the military stronghold, an inherently military concept.

Antoine de Ville drew a distinction between conservation and the defence of a military stronghold. Although both fell within the remit of the place commander, they seemed to be different in nature. Let's recall what the defence of a place of war consists of: « *tout ce qu'il faut faire pour s'opposer à la force de l'ennemi* »[106]. Clearly, this is the heart of military action. Defence refers to the military command's ability to put all parts of the town into action in the event of a siege. In essence, it is the military science of the town commander. During the eighteenth century, this question was developed in a scattered fashion, as the obvious scope of the principle seemed to require no further elaboration. However, defence comprises two heterogeneous elements: the action of the local commander (2.1), and the evaluation of this action at a later date, in other words, whether the local commander is implicated and held responsible (2.2); a third element, at first sight more secondary, but which constitutes both a limit to the use of the state of siege and an additional determination of its military nature, should also be the subject of brief developments: the moment when the state of siege is applied (2.3).

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105. *"Everyone must have the judgement and discretion to know what must be observed and what can be relaxed"* (VILLE, 1639)

106. *"Everything you need to do to oppose the strength of the enemy"* (VILLE, 1639, p. 17).

2.1 The principle: unlimited action by the commander in a besieged military stronghold.

The siege (the fact that the military stronghold is besieged by the enemy, which should not be confused with the state of siege defined in law by the law of 1791) was defined mathematically very early on. Defence, for that is what it is all about, relates to the resistance that the place must offer in the presence of the enemy: undergoing a siege means resisting the attacker as best as possible, using both active forces and passive advantages (by which we mean the defences of the military stronghold). Here is how Jean Errard, sometimes referred to as the father of modern fortification, defines fortresses, precisely in terms of their purpose, the siege to be supported: « *Les forteresses sont* faites *afin qu'une petite force résiste à une plus grande, ou un petit nombre d'hommes à un plus grand nombre d'hommes* »[107]. The actions of the military commanders relate to the art of resisting with significantly smaller numbers, but supported by the art of the engineer. The engineer must have designed appropriate fortifications. The commander, on the other hand, must know his place perfectly, i.e. « *le fort et le faible* » (*"the strong and the weak"*) (a very common expression) and « *suppléer à tous les manquements autant que l'art, la raison et le travail bien dirigé le* pourront *permettre…* »[108]. Military action is based on perfect knowledge of the area and the science of warfare, which compensates for shortcomings. The shortcomings are ensured by the presence of several elements: « *le chef, les soldats & les munitions sont les choses* nécessaires *à la conservation & à la défense d'une place fortifiée* »[109]. The anthropomorphic metaphor is the natural one to use to describe

107. *"Fortresses* are built *so that a small force can resist a larger one, or a small number of men can resist a larger number of men"* (ERRARD, 1600, n.p).

108. *"*To *make up for all deficiencies as far as art, reason and well-directed work* will *allow…"* (VAUBAN, 1705, p. 1614).

109. *"The chief, the soldiers and the ammunition are the things* necessary *for the preservation and defence of a fortified place"* (VAUBAN, 1705)

the whole, because the exercise of power is vertical: the head is in charge – « *Princes et ceux qui gouvernent en sont les chefs* »[110] – and the members obey – « *la garnison, & les citoyens en sont les membres* »[111]. *It's up to the leader to ensure the defence. In a valuable draft dated 1750, a clerk at the Ministry of War, Fumeron, defined the defence of a place, and he did so by skirting around the difficulty of the legal surrender of a place of war at the end of a siege. Thus, the governors of « ne pourront rendre la place en cas qu'elle fut attaquée qu'après l'avoir défendue autant qu'il leur sera possible* »[112]. 'As far as it will be possible for them' refers to his knowledge and the way he uses it, in other words the relevance of his command. Nothing can define it otherwise. It is easy to understand why, in 1791, this same difficulty gripped the deputy Bureaux de Pusy, who was himself an engineer by training, when he spoke before the National Assembly, which included deputies who were not versed in these matters. To justify the competence of the military authorities, he used a familiar vocabulary: Roman law and Roman history. In a comparison that would be constantly repeated until the 20th century, Pusy likened the action of the commander of a besieged place to dictatorship in the Roman sense of « strong power to maintain the institutions » (BRUSCHI, 1996, p. 223). So, in his opinion, the situation calls for « *une suprématie, une dictature seule capable d'assurer l'unité des forces et la concordance des moyens* »[113]. Thus, in the absence of a satisfactory legal definition of what constitutes the defence of the military stronghold, we rely on the qualities of the man-of-war. Consequently, there can be no question of hindering his action: « … *il était indispensable que*

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110. *"Princes and those who govern are their rulers"*

111. *"The garrison, & the citizens are its members"* (DU PRAISSAC, 1614, p. 50).

112. *"Will not be able to surrender the place if it is attacked until they have defended as far as it will be possible for them"* Defence Historical Service : X[A] 27, pièce 2 : Jacques-Jean-François de Fumeron, *Projet d'ordonnance concernant les états-majors des places*, 1750.

113. *"A supremacy, a dictatorship that alone can ensure the unity of forces and the concordance of means"* (BRUSCHI, 1996).

cette police fût confiée exclusivement à celui qui sur sa tête et sur son honneur était garant de ses effets »[114]. The salvation of the military stronghold is entirely entrusted to the place commander - and to him alone ('exclusively') - who is responsible for carrying it out to the best of his ability.

2.2 The corollary: the place commander's personal responsibility.

The place commander has absolute power. This did not mean that he was free of all responsibility. During the 18th century, this issue was the subject of several memoirs and legal provisions. For clerk Fumeron, the law was too categorical in its terms: the commanding officer could not surrender his position : « *qu'après avoir soutenu trois assauts, et qu'il y aurait brèche considérable au corps d'icelles* »[115], according to a provision reproduced in the letters of provision of the place commanders. He turned away from this solution because the quality of the defences of the places in the kingdom was not identical, and some places of war did not have the necessary defences to withstand the three required assaults: « *Il y a des places construites de manière qu'on ne peut l'exiger de ceux qui les défendent ; souvent, d'autres circonstances empêchent d'attendre cette extrémité* »[116].

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114. *"It was essential that this police force be entrusted exclusively to the person who, on his own head and honour, was the guarantor of its effects"* (BRUSCHI, 1996) [il s'agit de la fin de l'antépénultième citation].

115. *"That after having sustained three assaults, and that there would be a considerable breach in the body of these ships"*. Defence Historical Service : X^A 27, pièce 2 : Jacques-Jean-François de Fumeron, *Projet d'ordonnance concernant les états-majors des places*, 1750.

116. *"There are places built in such a way that it cannot be demanded of those who defend them; often, other circumstances prevent us from waiting for this extreme"*
The passage is worth reproducing in its entirety: « *Il y a des places construites de manière qu'on ne peut l'exiger de ceux qui les défendent ; souvent d'autres circonstances empêchent d'attendre cette extrémité ; ces raisons ont à substituer aux anciennes ordonnances ce qui est dit dans l'article proposé. Il n'exige d'un gouverneur que de se défendre autant qu'il lui sera possible ; c'est au prince à juger s'il a poussé cette défense au point où elle a dû l'être ; il y a eu des Souverains qui ont établi des conseils de guerre pour en juger. Leur jugement, lorsqu'ils sont bien composés, établit l'honneur ou la honte de ceux qui doivent y rendre compte de leur conduite* ». / *"There are places built in such a way that it*

As the issue was discussed, another brief was commissioned on the subject, this time from a lieutenant-general (who had the ear of Marshal de Saxe), Michel de Dreux de Brézé. He emphasised that the commander's military qualities alone counted, because « *tout y est trop dépendant des circonstances et des conjonctures, pour pouvoir rien proposer qui ne fut sujet à trop d'inconvénients* (…) *Le Roy honorant un de ses officiers d'assez de confiance pour le charger de défendre une de ses places, en a sans doute assez bonne opinion pour s'en remettre à lui des moyens et des mesures à prendre pour sa défense* »[117]. However, it concludes that the site commander is personally responsible, if need be: a council of war must then be held for « *examiner la conduite de ceux à qui il en aura confié la défense* »[118]. The relevance of holding a council of war at each siege to discuss the defence of the fortress is open to question. For our part, let us retain the principle: the personal responsibility of the commanding officer. In 1791, the National Assembly, at the invitation of Bureaux de Pusy, took the same line: dictatorship in the event of a state of siege was total, and only *a posteriori* personal responsibility was conceivable in law: the the commander *"will exercise it exclusively under his personal responsibility"* (art. 10, tit. 1er).

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cannot be required of those who defend them; often other circumstances prevent us from waiting for this extreme; these reasons have to replace the old ordinances with what is said in the proposed article. It only requires a governor to defend himself as much as possible; it is up to the prince to judge whether he has pushed this defence to the point where it should have been; there have been sovereigns who have established councils of war to judge this. Their judgement, when well composed, establishes the honour or shame of those who must give an account of their conduct".
Defence Historical Service : X^A 27, pièce 2 : Jacques-Jean-François de Fumeron, *Projet d'ordonnance concernant les états-majors des places*, 1750.

117. *"Everything is too dependent on circumstances and conjunctures to be able to propose anything that is not subject to too many inconveniences (…) The King, honouring one of his officers with enough confidence to entrust him with the defence of one of his places, no doubt thinks highly enough of him to rely on him for the means and measures to be taken for its defence"* Defence Historical Service : X^A 27, pièce 3 [rayé] : [Michel de Dreux de Brézé], *Gouverneurs ou commandants des places*, s.d. [1750]

118. *"To examine the conduct of those whom he has entrusted with its defence"*. Defence Historical Service : X^A 27, pièce 3 [rayé] : [Michel de Dreux de Brézé], *Gouverneurs ou commandants des places*, s.d. [1750].

With the Law of 1791, the civil authorities were competent in principle to ensure the police and public order in military strongholds, but were totally under military control as circumstances dictated. Contrary to Firmin Laferrière's assertion, the 1791 legislator did in fact bequeath a complete and coherent body of legislation capable of ensuring the conservation and policing of military strongholds in legal terms. In so doing, he managed to take into account the first constraint: to perpetuate a military instrument – the military strongholds – while adapting it as far as possible to the new political principles. Above all, as far as we are concerned, there is little point in determining the powers of the authority: the commander's knowledge of warfare is his guide, which will lead him to take the necessary decisions when the fortress is under siege, i.e. when communications between the fortress and the outside world are cut off[119]. A dictatorship, for the benefit of the military authority, therefore, to make the scope of these decisions as clear as possible to the layman. A state of siege is defined as the transfer of responsibility for maintaining public order in a military stronghold to the military authorities. It will later be understood as referring only to the powers of the civilian authorities to maintain law and order, but in terms of the military doctrine on the subject, it is in fact all the decisions necessary to ensure law and order that are concerned, without further detail.

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119. The great innovation of the decree of 14 December 1811 was to provide for the possibility of declaring a state of siege. As a result, a state of siege was no longer the consequence of an observed fact. This innovation was the result of Napoleon I's desire to overhaul the elements of the Empire's defensive system to meet the needs of future campaigns: the *Traité sur la défense des places* (*Treaty on the Defence of Places*) was drafted by Carnot in 1810, at Napoleon's request; the 1811 decree was the legal component that should be read in conjunction with other texts: several instructions on the subject from 1811 and 1813 (preserved in the archives) and the decree of 1 May 1812 on capitulations. See on this point: Defence Historical Service : 1 M 1996, dossier 2 : César de Laville, *Instruction du ministre de la guerre sur la défense des places, rédigée en exécution de l'art. 86 du décret impérial du 24 décembre 1811*, (1815).

II. Exorbitant powers as a characteristic of emergency legislation derogating from ordinary law.

The practice of a state of siege, which cannot be discussed in detail here, could naturally be considered in order to understand how the military authorities used their powers. However, this is not the perspective we are adopting[120], because a decisive break occurred in legal terms, which explains the evolution of the legislation during the 19th century. This break was the result of the intervention of a new actor, the judge, who forced us to think differently about the effects of the state of siege. In response, the government on several occasions drafted successive bills. Although these bills were often abandoned, they are nonetheless instructive and enable us to measure the new constraints imposed on the legislature, which will have decisive consequences in the long term. In fact, by endeavouring to detail the exorbitant powers of the military authority in a state of *political* siege, the legislature is also highlighting the resources it considers necessary for any authority in times of crisis (1), whether military or not. This consequence, unsuspected when the law of 9 August 1849 was drafted and then adopted, is a reality that is imposed when the state of siege is applied durably and over the whole territory, under the effect of total war (2).

1. The birth of emergency legislation: the effects of the Law of 9 August 1849.

The liberal 19th century, which began with the Charter of 1814 (BIGOT, 2013), was to use the state of siege as an instrument of power to restore order in the event of internal unrest or an external threat. The campaign of 1814 and then the Hundred Days had led to the use of the state of siege, and consequently, under article 103 of

120. For this approach, we refer you to our thesis: Le Gal (2011).

the decree of 1811, had made it possible for non-military personnel to be tried by military courts. It is precisely the question of the jurisdiction of military courts to hear offences committed by non-military personnel, who are thus distracted from their natural judges, that forces us to revise the legislation and, in the end, to enshrine the fictional state of siege (état de siege fictif) in law, as distinct from the real state of siege (état de siege reel).

1.1 The forgotten precedent of 1829

The Restoration attempted to reform this provision with a bill relating to the jurisdiction of military courts [121]. It is remarkable that, in this text, the effects of the state of siege were still limited to the elements contained in the texts of 1791 and 1811: the transfer of jurisdiction to the military authority and the jurisdiction of the military courts. Count Louis d'Ambrugeac was concerned about the ease, since the decree of 1811, of declaring a state of siege by an order of the King. He also questioned the King's commissioner – none other than Salvandy – who reported on the law, on the effects of the state of siege. For his part, Baron Mounier (1829, p. 953) recalled, in the vague terms commonly used at the time, that the transfer reduced the civil authorities to inaction, without further comment, while emphasising that, in the case of places of war, the effects concerned nothing less than 'the imperious law of the salvation of the State". For another Peer, Viscount Lainé (1829, p. 954), this axiom implied a "frightening latitude" ("latitude effrayante").

In short, during these debates, the principle of the jurisdiction of military courts was not called into question, only the

121. According to Article 42 of the draft, two councils of war would be established in each place under siege. On the context of the discussion of this draft, see note 1, under the law of 15 July 1829 relating to the interpretation of several provisions of military criminal law (v° délits militaires), in Devilleneuve et Carette (1851, p. 1208).

composition of the councils of war was discussed, and the appropriateness of the state of siege to repress unrest, but this question was dismissed by Salvandy himself. During these debates, there was no doubt that the effects of a state of siege were defined by the jurisdiction of the military authorities. It is the transfer of jurisdiction itself that defines a state of siege. The bill was finally withdrawn, which led Théodore Reinach (1885, p. 110), the author of the earliest thesis on the state of siege, to make a very accurate observation: "Neither liberty nor authority gained from this abortion, that is to say from maintaining a legislative *status quo* where everyone could see what suited them". Consideration of the effects of a state of siege, and recognition of the need for exorbitant powers, resulted from a new constraint placed on the legislature: the intervention of the judicial courts.

1.2 The Geoffroy Case of 1832, or how to force the legislator to define the effects of a state of siege.

In a famous decision of 1832[122], handed down in the context mentioned above to introduce Salvandy's remarks, the Cour de cassation called into question the jurisdiction of military courts to hear cases involving non-military personnel, as provided for in the decree of 24 December 1811. This judgment has been widely commented on, as it shows the Court of Cassation's desire to carry out an *a posteriori* review of constitutionality (MESTRE, 1995, p. 35-67). More cautiously, it seems to us that this is no more than a review of legality decided on the basis of a conflict of laws over time.

In 1878, Ferdinand Gatineau, a deputy, said the same thing: « la cour de cassation a trouvé dans la Charte qui était de date plus récente et qui était une loi d'un ordre supérieur, un motif pour ne pas faire

122. Cour de cassation, 29 June 1832, *Sieur Geoffroy*. *Sirey*, 1832.1.401; *D.* 1832.I.265.

produire leur effet aux ordonnances »[123]. As far as we are concerned, this judgment forces the legislature to consider the effects of a state of siege: this is the real birth of exceptional legislation or, to put it more accurately, crisis legislation, because it is a question of derogation from ordinary law. A first attempt must be made to understand the provisions adopted in August 1849.

By ensuring that the provision of the decree of 1811 relating to the jurisdiction of the military courts was implicitly abrogated by the Charter of 1830, the Cour de cassation rendered the use of the state of siege of little interest with regard to the practice of the time, both to suppress the Ultra led by the Duchess of Berry in the West and the Republican uprisings in Paris[124], at the same time, in the context of General Lamarck's funeral. The Minister of Justice, Félix Barthe, submitted a text that was not lacking in interest, although it was unsuccessful.

The quality of the text is undeniable, as is the report presented to the House of Peers by a specialist in these matters, Allent[125]. Let's go back to the words of the protagonists. For Barthe, there could be no question of maintaining military courts in law, not because they were unconstitutional, but because of political expediency: « nous nous sommes décidés à ne pas vous demander le maintien des juridictions militaires pour ces cas prévus »[126]. but - and this is the great innovation – by "establishing preventive means" (« l'établissement de moyens préventifs »). For Barthe, maintaining the former would

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123. "the Court of Cassation found in the Charter, which was of more recent date and was a law of a higher order, a reason not to give effect to the ordinances". Ferdinand Gatineau, *JO, 3* April 1878, p. 3894.

124. The texts are: *the royal order of 15-22 August 1815 relating to the state of siege of nine military divisions, the orders of 28 July 1830, 3, 6, 29 June 1832, 10 June 1832 concerning the state of siege in the western departments and in Paris (*TEYSSIER-DESFARGES, 1848. p. 501-502).

125. Pierre Alexandre Joseph Allent was the author of *Histoire du corps impérial du génie, des sièges et des travaux qu'il a dirigés*, Paris, Magimel, 1805.

126. *"We have decided not to ask you to maintain the military courts for these cases"*. See the debates: *Archives Parlementaires*,[2nd] series, p. 474-476.

fall under 'exceptional' means, the latter under 'preventive' means. In this draft of 1832, the effects are therefore not designed to be cumulative; they are alternative: either exceptional (the jurisdiction of military courts) or preventive (the exorbitant police powers). Not content with introducing these exorbitant preventive powers, Barthe emphasises that they "will, we have no doubt, suffice to consecrate the order so happily strengthened by the government's energy" (« suffiront, nous n'en doutons pas, à la consécration de l'ordre si heureusement affermi par l'énergie du gouvernement »). Barthe's point is crucial: the effects take precedence, not the competent authority, which the government will have to designate. He therefore placed the emphasis on 'government action' and even more so, with regard to the expulsion of undesirable persons, on "the power granted to the government, in the person of a special delegate" (« la faculté accordée au gouvernement, dans une personne d'un délégué spécial »). In short, in Barthe's draft, the military authority characteristic of a state of siege gave way to the means the government should use to restore public tranquillity. Barthe's point is crucial: the effects come first, not the competent authority, which the government must designate. He therefore emphasised "government action" (« l'action du gouvernement ») and even more so, with regard to the expulsion of undesirable persons, "the power granted to the government, in the person of a special delegate" (« la faculté accordée au gouvernement, dans une personne d'un délégué spécial »). In short, in Barthe's draft, the military authority characteristic of a state of siege gave way to the means the government should use to restore public tranquillity.

It fell to Allent, a specialist in military issues relating to strongholds, to explain the nature of the state of siege and its effects. He did so in terms that demonstrated his in-depth knowledge of modern legislation, as well as the ordinances of the Ancien Régime. This report is therefore an essential text for understanding how the state of siege was portrayed; it will be essential for drafting the future law of

9 August 1849. What does it say? The first, from Bureaux de Pusy, Allent points out that the transfer of powers is general in a place of war, and, drawing on the corpus drawn up in 1811-1813 (decree of 1811 and subsequent instructions), he states that the governor of the place has immense obligations which have not been detailed, because they relate to the orders he gives in response to "to the efforts, often combined, of attack, sedition or treason" (« aux efforts, souvent réunis, de l'attaque, de la sédition ou de la trahison »)[127]. The place commander's science of war. In return, this means engaging "He must understand 'the full extent of the personal responsibility imposed by these legal obligations, failure to comply with which carries the death penalty" (« toute l'étendue de la responsabilité personnelle que lui imposent ces obligations légales, dont l'inobservation entraine la peine capitale »). And Allent concludes: "By imposing such a responsibility on the governor, the law gives him a power equal to his obligations" (« en imposant au gouverneur une telle responsabilité, la loi lui donne un pouvoir égal à ses obligations »). In the light of this, how are we to view the exorbitant powers detailed by Barthe in his bill? Allent states: "'the government renounces military jurisdiction (...) The law replaces it with police measures. Articles 5, 6 and 7 specify these measures, the purpose of which is to remove the instigators of the rebellion, to remove their weapons and ammunition, and to arrest, even at night, the rebels being pursued by the law" (« le gouvernement y renonce à la juridiction militaire (…) La loi y supplée par des mesures de police. Les articles 5, 6 et 7 spécifient ces mesures, dont l'objet est d'éloigner les instigateurs de la rébellion, d'enlever leurs armes et munitions, et d'arrêter, même la nuit, les rebelles que poursuit la justice »). As we can see, the 1832 project, although abandoned, is essential both in itself and in the report he had produced for the Chambre des Pairs. Allent's aim was to determine the respective nature of the effects of the

127. Joseph Allent, *A.P.*, 2nd series, 1832, p. 474.

state of siege, past and future, according to military logic. Barthe's project, on the other hand, considered the action of the government, whatever its delegate, civilian or military (Barthe did not express this explicitly, but the military was hardly put forward), through the use of exorbitant powers. Although abandoned, the text was of direct use to the next project, in 1849.

1.3 The enshrinement of the fictional state of siege by the law of 9 August 1849, considered in terms of its effects.

The law of 9 August 1849 relating to the state of siege was the most important law on the subject. It provided the basis for crisis legislation and definitively established a state of siege as an exception to ordinary law. Compared with previous provisions, it resolutely broke the link between places of war and a state of siege. It is now a political state of siege. The debates between minister Jules Dufaure and certain deputies, including Charamaule[128], were lively.

As for the effects, for Charamaule, jurisdictional competence was « sans contredit la question la plus grave que soulève le projet de loi »[129], because the government was reintroducing this competence, which had been renounced in the 1832 bill. For Dufaure, the alternative was clear: « l'Assemblée veut-elle attribuer à cette mesure des effets extraordinaires (…) ou l'Assemblée, après avoir déclaré l'état de siège, veut-elle que tout reste dans le droit commun ? »[130]. Convinced that the jurisdiction of the military courts should be retained

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128. It was on this occasion that the debate focused on the interpretation of article 106 of the constitution, which provided for the drafting of an organic law on the state of siege. On this debate, see Saint-Bonnet (2001, p. 363-366).

129. *"Without question the most serious issue raised by the bill"*. Hippolyte Charamaule, *Moniteur*, 1849, p. 2651.

130. *"Does the Assembly want to attribute extraordinary effects to this measure (...) or does the Assembly, having declared a state of siege, want everything to remain under common law?"* Jules Dufaure, *Ibid.*

and exorbitant powers introduced, he drew on the 1832 draft to list them. He justified these cumulative (and not alternative) powers by the following aim: « quand la société est attaquée par un ennemi à main armée, quels moyens doit-on lui donner pour se défendre ? Ce sont des moyens exceptionnels, qui ne le comprend ? qui voudrait s'en rapporter au droit commun ? »[131].

And while the text could be considered a 'dictatorship law', in the words of Jules Grévy, Dufaure willingly accepted the qualifier, in the name of the goal, the common salvation: « Vous voulez l'appeler dictature ? Appelez-le dictature ; mais ajoutez que ce n'est pas la dictature d'un homme, mais bien la dictature d'une assemblée procédant législativement, d'une assemblée émanée du suffrage universel. Je dirai que cette dictature est la dictature de la société entière, représentée par l'Assemblée, et voulant se défendre contre l'insurrection »[132]. Less assertively than Barthe before him, Dufaure emphasised that the effects of the state of siege were intended by the nation as a whole, without going back on the instrument (civil or military) of repression. However, Dufaure backed down during the very brief discussion of the exorbitant powers of article 9. For him, these powers were naturally entrusted to the military authority, since this article used the same expressions as article 7 on the transfer of jurisdiction: « il y a un commandant de l'état de siège ; c'est lui qui est responsable de tout ; c'est lui qui donne des ordres à tout le monde ; c'est lui qui répond de tous ses subordonnés »[133], and it was to him that these powers were entrusted.

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131. *"When society is attacked by an armed enemy, what means should it be given to defend itself? Who would not want to rely on ordinary law?"*. *Moniteur*, 1849, p. 2652.

132. *"You want to call it a dictatorship? Call it a dictatorship; but add that it is not the dictatorship of one man, but the dictatorship of an assembly that proceeds legislatively, of an assembly emanating from universal suffrage. I would say that this dictatorship is the dictatorship of society as a whole, represented by the Assembly, and wishing to defend itself against insurrection"*. Jules Grévy, Jules Dufaure, *Ibid*.

133. *"There is a commander of the state of siege; it is he who is responsible for everything; it is he who gives orders to everyone; it is he who is responsible for all his subordinates"*.

Article 9 of the law simply records the practical requirements of a state of siege: « L'autorité militaire a le droit : 1° De faire des perquisitions, de jour et de nuit, dans le domicile des citoyens ; 2° D'éloigner les repris de justice et les individus qui n'ont pas leur domicile dans les lieux soumis à l'état de siège ; 3° D'ordonner la remise des armes et munitions, et de procéder à leur recherche et à leur enlèvement ; 4° D'interdire les publications et les réunions qu'elle juge de nature à exciter ou à entretenir le désordre »[134]. This last power took on considerable importance in the 19th century. It justified maintaining the state of siege for a long time after the 1870 war, until 1876 for the three major French cities. It made it possible to rely on military authority to control newspapers and contain anarchist movements in particular. This heralded extensive use when France was faced with the effects of total war.

2. The consequences of total war on the use of emergency legislation

The Law of 1849 was applied on several occasions in the second half of the 19th century: during Louis-Napoléon Bonaparte's coup d'état, it was used as a privileged instrument to establish authority and suppress unrest and uprisings, and then the Franco-Prussian war led to massive use of the state of siege. This first wave of declarations of a state of siege already changed the nature of this measure through the particular use of the exorbitant means of article 9 of the law of 1849 (2.1). However, the First World War undeniably marked a decisive turning point in the use made of the state of siege (2.2), by making the relationship between civil and military authorities closer.

134. *"The military authorities have the right : 1° To conduct searches, by day and by night, in the homes of citizens; 2° To remove convicts and individuals who do not have their home in places subject to a state of siege; 3° To order the surrender of arms and munitions, and to search for and remove them; 4° To ban publications and meetings that it deems likely to stir up or maintain disorder".*

Finally, the state of emergency, invented in 1955, registered the shift by making clearer distinctions between the different civil authorities (2.3).

2.1 The shift from a state of siege of repression to a state of siege of surveillance

While the debates tended to focus on the procedures for declaring a state of siege, the effects of the state of siege were to take hold, both in practice and in discourse, with the application of the 1849 law. However, it should be emphasised that awareness of this shift came very late. There are several examples of this. There were two, in Lyon in 1851, and the maintenance of the state of siege after the 1870-71 war.

In January 1851, at a time when there was already talk of lifting the state of siege in Lyon, a deputy put forward the idea of setting up a police prefecture there, following the example of Paris. The idea was easily rejected, but what is important here is the reason for the rejection of this proposal: what was the point of setting up a police prefecture in Lyon, since it would not have the exorbitant powers provided for by the 1849 law and entrusted to the military authority. The deputy Bréhier, who had been a sub-prefect before his election, emphasised two important points on this subject. On the one hand, « *l'état de siège réprime, la préfecture de police surveille* »[135], and on the other hand « *l'état des esprits y exige que l'autorité militaire reste investie de ses attributions extraordinaires* »[136]. A 'war against sedition' was then

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135. Jacques-Joseph Bréhier, « Rapport fait au nom de la 20e commission d'initiative parlementaire, sur la proposition de M. le général Fabvier, ayant pour objet la levée de l'état de siège dans la 6e division militaire », Assemblée nationale législative, 11 avril 1851, *Impressions des projets de loi, rapports, etc.*, 1851, t. 26, p. 4.

136. *"The state of siege represses, the prefecture of police supervises "*[1] and on the other hand *" the state of mind requires that the military authority remain vested with its extraordinary powers"*. Jacques-Joseph Bréhier, « Rapport fait au nom de la 20e commission d'initiative parlementaire,

waged, using a term not unlike today's *'war against terrorism'* (ALIX & CAHN, 2017). Thus, the state of siege allowed the use of exorbitant powers, which were certainly entrusted to the army, to respond to a threat rather than an insurrection.

During the Franco-Prussian war of 1870-71, some forty départements were declared to be in a state of siege, which lasted for several years. This posed the formidable difficulty of interpreting this exceptional regime, which was perpetuated in a particularly fragile political context. For fervent republicans, the state of siege obviously crystallised discontent, as it prevented the new regime from taking root. The legislative elections took place while the state of siege was declared, with the prefects in particular working unstintingly on public opinion. It was not until 29 December 1875 (LE GAL, 2020, p. 73-87), and even the law of 5 April 1876 for the departments of Seine, Seine-et-Oise, Rhône and Bouches-du-Rhône, that the measure was lifted. The objective of the powers that be was clear: to monitor opinions, facilitated by the control of publications, one of the powers granted to the military authorities by the 1849 law. In so doing, we were moving from a state of siege of repression, aimed at restoring order and public tranquillity, to a state of siege of surveillance, aimed at prevention, as it was difficult to confirm the existence of a crisis. The Dean of the Faculty of Poitiers, Théophile Ducrocq (1881, p.732) emphasised that maintaining a state of siege after the war was a lasting departure from the *"principle of individual liberty"* that was the foundation of the republic. It also points out that « *ce régime, dans les cinq années 1871 à 1876, a été en France celui de la presse périodique dans 40 départements* »[137] which required prior authorisation for all new

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sur la proposition de M. le général Fabvier, ayant pour objet la levée de l'état de siège dans la 6e division militaire », Assemblée nationale législative, 11 avril 1851, *Impressions des projets de loi, rapports, etc.*, 1851, t. 26.

137. *"In the five years from 1871 to 1876, this system was used in France for the periodical press in 40 départements"*

newspapers or periodicals dealing with political issues or the social economy (DUCROCQ, 1881, p.732). The fragility of the republican regime was undeniable and the crisis of 16 May 1877 - an opposition between the President of the Republic, Patrice de Mac-Mahon, and the majority of the Chamber of Deputies - was to prove it. In short, a shift had taken place, making the state of siege an instrument used by the government to control and no longer just to repress.

During the debates of February and March 1878, on the subject of a reform of the law of 9 August 1849, the comments made are revealing of what the state of siege had become in recent practice. Political forces opposed to the Republic did not hesitate to denounce the direct relationship between the state of emergency and the Republic. For example, Count Douhet of the Senate, a legitimist who was firmly hostile to the Republic, stated that Adolphe Thiers - who had become a conservative republican - had used the law of 28 April 1871 to declare the state of siege « le parrain de la République actuelle (…), car sans l'état de siège, pratiqué non pendant des mois, mais pendant des années, vous n'auriez pas probablement aujourd'hui la République »[138]. The state of siege guided opinion in order to contain the country: « c'est par l'état de siège, habilement, sagement exercé, que le pays a pu traverser toutes ces crises d'opinion redoutables (…) et atteindre le moment politique où une constitution républicaine lui serait pratiquement donnée par le jeu et le mouvement des opinions »[139]. It denounces the exception, the denial of freedoms, and the Republic all at once. The Republicans retort that the context would have dictated such measures, whatever the political regime in place.

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138. *"The godfather of the current Republic (...), because without the state of siege, practised not for months, but for years, you would probably not have the Republic today"*.

139. *"It was through the state of siege, skilfully and wisely exercised, that the country was able to get through all these formidable crises of opinion (...) and reach the political moment when a republican constitution would be practically given to it by the play and movement of opinions"*. Count Guillaume de Douhet, *JO*, 15 March 1878, p. 2887.

During these debates, the definition of the effects of the state of siege attracted a great deal of attention. For the President of the Council (and Minister of Justice), Jules Dufaure, who had already drafted and defended the 1849 law, when he was Minister of the Interior at the time, it was less a question of emphasising the transfer of jurisdiction, which was rarely discussed, than the effects of the powers granted under a state of siege. However, when Dufaure lists them, he does not mention the competent authority, but specifies the rights infringed with regard to the powers recognised by article 9 of the 1849 law. He said: « C'est que l'état de siège est une véritable loi qui m'enlève mes droits privés, les droits les plus sacrés ; qui m'enlève l'inviolabilité de mon domicile (…) c'est écrit dans la loi de 1849 elle-même… qui m'enlève l'inviolabilité de mon domicile ; qui permet, sur une simple délation, de me traduire ailleurs que devant mes juges naturels ; qui interdit l'usage du droit de réunion, qui interdit l'usage de la presse, qui ne permet la propagande de ses idées par aucun moyen. L'état de siège a ces conséquences et c'est pour cela qu'il doit être déclaré par une loi »[140].

In both cases - the correlation between a state of siege and the Republic, and the infringement of rights and freedoms - the shift is striking. It is indeed the exorbitant powers resulting from Article 9 that crystallise the debates, because they allow surveillance and preventive action.

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140. *"It is that the state of siege is a real law which takes away my private rights, the most sacred rights; which takes away the inviolability of my home (...) it is written in the law of 1849 itself... which takes away the inviolability of my home; which allows, on the basis of a simple accusation, to bring me before someone other than my natural judges; which forbids the use of the right of assembly, which forbids the use of the press, which does not allow the propaganda of one's ideas by any means. A state of siege has these consequences and that is why it must be declared by law"*. Jules Dufaure, *JO*, 16 March 1878, p. 2945.

