

//Enfoques//

**The State of Exception in the Age of Terror:
The Legal, Political and Social Consequences of Necessity
(PART II)**

**By Emmanuel Guerisoli.*

The Political and Social Natures of the State of Exception

The main questions regarding the political and social natures of the state of emergency concern: **the restriction of individual freedoms as an innate power of the State to assure its continued existence – and of its democratic regime- in times of national crisis; the exception as being a transitional phase from democracy to autocracy or dictatorship; and, the legitimization of a permanent state of exception through consensus.**

Carl Schmitt stated that ‘sovereign is he who decides on the exception’ (1).

This means that the exception, which he defined as the application of extraordinary measures, is what constitutes the essence of the highest power of the State. Schmitt, following Bodin and Hobbes, emphasized the extralegal nature of the State’s sovereign power. The State could not exist without the possibility of exception. In fact, the State was born from the exception and relied on it for its survival (2). Therefore, the state of exception could not be framed within the legal order. Sovereignty cannot be limited; it is an absolute. Laws are created by the State, but the State’s sovereign power –the exception- has to remain outside the boundaries of the rule of law. This was the only way that the exception could function as the mechanism that guaranteed the State’s survival in moments of grave peril. To Schmitt, there was no point arguing about lesser or greater evils.

The State had to prevail always. Order, even a dictatorial one, was preferable to revolution and anarchy. The permanent elimination of individual freedoms was, at all times, more desirable than the extinction of the State. Schmitt was deeply influenced by the 1918-1919 Revolution, following Germany’s defeat in World War I, and by the early chaotic years of the Weimer Republic. He considered, taking on Weber *in extremis*, that the State was the absolute embodiment of the monopoly of the use of violence. Legitimacy did not matter because authority –the sovereign- was the real source of law, not a Rousseauian state of nature or the people’s will (3). The State creates and maintains law through force. When the monopoly is broken, because violence is being used against the State from outside or within, the exception assures its reestablishment.

Other authors have considered the survival of the sovereign body at all costs, perceived as a lesser evil when weighted against the greater evil of its possible decease, as the driving force behind the state of emergency’s employment in moments of real or perceived national crisis (4).

Exception, to them, is a legal tool that restores order by rapidly extricating the threats to the polity's existence. Supporters of this view consider that in times of foreign war or internal strife the State is compelled to undermine individual freedoms. Dictatorships react to crisis in a much effective way than democracies. The very nature of the latter – mainly enacting decisions after deliberation, consensus and the rule of law- may be its own Achilles' heel. In order for modern democracies to survive, they have to recur to non-liberal, but legally framed and provisional, measures (5).

After 9/11, the War on Terror has been defined as a national crisis that cannot be overcome within the 'normal' rule of law. The long term peril to democracy, which terrorism poses, is far greater and more permanent than the one that the state of exception causes to democratic liberties in the short term. The suspension and restriction of fundamental freedoms are a small price to pay when a democratic regime is faced with the kind of foe that terrorism is. Even such strong advocates of liberal democracy, like Michael Ignatieff, believe that the state of emergency is a necessary tool to protect society from terrorist attacks (6). To him, the exception in a modern democracy can be effectively restrained from committing the kind of human rights violations and abuses that were present during the French-Algerian War and the Dirty War in Argentina. Ignatieff considers that those cases can be avoided, in the current War on Terror, by setting up contradictory procedures after targeted killing and aggressive interrogation have been implemented(7). Lastly, the provisional characteristic of the state of exception must also be properly defined by introducing a time limit or by setting up attained objectives. The problem with the latter is that it is difficult to discern when terrorism has been actually defeated. Regarding the temporal nature of the exception, it has been the case that governments have continued to extend, indefinitely, the state of emergency (8). In this sense, Charles Tilly was right when he noticed that once the State acquires more power it is extremely difficult, or almost impossible, to go back to the previous situation (9).

Ignatieff's notion that the state of exception can be controlled if it is properly framed within the legal order is mistaken. First, following Tilly, the State's behavior is not controllable, particularly within a legal framework. Even if the State seems to be making concessions, it is actually gaining more command. It is in the State's nature to increase its control over society in order to assure its survival(10). Therefore, the state of exception will never be controlled by the legal order. Terrorism overtly defies the essence of the State: its monopoly of the use of violence. To protect itself the State will disregard the rule of law if necessary.