2.2 The effects of the maximum temporal and spatial extension of the state of siege

The studies published by Joseph Barthélemy in the *Revue de droit public* are an essential guide to the extent of the effects of the state of siege during the First World War. A state of siege was declared throughout metropolitan France and the departments of Algeria, until peace was achieved, by a decree of the President of the Republic on 2 August 1914, confirmed by a law of 5 August. This was an unprecedented extension. Joseph Barthélemy (1915, p. 137) described the 1849 legislation as « régime spécial aux périodes de trouble [qui] est encore un régime légal » so that, he stresses "special regime for periods of unrest [which] is still a legal regime" so that, he stresses "it does not have the effect of establishing what used to be called a *dictatorship*". He then goes on to detail the consequences of the state of siege. What is essential here is that the eminent publicist refers to the effects *for the benefit of the government*. It is not so much the military authority that finds itself seized of exorbitant powers as the government of France: "The aim of a state of siege is to temporarily increase the authority of the government; this aim is achieved by the following measures: 1° Instead of using its ordinary agents to maintain order, the government will act through agents who are considered to be particularly energetic: military agents". With regard to the maximum extension of the state of siege, Barthélemy concludes: "In fact, the state of siege proclaimed on 2 August 1914 did not lead to the military authorities *taking over from* the civilian authorities so much as to these various authorities *working together*; in terms of form, the public acts in which this collaboration took place often bore the joint signatures of the authorities of both categories (...). (...) It is logical, moreover, that the authorities who routinely exercise police powers should not be deprived of them by military authorities who are not prepared for this role" (BARTHÉLEMY, 1915, p. 137). The whole of Barthélemy's study argues in favour of this shift: "the

effect of declaring a state of siege is to open up *faculties* for the benefit of the government" (BARTHÉLEMY, 1915, p. 149), and even more surely: "As soon as war broke out, most citizens' freedoms passed, by virtue of the declaration of a state of siege (decree of 2 August 1914), into the hands of the military authorities and, consequently, into the hands of the government" (BARTHÉLEMY, 1915, p. 155). Practice, according to the author, demonstrates the obvious: during the Great War, the civilian authorities seized the resources made available to the military authorities: "In fact, the civil authorities considered that the state of siege increased their powers: it was by virtue of the state of siege that first the prefects, on the orders of the Minister of the Interior, and then a decree of the President of the Republic banned absinthe" (BARTHÉLEMY, 1915, p. 155) ; lastly, freedom of trade is affected by measures that go far beyond the provisions of Article 9, and are taken, what is more, by the civil authorities: "It is therefore that, to a certain extent, the administrative authority must have considered itself invested by the state of siege with a kind of legislative power that allowed it to resurrect the maximum laws of the revolutionary period" (BARTHÉLEMY, 1915, p. 158). After the war, the War Administration drew up texts and reports on the internal consequences of the war. This led, initially, to the drafting of the*Instruction* of February 1924 *regulating the exercise of police powers by the military authorities on national territory during a state of siege*. Everything was affected by this text, which was classified as a defence secret: the requisitioning of people and goods, the mobilisation of economic forces, and of course the preparation for battle of regalian powers, as well as technical advances that could not have been envisaged in 1849 (such as wireless devices, which were treated as weapons). But it was necessary to go further, and make provision for the social and economic aspects. This was to be the law on the general organisation of the nation for wartime of 11 July 1938, which the administration did not dissociate from the state of siege. In this sense, this 1938 law was not

so much a law preceding the war to come, as the result of reflections undertaken by the military administration after the Great War.

2.3 The change is complete: the adoption of the law of 3 April 1955 on the state of emergency.

A preliminary point must be mentioned. In order to emerge from the Occupation, it was decided to rely on a distorted state of siege to ensure the continuity of the State as the territory was liberated. This is the purpose of the Order of 29 February 1944 *temporarily regulating the conditions of application of the state of siege in mainland France*, which stipulates - article 2: that « *Dans la zone de l'intérieur, les pouvoirs de police individuelle et collective, ordinaires et exceptionnels définis par les lois et règlements en vigueur sur l'état de siège sont exercés par les commissaires régionaux de la République, qui disposent du droit de requérir la force armée* »[141]. For the authorities, the liberation of the territory and the constant concern for the permanence of republican principles led Free France to resort to a state of siege to prepare for the return to peace, but by entrusting to the civil authorities the powers that the law of 1849 had expressly attributed to the military authorities. In so doing, the French Committee for National Liberation reversed the gradation of states: instead of the succession of 'peace/war/state of siege' inherited from 1791, these texts imposed a new order of 'war/state of siege/peace'. This gradation was further blurred by the introduction of the state of emergency in April 1955.

The state of emergency was adopted later by the French legislature, in the context of decolonisation. The remarkable thing about

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141. *"In the interior zone, the ordinary and exceptional individual and collective police powers defined by the laws and regulations in force on the state of siege are exercised by the regional commissioners of the Republic, who have the right to call in armed force"*. Provisional Government of the French Republic. General Secretariat. *Textes essentiels concernant les pouvoirs publics*, Algiers, impr. Baconnier, s.d., p. 13.

the law of 3 April 1955 that created it was that the civil authorities, who retained their powers over public order and the police, were given even more extensive powers than the military authorities had under the law of 1849. During the parliamentary debates (BEAUD & GUÉRIN-BARGUES, 2018, p. 10-11), the government's intention was criticised « *d'établir entre le droit commun et l'état de siège un état particulier* (…) *qui étend à des territoires entiers les conséquences de l'état de siège véritable* »[142]. It's not just the imaginary state of war that justifies not resorting to a state of siege[143], it's the extension of the legal arsenal that restricts freedom. The chosen expression, *' state of emergency '*, attempts to conceal the exorbitant powers it implies, but in reality, the state of emergency gives the civil authorities more latitude than the law of 1849 allows (DRAGO, 1955, p. 670-708). Finally, the state of emergency distinguishes between three civil authorities, and it should be noted that the powers of article 9 of the Law of 1849 are divided between these authorities, alongside others which are new. The powers given specifically to the prefects (without the possibility of delegation): prohibition on the movement of people and vehicles; establishment of protection or security zones with restricted access; prohibition on the entry of any person seeking to hinder the action of the public authorities; closure of theatres, pubs and meeting rooms. Ban on meetings. Powers granted to the Minister of the Interior (without the possibility of delegation): house arrest (without creating camps); surrender of weapons and ammunition. Powers given to the Minister of the Interior and the prefects by provision (without the possibility of delegation): day and night searches; control of the

142. *"To establish between ordinary law and a state of siege a special state* (...) *which extends to entire territories the consequences of a genuine state of siege"*. Francis Vals, AN, 2nd sitting of 30 March 1955, *JO*, *deb. parl.*, AN, 2nd sitting of 30 March 1955, p. 2138.

143. Edgar Faure's argument is well known, put forward in retrospect: *"the simple truth being that the term state of siege irresistibly evokes war and that any allusion to war should be carefully avoided in relation to the affairs of Algeria"* (FAURE, 1987, p. 197).

press - publications - radio broadcasts – cinema – theatre. The state of emergency marked the definitive shift of exorbitant powers to the civil authorities, powers conferred in their own right. By the same token, it rendered the state of siege totally unsuitable.

Conclusion

From the state of siege to the state of emergency, the characteristics of emergency legislation are gradually taking shape, through the study of their effects. During the Algerian war, a group of jurists, many of them lawyers, endeavoured to make citizens and public authorities aware of the disastrous consequences of such legislation for the continued existence of the Republic. One of its most zealous protagonists, René-William Thorp (1962, p. 120), a lawyer and former Member of Parliament, recalled the constituent elements of this type of legislation: according to him, four characteristics stand out: "1° it is based on legislation passed by Parliament; 2° it is determined in time and space; 3° it includes very precise regulation of the restrictions it places on public freedoms; 4° it provides citizens with jurisdictional guarantees commensurate with the increased prerogatives it invests the authorities with". In theory, it validated the definition of all exceptional legislation: a special regime for periods of unrest was still a legal regime, to paraphrase Barthélemy, involving derogatory powers, but not suspending the guarantee of rights. The holder of these powers had become secondary: it was no longer the science of war, the qualities of the military leader, but action within the circle of a derogatory regulation.

The holder of these powers had become secondary: it was no longer the science of war or the qualities of the military leader, but action within the circle of a derogatory regulation by an empowered authority, whatever its nature.

This shift makes it possible to capture in law the action to be taken: the exorbitant powers are indeed those used as a priority by the

local commander under the Old Regime. Antoine De Ville would undoubtedly have listed similar exorbitant powers – with the added severity of application. These exorbitant powers are therefore the legal transcription of action in times of unrest. The jurist may be delighted by this – indeed, the various powers are listed following the *Geoffroy* Case of 1832, formalising an implicit request by the magistrates – but this immediately leads to a considerable weakness: the next crisis is never identical to the previous one. Admittedly, 'the exception is of all times and all countries', but it is never identical. It therefore requires ever greater adaptation, as resources become more detailed. French legislation in recent years has shown this clearly, whether it be the application of the state of emergency after 2015 or the state of health emergency in the context of the COVID-19 pandemic. In these cases, the authorities have to apply complex regulations that are monitored by an administrative judge who has become the guardian of freedoms, at the risk of an unfortunate shift from the judicial police to the administrative police. The preventive action that exorbitant powers once constituted with the law of 1849, when the previous military action was repressive, has crept into other subsequent emergency legislation to the point of being its raison d'être and DNA. For its part, the ethics of military command have disappeared for good.

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THE BRAZILIAN FIRST REPUBLIC IN STATE OF EXCEPCTION

Antonio Gasparetto Júnior

Expressed in a constitutional text for the first time during the French Revolution, the state of siege institute has older military roots focused on the actions of troops on the battlefield. Gradually, the state of siege absorbed new connotations that defined it as an exceptional political regime to which a political community is temporarily subjected due to an internal or external threat to public order. Much more than its military technical connotation, this was the approach that gained international repercussion, being adopted in several Constitutions around the world. In such a way that the repercussion of the French revolutionary elaboration at the end of the 18th century for the most different normative legal systems is undeniable.

The motivations for using the institute and its effects are still little studied in Brazil. However, the country experienced a period with the recurrence of the application of the institute, which offers an open field of research. Brazil's first Constitution, from 1824, did not adopt the term state of siege, but already had similar emergency provisions. The institute would only be clearly expressed for the first time in the Republican Constitution of 1891. The state of siege would be the constitutional resource against external threats and internal commotions, and could be declared by Congress or the Executive. Its effects suspended constitutional guarantees during a previously established

period and in specific locations within the national territory. The First Republic (1889-1930) would witness several uses of the state of siege.

The state of siege was present in the First Republic from its beginning to its end. As an object of analysis, the state of siege is one of the great gaps in republican historiography. Always referred to a broader framework, it has only received fragmentary and scattered references. The topic is a challenge for researchers due to the dispersion of sources or even their absence, making the undertaking more arduous. The purpose of this chapter is to bring the state of siege to the forefront of the analysis of this Brazilian political period.

A Republic Under Siege

When Renato Lessa published his classic book *A Invenção Republicana*, in the 1980s, he claimed that we knew little about the political order that was established in Brazil with the republican coup of 1889 (LESSA, 1988: 12). Since then, a great profusion of studies on the period has shed light on several aspects that were considered obscure and that are fundamental to understanding the regime, such as the federalist model, voting practices, social movements, etc. However, there is still a lack of knowledge about the role played by the state of siege in structuring the Republic in Brazil.

For the English consul Ernest Hambloch, who lived in Brazil in the first half of the 20th century, the 1891 Constitution granted a "private license" to Presidents that transformed them into true emperors. Hence the title of his work, *Sua Majestade, o Presidente do Brasil* (Thy Majesty, the President). This notion of hypertrophy of the Executive is shared by many more recent authors and was already criticized in Brazil at the time as a kind of permanence of the Moderating Power, an inheritance from the Empire. Noticing the recurrence of the state of siege in Brazil during the First Republic and the authority and freedom granted to the Executive in these periods of exception,

Hambloch said that "presidential heads of state may hesitate to go as far as Louis XIV, saying that they are the State. But what they could say, with perfect fairness, is that they represent the state of siege" (HAMBLOCH, 1981: 90).

In fact, the state of siege granted broad freedom of action to the Presidents of the Brazilian Republic. The institute's practice enabled political persecution, exiles and deaths, for example. In addition to the mechanisms already highlighted by historiography for maintaining oligarchic power in the First Republic (governors' policy, halt vote, colonelism, clientelism), the legal apparatus, made possible through the state of siege, reveals itself as a valuable tool for the which public power sought to ensure the nascent republican regime in the country and contain disputes over republican power. We maintain as a hypothesis that there was a instrumentalization of law in the First Republic, subjectively justifying the Executive's acts carried out in a state of siege. Sometimes it repressed the opposition, sometimes it repressed the people. Thus, the state of siege functioned as an escape valve between real Brazil and legal Brazil, impeding the political market by punishing the people and the opposition.

The state of siege fulfilled a historical function in Brazil of supporting the elites through the legal means of discretion, exercising its conservative and authoritarian influence. If there were two long institutionalized dictatorships in Brazil, with Getúlio Vargas (1937-1945) and the military (1964-1985), the liberal and democratic First Republic, which is still our most lasting republican experience, was deeply marked by authoritarianism made possible by a legal provision.

The state of siege and its recurrence are not a particularity of Brazil and the Republic. We believe, in fact, that in a broader context, authoritarianism found in the institute of the state of siege the way for its expression in the era of constitutionalism. This led Deputy Adolpho Bergamini to declare that "the state of siege is the last residue of absolutism in the life of democracies" (BRASIL, 1930: 3690).

Or, according to an Argentine publicist much cited in parliamentary debates at the time, Amâncio Alcorta, "originating from a time when governments recognized no other basis than force, the state of siege is contrary to the federal system, an ingenious invention of political science" (BARBOSA, 1947: 53). In this way, Brazil entered this process late, only at the end of the 19th century, when other countries had already experienced the institute in practice in various situations.

Once inserted in this context, the First Republic was a fertile field for the application of the state of siege. In the session on November 9, 1917, Rui Barbosa made the following assessment of the institute during the period:

> For some, it is a kind of dictatorship, with vague, indefinite, unlimitedly arbitrary responsibilities; for others, like here, from one of the seats in this House, it has already been argued, it is the eclipse of the constitutional regime; some define it as the general suspension of constitutional guarantees, many confuse it with martial law. No, Senators, the state of siege is neither dictatorship, nor constitutional eclipse, nor the general suspension of guarantees, nor martial law. The state of siege is purely and simply the suspension of the guarantees defined in Article 80 of the country's Constitution. Any and all acts that exceed these limits exceed the institution of the state of siege, as it is established among us. But all governments have exceeded, one after another, these limits, all governments have violated; everyone has contributed to this indecision from which, in the end, only today, above all, the jurisprudence of the courts of justice, fortunately headed in the constitutional direction, frees us (BARBOSA, 1999: 40-41).

Of all the voices of the Brazilian First Republic that rose against the discretion of the state of siege, it is undeniable that Rui Barbosa's actions were the most significant and forceful. First, by the institute's own drafter of the Constitution. Secondly, as he was an erudite jurist and was concerned about the matter, he studied similar provisions in other legislation and their respective analyses. Rui Barbosa's

outstanding work on the state of siege deserved international recognition. In the brief passage above, the renowned Brazilian politician and jurist gave his considerations about the use of the state of siege in the Brazilian republican regime according to what he had experienced in his more than 25 years in the Republic. Rui would not live to witness all the uses of the state of siege in the First Republic, but he already knew the Brazilian essence of the institute well.

The Brazilian state of siege did not have vague definitions, they were the broadest and most complete in South America when they were drawn up, 1890-1891. Within a regional panorama on the continent, the Constitution of Brazil adopted several provisions regarding the state of siege, placing it among the most advanced on the matter. At the end of the 19th century and the beginning of the Republic, South American neighbors had already experimented extensively with the state of siege, especially Chile and Argentina. So Rui Barbosa already knew its practical implications, seeking to make the state of siege an emergency resource that would not harm freedom.

However, Brazil's rulers in the First Republic used the state of siege to increase their powers, but not exactly because the laws allowed them. The Presidents of the nascent Republic instrumentalized constitutional law in order to promote specific actions, such as preventing opposition and social cleansing in the country's capital. Rui Barbosa was right when he said that all governments had exaggerated the definitions of the state of siege, hence his legal battle to put the effects of the institute back in its place. As a demonstration of this exorbitant instrumentalization of the state of siege, some data deserve to be highlighted about the First Republic.

In the 39 years the 1891 Constitution was in force, 44 decrees or laws were registered declaring a state of siege. In these occurrences, in only ten situations the state of siege was declared by the Legislature. In all of them, the measures came from requests from the President of the Republic, who, to enforce the law, did not declare

the state of siege while Congress was in operation. Therefore, on 34 occasions the Executive used the institute on its own. From the beginning, Deodoro da Fonseca's attitude was arbitrary, even dissolving Congress. In several other situations, the Executive took advantage of the Legislative's vacations, which lasted four months at the beginning of each year, to access the extreme resource. In most cases, the state of siege was extended with the consent or prior authorization of Congress.

The shortest duration of the state of siege of a decree in the First Republic occurred in 1892, during the government of Floriano Peixoto (1891-1894). Short on formality, its effects were very lasting. The practice of exiles, permitted by the Constitution, began, affecting political opponents. In this case, *deodorists*. The longest period foreseen in a decree occurred during the government of Wenceslau Brás (1914-1918), when he declared a state of siege for a period of 300 days, something that greatly exceeded constitutional provisions. But this was not the only case in which the deadline was too long, similar actions took place in decrees by Hermes da Fonseca (1910-1914), by Epitácio Pessoa (1919-1922) and became routine with Arthur Bernardes (1922-1926).

What can be attributed to Wenceslau Brás, however, is the practice of declaring a state of siege for a period that involved the government of his successor in the Presidency of the Republic. A pioneer in this modality, similar conduct was observed by all his successors until the end of the First Republic. Delfim Moreira governed under the state of siege declared by Brás. Arthur Bernardes inherited the exception from Epitácio Pessoa and imposed it at the beginning of Washington Luís' government.

Another curiosity is that few governments ended the state of siege before the deadline set by decree. Rodrigues Alves (1902-1906) ended the state of siege in the Federal District and in Niterói, in 1905. Hermes da Fonseca (1910-1914) ended the state of siege in Ceará, in

1914. Arthur Bernardes suspended the measure ahead of schedule in the Federal District and in Rio de Janeiro, in 1923, in Bahia, in 1924, in Paraná and Santa Catarina, in 1925, again in Bahia and Sergipe, in 1925, in Maranhão and Ceará, in 1926. And Washington Luís (1926-1930) suspended the siege in Santa Catarina, in Rio Grande do Sul, in Mato Grosso and Goiás, in 1927.

In the case of the sum of the time spent under an exception regime for each ruler, Deodoro da Fonseca (1889-1891) was the one who used the resource for the shortest time, 20 days. On the other hand, the one who used the resource the longest was Arthur Bernardes, totaling 1,294 days of his government under the state of siege. Three times more than second place, Wenceslau Brás' 401 days. The exception in the Bernardes government was the absence of a state of siege. Such was its presence that Bernardes became the "President of the Siege" in the periodicals of the time. However, a greater number of days in a state of siege did not always correspond to a greater degree of repression, but Arthur Bernardes famously managed to reconcile both things. Taking all occurrences together, the state of siege was in force for 2,845 days in the First Republic. A combined period that corresponds to seven years, nine months and 20 days of the 39 years of the republican constitutional regime. In other words, approximately 20% of the First Republic was in a state of exception.

Territorially, the siege began restricted to the Federal Capital and Niterói, with Deodoro da Fonseca in 1891, and ended up covering the entire country, with Washington Luís in 1930. Before the last President of the First Republic, the largest territorial extension of the state of siege had occurred with Arthur Bernardes, in 1925, covering ten states plus the Federal District. Between the first and last use of the measure, a total of 15 of the 21 states were subjected to the extreme appeal (Amazonas, Bahia, Ceará, Goiás, Mato Grosso, Minas Gerais, Pará, Paraíba, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, Santa Catarina, São Paulo and Sergipe), plus the Federal District.

On some occasions, a state of siege was declared for specific cities, five of them: Niterói, Paraíba (Capital of Paraíba), Petrópolis, Recife and Rio de Janeiro (Federal Capital).

Mapping the division of groups around the issue of the state of siege is not a simple and straightforward task. The position, in general, reflected particular conditions between government supporters and opponents. This is because the institute was a relevant tool at the time to dominate or overcome the opposing group. As Hélio Silva interprets, the great struggles of the First Republic were competitions to take power and not a divergence of ideas, antagonisms of programs or discussions of administrative plans. It was a small group splitting the majority when choosing a ruler, with the differences being purely circumstantial, as they represented the same oligarchic system and only disputed the advantages of power (SILVA, 2004: 102). In this way, positions tended to change over the years and mandates. Epitácio Pessoa, for example, was an avid questioner of Floriano Peixoto's state of siege. However, he used the measure in his government against the military. The conservative profile was accentuated when the government group wanted to justify the attitudes of the Executive that was on its side. On the other hand, the opposition condemned despotism and the violation of laws. An opponent of the state of siege that lasted throughout the First Republic, even though he voted a few times for its concession, was Rui Barbosa. The author, unhappy with the effects of his creation on the regime, was a constant actor against his will. Furthermore, Senators Nilo Peçanha, Lauro Sodré, Leopoldo Bulhões, Antonio Muniz and Moniz Sodré and Deputy Adolpho Bergamini gained prominence as contesters on different occasions.

With regard to proposals for regulating the state of siege, parliamentarians presented more projects safeguarding constitutional guarantees and parliamentary immunities, as they were normally in the opposition and knew that they would be subject to the discretion

of the Executive without rules to limit their action. This explains, to a large extent, why so many projects were blocked, as these proposals aimed to limit the Executive's scope of action. Thus, the government officials blocked the continued liberal attacks or even did not even put them on the agenda. The institute followed the precepts of the 1891 Constitution without undergoing any type of legal change during the period.

Regarding exiles, the North of the country received preference from Presidents to be the destination for those exiled. With the exception of Fernando de Noronha, in the Northeast, which received some exiles from the Prudente de Morais (1894-1898) state of siege in 1897, the other victims of exile were sent to Rio Branco, Cucui, Tabatinga, Santo Antônio do Rio Madeira and Clevelândia do Norte. Locations in territories of Amazonas and Acre. Just as the locations of exiles changed, their victims also changed. Initially applied against political opponents by Floriano Peixoto and Prudente de Morais, exile was heavily used against the most needy and unwanted population of the Federal Capital.

Rodrigues Alves, Hermes da Fonseca and Arthur Bernardes turned exile in a state of siege into a tool for social cleansing in Rio de Janeiro. If exiled politicians returned to the capital with more political capital and even more assets, the most humble and almost anonymous individuals were condemned to die in ostracism. Without money to return and without any legal support, these people succumbed to isolation and diseases in the north of the country, in regions full of natural dangers and human violence. This happened when they arrived at their destination, as several died on board the ships that transported them, either due to the terrible conditions to which they were subjected or through direct executions.

Among all the states of siege of the First Republic, no deaths were recorded during the institute's period only in the governments of Deodoro da Fonseca and Wenceslau Brás. In all other situations,

there were fatal victims. During Floriano Peixoto's period of state of siege, it is estimated that there were around ten thousand deaths, due to the context of civil war that afflicted the country. In the state of siege in Prudente de Morais, only one death was recorded in the context of the measure, that of Marcelino Bispo. During the Rodrigues Alves siege or due to its effects, hundreds of people lost their lives. Just like the Hermes da Fonseca state of siege. Numbers that grew by hundreds more during the governments of Epitácio Pessoa and Arthur Bernardes. Finally, Washington Luís' state of siege occurred during a so-called revolutionary uprising that shed blood in the country, causing dozens or hundreds of deaths. It is impossible to specify a number of fatal victims linked to the context of the state of siege or its effects because of the various related events, because of the imprecision of their names and because of the little political, economic and social relevance that many of them represented, being anonymous to the story. We therefore estimate that the state of siege resulted in the deaths of around 15 thousand people during the First Republic. Among these victims are soldiers, civilians who took up arms, undesirable people such as the unemployed, vagrants, capoeiras, prostitutes, sailors, gunmen and lieutenants. It should be noted, however, that no renowned politician or personality was a victim of the state of siege in the First Republic. Which perhaps would have increased pressure against the use of the institute. In practice, it was an authoritarian resource against lower, middle and emerging layers of the population, which did not match the imagined republican morality and which, perhaps, could affect the conservative status quo of that society.

For those who did not meet death as a result of the state of siege, they often faced long-lasting detentions. The number of prisoners under exceptional conditions during the period can be estimated at a few thousand more. In this case, opposition politicians and journalists were frequent victims. Their names were too well known and the

arrests already had enough negative repercussions for governments. Maybe that's why they weren't executed equally. But these individuals also suffered from various violations of their rights and all declarations of siege by the First Republic suspended some constitutional guarantee. Rui Barbosa fought as long as he lived to reverse the lasting effects of the siege. Political and press opponents were persecuted and imprisoned for months, several times exceeding the duration of the state of siege. Thus, exceptional measures to restore order ended up becoming a kind of condemnation, for as long as their effects lasted.

Through the state of siege, the rulers of the First Republic managed to block the onslaught of political actors and groups that tried to take or access power and shield their own images in the press. By the way, the press was one of the biggest victims of the period, as censorship was also a recurring practice. Hermes da Fonseca was the one who began a more severe persecution of journalists, but Epitácio Pessoa and Arthur Bernardes took this persecution to another level, with the newspapers most harmed by the effects of the siege in the First Republic being *O Imparcial* and *O Correio da Manhã*, which had its owners and journalists detained for many months and their assets attacked several times. The press was controlled to contain the flow of information and opinions contrary to republican power during the First Republic (ALVES, 1997: 29). On several occasions, the Federal Supreme Court considered that the freedom of publication and circulation of newspapers was one of the guarantees that the Executive was responsible for suspending during the state of siege. A 1930 ruling stated that the effects of the siege suspended all constitutional guarantees, including freedom of the press (RODRIGUES, 1991: 198).

At the end of Rui Barbosa's quote, there is a comment praising the actions of justice. It was Rui Barbosa himself who called on the Judiciary to decide on matters of the state of siege in 1892, with habeas corpus nº 300. Defeated on that occasion, Rui saw his theses being gradually adopted in the First Republic, trying to limit the effects of the

state of siege and the scope of the Executive's action in the emergency regime. Still, these achievements were full of ups and downs. There was no linear growth in achievements or constant evolution. The Federal Supreme Court has often exempted itself from judging issues pertinent to the state of siege, declaring itself incompetent over political matters, which would be the responsibility of Congress. In other cases, however, decisions were made in defense of individual freedoms, highlighting the work of Minister Pedro Lessa, who always granted habeas corpus to protect individual rights during the state of siege. Lessa was the magistrate who supported the re-examination of the constitutionality of the site to verify whether its decree had complied with constitutional assumptions (NOGUEIRA, 1999: 161). Conservatives maintained that the Federal Supreme Court should not intervene in political issues, such as elections, federal interventions and states of siege, as they would be the exclusive responsibility of Congress. The risk of politicking in the Judiciary was something that caused the disapproval of the conservatives who established themselves in power under Floriano Peixoto. In turn, liberals, such as Rui Barbosa, defended the role of the Federal Supreme Court as guardian of the Constitution, ensuring rights in political issues such as these (LYNCH, 2014: 137-154).

Throughout the First Republic, there was a discussion about whether or not the state of siege suspended habeas corpus, in a similar way to what happened with martial law. The constitutional remedy began to be used in 1892, as already seen, and protected rights and guarantees throughout much of the regime, contributing to the notion of the Brazilian doctrine of habeas corpus. However, the constitutional reform of 1926 caused a violent rupture with this doctrine, limiting the measure to freedom of movement, in addition to prohibiting requests to the Judiciary during states of siege.

During the governments of Floriano Peixoto, Prudente de Morais and Rodrigues Alves, the institute served to consolidate the regime and establish the current power in the nascent Republic against

excluded groups that wanted the restoration of the monarchy or the imposition of more specific republican projects. Floriano repressed the *deodorists* and the monarchists. Prudente repressed the jacobins and Rodrigues Alves repressed the military coup plotters who wanted to install a positivist dictatorship in the country.

In the last decade of the First Republic, governments faced challenges from emerging groups dissatisfied with the regime. The oligarchic system no longer knew how to survive the expansion of political society and integrate new actors (ENDERS, 1993: 453), Epitácio Pessoa and Arthur Bernardes used all possible authority to repress the lieutenants, who wanted to renew the Republic by moralizing political practices full of vices. One of these vices, by the way, would trigger the final stage of the regime, breaking any imagined stability in the oligarchic pact. The appointment of Júlio Prestes from São Paulo by Washington Luís to be his successor intensified a reorganization of political forces at the end of such a heated decade. Dissatisfied states joined together with the previously embattled lieutenants to conspire and act to seize power. The state of siege that barred the lieutenants in previous governments in the 1920s was not able, this time, to hold them back. The so-called revolutionary movement of 1930 ended cycles that year, that of the First Republic and that of the state of siege.

Regarding the institute, as well as its pioneering use in the Brazilian republican regime, it was a failure. The only two occasions in which the state of siege resulted in the defeat of the Executive were in 1891, overthrowing Deodoro da Fonseca, and in 1930, overthrowing Washington Luís. Both in around 20 days. In such a way that the state of siege reveals a tension between authoritarianism and democracy in the First Republic. The liberal-democratic system of the 1891 Constitution found in the institute a force of action that hypertrophied the Executive and restricted debate and the freedom of political

opponents. Therefore, the state of siege served the groups that were in power, who took advantage of it to maintain their powers.

In the middle of these two great moments, there was a third phase. When Hermes da Fonseca used the state of siege to repress poor sailors and to secure his supporters in state powers. And when Brazil found itself involved in the events of the First World War, with Wenceslau Brás. As the country was very far from the theater of operations of the armed conflict, the siege had repercussions, at that time, on the various strikes that were spreading. In practice, its effect is more against internal than external adversaries. Still, it is worth highlighting that the state of siege was never motivated against union movements, although they were victims of its effects.

If the Constitution of the First Republic allowed access to a state of siege in cases of internal commotion and external threat, the institute was used, in general, against the threat of deposition of the President of the Republic. This was at the essence of the applications by Deodoro da Fonseca, Floriano Peixoto, Prudente de Morais, Rodrigues Alves, Hermes da Fonseca, Epitácio Pessoa, Arthur Bernardes and Washington Luís. Only Wenceslau Brás did not face blunt questions regarding his government or to his position. Everyone else, each in their own way, feared seeing their governments end prematurely. In the case of Deodoro, the state of siege reproduced this in reverse, as it encouraged his downfall. His relative, Hermes da Fonseca, feared the growing disapproval of his government, especially through the press. The others all feared direct actions to take power.

So what can we say about the Presidents who did not use the state of siege in the First Republic? Ernest Hambloch attributes the fact that there was no state of siege during the Campos Sales government (1898-1902) to the governors' policy (HAMBLOCH, 1981: 101). This provided the support of the Presidents of the states for the Federal Government, which would guarantee the dominance of certain oligarchies in the states, barring the opposition. This

would have supposedly stabilized the Republic. In such a way that the state of siege would return for a short period in 1904 and then only in 1910, this first decade of the 20th century being the mildest in the use of the institute. However, there was no such stabilization and the opposition, naturally, did not disappear completely. Cláudia Viscardi criticizes the idea of the effectiveness of the governors' policies, arguing that much of this stabilizing character is the result of the author's own construction and which was endorsed by later scholars. Thus, although it had some immediate effects, its effects would have been limited for the period. With a new relationship established with the states, Campos Sales transferred the disputes that previously occurred in Congress regarding regional elections to the federation units. By gaining the support of local elites, the Presidency would achieve more legislative stability and autonomy, which, however, did not remain in force for that long. The governors' policy did not have definitive effect for the First Republic (VISCARDI, 2012: 34-37).

In his inauguration speech, Campos Sales warned that he would not hesitate in preventive action against disturbing elements (BONFIM, 2006: 63). In 1899, his government demonstrated that it maintained its focus on the country's economic recovery, withdrawing from the political struggles that marked the previous years of the First Republic. As a result, those in control of the situations in the states felt safer, leaving disputes restricted to their borders, resulting in more calm in Congress (GUANABARA, 2002: 76). It's not that Campos Sales hasn't experienced friction. There was even a coachmen's strike that triggered an atmosphere of rumors about a revolt linked to monarchists with a set date, established program and defined leaders. While everyone waited for another state of siege, Campos Sales just ordered the police to open an investigation. Later, the new threat of a monarchist restoration resurfaced, but Sales maintained the same serenity and confidence as before (GUANABARA, 2002: 88-95).

The President also did not stop using brutality. In 1899, a heterogeneous articulation involving military personnel, former participants in the Navy Revolt (1892-1895), involved in the attempt to assassinate Prudente de Morais and monarchists aimed to overthrow Campos Sales. However, the conspiracy was discovered and the police aborted the movement by making arrests in March of that year. Rui Barbosa denounced the existence of an undeclared real state of siege, a "white terror", in which there were arbitrary arrests and home invasions (SAMET, 2011: 244). On one occasion, he said: "if you need a state of siege, have the frank courage to proclaim it. If you don't have this need, as we are sure you don't, avoid the evasion of using it without declaring it" (MANGABEIRA, 1999).

In the following year's presidential message, Campos Sales recalled the conspiracy and highlighted that he did not feel the need for extraordinary resources, as the threat would not have gone beyond the common domains of the police, responsible for conducting the investigation (BRASIL, 1900: 13-14). And, in his last message to Congress, the first President that did not use the state of siege said:

> I consider myself happy that it is possible for me, despite these very close precedents, to say now, upon reaching the end of my Government, that I did not feel the need to apply the extreme remedy of a state of siege. I did not suspend a single guarantee, not a single freedom was violated. The alarm in the regions of power disappeared and, consequently, the disturbing regime of readiness ceased. The cries that were unjustly raised against authority were formally contradicted, first of all in the facts themselves, and then in the calm firmness of my tolerant conduct. We have never, however, gone through a phase in which the expansions of the press and the tribune would have been freer, more unlimited, more vehement and perhaps more seditious (BRASIL, 1902: 35).

Campos Sales had the opportunity to use extraordinary measures like his predecessors, but it seems to us that the President preferred

to avoid a state of siege so as not to compromise his project for the country's economic recovery and, at the same time, he was already committed to governors' policy to reduce conflicts that threatened the federal sphere.

Afonso Pena's government (1906-1910) did not have the same commitment to austerity. Pena took over the country with the most balanced accounts and dedicated his mandate to the execution of major national works. Brazil had once again gained the trust of international faiths for new loans. Despite the natural existence of a political opposition during his presidential term, there were no extreme demonstrations like the previous ones by the jacobins and *florianists*. Thus, the President was able to develop works, reorganize the Army and regulate technical education. At the end of his term there was an unprecedented electoral success campaign fought between Hermes da Fonseca and Rui Barbosa, but Afonso Pena did not reach the end of his four-year term alive. Politicians at the time attributed "political trauma" as the cause of death, after a series of strategic political errors and sinking into anguish over the loss of their allies and supporters. As the President passed away in 1909, the remainder of the mandate was held by Nilo Peçanha. He had just over a year of administration of the country, carrying out his predecessor's projects and trying not to get too involved in the succession process. Thus, we believe that the non-use of the state of siege in the Afonso Pena/Nilo Peçanha four-year period was a result of the positive economic moment, visible in the expansion of infrastructure and in the fragmentation that had already occurred among the most radical wings of the Republicans, who had been frustrated in their attempts previous coups.

Finally, even though Delfim Moreira did not declare a state of siege, he lived with the measure inherited from Wenceslau Brás at the beginning of his brief government. A case that distinguishes him from Campos Sales and Afonso Pena/Nilo Peçanha. Delfim Moreira

became President as a result of the death of Rodrigues Alves, elected a second time to the position in 1918. The Vice President assumed the Presidency already within the context of calling new elections, as determined by the Constitution in the event of a vacancy in the main post. Delfim Moreira had neither the political base nor the health to support himself in government, as Floriano Peixoto had done. The current state of siege would only end on December 31, 1918 and the acting President would take advantage of the exception to repress labor movements, ordering the closure of all unions in Niterói and Rio de Janeiro three days after his inauguration. He faced social problems with the large number of general strikes and extinguished the General Union of Workers of Rio de Janeiro, which he considered harmful to public order and made up of members agitating for anarchy, the majority of whom were foreigners. In his only presidential message to Congress, in 1919, he confirmed that, during the state of siege, censorship of the press was established, as well as postal and telegraphic censorship, even though it was restricted to international affairs and military measures. Remembering that this state of siege was part of the context of the First World War. Delfim Moreira stated that "criticism of administrative acts was permitted, as long as it did not degenerate into incitement to strike or disorder" (BRASIL, 1919: 22).

What about the major national events of the First Republic that did not receive a state of siege? This is the case of Canudos (1896-1897) and the Contestado (1912-1916) Wars, which are notorious occasions of conflict in the period. Canudos, in 1897, was fought by Prudente de Morais with military force. Antônio Conselheiro's followers were labeled monarchists, but they did not have the strength and support to promote a restoration or overthrow the ruler. It was a movement made up of popular, simple people, against whom force was used, with whatever violence was necessary. It did not cause a direct threat to the President in his role. As we have shown,

the state of siege was used against direct threats to the Presidency from political groups, suspending or ignoring parliamentary immunities and persecuting these opponents to remove them from the scene. In the case of the Contestado War (1912-1916), the conflict was linked to territorial disputes between the states of Santa Catarina and Paraná. Along the way, the *caboclos* were pushed into an armed conflict and monarchist ideas were also attributed to them. As Rogério Rosa Rodrigues explains, Hermes da Fonseca wanted to repeat in the south of the country the measure adopted in Ceará of annulling the political powers of state presidents and appointing Setembrino de Carvalho as federal intervener. However, he declined the invitation and frustrated the President's plans for a state of siege in the region. Setembrino believed in exempting his and the Army's actions from political partisanship, placing land forces above party interests, after his negative experience with the oligarchies in the Northeast. Therefore, his approach concealed political intervention and maintained a strictly military character. In the words of Rodrigues, "the idea was to make politics bow to the Army, and not for the Army to be confused with politics" (RODRIGUES, 2008: 55-56). Setembrino de Carvalho managed to convince President Hermes da Fonseca and, thus, the state of siege was not used in his government. The Army promoted exemplary war action for the modernizing ideals it proposed.

After the First Republic, the state of siege would be applied again in Brazil in 1935, when Getúlio Vargas benefited from the constitutional institute to repress the communists preparing his escalation to the dictatorship of the Estado Novo (1937-1945), and in 1955, when the the measure was used to ensure the legality of the inauguration of the elected President Juscelino Kubitscheck. Considered on some other occasions, it was not used more than that in the Brazilian Republic. This demonstrates, once again, the relevance of the measure for the period covered in this chapter.

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TERRORIST STATE IN LATIN AMERICA

Lisandro Cañón

State Terrorism

The era of state terrorism left in its wake its crimes, its concentration camps and the disappeared. This was the toll of dictatorships that, in modifying state structure, implemented a systematic plan of extermination and annihilation. The scope of the power to 'disappear', which was exercised in different countries of the Americas, is a phenomenon upon which one should never stop reflecting. In this regard, numerous studies have thoroughly analysed some of its effects. We ourselves have dedicated some of our research to this topic.

However, here we wish to adopt a different approach. The first step will be an analysis of the roots of state terrorism, to restore it to the historical framework in which it developed. That is to say, we will place it in the global context of the counterrevolutionary interventions that took place after World War II. Although each one of these interventions had their own differences, many of them can be understood as expressions of the state of exception, as defined by Giorgio Agamben (2004). But a clarification is necessary; in these interventions, we find a distinctive feature, which is the ruling classes' always latent and, now, renewed fear of a communist revolution.

Before state terrorism was a reality in the Americas, other forms of the state of exception existed in Europe: Francoism, Nazism, Fascism, Salazarism. All these experiences, as modes of domination[144], which may or may not have embodied the symbol of radical oppression, contribute to defining the image of the problem. However, our purpose is not to inventory all the processes of establishing states of exception, but rather to historicise the process that, from the second half of the 20th century, took place on the American continent.

This decision determines others. In the first place, there is the consideration of state terrorism as an extreme form of the capitalist state, a particular form of the state of exception, which corresponds to a type of crisis that Gramsci calls: crisis of hegemony[145]. At the same time, such crises and the respective forms of state of exception are phenomena that cannot be isolated from imperialism. Indeed, although the countries of the Americas were not colonies, their history bore the fate of dependency. In other words, countries that were sovereign and politically independent in principle were caught in the economic, military and diplomatic networks of dependency on a metropolis. A distinctive feature in this relationship is the transnational character of the ruling classes, historically allied with the central capitalist powers. This condition made it difficult for them, during the second half of the 20th century, to maintain mono-classist control of

144. Gramsci, when conceptualising the full state, proposed a criterion of methodological distinction in how the supremacy of a social group manifests itself: that is, a distinction between dominance and hegemony. The former is expressed in ways that are directly political and, in times of crisis, through direct or effective coercion that tends to liquidate or subjugate adversary social groups. For the notion of hegemony, see quote number 5.

145. We adopt the concept of organic crisis in the sense of the rupture of a historical bloc: that is, the loss of the capacity of the ruling classes of a society to be accepted as such (hegemonic). Gramsci says: 'The old intellectual and moral leaders feel the ground slipping from under their feet, … This is the reason for their reactionary and conservative tendencies; for the particular form of civilisation, culture and morality which they represented is decomposing, and they loudly proclaim the death of all civilisation, all culture, all morality; they call for repressive measures by the State'. (Gramsci, 1973, p. 273).

society and to establish lasting political hegemony. Undoubtedly, their inability to ensure the conditions of reproduction and institutionalisation of the socio-political order is linked to the ascending process of social struggles and conquests. And if this is true, then no less so is the validity of the idea of revolution, which permeated all instances of social life, from politics to art, and from popular culture to family habits and codes of love.

Another decision: it is essential to recover the centrality of the Truman Doctrine (1947). This, which guided US foreign policy for over forty years, not only entailed the formal acceptance of the United States as a hegemonic power and its will to become the world police but also a declaration of war against communism. However, this war was carefully protected behind a defensive argument; as an indication of this, in 1947 the War Department became the Department of Defense. From that moment, each time a US president presented his budgets, marked by an increase in the defence category,[146] he affirmed that 'in the face of the threat of aggression' every dollar invested contributed to reinforcing the defences of 'free nations' (a term used to refer to capitalist social formations, regardless of the political regime that governed them). In the 1970s, the Nixon administration would be the one to recognise – as a consequence of the Vietnam War, Japanese and European economic competition and the oil crisis – that anti-communism could not be the only objective of US foreign policy. Of course, this policy was about more than just anti-communism, and it often corresponded with the interests of the military-industrial complex and its main beneficiary: financial capital.

Final decision: in analysing these problems, it seemed urgent to us to remove the history of state terrorism from the ghetto into

146. The US budget for national defence grew from $11.9 million in 1949 to $52.8 million in 1963. After this last date, the budget continued to increase, although it becomes difficult to monitor the increase once the US intervention in Vietnam begins.

which academia has enclosed it: that of political violence. In this sense, the works of Walter Benjamin undoubtedly mortally wound, if the expression is permitted, the efforts of violence experts and peace experts, as well as violentology itself. Violentology, entangled in the study of two different types of violence in opposition, places the establishment of a system of state terrorism with the actions of the armed opposition in the same register, which seems to indicate that its formulations disregard Benjamin's ethical-historical studies.

For Benjamin (1992), the law, and the state that is expressed within, is imposed by and from violence, underlining the existence of a permanent state of exception for the oppressed. Even in his reflections on the revolutionary general strike, he emphasised that when the action expresses 'the decision to resume work completely modified and not forced by the state', this prevents it from being affiliated with violence (BENJAMIN, 2006). In this way, Benjamin invites us to think about the forms that the capitalist state can acquire, especially in relation to scientific activity for the critical analysis of social problems. However, majority trends lean in another direction; for example, one of the greatest exponents of American academic thought, Richard Bernstein, in wanting to equate the unequal, establishes a comparative simile between George Bush's pre-emptive wars and the struggle for national liberation in Algeria (BERNESTEIN, 2015).

Such premises account for the structure of this essay, where we will revisit the counterrevolutionary conception that colonised the American states, without losing sight of the fact that this colonisation occurred simultaneously with another process: the development of an increasingly favourable sensitivity to human rights. This was not only because of the Universal Declaration (1948) but also because of the existence of social movements that worked for the recognition of such rights, for their implementation and protection. Understanding this is key because state terrorism was the most serious, systematic and massive violation of human rights in the recent

history of the Americas. For this reason, it is essential not to confuse the question of the beginnings of colonisation with that of the origins of state terrorism.

Part One

The history of state terrorism does not begin with the coups that led to its establishment. To find the deep, structural roots that allow us to understand it, we must observe the way in which the countries of the Americas were inserted into the world economy; the transnational character of the ruling classes; the development of informal US imperialism in the region; and that many people in these countries experienced their history as that of a struggle against imperialism. Let us review some of these aspects.

When the 19th century was about to end, the process of structuring the nation states, which would shape the map of the American continent, was practically complete. Meanwhile, the primary export model, with the exception of Canada and the United States, which followed different paths, directed the consolidation of capitalism in the Americas. These processes did not entail the rupture of certain economic ties that perpetuated the old colonial dependency in another way and for the benefit of the metropolises and their local partners. This fact defined not only the possibilities and limits of economic growth but also the logic of capitalist production; the formation of new categories and social groups with differentiated interests; and the political model, which was defined by the hegemony of the oligarchies. Whether landowners or miners, depending on the production specialisation of each country, these were the main beneficiaries of a model characterised by a period of strong economic expansion. Although this generated a transformative dynamic, it did not displace the export sector as the axis of growth. While the interests of the different factions of the ruling classes (oligarchies and the bourgeoisie

– industrial, commercial and banking) could be contradictory, this did not lead them to confront each other as adversaries[147].

However, an ever-increasing number of organised peasants and workers did confront the established powers. Without wanting to ignore the differences between the different organisations, we can say that some demanded the opening of the political system and greater participation as well as social and labour improvements; and others aspired to a total change in structures. The oligarchic regimes tackled social conflict by intensifying repressive measures, incorporating new legislation for social control and widening the scope of the education system. Nonetheless, this did not dispel the tensions, which were exacerbated with the crisis of the 1930s. This general crisis of capitalism was a great shock for the export model and oligarchic control.

The crisis was more than an economic event; it created a situation in which the hegemony of the oligarchy began to disintegrate[148]. The

147. Both Gramsci and Poulantzas pointed out the unsuitability of an instrumentalist vision that puts classes into a dualistic, dominant-dominated confrontation. Both thinkers observe the coexistence of various classes and class factions and, therefore, of various dominant classes and factions in which political-ideological determinations are as important as economic ones; in other words, within a class there are autonomous factions but not independent ones. In a context as complex as that of the factions throughout the ruling classes (with their respective economic, social and cultural interests), and by virtue of the divisions and contradictions in their own core and the conflicts they may have with each other, as well as the confrontation with their social antagonists, they need political and discursive mechanisms of legitimation.

148. Here we use the Gramscian notion of hegemony, understanding it as: the political resolution of economic needs (always keeping in mind that it is not possible to present and expose all fluctuations in politics and ideology as an immediate expression of structure), through the dynamic process of incorporating values, ideas, beliefs and practices into a social order; as part of the same process, and without being able to be separated from it, emerge resistance and questioning (organised or spontaneous); finally, the effectiveness of the process entails symbolic realisation. The latter is associated with the expansive capacity of hegemony, since it is not limited only to political leadership (which could be achieved by increasing coercion to silence resistance), but it is also part of the different ideological and cultural apparatuses. If the ruling class succeeded in creating a common sense that legitimises its status as leader in the social system, imposing itself on dominated groups on the basis

export model itself went into crisis, and its consequences reached the state itself, whose opening was necessary to allow broader participation and greater institutional autonomy. In this context, the oligarchies adopted a defensive strategy to keep the economy linked to the foreign sector, awaiting the reactivation of the international market. Meanwhile, groups connected to the domestic market saw that the replacement of importation, supported by protectionist measures, could allow industrialisation to take off.

Thus, as an undesired result of the crisis, political movements with pluri-social proposals emerged. If, on the one hand, they proposed moving the role of revitalising the economy and expanding the domestic market to other productive sectors, then on the other hand, they took up some of the traditional claims of the subaltern classes. Their governments embodied an industrialisation project led by the state that, allocating the resources released by the contraction of imports, actively intervened to readjust the economic structure and redirected public spending to stimulate development and the domestic market. In other words, industrialisation in this case owes little to the national business world.

Their proposals to solve the problems of the previous period led them to direct some of the most important social innovations of the 20th century. This did not mean transforming the capitalist system, but making it more rational: in short, strengthening it. Industrialisation by replacing imports seemed to be heading towards a democratisation of capitalism, embodied by the social welfare state, which involved a process of negotiating integration of the working class into the state. The state came to be considered as the essential agent in satisfying their demands and as a space for negotiation. This process meant referring

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of an ideology that justifies and naturalises domination, it would achieve what we could call real hegemony, the ability to direct in an organic and non-administrative and bureaucratic way all the apparatuses of hegemony (BUCI-GLUCSMANN, 1978, p. 52-64).

to the state as guarantor not only of the model as a whole but also of political expression in favour of social protection. For their part, the ruling classes expressed their demands with all the more force as their economic power increased and their capacity to use the state for their defence grew. Thus, one of the most transcendent features of this time, with respect to the organisation of relations between state and society, is the successful social institutionalisation through politics that, through the widespread presence of the institutions of political society in civil society, reinvigorated and directed social and political practices in a climate of general consensus.[149]

It is true that the regimes that promoted industrialisation met some of the demands of the subaltern classes and implemented universalist social policies, but it is also true that the hegemony of the ruling classes was never called into question. However, and despite the reformist moderation of many governments, and the fact that they did not renounce traditional repressive methods, a feeling of nascent and irremediable concern was emerging due to the use of a resource, until then neglected, of incredible latent power: social justice. The advances of mass democracy awoke the greatest fears of the ruling classes, which, through the yearning language of their intellectuals, manifested their dread of social overflow: 'the risk of being overcome by the revolutionary and Marxist left' (AMADEO, 1954, p. 132). Their pressure for greater control would not only weaken governments but would destroy the very foundations of the regimes.

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149. For this characterisation, we start from the Gramscian conceptions of 'state = political society + civil society, that is, hegemony armoured with coercion'. Where, political society is identified with the devices of the state system used to hold a legal monopoly of repression and violence, under the control of institutions of coercion (bureaucratic groups linked to the application of laws, armed forces and police). Civil society, for its part, encompasses the institutions responsible for developing and disseminating symbolic values and ideologies: that is, the apparatus of hegemony, including the education system, the church, political parties, professional organisations, unions, communication media and scientific and artistic institutions, among others (GRAMSCI, 1977, p. 291).

However, in the 1950s, the first symptoms of the following economic period appeared, characterised by slow growth and deterioration in terms of trade. In the countries that pioneered the replacement of imports through industrialisation – Argentina, Brazil, Chile, Mexico and Uruguay – the limitations of the model as a long-term strategy started to become evident. The model had not succeeded in lowering the degree of importation, and growing import needs were satisfied not with domestic savings but with external capital flows and exports of primary goods. In other words, industrialisation as a substitute for importation was not at all able to overcome foreign dependency. On the contrary, within a model characterised by the participation of national capital subjected to patterns of technological dependence and foreign control of primary sectors of exportation, technical and financial assistance from external sources accentuated subordination.

Despite the fact that the US trade and aid policy was an obstacle to industrial diversification, which would enable American countries to accelerate development, their governments continued to encourage it. Thus, in mid-1958, the then president of Brazil, Juscelino Kubitschek (1956-1961), proposed to the US president, Eisenhower (1953-1961), a new hemispheric policy, known as Operation Pan America. According to its own proponent, the policy should be understood as 'a corollary of the general strategy of the West, and among its fundamental purposes the following are particularly outstanding: preservation of the democratic system, based on political and religious freedom and on respect for private ownership and free enterprise' (KUBISTCHEK, 1959, p. 86). By August 1958, all the countries of the continent were debating the *Aide-Mémoire*: Programme for the Economic Development of the Continent. The hopes of the Operation's planners were based on the belief that there was a progressive capitalist alternative to communist industrialisation. The *Aide-Mémoire* synthesised that hope in the language of the Cold War:

> a new orientation of continental politics in order to put Latin America through a process of total revaluation, in a position to participate in the defence of the West … attempting first, to demonstrate that populations submerged in misery, disease, ignorance, are a dead weight for the Western world and are subject to anti-democratic infiltrations (KUBISTCHEK, 1958).

That was the proposition that served as the basic justification for the Act of Bogotá (1960), that is to say, overcoming underdevelopment should allow for the erection of barriers against the communist revolution: 'recognizing that the preservation and strengthening of free and democratic institutions in the American republics requires the acceleration of social and economic progress in Latin America adequate to meet the legitimate aspirations of the peoples of the Americas' (ACTA DE BOGOTA, 1961, p. 168). Other possible solutions to the situation of underdevelopment and dependency seemed far off – or perhaps not so much? The Bandung Conference (1955) proposed an alternative. But this was, in the eyes of the ruling classes, the beginning of a ploy to fence in the West, devoted to the abolition of the Christian family, the homeland, nationality and private property.

The variant proposed by the Act deepened the influence of the United States, which allocated $500 million to technical assistance and loans. This not only saddled capital and the American countries with a heavy debt, but also enabled interference from credit agencies and benefitted the penetration of foreign capital. National industrialisation, based on a mix of private and public capital and regulation, was moving towards a growing concentration of power in transnational organisations and companies. Little by little, the multi-class project was abandoned, and the state became engaged in another, which only expressed the interests of the ruling classes. This was but a symptom of the exhaustion of the ruling classes as such, and of their weariness with attempts to maintain their hegemony.

Under the Kennedy administration (1961-1963), and after the triumph of the Cuban Revolution, Operation Pan America was replaced by the Alliance for Progress (1961). This programme more clearly justified US penetration policies under revolution-counterrevolution logic. President Kennedy invited the ruling classes to 'lead the fight for those basic reforms which alone can preserve the fabric of their societies. Those who make peaceful revolution impossible will make violent revolution inevitable' (KENNEDY, 1962, p. 41). Following a similar line were the words of Teodoro Moscoso, director for Latin America of the Administration for International Development: '[The Alliance] deserves the support of the privileged, because it is an appeal … to their sense of self-defence ... they must choose between supporting the objectives of the Alliance or exposing themselves to a destructive Castro-type revolution' (MOSCOSO, 1962, p. 35).

Undoubtedly, the important point is that at the moment when the United States intends to increase its control over the American countries, the ruling classes of these countries are in the process of proposing a thorough revision of the patterns of political organisation of their societies, a restructuring of dependent capitalism. It was a structural change in the functioning of the economy, replacing industrialisation with a new highly diversified primary export model.

In line with this idea is its socio-political counterpart and within it (containing it), the discursive articulation of a hegemony that would seal the return to redistributionist proposals, typical of the industrialist period. Here, the relevant role of the organic intellectuals – civil, ecclesiastical, military – of the ruling classes appears. They were the indispensable authors of the counterrevolutionary discursive-ideological phenomenon that shaped the ways of seeing, being and feeling social life since the middle of the 20th century in the Americas. They not only produced discursive practices but also represented specific social interests, weaving and interconnecting the political and cultural tendencies of different actors involved

in the development of a new political order, not of change but of reaction. It was a project that brought together the most reactionary sectors of the Catholic Church; of the armed forces; of the industrial, commercial and banking bourgeoisie; and the oligarchy. This nucleus of power flatly rejected any secular ideological perspective: atheistic liberalism, anarchism, socialism and, very especially, communism (CAÑÓN, 2018).

One space where this can be observed is the Inter-American Confederation for Continentental Defense. Created in 1954, this confederation joined the World Anti-Communist League (1967), giving rise to the Latin American Anti-Communist Confederation (1972). Its members included: politicians, members of political organisations or parties, or their founders; judges; government officials and representatives of multinational institutions; teachers and university rectors; diplomats; priests; businesspeople, industrialists, landowners and bankers; military officials; constituent legislators and drafters of constitutional reforms; labour leaders and Catholic students; journalists, media directors or owners; and war criminals from the Ustaše (Croatia) and the Balli Kombëtar (Albania). Banzer, Stroessner and Videla, who presided over the bloody dictatorships of Bolivia, Paraguay and Argentina, respectively, were also members (CAÑÓN, 2017, p. 79-99).

Part Two

Before World War II ended, American diplomacy and business joined forces to guarantee their country's position of hegemonic power. Among other things, they succeeded in drawing the guidelines for a new world economic order. In this sense, the International Monetary Fund – to regulate currency exchange – and the International Bank for Reconstruction and Development – to promote private investment – are among their most significant achievements.

The circumstances of World War II placed the United States in a pre-eminent position. With arms production – stimulated by the state itself – as the main revitaliser of its economy, and with military supply consortiums occupying the key positions of the economy, expansion and the rate of profit increased constantly. In this context, a high government official, the executive vice-chairman of the War Production Board,[150] Charles Wilson (president of General Electric) ventured the possibility of prolonging the alliance between corporations and the armed forces for 'a permanent war economy' (THE NEW YORK TIMES, 20-01-44, p.1). This decision to channel state resources towards the military-industrial complex not only largely subordinated economic planning to political-military strategy but also fuelled a trend present since World War I and accentuated during the crisis of 1929: direct state intervention in the economy.

Until then, as is well known, the expanded reproduction of capital had not required state intermediation, but that changed when the state joined together with corporations to alleviate the crises of capitalism. To ensure proper functioning of industrial, commercial and financial machinery, the governments of the major powers adopted planning measures, which contributed to the centralisation of capital. Simultaneously, while governments tried to regulate the economy, creating a privileged market for monopolies, they used the latter to accumulate capital. It was then that state monopoly capitalism became established.

All of the above and, fundamentally, the alliances between the state and the corporations, between the latter and the armed forces, made the militarisation of the economy viable. As previously mentioned, this was not a momentary phenomenon, limited to World

150. Created in 1942, the Board was an agency of the American government that supervised production during World War II. It had the ability to transform industry from peacetime to the needs of war, establishing priorities in the distribution and allocation of materials and services. War Production Board, *Industrial Mobilization for War*.

War II. On the contrary, in the following years, the public orders, expenses and revenues of the state (three elements that directly affect economic dynamics) were oriented towards massive rearmament, in view of a potentially unlimited world war conflict.

It would not be entirely accurate to attribute the militarisation of the economy to economic causes alone. This must be considered in relation to the general course taken by US domestic and foreign policy. After the end of World War II, the USSR established itself as an alternative model to capitalism. Faced with this reality, a whole system of propaganda, using the most diverse means (cinema, radio, newspapers, illustrated magazines, schoolbooks, etc.), insisted monotonously on a West threatened by communist danger. Thus, terms such as Soviet imperialism, enemies of democracy, anti-democratic forces and subversion colonised the social discourses of the Cold War.

Of course, this reactionary anti-communism was not the same as that of the liberals of the period. But both variants agreed in the belief that, if they managed to crush the communist movement, capitalism would remain stable. For the ideologues of US imperialist politics, the difficulties of capitalism derived mainly from the action of forces that were outside the system. Even those who acknowledged the fact of the general crisis (that is, the weakening of all their internal forces: economic, political and ideological) attributed it to the presence of the socialist system, and to the communists, who were trying to overthrow capitalism. According to their perspective, the only possible social system was capitalism; the communist movement was inspired from outside and organised by what they called 'foreign agents'.

It is true that the USSR, in particular, and the communist movement, in general, were opponents of the United States, but the latter did something else; it presented them as a threat, made them its enemies, declared war on them. Indeed, starting with the Truman Doctrine (1947) – the matrix of American foreign policy during the

Cold War – the fight against communism became the most important factor in world history. Although the Doctrine intended to give continuity to the US ideal of respect for self-determination, the facts would reveal a very different reality: constant US interventionism to stop independent development.[151]

The first act of this paradox took place when the United States replaced Great Britain as the imperial arbiter in Greece. On the eve of the referendum, by which Greek society would define the political regime to be established (September 1946), an American fleet arrived at Phaleron Bay 'in order to demonstrate the friendly support of the United States for Greece' (ABC, 06-09-46, p. 13), as announced by the US embassy. The second act was Truman's speech *Recommendation for assistance to Greece and Turkey* (12-03-47), where the Doctrine was stated. The speech itself was a request for Congress to authorise military and economic aid ($400 million) for Greece and Turkey. Most of that aid would go to backing the Greek government – in the face of British withdrawal – in the civil war. It is worth noting that Truman's speech was a difficult balancing act between the domestic and foreign policy interests of his country. If he wanted the approval of Congress, he had to convince them, on the one hand, that America's security frontiers were beyond its geographic limits, and on the other, that the Greek civil war demonstrated that communism was a force that threatened security.

Therefore, the contradiction between respect for self-determination and interventionism could exist as long as the communist threat played its part. Truman and his advisers knew this and articulated the speech as a resistance to Soviet expansionism. The former

151. President Roosevelt (1933-1945), Truman's predecessor (1945-1953), agreed with British Prime Minister Churchill (1940-1945) that respect for self-determination (point three of the Atlantic Charter, 14-08-41), would be one of the principles that would rule in the post-war world. The full text of the Charter can be consulted in Pereira, Juan Carlos – Pedro Antonio, Martínez. *Documentos básicos*, pp. 306-307.

ambassador to Moscow and then presidential adviser George Kennan, in his well-known 'Long Telegram' (22-02-1946), had provided the conceptual framework for this.[152]

In this way, President Truman made sending aid 'a matter that concerns foreign policy and national security' (TRUMAN, 1947). He made it known to Congress and to the American people that 'totalitarian regimes imposed on free peoples, by direct or indirect aggression, undermine the foundations of international peace and hence the security of the United States' (TRUMAN, 1947). In short, the United States should prepare for a long struggle in the face of the irreconcilable nature of its objectives and its philosophy with those of the USSR. In his message, Truman presented the United States and the USSR as two adversaries with antagonistic and irreconcilable concepts of civilisation: 'One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guarantees of individual liberty, freedom of speech and religion, and freedom from political oppression' (TRUMAN, 1947). Undoubtedly, the interest in democracy was genuine, but to elevate it to a political paradigm, communism was presented as follows: 'The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression' (TRUMAN, 1947). Already positioned in that point of view, Truman gave his foreign policy the aspect of a crusade: 'We shall not realise our objectives, however, unless we are willing to help free peoples […] against aggressive movements that seek to impose upon them totalitarian regimes' (TRUMAN, 1947).

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152. This telegram presents George Kennan's theory of a post-WWII worldview where capitalist and socialist spheres of influence emerge; illustrates the actions the USSR will take to gain dominance over the world economy; and suggests solutions to the imminent conflict. The telegram is organised into five sections: basic characteristics of the post-war Soviet perspective; the history of this perspective; its projection on practical politics at the official level; its projection at the unofficial level; and practical deduction from the point of view of US politics.

We can say that the Truman Doctrine was not only a projection of American interests towards Europe, but an offensive against communism. It was a new modality in counterrevolutionary policies, which reflected US aspirations to institutionalise its dominance and guarantee the production and propagation of its status of power, holding the reins of political and economic operationalisation. If the Marshall Plan enabled the reconstruction of a socially and materially ravaged area of Europe and the reassembly of European capitalism, then the Truman Doctrine also contributed. Although, as Richard Clogg says, in another way: 'the meagre resources of the weakened state were not used, as in the rest of Europe, to repair the ravages of war and occupation, but to contain the internal enemy' (CLOGG, 1998, p. 140).

By October 1949, American resources and assistance had managed to save the monarchical regime and crush the popular insurgency. After the civil war, while military and economic aid continued to arrive, Greece opened up to receive investments from American corporations. The United States gained new markets and access to raw materials and energy sources while preventing hypothetical Soviet access to the Mediterranean. The US analysts evaluated the situation, congratulating themselves on what had been achieved and, even knowing full well what the role of the USSR had been in Greece, stated:

> The Soviet Union, unlike previous aspirants to hegemony, is animated by a new fanatic faith, antithetical to our own, and seeks to impose its absolute authority over the rest of the world. Conflict has, therefore, become endemic …. [E]very individual faces the ever-present possibility of annihilation should the conflict enter the phase of total war …. The conflict becomes endemic and will enter the phase of total war. … The issues that face us are momentous, involving the fulfillment or destruction not only of this Republic but of civilization itself (NSC 68, 1950, p. 58).

We insist on this point, contained in Secret Memorandum No. 68 of the National Security Council (14-04-1950), because it enables us to understand how those who carried out the Cold War comprehended it. The formulators of that analysis, which relapsed into Soviet expansionism, posed the conflict in terms that only allowed for a single resolution: annihilation, either their own or that of the enemy. According to the US ideologues, this meant that there were not only two superpowers in the world competing for primacy but also a challenge on a global scale around the very guidelines of the organisation of the state and society. It was a formidable undertaking of social demolition and building.

The Truman Doctrine had its immediate correlate for the Americas: the Inter-American Treaty of Reciprocal Assistance. Approved on 02-09-1947, it allowed the United States to advance in the institutional fabric of its influence on the continent. In the case of the Treaty, and unlike in the Doctrine, the United States had to negotiate with the nations involved. The American countries took their precautions; ever since the Venezuelan crisis (1902) – the beginning of the replacement of the European powers in the Americas – US interventions, marked by Big Stick diplomacy, had triggered broad social discontent, manifested in anti-imperialism.[153] Even so, the United States succeeded in its mission to lay the foundations for a hemispheric security policy, enshrining as a guiding principle the link between domestic political processes and the international balance of power.

While the Treaty did not contain any provision regarding partial agreements between its members for its application, neither did it prohibit them. In this way, after the enactment of the Mutual Defense Act (1949), the United States was able to get rid of its war surpluses

153. A recent work that gathers different contributions on the subject of anti-imperialism is: KOZEL, Andres (coord.). *El imaginario antiimperialista en América Latina*. Buenos Aires: CLACSO, 2015.

– useless for any future conflict – by selling them to the countries of the Americas. Between 1952 and 1955, the United States signed bilateral agreements with Brazil, Chile, Peru, Uruguay, Colombia, Cuba, Ecuador, Guatemala, Haiti, Honduras, Nicaragua and the Dominican Republic. By virtue of these pacts and the Mutual Security Act (1951), it was able to sell weapons for $200 million. The bilateral agreements not only served as a stimulus for the arms industry but also allowed the United States to consolidate an area of influence. It should also be noted that the signing of such agreements encouraged hope, among the governments of the region, to obtain financial aid.

Part Three

Among other aspects, the Truman Doctrine and the Inter-American Treaty of Reciprocal Assistance marked a change, on a global scale, in the policies against communism: a shift from containment to defence policies. From that moment on, anti-communism and the war against Marxism set the agenda of the American continent. Indeed, this development is one of the elements that explain the reorientation of state apparatuses towards persecutory state violence. In other words, it resulted in a restructuring of the state, based on the real or perceived interference of cultural values considered alien to the country's traditions, to use repressive force against specific political groups.

In various countries of the Americas (Brazil, Haiti, Peru, Chile, Venezuela, Costa Rica and Bolivia), legislation proposed a block on the participation of communist parties and affiliated organisations.[154] But the aforementioned shift led states to design and implement policies no longer of opposition but of persecution, harassment,

154. In this regard, the Dominican Republic is an exception; since 1936, under the Trujillo regime, it had begun to systematically eliminate political opposition in general and communism in particular.

systematic repression and annihilation of communism and communists. In this way, little by little, the American states became the agents of rationally directed violence against communists. One aspect of this change can be observed in the ministries of war, which assumed and incorporated the management and coordination of all actions of control and internal repression into their traditional tasks. The Ninth and Tenth Pan-American Conferences (1948 and 1954, respectively) and the Fourth Meeting of Consultation of Ministers of Foreign Affairs of American States (1951) are the institutional spaces, of continental scope, that gave way to the counterrevolutionary conception of ending communism that colonised the states.

The Fourth Meeting of Consultation of Ministers of Foreign Affairs of American States, convened by the Organization of American States at the request of the United States, was intended to take measures to 'uproot the danger that the subversive activities of international communism pose to the American states' (ORGANIZATION OF AMERICAN STATES, 1948, p. 160). This ministerial summit was the first of its kind to address and specifically deal with 'common defence against the aggressive activities of international communism' (CUARTA REUNIÓN DE CONSULTA, 1959, p. 160). The ministers not only agreed on measures for the economic, military and political defence of the continent, but also committed themselves to modifying the legal system of their countries. In this sense, some of the most substantial modifications are contained in Resolution VIII 'Strengthening of Internal Security' (CUARTA REUNIÓN DE CONSULTA, 1959, p. 169-171). This classified communism as a crime and, by extension, activities included within communist operations or, in other words, any actions attributed to communism (from street revolts to civil war, through strikes and insurrection). Communism was established as legally punishable, in the realm of crimes against internal security.

The measures that had existed until that moment – the banning of communist parties – were bans against opponents. Now, the norms no longer responded to a specific and human logic but, through expansion, became norms to safeguard the hierarchical social order. Their nature is not without links to the campaign led by Senator Joseph McCarthy (1950-1956) or to the Internal Security Act (1950), which showed the willingness of the United States to suspend civil liberties, at least of the sectors of the population that enjoyed them. If the United States, in the name of defence and security, was willing to question the validity of political liberalism, how could it not ask the same of other countries? Indeed, the Fourth Meeting entrusted the Pan-American Union (general secretariat of the Organization of American States) with the preparation of the report: Strengthening of Internal Security.