Secondly, the exception cannot be legal in any sense because, as said by Giorgio Agamben, it is the negation of law (11). Agamben considers exception as it has been defined by Schmitt: the nature of sovereign power. Consequently, it can never be framed by the rule of law. In fact, when the exception is enacted law ceases to exist. When national crisis occur, a State will make decisions based on necessity, not on lawfulness. Accordingly, if the rule of law is negated and the newly

acquired faculties are not relinquished after the crisis has passed, the exception represents the transition of a democratic regime into an authoritarian or autocratic one. There is a divide in literature regarding this issue: some deem that the exception creates a provisional dictatorship but once the crisis is over democracy returns in full force, others see the exception as a one way ticket ride. According to Rossiter when the state of exception is declared, a democratic regime turns into a provisional dictatorship by granting extraordinary authority and powers to the executive (12). Ignatieff, following Rossiter, considers Italy and Germany during the 70s, by naming them 'selective dictatorships', to show how modern democracies used the state of exception to tackle terrorism and returned to the rule of law once the threat had ended (13).

However, the provisional and extraordinary measures passed in both countries have never been suspended. They are still in place and sporadically and selectively used. As a result, the provisional feature of the exception never actually materializes. Authors, like Hannah Arendt and Frances Fox Piven, explain how the suspension, restriction and infringement of constitutional rights and individual freedoms by the necessity of the state of exception permanently erode democracies by introducing autocratic measures (14). Arendt wonderfully describes how democracy died in the Weimer Republic when Chancellor Bruning declared the state of emergency in 1930, and not the moment Hitler raised into power in 1933 (15). For Arendt, from the moment the exception was enacted until Hitler took over the Chancellery, the path to dictatorship was irreversibly one. Piven regards the declaration of the state of emergency in the United States in September 2001 as the crucial moment where democratic liberties started to irrevocably fade away in the name of necessity (16). The subsequent restrictions to individual freedoms were accepted as necessary sacrifices to avert a catastrophe. It was not considered that the greater evil was not the one posed by terrorists; but, the permanent damage made to democracy by the State. Democracy is still far from dying in the United States, but its agony may have already started.

The state of exception requires another ingredient to remain in effect indefinitely and permanently harm democracy. The State's intentions –if there is such an oxymoron- are not sufficient alone. Legitimacy, as Weber so cleverly insisted upon, is also needed (17). Arendt showcased how the transformation of the Weimar Republic, from a democracy into a totalitarian regime, mainly depended on the masses (18). In modern democracies it is the general public, the citizenship or the masses who always have the final voice on any matter. Governments' actions have to be legitimized by the public in order to be truly effective. They are accepted if they are not broadly contested or if they are enthusiastically received. They are not perceived as legitimate when they produce protests against them (19).

The measures taken by the U.S. Government after 9/11 have received its share of criticism, but they have not been openly contested by the public in a massive way. In fact, there has been a strong consensus from the

American citizenship. It may have been a tacit consensus between the executive, Congress and the citizens; but, the case remains that the suspension, restrictions and infringement to fundamental liberties have been seen as a necessary sacrifice to assure the security of the nation (20). Even controversial and dangerous measures as targeted assassination or torture have been widely accepted -in an extremely cheerfully way in some cases (21)- by the general public. Perhaps, the public truly considers them appropriate and it is willing to risk democracy for security. However, it would seem that the compliance comes from the perception that they will never be subject to those measures. The majority of the people of the United States do not consider themselves targeted by the restrictions to individual freedoms, and will never feel that way. For them it is easy to make sacrifice a minority's fundamental liberties. It has been the case in every country where the state of exception has been declared for terrorist activities. The idea that 'it will never happen to me' precludes the perception of being on the verge of loosing any kind of freedom. Interestingly, Karl Marx, in the *XVIII Brumaire*, warned us about the dangers of a massive support for an autocratic State in the name of security (22).