The report, presented in 1953 and inspired by the Internal Security Act, is a compendium of measures targeting ideological repression and the control of thought. The former allowed 'repressing expressions of opinion, activities or political aspirations' (DEPARTAMENTO JURÍDICO, 1953). Meanwhile, the latter were measures of control over 'the press, publications, professorships and functions of teaching in general' (DEPARTAMENTO JURÍDICO, 1953). In this way, the Organization of American States urged governments to exercise their police powers in order to prevent 'the infiltration of ideas [and] the subversive action of communism' (DEPARTAMENTO JURÍDICO, 1953). Incorporated into national legislation, the report's recommendations enabled the persecution of all those people who, from the spheres of state power, were considered communists. This is a remarkable phenomenon, since it was the states who decided what or who was communist; in other words, the condition of communist would be defined from the outside. The report gave some indications for its identification:

> The propagation of subversive doctrines and the circumstances of being a member of an association engaged in such propaganda are the

> chief elements to be proved in order to determine the classification of 'agent of international communism'. It is certain that his classification may apply to persons to whom none of these acts may be imputed, as is the case with those who carry on a forbidden activity without apparent connection with subversive movement, but whose intimate and close connection with it may be discovered or shown by some other circumstance. … When dealing with private individuals, outside of subjecting them to the supervision called for by the circumstances of the case no other measures appear to exist than those that might be applied when such persons incur liability for the commission of any other of the various activities proscribed and punished as subversive (DEPARTAMENTO JURÍDICO, 1953).

In short, it intensified a common reaction against communists, supposed or real, of accusing them of being at the service of Soviet imperialism and trying to neutralise them. This seems to indicate, on the one hand, a certain weakness of the ruling classes to ensure strong social consensus on their leading role and, on the other, an exaggerated fear of the emergence of opposition movements.

In line with this analysis and as the last element in the assessment of the Fourth Meeting, it is worth highlighting Resolution III on 'Inter-American Military Cooperation' (CUARTA REUNIÓN, 1951, p. 162-164). It states that 'the expansionist activities of international communism require the immediate adoption of measures to safeguard the peace and security of the continent' (CUARTA REUNIÓN, 1951, p. 163). Based on these considerations, the Fourth Meeting requested that the Inter-American Defense Board[155] prepare 'military planning for collective defense against aggression' (CUARTA REUNIÓN, 1951).

The Board, on the basis of its evaluation of the world situation, which it considered 'serious', and with the observations presented

155. Created on 30 March 1942, it provides technical, consultative and educational advisory services on military and defence issues to the Organization of American States.

by some of the American states, drew up the General Military Plan for the Defense of the American Continent (1951). This split up the hemispheric security zone created by the Inter-American Treaty of Reciprocal Assistance, dividing the continent into strategic subzones and political blocks (DECRETO 263/1958). Subsequently, given 'the seriousness of the danger in which continental unity and democratic institutions find themselves in the face of the offensive unleashed by communism in America' (DECRETO 6447/1963), the Plan was revised and updated, through the General Military Plan for the Defense of the American Continent against an Aggression by the Communist Bloc (1957). Each and every one of the member states of the Organization of American States made use of these plans and their subsequent modifications (such as the 1967 Military Plan for the Defense of the American Continent against Internal Subversion Directed and Supported by International Communism, as a Form of Aggression that Does Not Constitute Armed Attack) to define their internal security policies. One of the features that characterise the legal arsenal, which was developed from the Plans, is the increase in coercion and devices to control, follow and repress.

In effect, the practice of coercion became increasingly direct, the police measures unbearable and the repression and institutional violence so massive that at the inauguration of the Fourth Anti-communist Continental Congress (1958), the Archbishop of Guatemala, Rossell Arellano, said: 'I am not here to speak with the anti-communists who believe that communism is defeated with bayonets and musketeers, nor with those who believe that being an anti-communist is to exploit the workers and peasants, nor with the bosses who in the name of anti-communism lower workers' wages and steal their social rights' (CONFERENCIA INTERAMERICANA DE DEFENSA DEL CONTINENTE, 1958). The Archbishop's criticism is noteworthy, as it is directed both at the individuals who benefit from exploitation as well as at government repression. As a critique of the conditions of

exploitation and the methods applied against the communists, it was a clear attempt to call attention to the onslaught that was taking place in almost the entire geography of the continent. There, investigation commissions against communists perfected the mechanisms of control that, in practice, led to the development of a counterrevolutionary state war machine.

The most important innovations in the infrastructure of social control were found in the echelons of intelligence organisations, under the military sphere. The armed forces organised, restructured and put intelligence services into operation. These services started out at the strategic political level as technical bodies tasked with coordinating and centralising information produced on activities and institutions related to communism. This was done in order, then, to place such services in the planning, direction and supervision of state action in matters of communism, providing governments with all the necessary elements to address internal security matters. In a simile with the Orwellian fantasy of *1984*, the intelligence services acted as Thought Police, controlling and monitoring everyone. They counted on a specific division of 'psychological action', to 'carry out the counterrevolution, reconquer the population; the psychological weapon is decisive to achieving the objective: the conquest of man' (LÓPEZ AUFRANC, 1959, p.630). The psychological actions were aimed at shaping anti-communist sentiment that, in the context of the political discourse of the time, resulted in the proliferation of campaigns in which order and subversion were central concepts. From legislation and social discourses, the narrative and description of a war situation against an internal enemy was established: the subversive.

Returning to institutional spaces, where there was pressure to end communism, we find the Ninth Pan-American Conference (Bogotá, 1948), in which the Organization of American States was created, and within which the US delegation carried out a campaign to 'uproot and prevent' subversive actions. At the Ninth Conference,

the United States managed to obtain unanimous condemnation against communism (Resolution XXXII: The Preservation and Defense of Democracy in America), considering it an anti-democratic ideology, irreconcilable with the tradition of the American countries and incompatible with the American conception of freedom (ORGANIZATION OF AMERICAN STATES, 1948, p. 210-211). Thus encouraged, the United States directed its actions towards the preparation of resolutions to suppress any social, political and cultural movement that, in actuality or presumably, responded to communist interests. Supported by the other American countries, it used this forum and those mentioned previously to achieve its objectives. The peak of the US campaign occurred in the following Pan-American Conference (1954, Caracas), with the Declaration of Solidarity for the Preservation of the Political Integrity of the American States against International Communist Intervention. This had an immediate objective: to weaken and destabilise the Guatemalan government of Jacobo Arbenz (1951-1954). The only vote against the Declaration came from the representative of Guatemala, Toriello Garrido: 'They wanted to find an easy means to maintain the economic dependence of the American republics and suppress the legitimate desires of their peoples, classifying as "communism" any show of solidarity and economic independence' (TORRIELO GARRIDO, 1955, p. 289). The Guatemalan delegate did not defend communism but gave a warning about the extent to which communism was used as a justification for maintaining dependence.

The coup in Guatemala (27-06-54), financed by the US administration[156], established that it was not because of the autonomy that

156. The CIA declassified secret files on its participation in the destabilisation plan and coup in Guatemala. The undercover operation, Operation PBSUCCESS, was the agency's first in the Americas. PBSUCCESS was authorised by President Eisenhower in August 1953, with a budget of $2.7 million for psychological warfare, political action and subversion, among other components of a small paramilitary war. Later, PBSUCCESS became the model for

Guatemala acquired in its foreign policy nor because of advances made in the process of social, political and economic democratisation, but because of the conviction that this was dangerous. The initial scenario was one that had tended towards modernising the state and improving the conditions of the subordinate sectors that, during the 'ten years of spring' (1944-1954), saw some of their demands satisfied. Now, this would be replaced by a series of transformations: market liberalisation; elimination of restrictions on foreign investment; and the strengthening of the US private sector (exclusive beneficiary of concessions for the exploitation of oil and winner of public contracts for infrastructure).

It would be difficult not to understand the overthrow of Arbenz as a counterrevolutionary intervention, which sought to stop or even reverse the 'ten years of spring'. However, between the dictatorships of Castillo Armas (1954-1957), Ydígoras Fuentes (1958-1963) and Peralta Azurdia (1963-1966), there are differences that distinguish them. The first two can be understood as transitory authoritarian regimes, since there is no rejection of the democratic state as a form of social organisation in the country, but rather a momentary interruption of the civil and political liberties of the republican regime and an increase in repressive work. Meanwhile, to put an end to the policies that protected incipient industrialisation and the internal market, the third regime started from assumptions that contradicted the fundamental bases of the democratic state. Under this dictatorship, the principle of legality, respect for fundamental rights and jurisdictional control over this were considered as obstacles to achieving the opening of the market, the expansion of production relations and the privatisation of the means of production and state enterprises. Indeed, despite the fact that the two preceding dictatorships reinvigorated

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future CIA activities in the Americas. The files are available online: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB4/docs/doc01.pdf> [consulted on: 30/12/13]

the repressive and ideological apparatuses of the state (for example: National Committee of Defense Against Communism [July 1954]; Preventive Penal Law Against Communism [August 1954]; General Directorate of Security [1956]; the reform of the constitution [1956], article 23 prohibition of all those entities that advocate communist ideology, and article 62 classifying the punishment of any communist or associated action; Organic Law of National Education [1956] to train new generations in 'opposition to communism', and also to form 'good producers and good consumers' in defence of the interests of the market) to overcome the obstacles, they did not succeed. Thus, during the Peralta Azurdia regime, in order to put an end to opposition and resistance to the socioeconomic transformations, which the ruling classes could not direct, the state was freed from the limitations of the rule of law. This is an extremely serious phenomenon, the scope and consequences of which become unpredictable, since the state failed to preserve the integrity of all those it turned into subjects beyond the network of state obligations. It was the moment of arbitrariness, of resorting to authoritarianism, to direct coercion, coordinating an official and unofficial apparatus to eliminate them, either through state personnel or through agents outside the state body, but whose actions respond to state rulings[157].

Part Four

In every coup, before or after the one in Guatemala, there is one constant: the participation of the armed forces. These, at different times in the history of their countries, actively intervened in the political life of their societies. In many cases they did so directly; in other cases, they

157. In Guatemala, the unofficial organisations of the coercion apparatus were known as Death Squads. For a study that examines these as a parastatal entity, see: CENTRO DE ESTUDIOS DE GUATEMALA. *Guatemala: entre el dolor y la esperanza*. Valencia, Diputació Provincial de València, 1995.

acted as pressure groups; most of the time, they were arbitrators or rectors of the political system; and almost always, they served as an instrument of control. However, inscribed in the coordinates of the political, economic and military alignment with the United States, a process began in which the ruling classes re-evaluated and redefined their ties and relations with the armed forces. If in the previous historical cycle, the armed forces knew how to be the custodians of the alliance between the ruling classes and the central capitalist powers, now they were playing a pivotal role in state-class and state-society relations.

The institutional bases for turning to the armed forces, as a mechanism of the state system, remained unscathed, but doctrinal support for their action was changed. Now, under a change in the profile of military interventionism, they will be required to save the nation from communist infiltration. The armed forces prepared for this, under the influence of two doctrinal writings: the Doctrine of National Security and the Doctrine of Modern Warfare (CAÑÓN, 2012). Both redefined how to understand war conflicts, replacing, on the one hand, the confrontation between states with one between individuals and, on the other, the fight for territorial control with one for ideological control of society. At the same time, both doctrines tackled the problem of social conflict and its resolution by modifying the economic structure – in a readjustment of dependent capitalism – while social conflicts came to be considered as an aspect of an ideological war.

Since the development of the aforementioned Defense Plans, the Inter-American Defense Board pushed not only for the armed forces to assume tasks of repression and control within countries but also to make them an agent in economic and social modernisation. Thus, in 1960, the Board decreed:

> The General Military Plan for the Defense of the American Continent recognizes the desirability of doing everything possible to raise the standards of living of the peoples, with the object of effectively combatting Communist propaganda, which tries to exploit the ignorance and

> poverty of the underdeveloped areas … The Estimate of the Situation recognizes that 'Often the military establishment of each country can plan a very useful role in economic development' … The Council of Delegates recommends: A. That the Governments of the American States take into consideration the advisability of employing organs of their Armed Forces, preferably in regions considered to be underdeveloped, in order to: 1. Undertake highway and settlement work … 2. Broaden the economic bases directed toward raising the standards of living of the peoples; and 3. Educate the native populations in their own surroundings and create reserves of specialized labor for specific types of work (BARBER, 1966, p. 271-272)[158].

Clearly, the armed forces were thought of as a catalyst for structural changes in the status quo. The aims being pursued were transparent: to prevent the expansion of resistance to the change in state model as well as to limit the scope of action of counter-hegemonic trends. Furthermore, the new orientation of the armed forces, as an instrument of economic and social action demonstrating interest in improving the life of the population, sought to combat the traditional image of the armed forces as allies of the ruling classes and enemies of the people.

This decisive turn crystallised with the First Inter-American Course of Counterrevolutionary War (1961), in which the military cadres of fourteen countries participated (Argentina, Bolivia, Colombia, Chile, Ecuador, the United States, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela). The basic objective of the Course was to provide training in the planning, conduction and execution of the counterrevolution. The programme also included the study of Marxist philosophy and

158. We must clarify that we have extracted the cited document from the appendix of the referenced book. The title of the document is: Contribution of the Armed Forces to the Economic-Social Development of the Countries, Resolution XLVII of the Inter-American Defense Board, December 1, 1960. Barber, *Internal Security and Military Power*, 271-72.

techniques to prevent and combat communist infiltration. Brigadier General Carlos Túrolo, director of the Course, insisted that repressive methods should be accompanied by others of an economic and psychological nature, aimed at the subaltern classes, considered vulnerable to the action of communist infiltration: 'repressive laws, on their own, do not eliminate communism, and it is necessary to create an environment that is unfavourable to it' (TÚROLO, 03-10-61, p. 9).

The institutionalisation of counterrevolutionary training was consolidated with the founding of the Inter-American Defense College. Opened in September 1962, the College was in charge of training the new generation of military personnel in counterinsurgency. In bidding farewell to the first class of graduates, US Vice President Lyndon B. Johnson reminded them that 'we cannot be satisfied until communism is gone,' and that they must 'maintain constant and strict vigilance against subversion' (JOHNSON, 1963, p.9).

During the Fifth Conference of Chiefs of Staff of the American Armies (1964, West Point),[159] the Argentine representative, Lieutenant General Juan Carlos Onganía, univocally expressed the formal assumption of the new role for the armed forces:

> to actively contribute within its possibilities in cooperation with the civil power … in the economic and social development of the country … the general military plan for the defence of the American continent recognises the benefit of striving by all possible means to raise the level of life of the peoples in order to effectively combat communist propaganda, which tries to exploit the ignorance and poverty of underdeveloped environments (ONGANÍA, 1964, p. 751-752)[160].

159. Created in 1960 by the armies of Argentina, Ecuador, Panama, Bolivia, El Salvador, Paraguay, Brazil, the United States, Chile, Guatemala, Uruguay, Colombia, Honduras, Venezuela, Costa Rica, Nicaragua and Peru, with the aim of becoming a discussion forum for the exchange of experiences between the armies of the American continent.

160. Onganía, "El gobierno, las Fuerzas Armadas y la comunidad nacional" 751-52.

It is not merely a coincidence that Onganía's words almost literally echo the arguments raised in the aforementioned Resolution XVLIII by the Inter-American Defense Board regarding underdevelopment paving the way for communism. Nor is it coincidental that, at that time, ministries, secretariats and technical planning offices proliferated throughout the Americas. The planning systems, created through loans from the Alliance for Progress (in fact, they were a US requirement for the signatory countries of the Charter of Punta del Este [1961] to access Alliance funds), should enable, according to the technocrats, the development of the American nations. This development was associated much more with the idea of economic growth, through increased productivity and employee discipline, than with the concept of industrialisation. This new pattern of development was a structural change in the functioning of the economy, which dismantled the model of industrialisation and affected social formations as a whole.

Through planning systems, the Inter-American Development Bank, the World Bank and the US Agency for International Development designed and implemented stabilisation programmes, which included fiscal austerity and monetary control. In other words, there was a retraction in public spending that, until that moment, had been responsible for boosting domestic consumption and fulfilling social needs. On the other hand, these policies of restructuring and global integration tended to benefit the growth of privileged enclaves, associated with a reduced class of transnational capitalists, linked to multinationals and foreign banks: the faction of financial capital. Politically, the hegemony of this faction was projected in a state model whose main functions were meant to be: to generate all the conditions for the development of private initiative and to stand in for the private sector only when strictly necessary. In practice, it was a retreat from the state scheme that had consolidated labour and social protection. Obviously, this did not happen without due resistance from the

subaltern classes, which saw the improvements they had won evaporate. The deepening class divisions deteriorated the foundations of any social consensus; with financial capital unable to develop actions that would broaden its support bases, the ruling classes lost their ability to be accepted as such. The ruling classes as a whole, which did not change the objectives they had set for themselves, in the midst of the hegemony crisis, radicalised the perception of danger with respect to their interests and defended themselves against a common enemy: subversion. Although this did not allow them to overcome internal divisions, it did consolidate the connection between their interests in the political struggle against the subaltern classes. They summoned the armed forces to eradicate subversion, and these responded: 'as many people as necessary must die in order to achieve the security of the country' (VIDELA, 24-10-75, p. 1).

Final Part

The relationships of dependency with the central countries, with their permanence and their changes, marked the historical horizon upon which a great part of the history of the America south of the Rio Grande is inscribed. This had an impact on both how this region participated in the international division of labour and how it intervened in the world market. Dependency was also felt in different degrees: in the evolution of the capitalist cycle (expansion or crisis); in the capitalist structure (substitution of materials; expansion of supply); and in the international dynamics of the system (changes of hegemony between powers and their external needs). Finally, dependency acted on the world view of the dominant classes, which, as a product of the cultural penetration of the different hegemonic centres they allied with, was projected onto the oligarchic state, producing and reproducing an order of dependent economic and cultural relations.

The criticism and questioning of the oligarchic system of domination – due to its restrictive democracy, its unequal wealth distribution and its exclusive social order – crystallised, during the crisis of the 1930s, in a redefinition of intra- and extra-class alignments. The hegemonic instability that this entailed could be overcome, with or without ruptures in the political system, by the intervention of the armed forces, which by maintaining the discipline of the workforce and intervening in the arbitration of political confrontation, facilitated the transition to a system that protected domestic production from free importation. The time periods and ways in which the social welfare states were structured varied from one country to another; for example, the New State of Brazil was not the same as the 'ten years of spring' in Guatemala, nor was the Peronism of Argentina the same as the Bolivian Revolution of 1952. Each country had its own rhythm when incorporating social rights, nationalising resources and services, redistributing income and directing public spending to stimulate growth. But, regardless of time, methods and rhythms, what existed was a tendency to identify the state as the guarantor not only of the model as a whole but also of political expression in favour of social protection. Wide sectors of the subaltern classes began to define themselves based on their participation in the political system, considering the state as an essential agent in the satisfaction of their demands and as a space for negotiation.

Although many of the regimes that led these processes were characterised by their programmatic and practical moderation, different factions of the ruling classes perceived them as overly impatient in their reformist zeal. Furthermore, they feared that the capacity for mobilisation achieved by the subaltern classes would encourage the imminence of the communist revolution. This allegation about an eventual subversion of class order was nothing but the social translation of the implicit contradiction of the model: higher wages or more capital. The conflict entered an acute phase in the middle of the

20th century. The period of economic growth was ending, without the ties of dependency having come undone; the ruling classes were impatient to regain mono-class control of society while the United States pushed to establish a security zone.

During the Cold War, the United States, with all its generosity and interest, subordinated the needs of the American countries to the priorities of its corporations. Being, as it was, the most powerful economic power in the history of humanity, and using that power to exercise its dominance, it discouraged the industrialisation of its southern neighbours, applying high tariffs on the importation of processed products and low tariffs for countries that accepted their role as producers of raw materials. In this way, this commercial policy perpetuated dependency and forged the collapse of autonomous development. The Pan-American Operation completed this. The financial aid that resulted from the Operation was, in reality, loans. Furthermore, much of the money contributed by the United States was a subsidy for US companies, since the country receiving the aid was obliged to spend it in the US market. In addition, the stated objective of the aid was to promote a favourable environment for US private investment. The Alliance for Progress followed the same trajectory; the Secretary General of the Organization of American States, Galo Plaza, at the annual meeting of owners and directors of North American newspapers (1969) said: 'For every dollar that is paid in taxes in the United States, one third of a single cent (that is, one third of a hundredth) is devoted to "aid" to Latin America. 80% of this aid is offered in the form of loans, which must be paid in dollars and with interest. 0.90 cents of every dollar that the United States gives in aid to Latin America is spent in the United States itself.'

If, on the one hand, both the Operation and the Alliance stopped (voluntarily or involuntarily) independent development, then on the other, they marked an alignment with the political-military

strategy of the United States, and this was done in the terms of the Truman Doctrine: avoid the spread of communism, combat it. In this way, the United States and its local allies managed to position communist subversion as the greatest threat to the status quo of the continent. Those responsible for US foreign policy intervened, with the assistance of intellectuals and technicians from the business sector and, of course, with the backing of different actors from civil and political society of the member countries of the Organization of American States. The Organization established that the problem posed by communism 'with respect to our American community is that of survival' (Organization of American States, 1948). This gave new life to former visions of the action of communism, or else produced visions suited to the specific conditions of post-war contemporaneity. The denunciation of communism as a force that sowed chaos and destabilised order, articulated behind defensive rhetoric, was the message constantly being sent to society. To paraphrase Sartre (1948) regarding anti-Semitism: if the communist did not exist, the anti-communist would invent him. Although, in a less gnoseological and more practical sense, the anti-communist did: through intelligence and propaganda systems, the anti-communist identified the autonomy of the subaltern classes as part of the subversive enterprise. As Chomsky argues, 'There's always an ideological offensive that builds up a chimerical monster, then campaigns to have it crushed' (CHOMSKY, 2000, p. 32-33). Crushing the subversion was the reason for training the military in counterrevolution. This was but one step forward in establishing a permanent state of internal war, declaring war on civil society.

In this context of the rising counterrevolutionary wave, the transformations that Kennedy proposed, with his developmental rhetoric and his good intentions, were a coup de grace to distributionist policies. The granting of loans was tied to the application of stabilisation programmes that on the one hand, benefitted financial

capital – the main financing of the loans – while on the other, they undermined the foundations of an economic expansion based on domestic demand. The new logic of accumulation increased inequalities. Political tension and social instability increased; 'the forces of anarchy, terror and subversion run through the Americas', according to the Rockefeller Report (1970, p. 307). This same report lists the benefits of training military personnel from the Americas in the United States, where they learned to be alert to how the communists used 'the freedoms offered by democratic governments for their own ends" (ROCKEFELLER, 1970, p. 308). The option for maintaining security and political stability in the region was clear.

As is well known, and as Rockefeller knew, the state has a monopoly on legal violence and, in accordance with this power, has all the legal resources possible to implement repressive measures under the control of institutions of coercion. However, in order for financial capital – increasingly powerful, but without sufficient consensus – to achieve deregulation, the elimination of tariff barriers and the free flow of products, labour and capital, the state became the executor of rationally directed violence to destroy or at least weaken those who it had previously classified as subversives: in other words, to decapitate the autonomy of the subaltern classes. This meant a fundamental alteration in the ethical principles of the state that, on principle, should ensure the integrity of the people. But it is more than a matter of repressive techniques. It is a new model of accumulation and reproduction of capital, which dismantled interrelated sectors and economic regions, with the consequent marginalisation and exclusion of the productive classes that make up the national market. Therefore, the new role attributed to the state and within it to the armed forces, linked to the foreshadowing of a new matrix of political power and the implementation of regressive economic and social policies, leads us to wonder: should we be talking about state terrorism or the terrorist state?

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SPRAINS OF THE EXCEPTION IN COLOMBIA: A CHARACTERISATION ESSAY BASED ON THE FIRST DECADE OF THE 1991 CONSTITUTION[161]

Juan Fernando Romero Tobón

Introduction

As in many countries in the region, for much of the 20th century, the state of siege became the rule and the exception was normality. The constitutional changes that took place at the end of these century, including the one in Colombia in 1991, created a new scenario. However, during the first decade of its validity, a new scheme of exception was reconstructed on the foundations of the previous figure and by appealing to other devices that have led to the conclusion that exceptionality has managed to merge with the rule and has become indissolubly attached to it, with equal or greater force. This explains authoritarian expressions such as Colombia's after that year.

Initial chords

In the analysis of the powers of exception, its historical basis has been highlighted, which transcends the moment of the *"systemic*

161. * This text is written in homage to ALFONSO ROMERO BUJ (1933-1976), my father, a Colombian revolutionary leader, lawyer, university professor and political adviser to independent trade unionism.

leap"[162]. It is associated with magical and esoteric elements, related to divinity, when in addition, as in the Colombian case, the term *"conjuring"*[163] is used, thus reflecting the mystical experience that appeals to a providential being who finds a solution to a crisis situation by dominating supernatural (extraordinary) forces, with symbolic efficacy, beyond the effectiveness of the measures adopted (GARCÍA, 2016: 41-43)[164], transforming the spell of abnormality into normality. This withdrawal from the rule for the development of a power to cope with the crisis is related to the unity that arises between mystery and demons (FRANKENBERG, 2018: 261-262), to KAHN's (2012: 35) allusion to SCHMITT's (2009: 18) theses formulated in *Political Theology* and to the close relationship between sovereignty and state. Although it is stated that *"[s]ince very remote times, emergency measures were adopted to deal with situations of extreme gravity that endangered the very existence of societies"*[165], it is very common that, for the study of the exception, a reference is made to two Roman formulas

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162. The term is used in BERND MARQUARDT, "El salto sistémico de 1811-1825 en la Nueva Granada - Colombia, con un enfoque particular en la constitución de 1821 la transformación del virreinato santafereño de la monarquía de las españas e indias en la república bogotana de la burguesía hispanodescendiente y liberal", in La Constitución de Cúcuta de 1821 en su contexto: transformación del sistema y nacimiento de la familia constitucional hispanoamericana, Anuario X, MARQUARDT, LLINÁS A. & ROMERO T. (EDS.), Grupo editorial Ibáñez, Bogotá, D.C. 2021, pp. 15-179, 15-17. An in-depth explanation of this process through the term Sattelzeit can be found in LLINÁS (2022: 94-108).

163. Present, in Colombia, in A.L. 1 of 1968, which modified the constitution of 1886 by incorporating the state of economic emergency (art. 122), on the one hand, and in the constitution of 1991, by describing the situations of internal commotion and economic, social and ecological emergency (arts. 213 and 215), on the other. Conjuration, in one of its meanings, refers to "3: To say exorcisms. 4. tr. To invoke, to invoke the presence of the spirits. 5. tr. To plead earnestly, to ask for something with a request and with some formula of authority". REAL ACADEMIA DE LA LENGUA, RAE, Diccionario de la Lengua Española, https://www.rae.es/drae2001/conjurar (17.08.2023).

164. The symbolism of the measures referring to Covid-19 and its effectiveness in a plush state is in (MARQUARDT, 2021).

165. REINACH (1885: 11) refers to the Hebrews, Carthaginians and Gauls, through the figure of a magistrate elected in particularly serious circumstances and with almost absolute powers. So does GASPARETTO JÚNIOR (2019: 24).

(dictatorship and iustitium), which have been received as a postulate since the Renaissance. it is very common that, for the study of the exception, a reference is made to two Roman formulas (dictatorship and *iustitium*[166]), which have been received as a postulate since the Renaissance[167], with emphasis on the former as a contemporary model of the exception, relegating the influence, scope and implications of the latter (AGAMBRN, 2005: 94-96)[168]. REINACH's (1885: 11-88) exploration begins with the figures of the dictatorship and the *senatus consulto ultimun*[169] as specific mechanisms of exception. Such a device seemed very appropriate at the birth of constitutionalism as it was designed for the defence of the order, for a period of time (six months)[170], it separated the function of declaring the state of exception from the person exercising dictatorial power, although its powers were very broad (Siles, 2014: 414, 415, 418), it was presented as a benevolent power and, essentially, as a saviour[171]. It has also been

166. That is, the suspension of law for the salvation of the state, through the declaration of tumultus and, consequently, the proclamation of iustituim. See AGAMBEN (2005: 85, 86, 94).

167. One of the first reflections on this kind of institutes is made by NICOLÁS MAQUIAVELO (1469-1527), especially in the book *Discursos sobre la primera década de Tito Livio* (2015). In addition to NICOLÁS MAQUIAVELO, JEAN JACQUES ROUSSSEAU and ALEXANDER HAMILTON, see JEAN-JACQUES ROUSSEAU (1762: 283-290).

168. On this debate, see GASPARETTO JÚNIOR (2019: 24-25). On the influence of this institute as a paradigm of the exceptional regime, see SILES (2014: 411-424). See also, (SILES, 2020).

169. The approach to the exception through Roman figures is in SCHMITT (1968: 33-57); PARTURET (2017: 33-47). Additionally, it is the vision of imperial exceptionality that appears in ROSSITER (1948). At the Latin American level, (ZAMUDIO, 2004); UGARTE (2012: 232); (ÁLVAREZ, 2009); SILES (2020). At the Colombian level, this precedent is referred to in (CAMARGO, 2008: 27); (FARFÁN, 2019: 42-44); (TORO & CANO, 2021: 39); (DAZA, 2021: 23-25). For the Asian case, see (WELIKALA, 2008).

170. Seasonality presumably related to the duration of the war campaigns (March to October). In SILES (2020: 95).

171. See TITUS LIVIUS (1990: 159, 161, 162, 172, 173, 206, 207). Allusions to Roman dictators are profuse in the text, a particularly sensitive aspect in the history of that empire. The authoritative view of these powers is in APPIAN (1996). On this point KALYVAS (2007: 412-442, 426-).

related to the Greek Aesymnete *(αἰσυμνήτης)*, invested with absolute powers (REINACH, 1885: 11-13), a *"person who gives everyone a fair share"*[172] and in Greek tragedy itself, where extreme situations lead to ruptures of the normal: the transgression of OEDIPUS causes the plague and, as a consequence, the exception where the government itself is the efficient cause of the evils. In ANTIGON or in THE ORESTYAD is the extraordinary fact (DÍAZ, 2015: 43-45)[173], that fissure and antagonism that creates an enigma and a dead end in terms of normality until it finds a channel or catharsis. CREONTE, provisional king of Thebes, finally acknowledges his hybris and the transgression of the law of the gods: his law constitutes, to a certain extent, a regime of retaliatory exception resulting from the war.

Within this brief reconstruction, it is possible to note a variant of interest in the Holy Roman Empire of the German Nation through the imperial reforms between 1500 and 1555, in the framework of what has been called proto-constitutionalism[174]. While a new, highly controlled procedure of execution against disturbers of the territorial peace was established, at the same time the Emperor reserved for himself the power of exception for unilateral (uncontrolled) execution, called imperial proscription, in which someone was declared an enemy of the state (MARQUARDT, 2018: 265-). Such a declaration allowed them to be persecuted without any normative subjection, having been excluded from the state community (MARQUARDT,

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172. On this subject, see ARISTÓTELES (1988: 247).

173. The tragedy of SQUILO, The Orestiad (Ορέστεια, 478 B.C.), offers a transition to law from private vengeance. ANTIGON (ΑΝΤΙΓΌΝΗ, 441 BC), in turn, pits divine laws against the laws of men in the disproportion of victory.

174. The expression protoconstitutionalism is also used by Professor MARQUARDT, in order to circumvent the category of the absolutist state, as he finds that this state "was bound by law, including and in particular by the fundamental laws, i.e. the power of monarchs to rule was limited by an unavailable basic order", in MARQUARDT (2022: 78).

2022*:* 126). The colonial or vice regal discussion[175] and the vision of America as a territory of exception in multiple senses, and not only in terms of public order (JACOME, 2007: 15-41)[176], gave rise to a voice of its own in these territories. This may be the debate that opens up in relation to the aphorism *"se obedece, pero no se cumple"*, which has been understood as a formula for adapting the norm (MARQUARDT, 2019: 212-213), but which also served as an artifice of the encomienda not to abide by the laws of the Indians and to find there a seed of the exception and a justification for the non-application of the rule (ANZOÁTEGUI, 1992)[177]. More recently, French colonial domination developed the institution of the state of emergency in France, specifically due to the events of independence in Algeria in the 1950s (HALPERIN, 2017: 11-12), without neglecting the British Empire's provisions for its territories in Africa and Asia as set out in the Orders in Council 1939-73[178].

Returning to this line, exceptionality poses an existential dilemma as it tends to pit the Constitution against itself. Although it usually determines what its defence consists of, what limits to guarantees can be imposed, and who assumes responsibility for it[179], this adaptation generates great turbulence. Nowadays, most countries pose such complexity at the constitutional level under the postulate according to which the Executive (or the Legislature or both powers jointly) declares or endorses an exceptional situation that in its judgement calls into question the very existence of the State, one of its fundamental values, or places it in a situation of crisis and, on that basis, acquires the power to declare or endorse an exceptional situation, based on

175. The discussion of the colonial as a concept is in MARQUARDT (2021: 15-179, 21-31). On the concept and meaning of colony see ORTEGA (2011: 11-29).

176. Discussed in VITORIA (1975).

177. See also LLINÁS (2022: 235, 275, 346, 399, 562).

178. *Emergency Powers Order in Council 1939 and 1952,* URL en bibl. end.

179. The discussion can be found in GASIÓ (1995).

this, it acquires special powers in order to confront it, whether it is the declaration of a state of war, internal commotion, crisis, urgency, catastrophe, necessity, emergency, state of siege, although sometimes expressly providing for a series of limits on fundamental rights. A review of the most recent laws or drafts of them corroborates a growth in each of these topics, although some do not develop the grounds that give rise to a state of emergency. As a situation that should be highlighted, the Algerian constitution of 2020[180], in addition to the specific norms of emergency, took up the controversial clause of suspension of the constitution in a state of war, *"the president assumes all powers"* (art. 101), as one of the few states in which the negation of the constitution itself is openly preserved.

However, two topics have marked the last decade of emergency powers (2013-2023) in a '*greening*' of these powers: the fight against terrorism and the reaction against COVID-19. In the first case, the French experience in the face of the attacks that occurred in Paris on 13 November 2015 stands out, through the declaration of emergency[181] that gave rise to a host of restrictive measures (house arrest, blocking websites that apologise for terrorism, the possibility of dissolving associations or groups that participate in or facilitate the attacks, etc.), the restriction of freedom of movement, the prohibition to stay in certain parts of the territory, the search of persons and private places, the prohibition of certain public meetings and the

180. Constitution de la République algérienne démocratique et populaire, 2020, URL bibl. final, from the 1976 constitution (art. 123). The suspension was provided for in the French constitution of the Year VIII, 1799, or the constitution of the Consulate (art. 92) and was also found in the Chilean, Bolivian, Costa Rican, Haitian and Dominican Republic constitutions, as well as in the provincial constitutions of Cundinamarca and Cartagena in the territory that is now Colombia during the 19th century.

181. Vid., Decrees 2015-1475 of 2015, final URL and 2015-1493 of 2015. Law 2015-1501 of 20 November, in what is known so far as the fastest law ever issued, extending law 55-385 of 1955 on the state of emergency and reinforcing the effectiveness of its provisions in URL bibl. end.

closing of certain meeting places, the authorisation of administrative investigations)[182] and which lasted for almost two years[183]. The alarms continued with the attacks of 22 March 2016 in Brussels, which made Islamophobia[184] another spectre haunting Europe, to which Russophobia has now been added. In relation to the response to COVID-19, between 2020 and 2022 several countries resorted to emergency measures either through explicit formulas or through health and policing regimes, or both, including the strict and controversial figure of confinement[185]. The declared powers of exception would only be the surface of a deeper exception.

In view of this horizon and this resurgence, one of the questions that has been asked in the Colombian context is whether this kind of state of exception and broad powers has undergone a transformation as a result of the 1991 Constitution, overcoming the *"estadositismo"* that was experienced at least between 1948 and 1991, marked by this figure as a permanent and habitual condition (ROZO, 2012: 9-48)[186] that is located on the threshold between law and non-law and to

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182. GOUVERNEMENT DE FRANCE, «État d'urgence sur l'ensemble du territoire: quelles conséquences?», http://www.gouvernement.-fr/partage/5844-etat-d-urgence-sur-le-territoire-metropolitain-et-mesures-specifiques-en-ile-de-france-quelles, (11.05.2023).

183. The state of emergency was decreed on 13 November 2015 and will only be lifted on 30 October 2017. At the same time, Loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme, JORF, 31 octob.re 2017, was issued as a «laundering regulation».

184. LAINFORMACION.COM, "France increases its rejection of Islam after 'Charlie Hebdo' and 13-N attacks", 22 March 2016, URL bibl. end.

185. See MARQUARDT (2021: 45).

186. For a detailed account of human rights violations during the *Frente Nacional*, see COMITÉ DE SOLIDARIDAD CON LOS PRESOS POLÍTICOS (1974). On the abuse of this figure, MARQUARDT (2011: 179-186). On its use to affect social rights, see TÓBON (2020). Likewise, see CENTRO NACIONAL DE MEMORIA HISTÓRICA (2013: 128-135). On the state of labour siege and the prohibition of strikes, TÓBON (1992). As an X-ray of the period, BUJ (1965); Id, "Hacia una modificación consecuente del artículo 121 de la Constitución Nacional", in *Marcha*, July 1958, number 4; MARQUARDT (2012: 3-43); VILLEGAS (2004: 317-370, 328). Likewise, CAMARGO (2008: 73). It is estimated that about 85% of the time between 1948 and 1991 the country lived under siege.

which administrative capture adhered. In order to respond to this concern, it was considered relevant to analyse the first ten years (1991-2001) of the use of the exception in the Colombian constitutional order, the debates held in the National Constituent Assembly that took place between 1990 and 1991 with the aim of structuring a change in the handling of this type of powers and those that followed in order to construct a norm that would regulate this exercise. In this regard, there is a tendency[187] to consider that the Colombian Constitutional Court has indeed managed to tame the beast; however, the thesis that has been sustained is that the exceptionality has acquired other dimensions, even stronger and more powerful than those existing in the past, and that this new logic and channel was constructed during this first decade. The issue acquires new interest in light of the declaration of an economic, social and ecological emergency in July 2023, through Decree 1085[188], due to the situation in the department of La Guajira, in the northern part of the country, during a government that has proposed a paradigm of power different from those that have existed in the country until now.

The debates in the national constituent assembly: adagio.

Reinforcing the thesis that the state of siege was omniscient and omnipotent, Colombia resorted to this figure to adopt a new order, through the convening of a National Constituent Assembly[189]. Among the issues considered crucial was the regulation of states of emergency. During the discussions, there was an important

187. See, TOBÓN (2019: 440), GARCÍA V. & RODRIGO UPRIMNY R. (2006: 531-571) and in TOBÓN & MENDIETA (2021: 34-45), which contrasts with the article by the same authors (TOBÓN & MENDIETA, 2020: 243-253, 243-258, 250, 252 and 253). Against this, at least partially, CAMARGO (2008). Decidedly against, BARRETO R. (2007: 321-337).

188. Official Journal -DO 52444 Bogotá, D. C., 2 July 2023.

189. See Decrees 926 of 1990/DO 39335 of 4 May 1990 and 1926 of 1990, DO 39512 of 24 August 1990.

tendency to maintain the state of siege, the economic emergency and administrative capture intact[190]. In relation to the state of siege, the goodness of the figure was highlighted, since: "Article 121 of the current Constitution is a proven instrument for the management of internal disturbances or disturbances of external origin. As for the state of emergency, I find the modification reasonable in the sense of incorporating the ecological factor, even though this is implicit in the current article 122, when it speaks of public calamity"[191]. It was even intended to make these norms permanent without the mediation of Congress:

> "Another difference is that the decrees issued by the government during a state of emergency will remain in force once the state of emergency is lifted, unless Congress expressly modifies or repeals them. The purpose of this is to avoid the traumas that the country has experienced and the indefinite prolongation of the state of siege, given the prospect that government decrees will cease to be in force once the state of siege is lifted. In the case of measures that seek to ensure public tranquillity, there is no clear reason why they should cease to be in force once the critical situation that motivated them has been overcome, which could be repeated at any time"[192]. (Emphasis added)

These theses were finally defeated. In fact, as the discussions progressed, the need to limit these powers both with a time limit and with the restriction of fundamental rights and the trial of

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190. For example, Proyecto de Acto Reformatorio a la constitución política número 98, (EMILIANI R. & CORNELIO REYES, 1991: 13-14). Similarly, URIBE VARGAS, CG n. 7 of 18 February 1991, pp. 7 and 8; ZALAMEA, CG n. 12 of 28 February 1991, pp. 1 to 23, MOLINA G. and ESCOBAR S., Proyecto de Acto Reformatorio a la constitución política n. 108, CG n. 25 of 21 March 1991, pp. 44 to 86.

191. Record of constituent REYES, GC 105 of 22 June 1991, p. 3. Also present in right-wing constituents such as LLERAS DE LA F., Actas of Commission III, GC 121 of 23 August 1991, p. 19.

192. Proyecto de Acto Reformatorio a la constitución política n. 124, HERRERA V., GC. número 30 de 1° April 1991, p. 13.

civilians by the military, as well as the elimination of administrative capture in peacetime, gained ground[193]. The response to this position was as follows:

> "A fundamental feature of the Colombian Constitution is Article 121, which authorises the President of the Republic to decree for an indefinite period, if he deems it necessary, a state of siege in a part of the territory or in the whole country, in the event of internal disturbance or foreign war**. Since 1948, Colombia has been suffering the abnormality of the permanent state of siege, with broad powers of the President of the Republic to suspend laws to issue decrees of exception that include the judicial system and the guarantees of due process.** [...] In the shadow of the state of siege, certain legal-political practices have been created that lead to a lack of security for Colombians. [...] **Under the protection of article 121 of the Constitution, a real loophole has been opened through which the presidential dictatorship passes.** The legal loopholes and anomalies in this article are notorious, to the point that "we live under the rule of two constitutions", according to the graphic expression of the then Attorney General of the Nation, Carlos Jiménez Gómez, in the work "El palacio de Justicia y el Derecho de Gentes" (Bogotá, 1986), adding that one of these is the Constitution that is generally mentioned, and the other is the one that actually governs Colombian society "above all in the countryside and villages where the State is not present through its officials and judges. but where the law of the strongest governs"[194]. (Emphasis added)

Finally, the current regime of times for internal commotion was created, separating it from the external war, the prior opinion of the Council of State was eliminated, the emphasis was placed

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193. Proyecto de Acto Reformatorio a la constitución política n. 12, VÁSQUEZ C., GC. cit., pp. 7 and 8. This conception is taken up again, with certain nuances, in the Draft Act Reforming the Political Constitution of the UP, n. 113, GC. 27 of 26 March 1991, p. 12.

194. Proyecto de Acto Reformatorio a la constitución política n. 12, VÁSQUEZ C., GC. cit., pp. 7 and 8. This conception is taken up again, with certain nuances, in the Draft Act Reforming the Political Constitution of the UP, n. 113, GC. 27 of 26 March 1991, p. 12.

on the connection and the non-suspension of rights, as well as the express prohibition of the trial of civilians by the military during the internal commotion, the administrative capture was eliminated and, as an important novelty, the existence of a statutory law regulating the exercise of this type of powers was foreseen. It also maintained the informal control of the measures adopted during the exception by the new body created for this purpose, the Constitutional Court. Despite these adjustments, there was an overlooked victory for the authoritarian tendencies that would be reflected in each of the governments that followed the new order. Despite the evidence of abuses by the executive, one of the opposition tendencies gathered in the Alianza Democrática M-19 interfered in the declaration being shared with the Congress of the Republic.[195] On the other hand, in addition to maintaining the emergency with some reinforcements, allowing the norms issued during the internal commotion to remain in force for 90 days after the declaration generated an essential contradiction with the nature of the figure, echoing the tendencies through which the state of emergency became entrenched. In addition, and as had been done during the transition to the National Front (and even during that period), the Assembly adopted the following rule of continuity with the stateist logic: *"Transitory Article 8. The decrees issued in exercise of the powers of the State of Siege until the date of promulgation of this Constituent Act shall continue to be in force for a maximum period of ninety days, during which time the National Government may convert them into permanent legislation, by decree, if the Special Commission does not approve them"*.

One of the most subtle, but profound changes consisted of the characterisation of the police and public order functions covered by Article 213. One reading of this norm would seem to emphasise

195. Paper Report, Rules of exception. El Estado de sitio y el estado de excepción. La emergencia económica y social, NAVARRO W., et al., GC n. 76, 18 May 1991, p. 12.

the sufficiency judgement, as the internal commotion can only be declared when the situation "cannot be avoided through the use of the ordinary powers of the police authorities". However, another approach alluded to a strengthening of these powers, as indeed occurred. Thus, the Minister of Government during the tragic seizure of the Palace of Justice in 1985, echoed the proposals for high police powers, understood as the power to regulate human rights, public liberties and social guarantees to address issues such as *"curfew, dry law and the right of assembly"*. For this constituent it was clear that *"if we do not want a permanent state of siege, we have to extend the police powers of Congress and the authorities in charge of preserving peace and guaranteeing citizen coexistence"*[196], i.e., another form of regulation. In other words, another way of normalising the exception or allowing a low-intensity exception as a permanent power, as the conservative constituents were pushing for by strengthening the state of siege and its normalisation, since *"it is not clear why they should cease to be in force once the critical situation that motivated them has been overcome"*.

The incorporation of state of siege norms: continuetto 1.

By appealing to continuities, the continuity of the state of siege measures adopted between 1984 and 1991[197] was extended, expanding the burden of normalisation of this kind of provisions, in fact, abundant, which already existed during the period known as the *Frente Nacional* (1957-1974). With the same arguments that were used during the transition from the dictatorships of OSPINA PÉREZ, GÓMEZ CASTRO and ROJAS PINILLA (1946-1957), the strategy of

196. GC. n. 81 of 24 May 1991, pp. 23 and 24. The person concerned is JAIME CASTRO.

197. To a certain extent, and despite the paradigm shift, the doors to exceptionality were left open. (MEJÍA Q. & MÚNERA, 2008: 80-108, 84).

"laundering"[198] was used through a Special Legislative Commission, created and formed by the Assembly itself, charged with approving or disapproving this process (art. 8° T C.Pol.). In effect, in development of the aforementioned transitory article, between 3 and 4 October 1991, Decrees 2252, 2253, 2254, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272 and 2273, all of 1991[199], were adopted as permanent legislation. These incorporated all or parts of 44 state of siege decrees[200], in a regulatory wave that recalled Laws 90 of 1948 (of extraordinary powers), 141 of 1961 and 48 of 1968, this time with the endorsement of an opposition organisation such as the AD-M-19, which was also a member of the Commission, without requiring any specific motivation. Such legislation acquired permanent status with the approval of a delegated body, as if it were an unofficial review of constitutionality, with no regard for legality.

Despite the intensity of these norms, constitutional control was meagre, both because the Constitution itself established this transit scheme, and because only thirteen constitutional complaints were filed, three of which were rejected, against four of the twelve decrees issued[201]. The Constitutional Court, as the new controlling body, dealt with the process of incorporation in the same way as its predecessor did during the transition of the *Frente Nacional*, by sponsoring this kind of practice. In the first of the decisions in which it had the opportunity to pronounce itself, it stated, succinctly, that *"[.... ...] granting them the status of permanent does not in itself violate constitutional precepts as long as it is done by those with legislative competence"*,

198. See GARCÍA V. (2004: 333-334). As a debate in the Assembly itself, BARRETO R. (2012: 87).

199. They are available in OJ 40078 4 October 1991.

200. See ARIZA (1992: 300).

201. Decrees 2265 (D-109, D-124 and D-1786), 2266 (D-059, D-179, D-337, D-930 and D-1115), 2270 (D-089) and 2271 (D-061, D-087, D-126 and D-1312) were sued. At https://www.corteconstitucional.gov.co/secretaria/ (11.08.2023).

adding, as an argument of institutional custom, *"This was done on several occasions by this body in order to prevent the lifting of the state of siege - which, in itself, implied the total loss of validity of the exceptional provisions aimed at re-establishing public order - from causing trauma or inconvenience, especially if the extraordinary rules had given way to institutions accepted by the community and suited to state purposes, whose abrupt disappearance would not be desirable according to the criteria of the ordinary legislator"*.[202]

In the second of the pronouncements, in addition to rejecting a possible impediment of some magistrates for having belonged to the Corporation that decided on the constitutionality of some of the decrees adopted, it specified its contradictory logic by indicating that *"These assertions were expressly taken up by the Special Legislative Commission and by the National Government on the understanding that despite their emergency nature, they should be maintained within the new organisational and functional framework of the Charter, since the conditions surrounding the functioning of the Judicial Branch in the aforementioned special area of criminal legislation against organised crime and terrorism were maintained and continued in their persistent action."*[203] In this way, in addition to replicating a much less "democratic" strategy of whitewashing (passing from the exceptional to normality), the Constitutional Court made a bullfighter's pass at this onslaught as its predecessor had done, used as a reference for this analysis: it turned to the approach of the 1886

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202. CCC, sentences C-007 of 1993, MP. JOSÉ HERNÁNDEZ G., although in this case several norms were declared unenforceable; cf. FABIO MORÓN D. & ALEJANDRO MARTÍNEZ C., C-127/93, MP. ALEJANDRO MARTÍNEZ C.; C-208/93, MP. HERNANDO HERRERA V.; C-092/98, MP. CARLOS GAVIRIA D., also unenforceable. ANGARITA B., GAVIRIA D., MARTÍNEZ C. (at certain times) and ARANGO M. exposed the inconsistency of "normalising" the rules of exception.

203. CCC, sentence C-093/1993, cit. in relation to Decree 2271. Similarly, CCC, sentence C-593/93, MP. CARLOS GAVIRIA D., the dissent of Justices MORÓN D., NARANJO M. and HERRERA V. does not call this practice into question. The thesis is reiterated in sentence C-1050/01, MP. MANUEL CEPEDA E.

constitution and its reforms and did not carry out a study based on the new constitutional order which, by its philosophy, repelled this kind of transitions.

Reminiscences and evocations of the state of siege: continuetto 2.

The inexorable trace

Already in force under the new constitution, the first declaration of exception was a hybrid (emergency-commotion), classified as a social emergency, to increase the salaries of public servants, due to the lack of the respective framework law regulating the matter. On that first occasion, the Constitutional Court[204], although it considered that it was competent to decide on the reasons that gave rise to the declaration in a significant advance[205], thus modifying the thesis that its predecessor had held, it declared it enforceable because *"the President has made appropriate use of the discreet margin of appreciation that must be recognised in this matter"* without a thorough assessment of the causes, making the control almost non-existent and paving the way towards the normalisation of the exceptional, as highlighted in the dissenting opinion of Judge ANGARITA B[206]. The virtues that the decision might have had were overshadowed by the way in which this case was handled; it had no other rationale than to self-destruct from paragraph 18 of the decision, the wording of which was taken away

204. It dealt with the control of Decree 333 of 1992, OJ 40350 of 24 February 1992. Vid. CCC, Sentence C-004/92, MP. EDUARDO CIFUENTES M. Judge ANGARITA B. saved his vote.

205. Highlighting the benign nature of this ruling, see LLINÁS A. (2023: 90-91).

206. Dissenting opinion on sentence C-004. Obviously, it led to a dissenting vote against the judgement that declared Decree 335 of 1992/DO 40350 of 24 February 1992 to be constitutional. In CCC, Sentence C-005/92, MP. JAIME SANÍN G. Sentence C-062 of 1993, MP. JAIME VIDAL P., should be taken into account, with respect to the other decree issued, Decree 334 of 24 February 1992, DO. id.

from the dissenting magistrate. The debate on the emergency arose again in the electricity crisis at the beginning of 1992, which gave rise to the then famous *Gaviria hour*[207] and the declaration of the state of emergency for a period of four days. This time, in a unanimous decision[208], it was declared constitutional and the issuing of a special contractual, debt and tax statute for the companies that *"must attend to the generation, transmission and distribution of electricity"* and ECOPETROL, as well as a modification of the national budget.

But where this perversion and continuity was most evident was in the declarations of commotion and its extensions between 1992 and 1994. In effect, the first internal commotion declared under the new law (Decree 1155 of 1992[209]) was due to an interpretation of the rules of criminal procedure, a tangle of regulations created by the state itself, and the possible release of highly dangerous prisoners. It was a fleeting and strategic declaration for 6 days, which gave rise to Decree 1156 by means of which it was established that provisional release *"can only become effective when the decision granting it is final"* and that, additionally, in crimes within the jurisdiction of the Regional Judges and the National Court, habeas corpus was not admissible. But, in addition, and in order to have time to adopt this norm as permanent legislation (Law 15 of 1992), for the first time, the chess-playing practice of extending the validity of Decree 1156 for a further 90

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207. In addition to the power cut between 2 March 1992 and 7 February 1993, the timetable was brought forward by one hour to make more use of sunlight.

208. CCC, Sentence C-447/92, MP. EDUARDO CIFUENTES M. Revision of Decree 680 of 1992, OJ 40430 of 23 April 1992. It had an interesting clarification of vote on the anti-union bias of the decision formulated by Judge ANGARITA B. Decree 700 of 1992/DO 40431 of 24 April 1992 was issued. CC, Sentence C-448/92, MP. JOSÉ HERNÁNDEZ G. The decision only conditioned Articles 10 and 13 "in the sense that the powers conferred therein to the Executive shall be exercised "subject to the general principles and rules defined by law".

209. DO 40498 of 10 July 1992. Constitutional by Sentence C-556/92, joint report, Justices ANGARITA B. and MARTÍNEZ C. saved their votes. The incoherence was exposed, according to which *"It is easy to see that in Colombia it is much less serious to be extraditable than to wear an army crest. This paradox is unacceptable to those of us who saved the vote here".*

days, outside the state of internal commotion, was used: Decree 1195 of 1992[210], in addition to lifting the state of emergency, extended the measure until 16 October 1992. Regarding this attitude, the Constitutional Court, in a curious assessment of the abuse of the law, an echo of the government's position, affirmed that *"Fundamental rights cannot be converted, as it would be an absurd interpretative conclusion, into a means to obtain impunity"*[211]. It was the task of the dissidents to once again reveal the error of control:

> In this way the government obtains the benefits of exceptionality and normality, strategically combining the two states according to circumstances and political needs. [...] **Governments are not willing to tolerate the unfavourable consequences of the full exercise of citizens' rights, the separation of powers, the control of administrative decisions, etc. This intolerance is a reflection of the democracy we have. That is why, in a strong constitutional regime, the willingness of governments to respectfully and submissively abide by the decisions of the judiciary is a good sign of the mood and strength of their democratic regime**". (Emphasised outside the text).

Based on this insubstantial control, it did not take the government long to return to the 90-day internal commotion, through Decree 1793 of 1992[212], this time with the aim of dealing with terrorist actions, the armed conflict and the social movement. With the above precedents, its enforceability was to be expected, as indeed it was, endorsing theses from the internal enemy and the doctrine of national security such as *"the penetration that the guerrillas have managed to achieve in trade unions, companies and cooperatives"* and concluding that *"[t]he additional powers*

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210. DO 40503 of 16 July 1992. Declared enforceable in Sentence C-579/92, joint report, Justices ANGARITA B. and MARTÍNEZ C. with dissenting votes.

211. CCC, Sentence C-556/92. Judges ANGARITA B. and MARTÍNEZ C. dissented. On this case see MIRA G. (2016: 141-163, 144-149).

212. DO 40659 of 9 November 1992.

that the President receives as a result of the declaration of internal commotion are only justified on a constitutional and social level by an extra set of results"[213], the sophistry of which was evidenced by Magistrate ANGARITA B. Recalling the state of siege, a wide range of provisions were adopted, typical of this creative situation, which gave rise to a succession of constitutional approvals, including the creation of units within the Armed Forces with judicial police functions under the coordination of the Attorney General's Office[214], the establishment of grounds for sanctioning or dismissing governors and mayors for not adopting public order measures[215], the restriction of information on communiqués from guerrilla groups and other criminal organisations[216], the granting of benefits for collaboration with the justice system[217], regulation of

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213. CCC, Sentence C-031/93, MP. EDUARDO CIFUENTES M. Judge ANGARITA B. saved his vote, stating *"3. The phenomenon of the trivialisation of the State of Emergency has allowed governments to have a strategy that consists of maintaining intact the discourse on the Rule of Law and the practice of concentration of power, strategically using one and/or the other depending on convenience and political or military needs. This has been achieved, to a large extent, with the blessing of constitutional judges, who at times limited themselves in a formalist manner to recognizing the constitutionality of each declaration, ignoring the deterioration that this entailed for the institutional structure of normality".*

214. Decree 1810 of 1992/DO 40661 of 10 November 1992. Constitutional, on the understanding that "judicial police units are made up of non-military personnel" (sic), Sentence C-034/93, MP. EDUARDO CIFUENTES M. Judge ANGARITA B. saved his vote.

215. Decree 1811 of 1992/DO ib. Exceptional by Sentence C-032/93, MP. JOSÉ HERNÁNDEZ G. Judge ANGARITA B. saved his vote.

216. Decree 1812 of 1992/DO ib. Constitutional by Sentence C-033/93, MP. ALEJANDRO MARTÍNEZ C. Article 3 was conditioned to allow reporting of the news event, stripped of any apology for the crime. Judge ANGARITA B. saved his vote.

217. Decree 1833 of 1992/DO 40668 of 14 November 1992. Constitutional by Sentence C-052 of 18 February 1993, MP. JAIME SANÍN G. Justices ANGARITA B., MARTÍNEZ C. & HERNÁNDEZ G. with dissenting votes, MARTÍNEZ C. & HERNÁNDEZ G. The upheaval was also used to allocate seized assets to the payment of rewards (Decree 1874 of 1992, OJ 40673 of 23 November 1992, declared constitutional by Sentence C-066/93, MP. JOSÉ HERNÁNDEZ G.) Justices ANGARITA B., MARTÍNEZ C. & HERNÁNDEZ G. with the following dissenting votes: ANGARITA B., MARTÍNEZ C. & HERNÁNDEZ G. with the following dissenting votes, MARTÍNEZ C. & CIFUENTES M. See also Decree 265 of 1993, OJ 40739 of 5 February 1993. Constitutional, cfr. Sentence C-155/93, MP. JORGE ARANGO M.

the witness and victim protection programme[218], measures to control resources of territorial entities[219] and protection of judicial officials [220], modifications to the defence budget and for losses due to terrorist acts[221], assignment of powers to criminal judges in certain areas and for sabotage of oil pipelines[222], declaration of special territorial reserves in areas surrounding mining areas[223], tax and financial rules for defence[224],

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218. Decree 1834 of 1992/DO ibid. Constitutional, cf. Sentence C-035/93, MP. FABIO MORÓN D. Judge ANGARITA B. saved his vote.

219. Decree 1835 of 1992/DO ib. Constitutional, cf. Sentence C-068/93, MP SIMÓN RODRÍGUEZ R. Judge ANGARITA B. saved his vote. Rules on forfeiture of contracts were also established in Decree 1875 of 1992, DO 40673 of 23 November 1992, declared constitutional by Sentence C-136/93 MP ANTONIO BARRERA C., except for part of Article 5.

220. Decree 1873 of 1992/DO 40673 cit. Constitutional, cf. sentence C-058/93, MP. EDUARDO CIFUENTES M. Constitutional except for expressions in Articles 11 (and other bodies determined by the National Government) and 12 (on liability for gross negligence).

221. Decrees 1940 of 1992/DO 40679 of 30 November 1992, constitutional, cf. Sentence C-069/93, MP. SIMÓN RODRÍGUEZ R., and 2006 of 1992, DO 40690 of 15 December 1992, constitutional, cf. Sentence C-072/93, MP. JOSÉ HERNÁNDEZ G. Decree 2094 of 1992, DO 40700 of 29 December 1992. For the 1993 budget, see Decrees 446 of 1993, DO 40784 of 9 March 1993, 543 of 1993, DO 40803 of 24 March 1993, 828 of 1993/DO 40861 of 6 May 1993, 1497 of 1993/DO 40976 of 4 August 1993, constitutional in Sentences C-208/93, MP. ANTONIO BARRERA C., MP, C-261/93, MP. HERNANDO HERRERA V., C-271/93, MP. JOSÉ HERNÁNDEZ G. and C-416/93, MP. EDUARDO CIFUENTES M. With regard to budgetary modification in states of exception, Judge ARANGO M. saved his vote.

222. Decree 1941 of 1992/DO 40679 cit. Decree 1941 of 1992/DO 40679 cit. Constitutional, cf. Sentence C-059/93, MP. ALEJANDRO MARTÍNEZ C. Decree 005 of 1993, OD 40710 of 7 January 1993. Constitutional, cf. Sentence C-076/93, MP. JAIME SANÍN G., cf. Sentence C-059/93, MP. ALEJANDRO MARTÍNEZ C. Decree 005 of 1993, OJ 40710 of 7 January 1993. Decree 1941 of 1992/DO 40679 cit. Constitutional, cf. judgement C-059/93, MP. ALEJANDRO MARTÍNEZ C. Decree 005 of 1993, DO 40710 of 7 January 1993. Constitutional, cf. Sentence C-076/93, MP. JAIME SANÍN G., cf. Sentence C-076/93, MP. JAIME SANÍN G.

223. Decree 1942 of 30 November 1992/DO ib. Constitutional, cf. Sentence C-060/93, MP. FABIO MORÓN D.

224. Decree 2007 of 1992, DO 40690 of 15 December 1992, constitutional, cf. Sentence C-098/93, MP. EDUARDO CIFUENTES M. Decree 2008 of 1992, DO ib., constitutional, except for parts of Art. 2, cf. Sentence C-075/93, MP. ALEJANDRO MARTÍNEZ C. Decree 2009 of 1992, DO ib., modified by Decree 1400 of 1993/DO 40954 of 19 July 1993. Constitutional, cf. Sentences. C-083/93, MP. FABIO MORÓN D. and C-427/93, MP. HERNANDO HERRERA V.

rules on retirement of police officers[225], control of the carrying of arms and ammunition[226] and of radio communications systems[227]. Once the 90 days had expired, the state of commotion was extended twice for a further 180 days[228], the second time with the approval of the Senate of the Republic, with an extension of another 90 days[229], that is to say, almost a year of exception from 2 November 1992, in a pathetic scenario with the consent of the Constitutional Court[230]. The Court limited itself to stating, in a terse manner, that *"the need to prolong the state of internal commotion for the indicated period has been duly justified by the Government and derives from facts of notorious and public knowledge"* with regard to the first extension. In the second, the exercise of control could not be more regrettable and nebulous, stating, like a Greek coryphaeus, that *"the Court finds that the formal and material requirements for extending the duration of the exceptional state for a period of ninety calendar days have been met, in order to allow the President*

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225. Decree 2010 of 1992, DO ibid. Constitutional, except for art. 5°, on sanctions, cf. Sentence C-175/93, MP. CARLOS GAVIRIA D.

226. Decree 006 of 1993, DO 40710 cit. Constitutional, cf. Sentence C-077/93, MP. EDUARDO CIFUENTES M.

227. Decree 007 of 1993, OJ 40710 cit. Exceptional, cf. sentence C-082/93, MP. JOSÉ HERNÁNDEZ G. Modified by Decree 262 of 1993/DO 40739 of 5 February 1993. Constitutional, cf. Sentence C-153/93, MP. JOSÉ HERNÁNDEZ G. Paging was suspended in Medellín and Envigado, cf. Decree 266/93, DO 40739 of 5 February 1993. Constitutional, cf. Sentence C-153/93, MP. VLADIMIRO NARANJO M., extended and amended by Decrees 423 of 1993/DO 40779 of 5 March 1993, 624 of 1993/DO 40817 of 2 April 1993, 682 of 1993/DO 40827 of 13 April 1993, 827 of 1993/DO 40859 of 5 May 1993, declared Constitutional in judgements C-196/93, MP. CARLOS GAVIRIA D., and 827 of 1993/DO 40859 of 5 May 1993, C-266/93, MP. HERNANDO HERRERA V., C-267/93, MP. HERNANDO HERRERA V. and C-268/93, MP. CARLOS GAVIRIA D.

228. See Decrees 261 of 1993/ DO 40739 of 5 February 1993 and 829 of 1993, DO 40861 of 6 May 1993.

229. Decree 1515 of 1993/ DO 40977 of 4 August 1993. This decree extends the validity of 31 of the 41 decrees issued since Decree 1793 of 1992. Constitutional, Sentence C-464 of 21 October 1993, MP. ANTONIO BARRERA C.

230. On extensions see CCC, Sentences C-154/93, MP EDUARDO CIFUENTES M. and C-294/93, MP ID.

to effectively fulfil his duty to re-establish normality and achieve social peace, and therefore the government's decision is in line with the Constitution".

These extensions allowed, in addition to modifying and complementing some of the provisions adopted, the inclusion of new ones such as those relating to support for victims of terrorist attacks in health, housing, credit and education[231], the granting of benefits for collaboration with the justice system, declared unconstitutional as contrary to article 252 of the Constitution[232], provisions for dialogue, surrender and reintegration of members of guerrilla groups[233], as well as the aggravation of sentences for terrorism, also found to be unconstitutional[234], and the terms of instruction and grounds for provisional release in proceedings under the jurisdiction of regional judges and the National Tribunal[235]. In this way, the state of siege was revived from the ashes of 5 July 1991.

A slight nuance

At the end of the GAVIRIA T. government, two situations arose that were considered exceptional. On the one hand, and replicating the procedural situation that gave rise to the first internal upheaval,

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231. Decree 263 of 1993, DO 40739 of 5 February 1993, as regards health. Constitutional, cf. Sentence C-134/93, MP. ALEJANDRO MARTÍNEZ C. The assistance was extended in Decree 444 of 1993/DO 40784 of 9 March 1993, declared constitutional in Sentence C-197/93, MP. ANTONIO BARRERA C.

232. CCC, Sentence C-171/93, MP. VLADIMIRO NARANJO M. This decision partially affected Decree 445 of 1993, DO 40784 of 9 March 1993, in Sentence C-207/93, MP. EDUARDO CIFUENTES M.

233. Decree 542 of 1993, OJ 40803 of 24 March 1993. Constitutional review, cf. judgement C-214/93, MP. HERNANDO HERRERA V. Justices HERNÁNDEZ G., BARRERA C. and ARANGO M. also saved their votes. See also Decree 1495 of 1993, DO 40976 of 4 August 1993. Constitutional, except for Art. 11, cfr. Sentence C-415/93, MP. JOSÉ HERNÁNDEZ G.

234. Decree 709/93, DO 40833 of 16 April 1993. Unconstitutional, cfr. judgement C-275/93, MP. ANTONIO BARRERA C.

235. Decree 1496 of 1993, DO 40976 of 4 August 1993. Constitutional, cf. Sentence C-426/93, MP. HERNANDO HERRERA V. Justices ARANGO M., GAVIRIA D., HERNÁNDEZ G. and MARTÍNEZ C., dissenting.

on 1 May 1994, a new ten-day declaration was decided (Decree 874 of 1994[236]), despite the fact that Decree 1155 had been adopted as permanent legislation and amendments to the Code of Criminal Procedure[237] and the issuing of Decrees 875 and 952[238] had been approved. Based on information from the Attorney General's Office on the release from prison of 864 defendants accused of serious crimes, the judicial emergency led to the suspension of the terms set out in the articles for the granting of provisional release contained in Law 81 of 1993, as well as the mandatory appointment of public defenders, the suspension of the level of consultation and the redistribution of work in this entity[239]. In a change from its previous lazy thesis, it decided to undertake a slightly more detailed study of the situation presented by the government and thus transcend the discreet control it had carried out up to that point[240]. The ruling gave the government some leeway by stipulating that the effects of the unenforceability were only produced with its notification, thus providing a breathing space for the adjustment, an aspect that Justice GAVIRIA D., in his clarification of vote, questioned, considering that the decision produced effects as of the issuance of the decree of exception. Although there was a warning about the abusive exercise of the state of commotion, it would be a year later when a real change in the paradigm would take place: in Ruling C-300, the notion of public order and the exception were still conceived according to government criteria, and what that decision deprecated was the lack of evidential material to corroborate that the accused who were released from prison were dangerous, and not their real

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236. DO. 41339 of 1 May 1994.

237. Law 81 of 1993/DO 41098 of 2 November 1993.

238. DOs 41339 of 1 May 1994 and 41353 of 10 May 1994, respectively.

239. Decree 951 of 1994, DO 41353 of 10 May 1994.

240. CCC, Sentence C-300/94, MP. EDUARDO CIFUENTES M. Justices HERRERA V., MORÓN D. and NARANJO M. dissenting.

danger. As a consequence, the decrees issued, including the extension, were consequently declared unconstitutional[241].

A month after the previous declaration of internal commotion and a few days after the entry into force of the statutory law on states of emergency (Law 137 of 1994[242]), on 9 June 1994, an earthquake occurred with its epicentre in the department of Cauca, the first tragedy considered as qualifying for the declaration of an emergency under the 1991 Constitution[243]. The Corporation concluded that there had indeed been a supervening event that exceeded the capacity of the ordinary response. To address the situation, the Corpopaeces Corporation, later Nasa Kiwi[244], was initially created as a public establishment attached to the Ministry of Government, whose purpose was the rehabilitation and reconstruction of the area. The Corporation also issued regulations on the acquisition and expropriation of land[245], tax exemptions for new companies set up in the affected area[246], and the frustrated special provisions for the write-off of loans from official banks to private producers in the zone[247].

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241. CCC, Sentences C-309/94, MP CARLOS GAVIRIA D., C-310/94, MP ALEJANDRO MARTÍNEZ C. and C-338/94 MP. HERNANDO HERRERA V., with dissenting opinions by Justices NARANJO M., HERRERA V. and MORÓN D.

242. DO 41379 of 3 June 1994.

243. Decree 1178 of 1994/DO 41393 of 16 June 1994. In the clarification of vote to that decision, Judges HERRERA V., MORÓN D. and NARANJO M. reiterated the lack of competence of the Constitutional Court to review the substance of the declaration.

244. Decree 1179 of 1994/DO 41393 cit. Constitutional, cf. Sentence C-367/94, MP. EDUARDO CIFUENTES M. Added by Decrees 1252 of 1994/DO 41399 of 20 June 1994, 1263 of 1994/DO 41403 of 23 June 1994. Constitutional, cfr. Sentences C-368/94, MP. VLADIMIRO NARANJO M., C-376/94, MP. JORGE ARANGO M.

245. Decree 1185 of 1994/DO 41393 cit. Constitutional, except for the expressions "and other public entities, which are responsible for developing projects in disaster, risk and influence zones" in Article 2, cf. Sentence C-370/94, MP. FABIO MORÓN D.

246. Decree 1264 of 1994/ DO 41403 cit. Constitutional review, cf. judgement C-373/94, MP. FABIO MORÓN D.

247. Decree 1265 of 1994/DO 41403 cit. Unconstitutional for establishing an aid that would not be directed at the injured parties, Judgment C-375/94, MP. ANTONIO BARRERA C.

The unbearable lightness of a statutory law: allegro ma non troppo.

The subjection of states of emergency to a statutory law was a new issue in the Colombian constitutional order. Until June 1994, declared states of emergency were neither subject to nor regulated by a special law, an aspect that had already been developed in several constitutions in the region almost a hundred years earlier. Colombia, belatedly, incorporated it in order to regulate *"the powers of the government during states of exception";* however, its absence was not an obstacle to resorting to such mechanisms, and despite the fact that the tragedy of the Paeces zone occurred during its validity, neither the government nor the Constitutional Court took it into account to validate this condition. With regard to this law, which is still in force, it is interesting to examine both the procedure that gave rise to it and the review carried out by the Constitutional Court.

The draft laws

The return to real power in the country after the constitutional dreams came with the renewal of the Congress of the Republic in October 1991. Liberalism regained institutional control by winning more than half of the seats in both the Senate and the House of Representatives. Opposition forces and ethnic groups barely reached 10%. This scenario generated, from the outset, a problem in constitutional development that will be reflected, among other things, in the issuing of the statutory law on states of exception. The bill, which would become Law 137 of 1994, was filed under number 91/92 (S)-166/92 (C), similar to Bill 10/92 S *"which regulates the matter of states of exception"*[248], to which were added, in addition

248. Bill 10/92 (S), Annals of Congress 12 of 5 February 1992, pp. 7-12. For a review of this issue, see CAMARGO (2008). To begin the short legislature of 1991-1992, the government

to the bill on states of exception. to which bills 100/92 (S), presented by Senator BERNARDO GUTIÉRREZ Z. (1954-2008), a former militant of the Popular Liberation Army (EPL) and at that time representative of the AD-M-19, and 128/92 (S), an initiative of the congressmen of the Patriotic Union, HERNÁN MOTTA M., JAIRO BEDOYA H., MANUEL CEPEDA V. (1930-1994) and OCTAVIO SARMIENTO B. (1929-2001).

The government initiative did not regulate the state of emergency, despite its title, as a kind of slip of the tongue. It did not recognise such a state as exceptional, a perception stemming from the debates in the National Constituent Assembly. The restrictive reading of the constitutional order was seen in the possibility of creating courts martial (art. 13), in the event of external war; additionally, it contemplated zones of confinement of persons in internal commotion. With regard to the latter, in addition to what was finally approved, in relation to the powers (art. 23) it prohibited the movement of persons, as well as their transfer, allowed the seizure of goods and the imposition of personal services, prohibited the broadcasting of information with the possibility of provisional suspension of the measure by the Constitutional Court. Likewise, and without a court order, it empowered both the interception of communications and the arrest of persons "suspected" of involvement in crimes, as well as house searches, following the logic of Article 28 of the previous constitution. This draft included the prohibition of strikes that "contribute to the disturbance of public order", expropriation and temporary occupations, and the intervention of companies and closure of establishments. As for punitive power (art. 29), it did not establish major restrictions on the criminalisation of new conducts and increased penalties and, on the contrary, it incorporated a dangerous form of laundering through

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presented such an initiative, which was eventually shelved.

the back door[249]: it adopted one of the theses debated in the Assembly of direct normalisation of the exception in a much more harmful regime than the one existing in 1886 via positive silence, with which the government gave sincere signs of wanting to maintain the model of exception within the spaces of normality, in the manner of the state of siege. It also provided for the creation of ad hoc judges made up of executive authorities (art. 27) and, finally, warned of the limits of the tutela action in a state of emergency, stating that it did not proceed against decrees issued and added that its interposition "against actions and omissions of the public authorities that threaten or violate the essential content of rights" should be subject to the limitations authorised by the Constitution and statutory law (art. 34).

The AD-M-19 bill *"regulating states of emergency due to foreign war and internal commotion"*[250] did not refer to the emergency either. In terms of rights, it alluded to their intangibility; it included the guiding principles of non-discrimination, international notification and responsibility (Articles 8, 10 and 11) and included a special chapter on prohibitions (Article 12), which included absolute limitations on rights, the investigation and trial of civilians by the military, the creation of punishable acts and special judicial procedures, which contrasted with the punitive power of the government's bill. It also contemplated, within constitutional control, the possibility of provisional suspension of measures that were openly contrary to the Constitution (art. 18). In relation to the state of internal commotion, it

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249. *"Once the state of emergency has been lifted, if the Government decides to extend the validity of the legislative decrees, Congress shall have the 90-day period established in the Constitution to repeal or modify those referring to the matters indicated in the first paragraph of this article.* ***On expiry of this period, they shall be deemed to have been ratified. In any case, Congress may establish a maximum period and conditions for their validity and may subsequently modify, add to or repeal them in the exercise of its ordinary powers. The proceedings initiated shall be transferred to the competent judge to continue the process in accordance with the ordinary criminal procedure and the penalties may not be higher than the maximum ordinary sentence.****"* (Emphasis added)

250. Gazette of Congress, Year I, Number 23 of 11 August 1992, pp. 17-23.

defined what should be understood by serious disturbance of public order (art. 24), limited its use to causes that "motivated its application in immediately previous situations" (art. 26) and did not regulate the extension of the term of the commotion for a further 90 days outside the state of commotion. It did not establish limits to public actions, including the action for protection, and in terms of the powers of internal commotion it reduced them to restricting the movement of persons, seizure of goods, prior permission for demonstrations and meetings, rationing of services, limitation of civil rights of foreigners and suspension of safe conduct for carrying arms (art. 33). The explanatory memorandum posed the following dilemma: *"From a legal-institutional point of view, it is true that it was through an exceptional measure that Colombians were able to advance important peace processes and convene the National Constituent Assembly, but at the same time, this is a fact that demonstrates the permanence of the exceptional and the inability of the old order to generate political and social openness"*[251].

Finally, the UP bill "regulating the states of exception"[252] did have a comprehensive purpose by incorporating the regulation of the emergency did have a comprehensive purpose, but without any progress. As an innovative and protective feature, it included the *pro homine* principle according to which limitations must have a restrictive scope (art. 3°). In relation to the grounds for declaring any state of emergency, and in coherence with the above, it stipulated that there must be a serious and real threat to the life of the Nation (art. 6)[253], thus excluding hypothetical ones, which explains the principle of exceptional threat, to which the principles of proclamation (art. 7) and temporality (art. 15) are added. However, unlike the previous draft, it provided for the possibility of courts

251. *Ib.*, p. 19.

252. Gazette of Congress, Year I, Number 49 of 2 September 1992, pp. 2-10.

253. *Ib.*, p. 8.

martial in a state of war in exceptional cases (Art. 20). In relation to the internal commotion, three nuclear measures were established within the powers, namely the curfew, the decree of expropriation and the suspension of safe conduct for carrying arms (art. 28), and it provided for the application of international humanitarian law. Likewise, although it prohibited the trial of civilians by the military, it allowed, as in the government's draft, the possibility of civilian authorities exercising judicial functions (art. 33). Criticizing the government's exercise of the state of internal commotion so far, the explanatory memorandum stated:

> "In the project to regulate the States of Emergency presented by the current government, it is not difficult to find a traditional-despotic approach, in which security and stability come to act as a counterweight to human rights, and to such an extent that, on occasions, it is proposed in the official project, article 23, almost as a dichotomy, a radical cut between these and the latter. [...] This State of Exception is the one that has the greatest negative impact on the democratic transformation of our country. The way in which it is beginning to be used by Mr. Gaviria makes it similar to the State of Siege and the Security Statute of the fateful government of Turbay Ayala."[254]

It also clarified that the rights that it calls non-derogable are those that *"for no reason and under no circumstances can be affected by state action"*[255], taking up the classification in both the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR).

254. *Ib.*, p. 5.

255. *Ib.*, p. 5.

Concessions in the processing of the initiative

With these views, the government initiative was taken as a basis for structuring the regulatory regime, adding the emergency aspect in the first debate[256]. Plus the accumulation of the bill, the message of urgency and the processing in joint commissions, the same exercise of endorsing the government proposal was carried out in a new report, including the principle of non-discrimination, and some minor adjustments[257], in the report for the second debate in the Senate of the Republic, quite regressive aspects such as the scope of control by the Constitutional Court were taken up again: *"The first class of decrees [those of declaration] is a complex act of the President of the Republic and the Ministers, which is subject to the control of the Constitutional Court in the terms of articles 213 to 215. Its review by the judicial body may not include the study of the reasons for declaring it, because this corresponds to a discretionary, discretionary decision of the Government"*[258]. In this way, the intention was to carry out a constitutional reform through the back door after the Sentences C-004 and C-447 that had taken place that same year: a new step backwards supported by the sophistication of the existence of a control by the Congress of the Republic, echoing the dissent that was appearing in the Constitutional Court itself. With regard to the internal commotion, it provided a window for peace by offering the possibility of *"issuing exceptional measures aimed at facilitating the reincorporation of political criminals"* (art. 22), but preserved the executive power of detention, the prohibition of strikes and the scope of punitive power.

The draft for the second debate in the House of Representatives[259] attempted a less restrictive twist to the bill, becoming somewhat

256. Ponencia for first debate in the Senate of the Republic, Gazette of Congress, Year I, n. 45, 1 September 1992, pp. 2-6.

257. Gazette of Congress, Year I, n. 117, 9 November 1992, pp. 1-9.

258. Gazette of Congress, Year I, n. 203, 14 December 1992, pp. 1 to 12, 4, parentheses outside the text.

259. Gazette of Congress, Year I, n. 209, 15 December 1992, pp. 1-11.

independent of the government's orientation. In addition to including the somewhat bizarre and certainly not at all secular term *"sacrosanct"* rights for intangible rights (art. 4), it specified the possibility of pardon to achieve peace, proposed the outright elimination of courts martial in a state of war (art. 13) and created zones of protection for the population that may be affected by war actions (art. 15). In relation to police powers (Art. 23), it eliminated some of them, including administrative arrest[260], the provisional suspension of some information measures by the Constitutional Court, as well as house searches and the prohibition of strikes. It also included an interesting rule against laundering in one of its last articles (41): *"In no case may legislative decrees issued by the National Government to suspend laws that it considers incompatible with states of exception become permanent legislation"*. The document of the Andean Commission of Jurists that was incorporated into the debate warned of **"***concentration camps, internal exile, registration, occupation of premises of all kinds, military tribunals for civilians, the power to modify the penal system, censorship, the prohibition of strikes and the possibility of police commanders directly assuming the powers of internal commotion. [...] The criticism of emergency legality does not seek to tie the state in knots. What it is about is to prevent it from continuing to destroy itself by denying what is its foundation, human rights. The draft law on states of emergency would oblige the Colombian state to continue to be an agent of barbarism"*[261]. This aspect was highlighted by the Ombudsman in relation to the existence of Military Courts, due process, the lack of clear and specific determination of the rights that can be affected, the existence of censorship, capture and searches

260. It should be noted that the Procurador General de la Nación argued the unconstitutionality of this measure and the return to the scheme of the 1886 Constitution and its reforms. In Actas de plenaria, Congressional Record, Year 2, n. 2, 5 April 1993, p. 7. The same reflection is made with regard to house searches without a warrant.

261. Gazette of Congress, Year II, n. 2, cit. p. 9.

without a warrant, the prohibition of strikes and the scope of punitive power[262].

These warnings, which somewhat mitigated the government's statist vision, were included in the second report in aspects such as the intangibility of certain rights and prohibitions during states of exception. The government's powers were also adjusted, including the elimination of administrative arrests and house searches without a warrant, the prohibition of a permanent state of emergency, eliminating the possibility of its declaration in the following year for the same reasons, emergency measures within a peace process, and the control of the legality of administrative functions[263]. A text with this orientation and denying the Military Courts was adopted as definitive by the Senate of the Republic, allowing, however, verbal judicial orders in the case of arrest and house searches[264], which was opposed by the AD-M-19 and representatives of the UP[265]. This did not prevent certain voices from defending the previous thesis of the exception because, according to these tendencies, the protection of individual rights was limiting the government's capacity to act, encouraging self-defence and anarchy[266], or the Minister of Government from strongly supporting the Military Courts because without them it would be as much as depriving the country of justice[267], recapitulating the discussion that the Supreme Court of Justice had addressed under the previous constitution. Interestingly, the debate

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262. *Ib.*, pp. 10 a 14.

263. Gazette of Congress, Year II, n. 151 of 26 May 1993, pp. 1-16.

264. Gazette of Congress, Year II, n. 188 of 10 June 1993, pp. 3 to 9. A very similar text is approved by the House of Representatives, in Gazette of Congress, Year II, n. 189 of 10 June 1993, pp. 2 to 7.

265. Gazette of Congress, Year II, n. 237 of 19 June 1993, p. 7.

266. Gazette of Congress, Year II, n. 161 of 28 May 1993, p. 8. Actes of the plenary session of 26 May 1993.

267. *Ib.*, p. 9. This thesis was supported by Senators SORZANO, MENDOZA A., ESPINOSA J. See, also, Gazette of Congress, Year II, n. 173 of 4 June 1993, pp. 3 to 18.

on the regulation of the state of emergency was absent from the process that led to the issuing of the statutory law. Taking up the UP's initiative, the added value of the regulation of this issue, with the exception of the general provisions, was minimal or non-existent[268]. It is worth asking whether the aim of the statutory law was to repeat the constitutional norms or, as indicated in the law itself, to regulate the exercise of powers, an issue that did not give rise to any exhortation or statement by the Constitutional Court since, in reality and *stricto sensu*, it can be affirmed, without any doubt, that this state is not regulated by a statutory norm. Finally, although some of the aspects proposed by the government were mitigated, others were maintained that opened the door to abuse, which, moreover, were admitted by the High Court, as will be analyzed in the following section.

The "control" of constitutionality: an unbearable levity?

The norm raised several points of debate which, during the process, confronted disparate views on the scope of the powers and the restriction of rights among those involved in the regulation of states of exception, especially the governmental perspective and that of VÁSQUEZ C., a former Constitutional Court member, among others, in which the Ombudsman and, by constitutional obligation, the Attorney General of the Nation also participated. Much expectation was generated both by the rule that would be adopted to define the exercise of these mechanisms and the Constitutional Court's decision on it, once there had been a significant number of rulings on the limits of this exercise and, especially, on the control of the declaration, which was heightened by the unknowns that were raised in the

268. The five articles adopted were limited to transcribing the nine paragraphs of Article 215 of the Constitution. Indeed, Article 46 of Law 137 compiles paragraphs 1 and 4 of the constitutional provision, Article 47, paragraphs 2 and 3 ibid., Article 48 does the same with paragraph 5, Article 49 is a transcription of paragraph 6, and Article 50, paragraph 9.

debates on the scope of the limitations adopted, the remnants of the State regime and the vision of the *raison d'état*.

The decision upheld the structural pillar of the law and only partially questioned or conditioned eleven of the 59 articles and declared one of them unconstitutional, relating to the power of Congress to reform or repeal, at any time, the legislative decrees issued by the government during the internal upheaval, as well as certain sections of certain norms. One of the first points of discussion, raised by both the Attorney General and the Ombudsman, had to do with the scope of the decision and the possibility of public actions against the law, which elicited a dismissive response based on the three previous decisions on this type of laws[269], without recognising the blunder that would be committed by not considering the existence of a legislative omission in the regulation of the state of emergency. Likewise, the comparison of the formal requirements for approval left a doubt as to the majorities, as the Court itself emphasised that it was not enough to affirm *"that it was approved by an absolute majority, but that the number of senators or representatives who so decided must be recorded"*[270]. This only generated an exhortation, but did not have a specific impact on the review that would be undertaken, making the control in its charge doubtful, as it took actions for granted without concrete verification of their compliance.

The Sentence accepted the thesis of the admissible limits of order and the overstepping of these limits, which occurs when *"disorder has been substituted for order"* which is declared by the authorized organ *"which has to verify, with binding force, that the phenomenon has occurred*

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269. See, CCC, Sentences C-011/94, MP. ALEJANDRO MARTÍNEZ C., C-088/94, MP. FABIO MORÓN D. and C-089/94, MP. EDUARDO CIFUENTES M. In the first sentence, the thesis was formulated that the decision on statutory laws is definitive and becomes res judicata and, therefore, does not allow it to be challenged through public actions.

270. CCC, Sentence C-179/94, MP. CARLOS GAVIRIA D. Considering c., formal requirements.

or its advent is imminent"[271], which would suggest a return to the thesis of formal control of the state of emergency. This would suggest a return to the thesis of formal control of the declaration, although when analyzing article 55 of the norm, he fortunately clarified that its scope involves the decrees declaring the state of emergency, but not in an emphatic manner. Among the critical points, it declared the expression *"in accordance with the principle of reciprocity on the part of the state with which there is conflict"* in the final part of Article 3 to be unconstitutional on the grounds that it was a limit that was not contemplated in Article 212 of the Constitution. It adopted the same decision with regard to the paragraph of Article 4, considering that amnesty and pardon is a non-delegable power of the Congress of the Republic. In this regard, the Corporation considered that this type of power was exclusive and non-delegable by the Congress of the Republic, especially given the political connotation of the measure and the qualified majorities[272].

With regard to the suspension of rights, regulated in different ways in Articles 4 to 7 of Law 137, the Corporation considered that the essential nucleus is the irreducible scope of the protected conduct, which served to dispel, in brief and almost tautological reasoning, the antithesis that arises with the suspension or limitation of rights, as well as the ambiguity inherent to the essential nucleus. Thus, the rule that abruptly lands the guarantee of rights is the confrontation of the principle according to which *"human rights and fundamental freedoms may not be suspended"* contained in Article 214 of the Political Constitution. Article 4 of this norm alludes to intangible rights and announces them in correspondence with Article 5, which develops the prohibition of suspending rights, in the sense that they can be limited, in a kind of play on words, as well as Article 6, which

271. *Ib.*, considering e3.

272. *Ib.*, considering f Article 4, seventh reason.

sets out the effects of the division, exogenous to the constitution, between tangible and intangible rights. Nowhere in the decision is there any clarity about the subtle difference between restricting and limiting and suspending, except for the theory of the essential nucleus, thus obviating the debate raised by the constituent VÁSQUEZ C. For the Corporation, with regard to Article 4, the argument of generality and custom was sufficient to affirm that *"During states of emergency,* ***it is common for certain rights to be affected which the Constitution itself allows to be restricted or limited in times of normality****, such as: the right of assembly, the right of association, freedom of movement, etc."*[273] (Emphasis added).

This form of reasoning is paradigmatic in the judgement and occurs in the review of Articles 8 to 18, 22 to 26, 28 to 37, 39 to 42, 45 to 54, 57 and 58, in short, catch-all phrases such as *"this provision in no way violates the Constitution"*, *"this provision is superfluous"*, the norm *"merely reproduces"* the constitutional text[274], or in tautological efforts set with some decisions of the Corporation itself that converge in the constitutionality of these norms, or in tautological efforts set against the backdrop of some of the Corporation's own decisions which converge in the constitutionality of these norms, with a clarification in relation to the disciplinary function of the Procurator General's Office in Article 14 and an unconstitutionality which in no way affects Article 35[275]. As already indicated, the repetition of constitutional norms, under the pretext of regulating them, as is the privileged case with the state of emergency, did not raise any constitutional objection in the face of an evident absolute legislative omission.

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273. *Ib.* considering f Article 4.

274. *Ib.* considering f Article 45.

275. On the criticism of this decision, see CAMARGO, *Los estados de excepción*, op cit., pp. 117-216.

When reviewing the prohibitions in states of exception, (art. 15) the following argument is put forward: *"While it is true that during states of exception, the extraordinary legislator is empowered* ***to restrict or limit*** *certain fundamental rights or freedoms, it is no less true that the Constitution has denied him, in any case, the possibility of* ***suspending them****; since constitutional guarantees in exceptional periods are not extinguished, despite the fact that some of them are subject to restrictions or limitations. Nor is the Government allowed to interrupt the normal functioning of any of the branches of public power, or to modify or suppress the entities and functions of prosecution and trial, [...]"*[276] (emphasis added) The assignment of judicial functions to executive civil authorities in certain places referred to in Article 21 was not affected, with the argument that these do not involve investigating and judging crimes, but may, in any case, have this competence in relation to contraventions, an issue that the Court did not clarify.

More of interest in the review were topics that provided greater protection against abuses that could arise from the immediacy of the measures, such as the suspension of the provisions adopted during the state of emergency, contained in Articles 19, 20 and 56, paragraph 2. He pointed out that the power contained in article 241 of the Constitution implied a definitive decision on such measures and *"it is wrong for a law, such as the one under study, to establish the provisional suspension of such legal acts, which constitutes a clear and open violation of the Supreme Law"*[277], despite the fact that the protection of the integrity of the Constitution should contemplate that decisions openly contrary to the law could be stopped in time[278].

With regard to the powers (art. 38), the debate was generated in relation to the scope of these powers in times of internal and external

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276. CCC, Sentence C-179/94, cit. Considering f Article 15.

277. *Ib.*, considering f, Article 19.

278. See CAMARGO (2008: 118).

war. One of the first issues was the restrictions on the media, with regard to which, in addition to the provisional suspension, which was found to be unconstitutional, it also found this circumstance in relation to the possibility that organizations or individuals who are outside the law could be prohibited from disseminating information on human rights on the grounds of violating the right to equality, without questioning the other existing mechanisms for controlling information. In relation to article 38, which lists some of the measures that can be adopted in the midst of the internal upheaval, in addition to that provided for in paragraph c), the Court carried out the following analysis:

> Respect to the right to freedom of movement and residence (paragraph a), it did not note a problem with the notification of movements or special permits, which are analyzed as *"a fully valid procedure to protect people's lives and physical integrity, given the serious public order situation that may arise in certain rural areas, which makes it necessary to take this kind of measure"*[279]. Nor did the curfew, an exceptional measure which, as a function of the police power, has nowadays been extended to normality.
>
> The use of goods and the imposition of services (subparagraph (b)), the prior permission or restriction of meetings and demonstrations (subparagraph (d)), the interception of communications (subparagraph (e)), the restriction of the right to strike (subparagraph (g)), the limits or rationing of services and orders to supply markets, services and production centers (subparagraphs (h) and (i)), the subordination of the exercise of certain civil rights to foreigners (subparagraph (j)), the imposition of fiscal or parafiscal contributions and the allocation of royalties (subparagraph (l))[280], the amendments to the budget (subparagraph (ll)), the suspension of the validity of safe-conducts

279. CCC, Sentence C-179/94, cit. Considering f Article 38 a.

280. Regarding this possibility, see the dissenting opinion of Magistrate ARAÚJO R. to Sentence C-876/02, MP ÁLVARO TAFUR G. In this opinion, it was proposed that this rule should not be applied because it was contrary to article 213 as an implicit prohibition. This reflects the lack of rigour in the review of the constitutionality of the draft statutory law.

(subparagraph (m)), did not give rise to any disparity or deep reflection, and adhered to the parameter of the sentence of short and brief syllogisms without any further effort of complexity and debate. With concerns the interception of communications, the Court pointed out that the order can be verbal, as the Constitution does not specify it, as it does in the case of detention, and to this end it reflects that *"[a]ccording to this higher precept, the order of the competent judicial authority does not necessarily have to be written, which in the opinion of this Court would be desirable, but if the Constitution did not determine it, the interpreter cannot demand it, creating distinctions where the constituent did not do so"*[281], in an interpretation that decontextualises the two constitutional norms (arts. 15 and 28) to derive a subtle difference, leaving aside the written nature of the state action. In an interpretation that decontextualises the two constitutional norms (arts. 15 and 28) to derive a subtle difference, leaving aside, furthermore, the written nature of the state's actions. In relation to the possibility of expulsion of foreigners for activities that threaten public order, the reasoning of the Corporation, which has great affinities with the formulas established in the 1920s or the McCarthyist ideology, was based on a decree law prior to the 1991 Constitution (the statute on foreigners) on the basis of which it concluded that *"this statute provides for the expulsion from the national territory of foreigners who incur in any of the grounds indicated therein, for example, those accused of subversive activities, which in the opinion of the Government constitute a danger to the Colombian State", thus lowering its role to that of a "foreigner", which, in the opinion of the Government, is "a threat to the Colombian State"*[282], thus lowering his role as a constitutional judge to the level of an administrative judge.

For its part, preventive apprehension on suspicion of involvement in the commission of crimes related to the causes of the disturbance of public order (paragraph (f)), passed the constitutionality test. This rule allows the conduct that had been practiced under Article 28 of the previous constitution to be carried out for a period of 36 hours and, on this occasion, by any authority. In relation to the verbal nature of the order,

281. CCC, Sentence C-179/94, cit. Considering f Article 38 e.

282. *Ib.*, *cit*. Considering f Article 38 j.

following the subtle style, it admits it *"When there are insurmountable circumstances of urgency and it is necessary to protect a fundamental right in grave and imminent danger, the previously written judicial authorisation may be communicated verbally"* or in flagrante delicto. The only thing that is observed as contrary to the law is the registration of arrest warrants, which must all be written and not verbal[283].

About the power of suspension of governors and mayors held by the president and governors, respectively, the ruling appeals both to the power provided for in article 304 of the constitution and to the centrality in the management of public order, and warns nothing about the right of defense that these popularly elected representatives should have and who may be stigmatized for not belonging to the current of the President of the Republic[284]. Such is the synthesis and haste of the decision that it omits to pronounce on how the removal of a mayor by the governor would take place.

Also, with certain reservations, house searches and searches (paragraph n) are admitted, eliminating those of a massive or collective and indeterminate nature, on the grounds that they violate due process.

However, in the norm relating to punitive power (Art. 44) and the possibility of issuing criminal codes and codes of criminal procedure, a task that falls exclusively to Congress, the judgement puerile clarified: *"Although it may seem reiterative, the Court must insist that the fact that certain penal norms dictated during the period of internal commotion produce effects of a permanent nature, is not equivalent to affirming that due to this circumstance such precepts have a vocation of permanence, since the regulations dictated by the Government in this exceptional period, as ordered by the Constitution in article 213, are eminently transitory, and cease to govern once the reestablishment of the disturbed order has been achieved."*[285]

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283. *Ib.*, *cit*. Considering f Article 38 f.

284. *Ib.*, *cit*. Considering f Article 38 k.

285. Ibid., considering f., art. 44. In addition to the folklore of the decision, as CAMARGO (2008) points out, it endorsed many of the authoritarian features of the norm.

On the other hand, except for the permanent warnings of Justice ARAÚJO R., which would be expressed a decade later, an issue which has not generated any repercussions despite the declarations of the unenforceability of some of the states of exception, has been that of the responsibility referred to in Article 51 of Law 137 and which is found in Articles 214 and 215 of the Constitution, as an ornament. This did not elicit further reflection by the Court except to replicate the constitutional paragraphs[286]. Issues such as the procedure for asserting this responsibility were overlooked, and even an aspect that seems obvious, which is the ex officio referral to the competent authority of the declarations that have been found to be unconstitutional by the Constitutional Court and the breakdown of the responsibilities that have been generated, remaining at the very level of abstraction that generates impunity.

With regard to the review of the constitutional incongruity of maintaining the rules of commotion for a further 90 days after the lifting of the declaration, it meekly accepts this design when it states that *"if the rules enacted during the state of internal commotion are conditional on the recovery of public order, it would* ***seem illogical*** *to allow the application of some of them after their restoration, It would seem illogical to allow the application of some of these after their reestablishment, although this exception is justified by the fact that the disturbing situation may continue despite the state of internal commotion having been lifted, given that the maximum term that the Constituent Assembly set as the time limit for its duration has expired".*[287]

Finally, if the Sentence merits brief praise, which does not mitigate its fragility, it can be limited to the defence of the exercise of the tutela action, as the court detects the limit that was intended to be imposed on it and points out that *"this action, according to the*

286. CCC, Sentence C-179/94, *cit*. Considering f Article 51.

287. *Ib.*, considering f., Article 41. Emphasis added.

provisions of Article 86 of the Supreme Law, can be exercised "at any time and place", that is, it operates not only in times of normality but also in times of institutional abnormality"[288].

The dissenting opinions, in which a greater argumentative effort could have been made, do not contain any major reflections either. As well as rejecting ARANGO M.'s position on budgetary matters, Justices GAVIRIA D., CIFUENTES M., MARTÍNEZ C. and MORÓN D. considered that the power to grant amnesties and pardons is a development of the right to peace. The first three also questioned the notification of indeterminate persons of the displacement, with two days' notice, as an attack on the freedom of the person and the administrative arrest that would be permitted under Article 38, paragraph f) clause 3, as *"the intention is to revive Article 28 of the 1886 Constitution, through which the administrative authorities were empowered to apprehend and detain persons against whom there were serious indications of threatening the public peace, and under whose validity so many abuses were committed, a circumstance that led to its disappearance from the Charter that governs us today"*. As can be seen, neither in the dissents is there a clear and firm position on the exception and governmental powers, in the terms that Judge ANGARITA B. did at the time.

If the statutory law left several cracks, the review carried out by the Constitutional Court failed to remedy them and generated a trail of profound deficiencies in its analysis. It limited the few advances that the bill had made in terms of arbitrariness, such as the possibility of provisionally suspending actions that were manifestly contrary to the Constitution, an additional reason to maintain that statutory laws should be susceptible to public actions of unconstitutionality on grounds that were not considered by the High Court[289]. With regard

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288. CCC, Sentence C-179/94, cit. Considering f article 57. In the same sense, CCC, Sentence C-313/14, MP. GABRIEL MENDOZA M., considering 5.2.14.

289. See also the dissenting opinion to Sentence C-292/03 by Judge EDUARDO MONTEALEGRE L, against the claim of absolute res judicata that the Constitutional Court

to this last aspect, this shortcoming has been so evident that the Constitutional Court itself has had to establish jurisprudential limits in the absence of a true statutory law regulating the emergency.

The temporary exit and return to *estadositismo*: ritornello.

The *estadositisme* vision gained new momentum in 1995. SAMPER PIZANO, heir to the National Front generation, despite putting forward a vision of social inclusion in his government programme, the social leap ((Law 188 of 1995, National Development and Investment Plan 1995 - 1998.), did not resist the temptation of the figure of internal commotion. A year after taking office, in August 1995, he resorted to it for a period of 90 days in response to the increase in the actions of subversive and criminal groups and the prison situation, by means of Decree 1370 of 1995[290]. This declaration gave rise to measures such as increased penalties and aggravating circumstances both for crimes of conspiracy to commit a crime and for crimes committed in prisons such as prison escape[291], the creation of a specialized directorate to combat kidnapping[292], the reassignment of powers and the creation of a specialized directorate to combat kidnapping, the reassignment of powers and a special procedure for contraventions regulated by Law 23 of 1991, the creation of the Corporation for Citizen Coexistence in the region of Urabá, whose purpose was to promote the coexistence project, and the crimes of failure to report, the capture of suspicious persons and the interception of communications in that region[293]. This scaffolding would collapse

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has upheld since Sentence C-011 of 1994. For a review of the subject see ROMERO T. (2016: 211).

290. DO 41999 of 16 August 1995.

291. Decrees 1371 of 1995/DO 41966 cit., 1372 of 1995/DO ib.

292. Decree 1723 of 1995/DO 42040 of 6 October 1995.

293. Decrees 1531 of 1995/DO 41975 of 13 September 1995 and 1590 of 1995/DO 42008 of 20 September 1995. Decree 1532 of 1995/DO 41994 of 13 September 1995 amended the

on 18 October 1995[294] with effect from the notification of each ruling, which led to the dissenting votes of Justices MARTÍNEZ C., GAVIRIA D. and BARRERA C., for that reason alone. After clarifying the scope of its review, the Constitutional Court, taking a stricter control than it had done so far, in a close 5-4 vote, pointed out that the facts adduced for the declaration, although serious, were not supervening and that ordinary means existed to deal with the alleged situations. In this way, it departed from the thesis up to that point, as it considered that what the government had indicated constituted *"deep-rooted pathologies that deserve different treatment by means of the ordinary mechanisms available to the State to deal with normal functional and structural problems"*. It highlighted the nature of states of exception and the abuses committed during the state of siege, and the 1991 Constitution's intention to *"confront even the most critical situations without abdicating its ideological legacy, which is both its raison d'être and its substance"*[295]. It reiterates the nature of the (integral) control that it must carry out and adds that the declaration of the state of emergency is not discretionary. It therefore concludes: *"5. From all of the above it is clear that Decree 1370 of 1995 violates not only Article 213 of the Constitution, but also the provisions of Law 137 of 1994 - which regulates states of emergency - in the parts that develop this precept, namely Articles 34 and following, and especially Article 2, which provides that the powers attributed to the Government during states of emergency "may only be used when extraordinary circumstances make it impossible to maintain normality through the ordinary*

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budget to finance the Corporation. These norms revived the attempt at special treatment for that region, which would also be declared unconstitutional, contained in Decree 666 of 1987.

294. CCC, Sentence C-466/95, MP. CARLOS GAVIRIA D. In addition to the unenforceability of Decree 1370, the decrees issued under its protection were consequently declared unconstitutional. Cfr., CCC, Sentences. C-488/95, MP. JOSÉ HERNÁNDEZ G., C-503/95, MP. HERNANDO HERRERA V., C-519/95, MP. VLADIMIRO NARANJO M., C-520/95, MP. FABIO MORÓN D., C-534/95, MP. EDUARDO CIFUENTES M., C-535/95, MP. JORGE ARANGO M., C-582/95, MP. ALEJANDRO MARTÍNEZ C. and C-560/95, MP. ANTONIO BARRERA C.

295. CCC, Sentence C-466/95, considering c.

powers of the State"[296]. It can be said that it is through this decision that the *"estadositismo"* conception of the country was broken, that is, four years, three months and thirteen days after the adoption of the new law and a whole previous history of lax theses, barely qualified by an unfavorable (lost) opinion of the Council of State in 1949.

In his dissent, in addition to proposing a change in jurisprudence, he reiterated the lack of competence of the Corporation to pronounce on the declaration or its competence limited to extreme cases. Judge MORÓN D., on the one hand, emphasized that the Court would be interfering in the orbits of the President of the Republic and the Congress of the Republic, affecting the balance of powers. He pointed out that *"it does not have an organic infrastructure that allows it to directly verify the facts, it makes use of the request for evidence that allows it to form a criterion on the motivating causes of the internal commotion"* and, in an unusual and apocalyptic clamor, affirmed that the judgement *"endangers the scope and achievements of the new constitutional order, and could open the field to reforms, with undesired overflows, which should only be limited to considering specific and punctual aspects such as the one that is the object of this opinion"*. In the dissent of Judge ARANGO M., as well as highlighting the change in jurisprudence (especially in relation to Sentence C-031/93), he took advantage of the moment to propose the elimination of the political criminal nature of guerrilla organizations, close to the proposal of URIBE V., in very strong language, which would achieve success in Sentence C-456/97[297]. He added that the Court does not have omnipotent power and considered that, in this way, it would be writing the death warrant for the Political Constitution, concluding that *"[n]*

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296. *Ibid*., considering conclusions.

297. CCC, Sentence C-456/97, MPs. JORGE ARANGO M. & EDUARDO CIFUENTES M., by which Article 127 of the Penal Code (Decree 100 of 1980) was declared unenforceable, *"Rebels or seditious persons shall not be subject to punishment for punishable acts committed in combat, provided that they do not constitute acts of ferocity, barbarism or terrorism"*.

o one can be naïve enough to sacrifice society for the sake of a false legality that only serves criminals".

This position was subjected to extreme scrutiny, which led to a lowering of the guard. Just two weeks after the ruling on the unenforceability of the law, on 2 November 1995, GÓMEZ H, a former Constitutionalist and former Conservative Party candidate, was assassinated. This event provided the qualitative argument and reinforced the position of those who had saved their vote in the previous decision. Decree 1900 of 1995[298], which declared the state of internal commotion for 90 days, was highlighted as a new situation compared to what had happened in August, a supervening event, and took up the thesis of the "discretion" of the President of the Republic in the management of public order[299]. The dissenters reiterated the position expressed in Sentence C-466 and, making an implicit parallel with what happened with the death of Liberal leader JORGE ELIÉCER GAITÁN, *"following the death of Dr. Gómez, there was no public order situation that was unmanageable with the support of the ordinary powers of the Executive and the Police, there was no reason to declare a State of Internal Commotion"*. Likewise, as stated in the citizen interventions, among others by PABLO CAMARGO and the JOSÉ ALVEAR RESTREPO collective: *"Herein lies our disagreement with the majority, as the analysis of the evidence accepted by the Court seems to us to be too lax in relation to the events alleged by the Government, in open and inexplicable contrast with the clear and categorical position observed by the Court just three months earlier, given that the public order situation had not undergone any significant change and that the murder of Dr. Gómez had not generated a situation that was uncontrollable for the ordinary legal system."*

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298. DO 42075 of 2 November 1995.

299. CCC, Sentence C-027/96, MP. HERNANDO HERRERA V. Justices GAVIRIA D., HERNÁNDEZ G. and NARANJO M. saved their votes.

In this way, the internal commotion returned to its mission of symbolic effectiveness (GARCÍA, 2016: 139-148), and as a development of this new declaration, certain measures already adopted were taken into account, such as the one foreseen for the region of Urabá contained in Decree 1590, extended to the entire national territory[300], those relating to extortion and kidnapping, which were dealt with in Decree 1723[301], and those aimed at preventing crime in prisons and increasing sentences for associated crimes[302]. It was also used to intensify the restriction of information and communications *"originating from guerrilla groups, criminal organizations linked to subversion or terrorism or their members, or which are attributed to them"*[303], military operations and relocation, as well as the restriction of information and communications and restriction of movement of the civilian population[304]. Although the latter norm was declared unconstitutional, Decrees 717 and 900[305], both of 1996, issued during the extensions, created special

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300. Decree 1901 of 1995/DO 42075 of 2 November 1995. Constitutional, cf. Sentence C-067/96, MP. ANTONIO BARRERA C. Justices GAVIRIA D., HERNÁNDEZ G., MARTÍNEZ C. and CIFUENTES M. saved their votes.

301. Decree 2238 of 1995/DO 42163 of 26 December 1995. Only Articles 1, 2, 3 and 26 were declared enforceable. Cfr. Sentence C-135/96, MPs. JORGE ARANGO M. (in respect of Articles 1, 2, 3 and 26), ALEJANDRO MARTÍNEZ C. & EDUARDO CIFUENTES M. (Articles 4 to 25). Justices ARANGO M., GAVIRIA D., HERNÁNDEZ G., NARANJO M., MARTÍNEZ C. and CIFUENTES M. dissented for different reasons.

302. Decree 100 of 1996/DO 42690 of 17 January 1996. Unconstitutional due to lack of specific reasoning. Cf., CCC, Sentence C-136/96, MP JOSÉ HERNÁNDEZ G. Judge ARANGO M. saved his vote.

303. Decree 1902 of 1995/DO 42075 of 2 November 1995. Constitutional, cf. CCC, Sentence C-045/96, MP. VLADIMIRO NARANJO M. Justices GAVIRIA D., MARTÍNEZ C. and CIFUENTES M. saved their votes.

304. Decree 2027 of 1995, DO 42117 of 22 November 1995. Unconstitutional for lack of connection, CCC, judgement C-092/96, MP. EDUARDO CIFUENTES M.

305. DO 42769 of 19 April 1996. Constitutional, except for certain sections such as the registration and the sanction of arrest, CCC, sentence C-295/96, MP. HERNANDO HERRERA V. NARANJO M, HERNÁNDEZ G. and GAVIRIA D. saved their votes and DO 42.793 of 24 May 1996. Constitutional, CCC, Sentence C-344/96, MP. JORGE ARANGO M. Justices CIFUENTES M., HERNÁNDEZ G. and GAVIRIA D., dissenting.

public order zones for the restriction of movement, registration, safe conduct and carrying of weapons, and powers of identification, search and detention for members of the military forces; additionally, the incorporation of high school graduates into the national police was provided for[306]. As can be seen, although the declaration had an important endorsement, there were two decisions of unenforceability that significantly reduced the scope of the measures. Obviously, the validity of those measures that were maintained would extend beyond the extensions declared through Decrees 208[307] and 777[308] , both of 1996, and 90 days more, to complete a new year of internal commotion, by virtue of Decrees 1303 and 1312 of the same year[309].

From the promulgation of the 1991 Constitution until 1996, in addition to the adoption of state of siege regulations, the country experienced an alternative form of this mechanism, both in terms of the measures adopted and their duration. During that six-year period, since the promulgation of the Constitution, 53.8 per cent of the time, or more than half the time[310], was spent in a state of emergency, which undoubtedly reflects the lag of the state. Of this figure, 52.8%

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306. Decree 1311 of 1996/DO 42848 of 2 August 1996. Constitutional, CCC, Sentence C-452/96, MP FABIO MORÓN D. Judge GAVIRIA D. saved his vote.

307. DO 42702 of 29 January 1996. In the clarification of the vote, the magistrate who presented the opinion himself persists in the lack of competence to judge the declaration and its extensions. On this occasion, there were no dissenting votes as those who did so at the time concluded that there was a qualitative change in the public order. Sentence C-067/96, MP. Jorge Arango M.

308. DO 42776 of 230 April 1996. Constitutional, CCC, Sentence C-328/96, MP EDUARDO CIFUENTES M. Justices HERRERA V and ARANGO M. insisted, through clarifications, on the lack of competence of the Constitutional Court to judge this kind of acts.

309. DO 42843 of 29 July 1996 and DO 42848 of 2 August 1996. Constitutional by Sentences C-451/96, MP. JOSÉ HERNÁNDEZ G. & HERNANDO HERRERA V. and C-453/96, MP. EDUARDO CIFUENTES M., except for the reference to Decree 2110, which was not legislative. Judge HERNÁNDEZ G. saved his vote with regard to the first of these.

310. Taking into account Article 8T, which extended for 90 days the state of siege decrees issued on the basis of Decree 1034 of 1984, the declarations and extensions, as well as the times of economic and social emergency and calamity and the declarations of unenforceability, 1080 days were reached. Curiously, the declaration of unconstitutional of Decree 1370

corresponded to internal commotion and a state of siege, via the extension provided for in Article 8T[311]. For its part, the emergency will be gaining greater prominence.

From commotion to emergency and alternative measures: rubato and moderato.

After the shocked six-year term of office, the time of the emergency opened up, which will irrigate both the rest of SAMPER P.'s and PASTRANA A.'s and will be used more frequently in the following governments, between 2008 and 2020[312]. The latter, moreover, establishes the elements of a different kind of exceptionality that will characterise it for two more decades through the extended agreement with the IMF and Plan Colombia, as well as other international instruments.

The first emergency declared unenforceable: the emergency defeated?

Besieged by the investigation of drug trafficking money in his presidential campaign, SAMPER P.'s government was weakening; both from the elite and from the imperial headquarters, pressure was being exerted for his resignation, led and called upon especially by the zealous ambassador of the United States of America, FRECHETTE. On 8 September 1996, the vice-president resigned and openly called for the president's departure and the formation of a government of national unity. A number of his most prestigious ministers left the ministries, while SERPA U. (1943-2020),

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allowed for the extension of the time periods, as the commotion was maintained according to the thesis that non-executory nature began with the notification of each sentence.

311. See (VANEGAS G., 2011: 261-290, 270).

312. During this period, internal commotion was declared only once. For its part, during the same period, the emergency was used on ten occasions, almost once a year. See ANNEX table.

the Minister of the Interior, defended the government to the hilt in order to obtain his innocence in mid-1996 before the House of Representatives. In this context, at the beginning of 1997, the fourth declaration of emergency since the issuance of the 1991 Constitution was made[313], appealing mainly to the revaluation of the peso against the dollar and the increase in the fiscal deficit, which gave rise to a series of wide-ranging measures such as the creation of a tax on foreign currency financing and the modification of the stamp tax[314] and anti-evasion measures and the rationalisation of tax benefits[315], the modification of the budget for the 1997 fiscal year[316], the reduction of public spending[317], the creation of a foreign exchange control programme[318], the reactivation of the housing construction cycle[319], the adjudication of rural properties with forfeiture of ownership[320] and the privatization of El Cerrejón Zona Norte[321].

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313. Decree 080 of 1997/DO 42.956 of 13 January 1997.

314. Decrees 081 of 1997/DO 42956 (C-127/97 MP. JOSÉ HERNÁNDEZ G.), amended by Decree 224 of 1997/DO 42973 of 4 February 1997 (C-135/97 MP. JOSÉ HERNÁNDEZ G.), and 089 of 1997/DO 42963 of 21 January 1997 (C-130/97 MP. ALEJANDRO MARTÍNEZ C.). According to the new thesis of the Constitutional Court, these measures became ineffective after the notification of Sentence C-122, with the disagreement of Justice GAVIRIA D., for whom the decision in these cases should be inhibitory.

315. Decrees 088 of 15 January 1997/DO 42963 of 21 January 1997 (C-129/97 MP. ANTONIO BARRERA C.) and 150 of 1997/DO 42966 of 24 January 1997 (C-131/97 MP. CARLOS GAVIRIA D.). Norms amended by Decree 251 of 1997/DO 42976 of 7 February 1997, (C-186/97 MP. ANTONIO BARRERA C).

316. Decree 082 of 1997/DO 42.956 cit. (C-128/97 MP. EDUARDO CIFUENTES M.), amended by Decree 254 of 1997/DO 42.956 cit.

317. Decree 165 of 1997/DO 42967 of 27 January 1997 (C-132/97 MP. HERNANDO HERRERA V.), as amended by Decree 252 of 1997/DO 42976 (C-137/97 MP. HERNANDO HERRERA V).

318. Decree 222 of 1997/DO 42973 cit. (C-133/97 MP. FABIO MORÓN D.).

319. Decree 223 of 1997/DO 42973 cit. (C-134/97 MP. VLADIMIRO NARANJO M). Decree 255 of 1997/DO 42976 cit. (C-139/97 MP. CARLOS GAVIRIA D.).

320. Decree 250 of 1997/DO 42976 cit., (C-136/97 MP. JOSÉ HERNÁNDEZ G).

321. Decree 253 of 1997/DO 42976 cit., (C-138/97 MP JORGE ARANGO M).

Sentence C-122 of 1997[322], the first in Colombian constitutional history in which an emergency was found to be unconstitutional, affected, consequently, all the regulations adopted. Through the participation of a large number of experts[323], it was indicated that the crisis was clearly structural and that ordinary measures had not been exhausted to deal with the events that originated it. In this new emergency, produced outside of a calamity or tragedy, the Constitutional Court pointed out that it was not possible to make the criterion of effectiveness of the measures prevail over the principle of subsidiarity. It highlighted the democratic principle and the thesis that the Supreme Court of Justice had developed at the time in relation to the solution of structural problems when it had the opportunity to pronounce on the emergency declared by BETANCUR C. in 1982, which allowed it to analyze the situation of the State in the context of the emergency, not only the existence of the alleged facts and their supervening nature, but also to undertake an analysis of each of the exchange, monetary, credit and budgetary measures available to the State, not only the government but, in this case, the Banco de la República, to deal with the situation that led to its unenforceability, emphasizing the subsidiarity test. The dissenting magistrates underlined the change in jurisprudence in relation to Sentence C-004, with CIFUENTES M. as rapporteur, in which the discrete control and the margin of discretion of the President of the Republic were installed. They questioned the subsidiarity test carried out, mainly in relation to the powers of the Board of Directors of the Banco de la República, which is not part of the Government, they differentiated between the supervening and the unforeseeable,

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322. CCC, Sentence C-122 of 1997, MPs. EDUARDO CIFUENTES M. & ANTONIO BARRERA C. Justices ARANGO M., GAVIRIA D., MORÓN D. saved their votes.

323. On this occasion, this mechanism was especially used, to the point that the dissenting magistrates censured the plebiscitary deployment that this process became, as it included legal assessment.

even if the events were produced by the Executive's own negligence, and they found the gravity and imminence alleged for the declaration to be proven.

The financial troubles and tribulations and the tragedy of the "Eje Cafetero" (Caldas, Quindío y Risaralda departments)

Despite the failure of the emergency declared by SAMPER P., at the end of 1998 the PASTRANA A. government ventured to use the figure at a time of cyclical financial crisis that affected, among other aspects, the Purchasing Power Unit system -UPAC, which had been created by his father[324]. Decree 2330 of 1998[325] declared a state of emergency, mainly due to the high interest rates and unemployment that affected the system, in addition to the crisis in the cooperative sector. The government's security and the need to avoid adjustments to the regulations meant that the measure was decreed for only one day. In addition to two budget additions for 1998 and 1999[326], Decree 2331 envisaged a series of measures aimed at resolving the situation in both sectors. In its 38 articles, it provided for the creation of a special fund for the cooperative sector, FOSADEC, like the FOGAFIN that existed for financial institutions and was reformed by this decree, rules for the relief of mortgage debtors through new lines of credit, the possibility of returning real estate when the debt exceeds the commercial value for one year, support for financial sector institutions and the establishment of a contribution to financial transactions, known as the *"two per thousand"*.

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324. The scheme was conceived in 1972 through autonomous Decrees 677 /DO 33594 of 18 May 1972, 678, DO ib. and 1229/ DO 33663 of 16 August 1972, the latter establishing the UPAC Purchasing Power Unit system, which were incorporated in Decree 1730 of 1991.

325. DO. 43430 of 16 November 1998.

326. Decrees 2332 of 1998 and 2333 of 219898/DO 43430 cit. Constitutionality by Sentences C-137 and C-138, both of 1999.

The Constitutional Court, after ruling C-122 of 1997[327], was at a crossroads. Once again, in addition to a large number of opinions to various sectors and associations, it held a public hearing at the request of the Ministry of Finance and Public Credit, and concluded that, although the crisis was not systemic for the financial sector, there were economically vulnerable sectors for which the emergency was appropriate, namely *"individual debtors of the UPAC housing finance system; the sector of solidarity organizations that carry out financial and savings and credit activities, whether or not they are intervened or in liquidation; and public financial institutions"*, which in addition, due to their vulnerability, are constitutionally protected. In her analysis, she found evidence of a deterioration in the situation of credit institutions, aggravated by the international financial crisis, a long-standing deterioration in the quality of the financial sector's portfolio, which is nevertheless still solvent and profitable. With respect to the subsidiarity test, it pointed out that, although the ordinary measures had not been exhausted, it highlighted the specific situation of the Savings and Housing Corporations and the problems of the cooperative sector, which leads it to understand that the emergency does exist with respect to sectors that have been affected by the crisis, thus conditioning the executory nature of the declaration on these sectors and declaring it unconstitutional "in all other respects". Taking into account the above, Decree 2331 was constitutional[328], but only in relation to the sectors indicated. In this way, the connexion review *"no longer falls on the decision of the President of the Republic to declare the State of Economic and Social Emergency but refers to the measures dictated in its development, embodied in a Legislative Decree, it is therefore delimited and conditioned not only by the reasons that the President of the Republic alleged when declaring the exceptional state by Decree 2330 of 1998, but also by the conditions that*

327. CCC, Judgment C-122 of 1999, MP FABIO MORÓN D. Justices BELTRÁN S. and HERNÁNDEZ G. dissenting.

328. CCC., Sentence C-136 of 1999, MP. JOSÉ HERNÁNDEZ G. There were dissenting opinions by Judge SÁCHICA DE M. and Judges NARANJO M. and CIFUENTES M.

this Court introduced to such an act and its scope and legal repercussions in Ruling C-122 of 1 March 1999". This led to the declaration of the unenforceability of the rules aimed at the financial sector (Articles 19, 20, 21, 21, 22, 23 and 24), as well as those limiting the protection of the targeted sectors, namely Articles 4 regarding the criteria for credits, 5 regarding the amount to be recognized, 10 regarding the transformation of cooperatives into joint-stock companies and 12 regarding the time of the debtor's. Finally, when reviewing the tax on financial transactions (arts. 28 to 35), the Corporation clarified that it was, in fact, a tax for a specific purpose and, by virtue of this, declared it constitutional, modulating some of its elements, including the allocation of health resources. The introduction of this tax, and its constitutional endorsement, led to it becoming permanent, through the frustrated Law 508 of 1999, and then with Law 633 of 2000 and subsequent tax reforms.

The dissenting magistrates found that the decision substituted the emergency declared by the Constitutional Court, without having the competence to do so, and without the ordinary measures having been exhausted. Likewise, in the ruling itself, the judge who spoke on the matter clarified his position on the lack of competence of the Constitutional Court to examine the merits of the reasons for the declaration of a state of emergency. GAVIRIA D., for his part, contrasted the position of the Corporation in relation to the 1997 emergency.

As a corollary to the above, despite the relief and the defense of the UPAC system, six months later the Constitutional Court declared this financing system unconstitutional on the grounds, among others, that it violated the right to housing and that it had not complied with the provisions of Transitory Article 49 of the Political Constitution, in one of the decisions that generated great anxiety among the elite[329].

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329. CCC, Sentence C-700 of 1999, MP. JOSÉ HERNÁNDEZ G. Justices CIFUENTES M., NARANJO M. and TAFUR G. also dissenting, Justices BELTRÁN S. and HERNÁNDEZ G. deferred the effects of the decision (ROMERO TÓBON, 2011: 127-128).

A few days later, at the beginning of 1999 (25 January), a major earthquake occurred in the central part of the country known as the coffee-growing region, affecting five departments. Decree 195 of 1999[330] declared a state of emergency for 25 days from 30 January, the date on which the decree was published, and not the 29th, despite the fact that the decree states that it would take effect from the date of its issuance. Without further explanation or dissent, the Constitutional Court considered the decision to be constitutional[331], highlighting the inadequacy of the response through the National System for Disaster Attention and Prevention. In this situation, taking into account the harsh experiences of Armero and Cauca, the government's reaction envisaged the creation of credit lines for owners or possessors of affected property, the transfer of real estate for social housing, providing that the new buildings comply with seismic resistance standards, and other financial measures[332], the creation of a reconstruction fund[333], budget modifications[334], a group of tax measures consisting of discounts for donations, income tax exemption for companies, tax discounts for job creation, VAT exclusion and fiscal compensation for affected municipalities and departments[335], as well as provisions on

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330. DO 43489 of 30 January 1999. This regulation and Decree 198 of 1999 were amended by Decree 223 of 1999/ OJ 43496 of 8 February 1999. Declared constitutional CCC, Sentence C-220/99, MP. EDUARDO CIFUENTES M.

331. CCC, Sentence C-216/99, MP. ANTONIO BARRERA C.

332. Decree 196 of 30 January 1999/DO 43489 cit. Constitutional, in CCC, Sentence C-217/99, MP. EDUARDO CIFUENTES M. This norm also alluded to various issues such as presumed death.

333. Decree 197 of 1999/DO 43489 cit. Exceptional, with some conditions, in CCC, sentence C-218/99, MP. JOSÉ HERNÁNDEZ G.

334. Decree 198 of 1999, DO 43489 cit. Constitutional, in CCC, Sentence C-219/99, MP. MARTHA SÁCHICA DE M. Decrees 351 of 1999/DO 43512 of 26 February 1999 and 360 of 1999/DO 43513 of 26 February 1999 were also issued. Constitutional, in CCC, Sentences C-329/99, MP. ALEJANDRO MARTÍNEZ C. and C-330/99, MP. ANTONIO BARRERA C., respectively.

335. Decree 258 of 1999/DO 43500 of 12 February 1999. Constitutional, for the most part, in CCC, Sentence C-327/99, MP CARLOS GAVIRIA D. Issues such as presumptive income

access to public services in health, education, housing, environment, justice and police[336].

The pliers in the new environments of exception: The IMF, Plan Colombia and the norm and security and defense and paramilitarism.

Although PASTRANA A. would no longer resort to the regime of exception and, in doing so, during his government he broke the belief in the association of governability with the internal commotion, in 1999 he structured and consolidated the bases for the adoption of a regulatory scheme that would have a decisive impact on the alternative schemes of exception. In addition to the fact that a large number of *state of siege* regulations had already been adopted under Decrees 1239 and 1259 of 1948, 3518 of 1949 and 1038 of 1984, with the bridge established by Article 8 of the Constitution, thus introducing an important block of exceptions to normality, the Extended Agreement between Colombia and the International Monetary Fund (IMF)[337] was signed in that year. In addition, Plan Colombia was designed and agreed with the Government of the United States of America. These two documents, which are not subject to any constitutional control[338], can be inscribed within the cases of constitutional

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were declared unconstitutional. This rule was amended and supplemented in Articles 1 to 10 of Decree 350 of 1999/ OJ 43512 of 26 February 1999, rules declared constitutional by Judgment C-328/99, MP MARTHA SÁCHICA DE M.

336. Decree 350, arts. 11 to 63. In relation to these norms, in the aforementioned Sentence C-328, articles 46 and 63 were declared totally unconstitutional, and articles 38 and 52 were partially declared unconstitutional, one of them in relation to the positive silence in relation to environmental licensing.

337. Colombia's 1999 Extended Arrangement with the International Monetary Fund, https://www.banrep.gov.co/sites/default/ files/publicaciones/archivos/acuerdo_Colombia-_FMI.pdf (23.3.2021). See, VALIM (2018: 438-461, 445).

338. Curiously, 11 public actions of unconstitutionality were filed against the extended agreement with the IMF which ended up, as was to be expected, on the shelf of rejection (D-3408, D-3431, D-3435, D-3444, D-3451, D-3463, D-3466, D-3485, D-3518, D-3583 and

elusion (QUINCHE R., 2009), which will structure a powerful ally of regulation in the social and public order spheres. It is clear that the neoliberal programme, with the dismantling of social policy, gave rise to phenomena of criminalisation of the population with the strengthening of the right-wing response to popular demands (police, judges and prison) (PISARELLO, 2011: 192). The above, added to the anti-terrorist normality that AGAMBEN (2003) deals with, provides a permanent environment of exceptionality that has been extended and that allows for daily and routine control.

From that moment onwards, it is possible to point out that Colombia is in an exceptional state or fiscal martial law without it being recognised as such, a space that has been won by exceptionality, but this time without appealing to the constitutional formulas provided for it. Also, from that moment on, an escalation of armed conflict became visible, within the framework of a peace process that implied direct US intervention, and the development of typical measures of exception, as well as the attempt to create a fourth state of exception that would later become a reality with Law 1801.

a) The 1999 Extended Arrangement with the IMF

The IMF, which arose from the institutional framework prior to the end of the Great War (1944), is aimed at promoting the economic stability of countries. Before 1999, Colombia had approached the IMF twice during the governments of LLERAS R. and BETANCUR C., respectively. The fourth occasion occurred during the second term of URIBE V[339]. Although it is not evident that the monitoring and demands it makes constitute, in itself, a regime that could be classified as an exception, the dimension, scope and depth of the commitments

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D-3587). See ROMERO T., *Las acciones públicas de inconstitucionalidad en Colombia*, op. cit., p. 165.

339. See CASAS H. (2017: 9-36, 19-20).

agreed in 1999 surpassed the standards of subjection of the already existing fiscal policy and accelerated the second wave of reforms that had been promoted since 1989, by virtue of the Washington consensus, within the privatizing vision of the public sector. This agreement, initially foreseen for three years in 2002 and extended until 2006, gave rise to a stand-by credit and was preceded by the modification of article 58 of the Constitution, an apparently innocuous norm whose change went unnoticed. The aim was to eliminate expropriation without compensation in order to neutralize the Constitutional Court's decisions on the matter[340]. PASTRANA A.'s approval of Legislative Act 1 of 1999[341] opened the floodgate to investment and free trade treaty negotiations and broke with a tradition that had been adopted since 1936 as part of the vision of the social function of property[342]. The aforementioned document refers to it as one of the "necessary" reforms to strengthen the foreign investment regime. To this were added modifications to the pension and labor system, a tax reform and the advancement of privatizations, which called into question the project contained in the 1991 Constitution, as well as the *"presentation to Congress of a constitutional reform that would decouple transfers to local governments from the current income of the Central Government"*[343]. These

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340. Cf. CCC, Sentences C-358 of 1996, MP. CARLOS GAVIRIA D., C-379 of 1996, MP. ÍD. and C-008 of 1997, MP. ALEJANDRO MARTÍNEZ C. Article 6 was declared unenforceable in relation to the investment treaty with the UNITED KINGDOM.

341. DO 43654 of 4 August 1999.

342. Legislative Act 1 of 1936 provided as follows: *"ARTICLE 10. Private property and other rights acquired with just title, in accordance with civil law, by natural or legal persons, are guaranteed and may not be disregarded or infringed by subsequent laws. When the application of a law issued for reasons of public utility or social interest results in conflict between the rights of private individuals and the need recognized by the same law, the private interest must yield to the public or social interest. [...]* ***However, the legislator, for reasons of equity, may determine the cases in which there is no need for compensation, by means of a favorable vote of the absolute majority of the members of both Houses****". (Emphasis added)*

343. Colombia's 1999 Extended Arrangement with the International Monetary Fund, op. cit., pp. 17 a 20, 29 y 30.

reforms were implemented with the rigor required during this period, beginning with Law 617 of 2000 and continuing with Legislative Act 1 of 2001[344], which halted the growth of the territorial entities' share of the nation's current revenues. Initially, and from 2002 to 2008, a decrease in the growth of this share was imposed, from 43.9% in 2002 to 30.4% in 2008, i.e. 13.5%[345], a scheme that was extended with Legislative Act 4 of 2007 to continue its decline to 25.7% in 2014. In this way, programmes in health, education, as well as other social services provided by these entities, were affected.

On the other hand, and already during the first URIBE V. government (2002-2006), as part of that Agreement, Legislative Act 1 of 2005 was issued, which eliminated the possibility for workers to negotiate on pension matters, which would set the scene for general sustainability (Legislative Act 3 of 2011), approved during the government of SANTOS C. Of this tenor are the legal stability agreements (Law 963 of 2005)[346], found to be constitutional by the Court or, even earlier, the labor reform of 2002, contained in Law 789, also constitutionally approved[347]. In reality, such norms were imposed by the economic centers of power in a theatre of economic operations, and with regard to which, within this logic, there would be no possible options. Following (LANDAU, 2013: 189-260, 191, 196), in addition to the constitutional change of re-election, these modifications indeterminate democracy, understood as the protection of individual, social and minority rights (GONZÁLEZ J., 2015). As a corollary to the above, with similar characteristics, other mechanisms for regulating

344. DO 44506 of 1 August 2001.

345. National Planning Department, DNP, Sistema General de Participaciones, URL bibl. end.

346. CCC, Sentences C-242/06, MP. CLARA VARGAS H. and C-320/06, MP. HUMBERTO SIERRA P.

347. CCC, Sentence C-038/04, MP. EDUARDO MONTEALEGRE L. See Law 789 in DO 45046 of 27 December 2002.

international relations appear, such as the FTAs and international investment protection treaties already referred to[348]. With the exception of the 1996 and 1997 decisions, with respect to these types of instruments, constitutional control has been lax, tenuous or almost non-existent[349]. As was the case with the control of the declaration of a state of siege, the Corporation limited itself to reviewing the process of law formation; a stony, demolishing and uncontrollable formula for the incorporation of norms into the internal order against which no argument is feasible. The tension arises between the idea of guaranteeing the rule of law and eventual strong control, with certain formulas for incorporating norms into legislation that fracture the system and create a scenario of exceptionality.

b) Plan Colombia and other war strategies

The other element of exceptionality at the macro level, fully integrated into the armed conflict and closely associated with fiscal adjustment, was Plan Colombia, agreed in 1998 in the midst of the peace process with the FARC-EP, which was undoubtedly destined to put an end, sooner or later, to the negotiations that were underway. In addition to the fact that it was a diffuse document with multiple versions, it contains, among other things, clearly exceptional issues

348. MARQUARDT, *Comparative Constitutional History in Ibero-America, the six phases from the revolution of 1810 to the transnationalisation of the 21st century*, op. cit, p. 653.

349. See, for example, CCC, Sentence C-758/08, MP CLARA VARGAS H. in relation to the FTA with the United States. Judge ARAÚJO R. dissented from that decision. Similary, C-335/14, MP GABRIEL MENDOZA, for the case of the FTA with the European Union. See DIANA RODRÍGUEZ & CÉSAR RODRÍGUEZ, "¿Es el TLC constitucional?", *Revista Foro*, No. 61, May 2007, pp. 66-80. In addition to the control of free trade agreements and their limitations, see JUAN RODRÍGUEZ R., "La estrategia de repliegue de la Corte Constitucional, 1992-2006" in GRETCHEN HELMKE Y JULIO RÍOS F. (Eds.), *Tribunales Constitucionales en América Latina, Suprema Corte de Justicia de la Nación*, México D.F., October, 2010, pp. 137-168. Likewise, ROMERO T., "La sostenibilidad, la regla fiscal y la falacia, El cancerbero de los derechos sociales", op. cit. and ÍD. *Acciones públicas de inconstitucionalidad: 8030 días a bordo del nautilus*, op. cit.

such as diplomatic immunity[350], extradition even for political crimes (the SIMÓN TRINIDAD case, kidnapped in a US prison since 2004), and US military bases on Colombian territory, which was the real scenario of democratic security. Its soapy and elusive character made it difficult to control; it remained at a chameleon-like level, as another pathetic case of circumvention. Although the 2009 Complementary Agreement was declared unconstitutional because it turned out to be a real treaty[351], the process and intervention continued along a path of massacres, disappearances, "false positives", forced displacements and, in general, human rights violations, as well as the existence of the US bases of Apiay, Malambo, Palanquero, Tolemaida, Tres Esquinas and the Cartagena and Pacific Naval Bases in Colombian territory[352]. The logic of Guantanamo was incorporated, as AGAMBEN foresees, and it is possible to find it in the Auschwitz that the State of Israel has created in the Gaza Strip. Nothing could be closer to exceptionality.[353]

In parallel, Plan Colombia catalyzed existing elements of the conflict, such as the paramilitary strategy. This strategy began to take shape in the mid-1980s[354], followed an exponentially increasing course from 1991[355] onwards, and was consolidated at the beginning of the 21st century. Thus, under the criterion of the absence of the State in certain areas, and with the full complacency

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350. CORPORACIÓN COLECTIVO DE ABOGADOS JOSÉ ALVEAR RESTREPO, Plan Colombia-no, Rodríguez Quito editores, Bogotá 2003, 82 and 84.

351. CCC, Auto 288 of 2010, MP. JORGE PALACIO P.

352. TELMA LUZZANI, "La presencia militar de Estados Unidos en América Latina", en *Tercera Información*, de 3 de julio de 2015, URL Bibl. end.

353. RENÁN VEGA C., "La dimensión internacional del conflicto social y armado en Colombia", *Contribución al entendimiento del conflicto armado en Colombia*, ediciones desde abajo, second reprint, Bogotá, 2016, pp. 772-790, 783-786.

354. CARLOS MEDINA G, *Autodefensas, paramilitares y Narcotráfico*, Bogotá, D.E, Colombia, Rodríguez Quito editores, 1990. VELÁSQUEZ R., "Historia del Paramilitarismo en Colombia", in História Sao Paulo, vol 26, no. 1, 2007, pp. 134-153.

355. VELÁSQUEZ R., "Historia del Paramilitarismo en Colombia", *op. cit*.

of the military brigades, paramilitarism acquired a fundamental and leading role in the 1980s[356], which coincided with the peace process that took place during the presidency of BETANCUR C. (1982-1986) and the possibility of political participation by the left through the political party *Unión Patriótica*, which was created as a result of the negotiations. At the beginning, the city of Puerto Boyacá, then known as the first anti-subversive city, was the headquarters of operations, and in the area, the disembarkation of instructors such as the Israeli YAIR KLEIN[357], degraded the armed conflict[358]. Six years after the entry into force of the Political Constitution, the Constitutional Court decided on the matter when it reviewed Decree-Law 356 of 1994. Its issuing generated one of the most heated debates, as it was closely associated with a kind of legislation of the paramilitary project that was unveiled through the Private Security and Surveillance Cooperatives, CONVIVIR.[359] In reality, the behavior of these para-armies proved the dissident magistrates right: many of the cooperatives formed were involved in this project and actively participated in massacres and all kinds of human rights violations[360].

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356. *Ibid*. For a nuance on such participation, see FRANCISCO GUTIÉRREZ S., "Una historia simple?", *Comisión Histórica del Conflicto y sus Víctimas, Contribución al entendimiento del conflicto armado en Colombia*, ediciones desde abajo, second reprint, Bogotá, D.C., 2016, pp. 541-542.

357. GUIDO PICCOLI, *El sistema del pájaro, Colombia, laboratorio de barbarie*, Ediciones ILSA, Bogotá, 2005, pp. 15 and 29. For the case of Urabá, see GLORIA CUARTAS M., "Geopolítica crítica del Urabá", *Criterio Jurídico Garantista*, en-jun. 2015, Vol. 7 issue 12, (80-113), pp. 89-91.

358. IVÁN OROZCO A., *Combatientes, rebeldes y terroristas. Guerra y Derecho en Colombia*, op. cit., pp. 130-131.

359. CCC, Sentence C-572 of 1997, MMPP. ALEJANDRO MARTÍNEZ C. and JORGE ARANGO M. Justices EDUARDO CIFUENTES M., CARLOS GAVIRIA D., JOSÉ GREGORIO HERNÁNDEZ G. and VLADIMIRO NARANJO M. dissented.

360. NATIONAL CENTRE FOR HISTORICAL MEMORY, op. cit., pp. 158-160. Similarly, in RAINER HUBLE, "La violencia paramilitar en Colombia: Historia, estructuras, políticas del Estado e impacto político", *Revista del CESLA* N° 2/2001, pp. 63-81.

c) Towards a national security and defense norm

Still within the peace process, as part of the Plan Colombia strategy, the frustrated Law 684 of 2001 was adopted[361]. It was an initiative of the then congressman VARGAS LL., who had consolidated a dissidence in the Liberal party more akin to URIBE V. and opposed the peace process carried out by PASTRANA A. As part of the process, a call was made to the population *"as active members and participants in the search for National Security"*[362]. With respect to this norm, the report in the House of Representatives stated, among other aspects, that *"no citizen would dare to ignore the great work that the security forces carry out today, in defense of life, honor and property, and the re-establishment of order. Faced with the lack of regulations with the force of law on security and defense, and on the operational procedures of the military and police forces, this bill aims to provide these tools, always within the framework of international human rights instruments"*.[363] The vision of national defense and security typical of a martial regime, through, among other things, the concept of national power, the theatres of operations that subordinated civil authority to military authority (Art. 55) without even declaring a state of emergency, merely on the basis of a possible threat or alteration of the constitutional order with the possibility of control and search of the population (art. 54), of capturing people in a broad concept of flagrancy (art. 58), guaranteeing a regime of impunity through a military disciplinary jurisdiction (art. 60). In a way, the aim was to carry out a constitutional counter-reform by an alternative route and to address the constitutional control of the internal commotion.

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361. DO 44522 of 17 August 2001. Declared unenforceable by Sentence C-251/02, MPs. CLARA VARGAS H. & EDUARDO MONTEALEGRE L.

362. Gazette of Congress 504 of 14 December 2000, p. 1.

363. Gazette of Congress 293 of 13 June 2001.

For the Court, this approach had an eminently totalitarian character, as it eliminated the separation of powers, devoid of control, fostering a Manichean vision of friend and foe and the distinction between combatant and non-combatant, as well as the loss of the difference between normality and state of emergency; it erased any hint of pluralism and subjected civilian power to military power. Moreover, it envisaged an expanded vision of the exception[364].

This will pave the way for Legislative Act 02 of 2003, which incorporated an authoritarian norm that was finally declared unconstitutional by the Constitutional Court[365], the aim of which was to incorporate into the Constitution a model analogous to the security statute. The neutralization of this measure will not lead to affecting the other mechanisms of public order management that are being accommodated in the legislation and finally adopted through Law 1801 of 2016, which ended up consolidating a fourth state of exception through the back door.

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In the warm night, it is possible to affirm that exceptionality is no longer as described, nor does it have the components or contours to which the omnipresent state of siege had accustomed us. In principle, this disruptive element of the rule of law was deactivated through the Constitutional Court's control of the instruments designed in

364. CCC, Sentence C-251/02, op. cit. Judges ESCOBAR G. and MONROY C. saved their votes. For the dissenting judges, the analysis of the majority dealt with non-existent texts and therefore, they contested, among other aspects, the normative unity declared and sought to differentiate the view of the exceptionality of the law with the constitutional exception by considering the powers as those derived from the theatre of operations, in their opinion, proper to a normal situation within the powers of the executive or which can be interpreted as such.

365. Cf. CCC, Judgment C-816 of 2004, MMPP. JAIME CÓRDOBA T. and RODRIGO UPRIMNY Y. The measures led to Legislative Act 02 of 2004, on presidential re-election.

the 1991 Constitution, and one would think that the same was true of the exceptionality it represents. However, and this was the institutional rearrangement, through five levels of analysis, exceptionality was brought together as an element that enters normality through the front door but without being detected, barely glimpsed when the house has already been taken over, as CORTÁZAR would say. In these cases, control is weak, which has allowed the 1991 agreement to lose some of its fundamental axes.

Thus, from *frentenationalist stateitism*, we have moved on to a new kind of exceptionalism that is not declared but imposed and normalized through figures that endow the executive with exceptional powers. Following AGAMBEN, it extends to all its borders. In the case of the US, this is clear with the US Patriot Act, and in Colombia it is corroborated by the presidencies of URIBE V. who, although he resorted to declarations of internal commotion and social emergency, these were not essential to impose the strategy of democratic security; they found a place within the legislation of normality and within the framework of weak control. The defence of the constitution - as GASIÓ explains - rests on the executive precisely because it is the one who has control over the three forms of exceptionality analyzed. A plebiscitary state is thus consolidated, in which the President assumes the defense of the Constitution (or the meaning he believes it has), which leads to one of the crucial elements of opinion management. This aspect alone turns the role of the current Courts into the legitimization of the state of the scheme through "fear", an attitude that sponsors authoritarian projects of a plebiscitary type that appeal to the messianism that still claims an important political space. In the Colombian case, abnormality (which is what determines the state of exception) becomes normality. Violence and fear are what regulate and mediate the absurdity and the power that takes shape with the permanent exception, thus answering the question of whether a state could survive without the power of the declaration of exceptionality.

SANTOS C. has done no different, despite his dalliances with peace. He has acclimatized a whole scaffolding of war without needing to use exceptionality as a mechanism to incorporate the whole neoliberal paradigm to the maximum.

The articulating aspect for the variables under study is, then, exceptional power as an element of the project of modernity that is assumed to be invisible and overcome. However, violence in an ideological way is present in the case of Fear or Evil (ZIZEK, 2004: 63-102; 151-196), according to the global anti-terrorist logic unleashed after 9/11, and which was structured years before in our country. The control of power concentrated through the exception has not been as lax as one might initially think, and it would seem that the initial hypothesis can be contrasted with a certain rigour, which gives a certain confidence in the work of the Court to the detriment of ordinary control, which is lax in the aspects addressed. Although it has not reached the extremes proposed in Legislative Act 2 of 2003, ordinary legislation confers the necessary powers to strengthen an elitist project of systemic democracy. Add to this the coexistence of parallel armies, and the frontal action implied by declarations of internal commotion is no longer required.

In this way, the limit to the adoption of abnormality by normality, whether by constitutional changes or ordinary legislation, has been totally sterile. The authoritarian power has imposed the norm of exception on society, with the paradox that it does not have to resort to its declaration. This corroborates WALTER BENJAMIN's (2010: 24) statement that *"the tradition of the oppressed teaches us that the "state of exception" in which we now live is in fact the rule"*. Thus, authoritarianism does not manifest itself exclusively in the declaration of states of exception, but is found in the very atmosphere of everyday life, a dynamic in which the control of constitutionality itself has entered into issues that are not so visible, or in those that have passed into history, such as re-election. As far as criminal law is concerned,

and as the hypothesis is reformulated, the transition from exceptional legislation to ordinary legislation without strict control by the Constitutional Court is perceived as a paradigm of government.

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ANNEXE

President	YEAR	INTERIOR CONMOTION	EMERGENCY	ALTERNATIVE EXCEPTION MEASURES
GAVIRIA TRUJILLO	**1991**			Adoption of state of siege rules. Decrees *2252 to* 2273.
	1992	Decree 1155 (prisons), exequible C-556/92. Decree 1793 (general public order), constitutional, C-031/93, extended.	Decree 333 (Wages), constitutional C-004/92. Decree 680 (electricity rationing), constitutional C-447/92	
	1994	Decree 874 (prisons), unconstitutional C-300/94		
	1994	Law 137/94, estatutaria de estados de excepción, C-179/94, constitutional for the most part.		
	1994		Decree 1178 (Cauca tragedy), constitutional, C-366/94.	
SAMPER PIZANO	**1994**			
	1995	Decree 1370 (general public order), inconstitutional C-466/95		
	1995	Decree 1900 (general public order, murder of Álvaro Gómez), constitutional C-027/96, extended.		
	1997		Decree 080 (economy), unconstitutional C-122/97	
PASTRANA ARANGO	**1998**		Decree 2331 (financial crisis), partial constitutional, C-122/99	
	1999		Decree 195 (terremoto Eje Cafetero), constitutional C-216/99	IMF Agreement, Plan colombian Plan A.L. 1, end of expropiation.
	2000			Ley 617, fiscal austerity
	2001			A.L. 1, SGP. Ley 684, public order, unconstitutional.

President	YEAR	INTERIOR CONMOTION	EMERGENCY	ALTERNATIVE EXCEPTION MEASURES
URIBE VÉLEZ	**2002**	Decree 1837 (general public order), constitutional C802/02, extended.		
	2003			A.L. 2, anti-terrorism, unconstitutional.
	2004			A.L. 2, presidencial reelection
	2008	Decree 3929 (justice strike), unconstitutional C-070/09	Decree 4333 (pirámides), constitutional C-135/09 Decree 4704 (pirámides), unconstitutional C-249/09	
	2009		Decree 4976 (crisis salud), unconstitutional C-252/10	
	2010		Decree 2693 (relations with Venezuela), constitutional C-843/10 Decree 4580 (rains), constitutional C-156/11	
SANTOS CALDRÓN	**2011**		Decree 020 (rains), unconstitutional C-216/11	A.L 3, fiscal sustainability
	2015		Decree 1770 (relations with Venezuela), constitutional C-670/15	
	2016			Ley 1801, Police Code
	2017		Decree 601 (Putumayo tragedy), onstitutional C-386/17	
DUQUE MÁRQUEZ	**2020**		Decree 417 (COVID-19), constitutional C-145/20 Decree 637 (COVID-19), constitutional C-307/20.	

Own elaboration

GEOPOLITICAL CHANGES, THE STATE OF EXCEPTION AND MODERNISATION MODELS IN LATIN AMERICA: THEORETICAL AND HISTORICAL ANALYSIS

István Szilágyi

Introduction

During the last sixty years, the contradictions of the structural crisis of the economy, politics and society have become more acute on the Latin American continent. The different strategies, attempts and responses of the various political forces, currents, alliances and governments to the structural crisis in the hemisphere were presented. The military intervention of the Brazilian armed forces on *1 April 1964 marked the beginning of the era* of *the new militarism* or coup d'état in the continent. Dictatorships and military regimes of new types established *States of Exception* and authoritarian political systems and initiated the complete overhaul and reorganisation of the economic, social and political structures of the countries mentioned.

But in the 1980s and 1990s, fundamental and historic geopolitical changes took place in the world. In the three semi-peripheral regions of the world (Southern Europe, Latin America, Central and Eastern Europe), different types of authoritarian and bureaucratic dictatorships failed. Emerging countries, particularly the BRICS group of countries, have come to the forefront of world politics.

In Latin America, the era of States of Exception came to an end and the process of democratisation and the establishment of hybrid democratic political systems began.

The bipolar world ended and the process of building a multipolar world began. While EU-LAC relations have further intensified in the last three decades, the bi-regional strategic partnership between the European Union and Latin America was created and developed, and a new stage in the history of Latin America began. The article analyses the common characteristics of States of Exception, the different models of modernisation and the theoretical and historical interpretations of the State of Exception through the works of Carl Schmitt, Nicos Poulantzas, Giorgio Agamben and Alain de Benoist.

The birth and characteristics of States of Exception in Latin America

As we have already mentioned, the military intervention of the Brazilian Armed Forces on *1 April 1964 marked the beginning of the era of the new militarism* or new coup d'état *or new golpismo* in the continent.

What are the most peculiar and important features and characteristics of the new militarism and how does it differ from the traditional caudillismo regimes? The main characteristic feature of the new militarism is that the personal dictatorship of the caudillo of the traditional coup d'état (or pronunciamiento) was replaced and substituted by the institutional intervention of the Armed Forces; the Army assumed power with the intention of totally reorganising and refounding society, establishing the conditions for a new mode of capital accumulation and modernisation and redefining the content of the concept of National Security and the enemy.

According to the concept of National Security in the Cold War era, the central element of the National Security doctrine was the

fight against the internal enemy that threatens the peaceful, democratic and effective development of the country; the concept reinterprets the content of borders, saying and emphasising that the real and effective borders are found within the country between different ideologies and political forces; that is why they talked about internal and ideological borders.

At the same time, the emergence of States of Exception and of progressive and regressive, totalitarian and authoritarian military dictatorships questioned the capacity, efficiency and legitimacy of the existing political and economic system to meet the demands of development and modernisation. That is why the introduction of the *State of Exception meant the crisis of hegemony and legitimacy of the dominant classes and* social strata, as well as of the existing *power bloc.*

The State of Exception is a form of capitalist state, which emerged during the monopoly-capitalist and multi- and transnational stage of the globalised world, during the new phase of world development, and - as Michael Hardt and António Negri (2002) write and affirm - in the phase of Empire as a consequence of a certain economic and political-ideological crisis.

According to the particular characteristics of this crisis and the historical stage in which it has its effects, it takes the form of different types of regime of exception: Bonapartism, Fascism and Military Dictatorships (progressive and regressive); forms which are always *combined under the predominance of one of them*.

The concept of the State of Exception explained, expressed and was elaborated by Nicos Poulantzas during the 1970s. And because it was adaptable and applicable to processes in different historical circumstances and regions of the semi-peripheral world, it quickly spread among social science researchers and historians[366].

366. See in more detail: Poulantzas (1976a); Poulantzas (1976b); Poulantzas (1979); Szilágyi (2017).

The State of Exception means a fundamental change in the relationship between the ideological and repressive apparatuses of the state, in the legal order and system, in representation, in the organisation and functioning of political parties. It fundamentally transforms the political system, the functioning of the organisation and administration of the state and radically changes the performance, the „philosophy" of the system and the direction of the economy.

In the case of a State of Exception, *the state subsidiarity in the economic sphere is combined and linked to the state's omnipotence in the political sphere*. In other words, during the existence and functioning of the State of Exception, neo-liberal economic policy is implemented, and the neo-liberal model exists in the economy[367].

How can the functions of the state of emergency be summarised? We can highlight five main functions.

1) The special internal and external oppressive function (crisis management, salvation and global stabilisation of the existing system);

2) The function of modernisation and re-foundation of the economic system, ensuring the general conditions for the new mode of capital accumulation;

3) The function of reorganising the hegemony of the dominant bloc by redistributing sources, positions and expenses in favour of national companies associated with transnational and multinational companies;

4) The ideological function (supplying, elaborating and introducing new ideas and values into society).

5) The function of redefining national policy and national cohesion.

Both sides (internal and external) of the above-mentioned functions merge and interpenetrate. In other words, the "external effect", the internalised transnational corporations and the associated and

367. See in more detail: Szilágyi (2021: 479-517).

subordinate national oligarchy, the military elite and the supreme circles of the civilian techno-bureaucracy formed the dominant bloc of the States of Exception in Latin America.

But the end of the 1980s saw the overthrow and disintegration of the military dictatorships, the rebirth of previous regional integrations and the birth of regional integrations of new types, and the beginning of a new stage in Latin American history. The era of hybrid democracies began. However, the permanence of authoritarian and inherited enclaves and corruption at the system level destroyed the effectiveness of the plans, programmes, projects, ambitions and efforts of these regimes and hindered the successful realisation of democratic modernisation as well.

The different models of modernisation and historical strategies

The leaders of the States of Exception in Latin America refer to their regimes as modernising systems, but what do we mean by modernisation and what kind of modernisation do these dictatorships represent?

Modernisation means the creation of organically adaptive structures and characterises the cohesion and differentiation between the elements of the system. At the same time modernisation means the decrease of socio-economic tensions and underdevelopment and the renewal of political democracy as well. Modernisation *is a result and a process* as well.

Explaining our concept of modernisation we use and develop the model or scheme of *AGIL* structural functionalism of Talcott Parsons, which is based on coherence of four social subsystems (*economic-**A**daptation*, *political-**G**oal* a*ttainment*, *legal-**I**ntegration* and *cultural-**L**atent maintence pattern*). The basic hypothesis of the American sociologist's paradigm is that each system, in order to survive and develop, must be able to solve four kinds of functional problems:

A = Adaptation,
G = Goal Attainment,
I = Integration,
L = Latency.

Table 1: *AGIL Model*

A **Economic System**	**G** **Political System**
I **System of Norms** **(law)**	**L** **Value System** **(culture)**

We incorporate into Parsons' model the fifth element, the fifth factor, and this is the Social Welfare System (SWS).

Table 2: *AGILS Model*

A **Economic System**	**G** **Political System**
I **System of Norms (law)**	**L** **Value System (culture)**
S **Social Welfare System** (Social Security System)	

Thus, a distinction is made between *three models of modernisation*: *the German or Nordic, the Anglo-Saxon and the Latin model*[368]. The Anglo-Saxon and German models represent the successful types of modernisation. On the contrary, the Latin or corrected Latin model is the type of failed modernisation.

What are the main characteristics of these models of modernisation?

368. On the three models of modernisation See in more detail: Espina (2007) and Szilágyi (2018).

The Nordic or German (Bismarckian) model is characterised by:

- State-controlled universal social security;
- Centralised economy, i.e. strong state presence and influence in the economy and in the social security sphere;
- Political leadership and authoritarian political system;
- Late development, economic backwardness, accelerated development and catching up.

The Anglo-Saxon model

- Welfare system in the correction of distributive outcomes;
- Individualistic and free trade economic system. The engine of development is the market;
- Democratic political system;
- Organic development through reforms, i.e. in this case, tradition is tradition;

The Latin model

- Neglect of the welfare system;
- State intervention in the economy / centralised economy;
- Authoritarian-bureaucratic political system;
- Forced economic attempt to modernise without success or partially successful;

Instead of the Latin modernisation model Barrington Moore junior in his book *Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World*. Hardmondsworth, Penguin, Boston, published in 1966. and ten years later it appeared in Portugal as well *(As origens sociais da ditadura e da democracia: senhores e camponeses na construção do mundo moderno.* São Paulo: Martin Fontes, 1975.) elaborated and designed the concept and theory of *Conservative Modernisation*.

The basis of his concept is the examination of the capitalist development and the bourgeois revolution in Japan and Germany, which diverged from the paths and development of classical capitalism.

According to Barrington Moore, there were at least three forms of transition to modernity in contemporary societies. *The first* means *the bourgeois democratic revolution* that radically broke with pre-industrial economic and political relations and built the capitalist society and the democratic political system. This characterises the development of England, France and the United States. In these cases, the social strata interested in capitalist modernisation were strong enough to carry out the necessary transformations without compromise and were able to do away with the ancien régime.

The second route of capitalist development characterised the relative weakness of the social forces interested in bourgeois modernisation. That is why the bourgeois democratic revolution failed, defeated. The social forces interested in deep economic, political and social change were forced to make compromises with the various groups of the landed oligarchy.And these compromises prevent the realisation of the necessary transformations of the consequent modernisation. This *revolution from above* resulted in *conservative modernisation* and the political introduction of authoritarian regimes until the advent of fascism. This process characterises the development of Japan and Germany. But this solution and this route represent the States of Exception in Latin America as well, which institutionalise the system of dependent capitalism in the region.

The third way of the pre-industrial society towards economic, political and social modernisation is represented by the peasant revolutions of *the communist route* in Russia and China. These dictatorial regimes instead of following the models of the West, represent the model of *Easternisation* or the model of the East. But as the lessons of the Soviet Union, China and the Eastern European countries show, the reception and the mechanical and forced application of the Soviet

and Chinese experiments result in failed states and historically proved to be dead ends.

Summarising, augmented and interpreting Barrington Moore's model, we can schematise and design it in the following table or in the following way.

Table 3: Corrected and augmented model of Conservative Modernisation**.**

Democracy Road Western	**Route of Revolution Bourgeois**	**Capitalism with Democracy**	**The Puritan Revolution, French Revolution and the American Civil War**	**ENGLAND, FRANCE, USA**
Route of Authoritarianism and Fascism	**Conservative Revolution**	**Capitalist and Reactionary**	**There was no revolutionary wave, Revolutions from above**	**GERMANY, JAPAN**
Road to Communism	**Peasant Revolutions**	**Dictatorship of the «proletariat"**	**Revolutions from below = the peasant**	**RUSSIA, CHINA**

In the case of Barrington Moore's model, we must finally underline that conservative modernisation is closely linked to a predominant political regime type, i.e. politics ends up being the fundamental element in the process of social change.

And what kind of modernisation model and historical strategy do Latin American States of exception represent? The failure of Latin America's military and dictatorial regimes and the "orthodox and neoliberal adjustment" of the 1980s, which left the hemisphere in a situation of stagnation in the so-called "lost decade for development", without resolving the imbalances it was supposed to overcome, forced a rethinking of reform strategies. Despite this, *the foundational dimension of the States of Exception cannot be denied*. Due to the reorganisation carried out exclusively through state violence and repressive anti-democratic methods, the ancillary social costs - considering also

the human suffering caused - seem unjustifiably high. *In the face of democratic modernisation, Latin American States of Exception* represent the prototype and mixture of *" Bismarkian modernisation " and "conservative modernisation"* applied with (partial) success several times in the last 150 years. According to Alain Touraine, the main characteristic of this is that the ruling elite resorts to violence to achieve the goals it considers important and appropriate, wishing to lead society into the world of modernity by dictatorial means. External factors and international developments have a strong influence on the process. This can well be observed in the cases mentioned above as well. *Modernisation, the creation of organically adaptable structures, undoubtedly requires a concentration of forces*. After a certain point, however, both external and internal (state) pressure has the opposite effect. The same happened in the cases of Latin American military dictatorships as well.

Finally, we would like to underline that the satisfaction of the demands and requirements of the lower social groups and classes, the reduction of social imbalance, the narrowing of the income gap between the social classes, the elimination of extreme poverty and social exclusion, and the *establishment of a democratic political system are also an organic part of the modernisation process. In additiont to the partial, half-hearted progress of the economy, this is the area where the limits of military regimes are most evident.*

The thoughts of Giorgio Agamben and Alain de Benoist

Three decades after the appearance of the above-mentioned books by Nicos Poulantzas, *Giorgio Agamben* examined the question of the State of Exception from the broadest point of view, from the perspective of state and legal theory and from the aspect of the history of law and politics. In the first chapter entitled *The State of Exception as a Paradigm of Government* in his book *State of Exception* published in 2005, Agamben posed the question: When, how and in

what situation and under what historical circumstances is the political system of the State of Exception created and formed? How can the established situation and the situation of emergency be dealt with, how is it transformed into a State of Exception? Whose power centre has the task of administering and managing the State of Exception? Who is the sovereign who makes the political decision? What is the role of the institutionalised State of Exception? Does it restore society to the previously existing normality? What is the relationship and the link between public law and political events?

Giorgio Agamben begins his analysis by quoting the thoughts expounded by Carl Schmitt in his classic Theology of Politics (2001) originally published in Germany in 1922, emphasising and underlining the following considerations:

The essential contiguity between the state of exception and sovereignty was established by Carl Schmitt in his book Politische Theologie (1922). Although his famous definition of the sovereign as *"he who decides on the state of exception"* has been widely commented on and discussed, there is still no theory of the state of exception in public law, and jurists and theorists of public law seem to regard the problem more as a *quaestio facti* than as a genuine juridical problem. Not only is such a theory deemed illegitimate by those authors who (following the ancient maxim according to which *necessitas legem non habet* [necessity has no law]) affirm that the state of necessity, on which the exception is founded, cannot have a juridical form, but it is difficult even to arrive at a definition of the term given its position at the limit between politics and law. Indeed, according to a widely held opinion, the state of exception constitutes a "point of imbalance between public law and political fact" (Saint-Bonnet 2001, 28) that is situated - like civil war, insurrection and resistance[369]7—in an "ambig-

369. According to António Negri's point of view, between the circumstances of the economic, political and ideological crisis, i.e. during the period of structural crisis, *counter-power*

uous, uncertain, borderline fringe, at the intersection of the legal and the political" (Fontana 1999, 16). The question of borders becomes all the more urgent: if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds (De Martino 1973,320), then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and *the State of Exception appears as the legal form of what cannot have legal form"* (AGAMBEN, 2005: 1-2) (emphasis mine- Sz. I.).

Giorgio Agamban considers, underlines and emphasizes that: „over the course of the twentieth century, we have been able to witness a paradoxical phenomenon that has been effectively defined as a *"legal civil war"* (Schnur1983). Let us take the case of the Nazi State. No sooner did Hitler take power (or, as we should perhaps more accurately say, no sooner was power given to him) than, on February 28, he proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties. The decree was never repealed, so that from a juridical standpoint 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. Since then, the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones. Faced with the unstoppable progression of what has been called a "global civil war," the state of exception tends increasingly to appear as the dominant paradigm of

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is organised and created. See in more detail: Negri (2001: 83-95).

government in contemporary politics. *This transformation of a provisional and exceptional measure into a technique of government* threatens radically to alter—in fact, has already palpably altered—the structure and meaning of the traditional distinction between constitutional forms. Indeed, *from this perspective, The State of Exception as a Paradigm of Government, the State of Exception appears as a threshold of indeterminacy between democracy and absolutism"* (AGAMBEN, 2005: 2-3).

The problems and theoretical questions mentioned and considered by Giorgio Agamben intrigue Alain de Benoist in his work published in 2013 *Carl Scmitt today.Terrorism,"just"war, and the State of Emergency.*

The French philosopher Alain de Benoist devotes his work «Carl Schmitt today. Terrorism, «just» war, and the State of Emergency, «to the analysis of the thesis that George W. Bush's War on Terror was based on Carl Schmitt's theories, in order to dismantle it. According to the French author, the principles followed in it, far from being based on these theories, were in fact totally contrary to the philosophical postulates of the German jurist.

The policies of creating an absolute enemy that were implemented and the disrespect for the rules of traditional warfare, the author argues, were rather «Aschmittian».

Following Carl Schmitt's perspective, Alain de Benoist in the first chapter From «Regulated War» to the Return of the «Just War» points out how conflict is an integral part not only of social relations, but also of the political sphere and thus something that should not be rejected. Indeed, «The very essence of politics consists, according to him, not so much in the fact of hostility as in the possibility of making a distinction between public friends and public enemies» (2013: 21) - not when a conflict has already materialised, but in a potential conflict. In this work, Benoist considers unfair the position of one of the most important American neo-conservative thinkers, Irving Kristol, who, referring to Carl Schmitt, emphasises that among

the circumstances of war, the most important thing and the most important question is whether or not statesmen have the capacity to differentiate between friend and foe. According to Benoist, the real question is the exact definition of the political concept of the enemy. Alain de Benoist points out, in line with Schmitt's theories, «that war has its own perspectives and its own rules, and that the later all presuppose that the political decision has alredy been made as to who the enemy is" (2013: 21). The first basic rule is that the enemy must continue to be considered as such, i.e. a «political enemy», an adversary with whom one can fight, but with whom one can at some point make peace. The total war - the War on Terror - declared by President Georg W. Bush, which strives for the total elimination and destruction of the enemy, goes beyond the strictly political point of view. Thus, as conflict is an integral part of politics,»*the belligerents mutually recognise one other*» (BENOIST, 2013: 22).

Thus, when, for example, two states - or generally other types of warring parties - confront each other, the conflict will be able to be fought in a symmetrical way. Moreover, in this case, as the only actors on the international stage to hold the monopoly of legitimate violence and political decision, states enjoy *ius ad bellum and ius in bello*, a right that came to replace, through ius publicum europaeum, the «just war». According to Schmitt and de Benoist's evidence, this was possible because a process was reached in which it is no longer the war that is considered «just», but «the enemy that becomes 'just'». Thus, «international law makes war a regulated confrontation between sovereign states that are formally equal" (2013: 23). The problem with the War on Terror, argues the French author, is that it was not presented in these terms, but as a total war, whose main characteristic is that it «does not recognise any kind of limitation». In this type of war, the enemy is no longer political, but absolute: an evil figure who does not belong to the political, but to the moral sphere and who has to be annihilated, since the process of peace with him

is no longer possible „because they come under moral categories between which there can be no reconciliation… that evil cannot enjoy equality under the law with the good side» (BENOIST, 2013: 31).

Likewise, wars are no longer endless, but being waged with absolute evil and having no possibility of a peaceful end, they are «interminable».

According to Alain de Benoist (2013: 40), this has been the way in which the United States has been conducting its conflicts. The enemy of this country «is not someone whom circumstances has made into an adversary,and who under other circumstances could be transformed into an ally. He is identified with Evil». This process of identification was put into practice first with the Soviet Union, and later with other enemies such as «international terrorists» and so-called «rogue states». The war waged by the United States against these absolute enemies is a total war, a «just» war, which no longer respects the principles of international law and is displaced into the moral realm. The absolute enemy must also be annihilated because it does not share the values of this country. It is for this reason that, as the French philosopher remarks, this type of conflict is no longer justified by specific interests but «from a superior and impartial point of view and by invoking values that are supposed to be shared by all of humanity" (BENOIST, 2013: 47). Thus, if the dynamics of the War on Terror are as described above, the terrorist becomes a «global partisan», as discussed in the chapter From Partisan to «Global» Terrorist. The partisan, as described by Carl Schmitt (2004) is a guerrilla who engages in a non-legitimate struggle, as he is not recognised as a combatant. This figure carries out «an eminently political struggle, but one which is undertaken outside the control of the state, and even generally directed against the state» (BENOIST, 2013: 53). For this reason, according to de Benoist, Carl Schmitt's partisan is the «contemporary international terrorist». Both partisan and terrorist consider their acts legitimate and their violence justified, since their

aims are political and, from their point of view fact, both consider themselves to be waging a fully-fledged war because, according to them, the violence they use «is only the consequence or mirror image of the other side's 'legal' use o force, and constitutes a reaction that is justified by the injustice of the situation» (BENOIST, 2013: 65). However, the political component of terrorist attacks is often not recognised. Indeed, in situations such as the War on Terror, they have been portrayed as absolute enemies that must be annihilated, eliminating their political grievances altogether[370]. And this process, de Benoist argues, is dangerous because «every terrorist acts is in fact a bearer of a political message wich should be deciphered.For the terrorist,terror is always potenctially convertible into political capital…. The more the democracies ignore the political message carried by terrorism….the more they encourage an escalation of violence by inviting the terrorist to trasform himself into an avenging angel" (BENOIST, 2013: 67).

The book continues with two more chapters. In the third, From a «Case of Emergency» to a Permanent State of Emergency, Alain de Benoist (2013: 80) refers to Schmitt's theory that «the *sovereign is the one who decides on the state of exception*». In this connection, the author describes how the United States, after the September 11 attacks, began a war that seems to have no end and, therefore, institutionalized. Therefore, „The state of emergency then stops being exceptional and becomes permanent». This fact allows the government to adopt extreme measures and, in some cases, to restrict the freedom of citizens in the name of security. On the other hand, the fourth and final chapter of the book, On the Land/Sea Duality in the new «Nomos of the Earth» discusses how, according to Carl Schmitt, the differences between sea and land «correspond to the

370. See in more detail *Sociétés face à la terreur (de 1960 á nous jours). Discours, Mémoire et Identité* (2017).

distinction between two forms of warfare.» While on land only the combatants took part in the conflict, in sea wars the non-belligerent population and neutral countries that had some kind of relationship with the enemy were also attacked; dynamics that also took place in the War on Terror. Alain de Benoist concludes his work by arguing that not only have U.S. policies in the War on Terror been «Aschmittian», contrary to what other scholars argue that they reflect the German philosopher's ideas on the conflict, but that, for the reasons that have been mentioned, the policy lines adopted in it can be considered dangerous.

Thus, Carl Schmitt Today. Terrorism, «Just» War, and the State of Emergency therefore transcends an analysis - or a denunciation - of the political lines adopted in this «conflict».It is also a demonstration of the timeliness of the German jurist's ideas.»For that reason, this essay can be seen as an approach to a better understanding of the War on Terror. Moreover, through its analysis of Schmitt's theories, this work can help us to understand why this and any conflict based on a similar pattern can only result in a political, dangerous and violent failure» - we can read Alice Martini's (2015: 128) analysis.

And finally, Benoist's work contributes to a better understanding of the nature of States of Exception and their link with the state of alarm, and the state of emergency. And so the thoughts and considerations of Carl Schmitt, Nicos Poulantzas, Giorgio Agamben and Alain de Benoist meet and complement each other.

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The concept of state of exception has a rich historical background and has become increasingly prevalent in contemporary discourse. In essence, the state of exception serves as a critical tool for governments to navigate through times of uncertainty and crisis, while also posing significant challenges to the principles of democracy and rule of law. This book endeavors to provide a comprehensive examination of the term "state of exception" and its significance in various fields such as politics, law, history, philosophy, and sociology. By offering a conceptual analysis of the term, its historical application, and implications, as well as an international historiographical perspective, this book aims to shed light on the complexities surrounding this topic.