Conclusion

The current War on Terror shows how close a stable and mature, democratic regime is to absolutely disregard the rule of law in favor of necessity. History and political theory has demonstrated that many authoritarian governments and dictatorships originate with a declaration of the state of exception. The measures taken by the enactment of the exception are not only immoral, they are unnecessary and illegal. The lesser evil is always less when it is not applied to the majority of the population. No matter how small the amount of individuals affected by the restrictions on their liberties, the damage done to democracy –and to their lives- is permanent and with grave repercussions for the future. Terrorism is a strategy used by a small group of people that pose no vital danger to the State's institutions or to democracy. The real danger to a democratic regime is the State's reaction to terrorism and the public's acceptance of them. Terrorists can be effectively persecuted within the rule of law. No worst case scenario can justify the torture, the indefinite imprisonment and the assassination of an innocent individual. The possible avoidance of a worst case scenario is never the lesser evil when it requires fundamental freedoms to be sacrificed. Finally, it is the public who always has the last word, and who is ultimately responsible for the known actions taken by their government. The choice between the rule of law and necessity, eventually, relies on them.

(1) Schmitt, Carl; *Political Theology. Four Chapters on the Concept of Sovereignty*; Chicago University Press; Chicago; 2005; pp. 5.

(2) *Ibid*; pp. 7-12.

(3) *Ibid*; pp. 35.

(4) See Huntington, Samuel; *Political Order in Changing Societies*; Yale University Press; New Heaven; 2006; and Krasner, Stephen; *Sovereignty. Organized Hypocrisy*; Princeton University Press; New York; 1999.

(5) See Walzer, Michael; *Just and Unjust Wars*; Basic Books; New York; pp. 335-360.

(6) See Ignatieff, Michael; *The Lesser Evil: Political Ethics in an Age of Terror*; Princeton University Press; New York; 2004; pp. 130-143.

(7) See Ignatieff, Michael; *The Lesser Evil: Political Ethics in an Age of Terror*; Princeton University Press; New York; 2004; pp. 150-156.

(8) See

<http://www.whitehouse.gov/the-press-office/2010/09/10/letter-president-continuation-national-emergency-with-respect-certain-te>

(9) See Tilly, Charles; *Coercion, Capital, and European States, AD 990-1992*; Wiley-Blackwell; New York; 1995.

(10) See Tilly, Charles; "War Making and State Making as Organized Crime," *Bringing the State Back In*, Eds. Peter Evans, Dietrich Rueschemeyer, Theda Skocpol. Cambridge University Press, 1985.

(11) See Agamben, Giorgio; *State of Exception*; University of Chicago Press; Chicago; 2005; pp. 32-40.

(12) See Rossiter, Clinton; *Constitutional Dictatorship - Crisis Government In The Modern Democracies*; Rossiter Press; New York; 2008. Rossiter takes the cases of the United States and the United Kingdom during the Second World War and analyses the 'dictatorial' powers held by Roosevelt and Churchill to command both countries during the crisis.

(13) See Ignatieff, Michael; *The Lesser Evil: Political Ethics in an Age of Terror*; Princeton University Press; New York; 2004; pp. 174-178.

(14) See Arendt, Hannah; *Origins of Totalitarianism*; Benediction Books; New York; 2005; pp. 305-341; and See Piven, Frances Fox; *The War at Home: The Domestic Costs of Bush's Militarism*; New Press; New York; 2006.

(15) See Arendt, Hannah; *Origins of Totalitarianism*; Benediction Books; New York; 2005; pp. 389-400.

(16) See Piven, Frances Fox; *The War at Home: The Domestic Costs of Bush's Militarism*; New Press; New York; 2006.

(17) See Weber, Max; "Politics as a Vocation," in *From Max Weber*, Eds. Gerth and Mills.

(18) See Arendt, Hannah; *Origins of Totalitarianism*; Benediction Books; New York; 2005; pp. 305-341

(19) See Piven, Frances Fox; and Cloward, Richard; *Poor People's Movements: Why They Succeed, How They Fail*; Random House; 1979; pp.1-41.

(20) See, Posner, Richard; *Law, Pragmatism and Democracy*; Harvard University

Press; Cambridge; 2003.

(21) Like it was seen immediately after President Obama announced the targeted assassination of Osama Bin Laden.

(22) See Marx, Karl; "The Eighteenth Brumaire of Louis Bonaparte," in *The Marx/Engels Reader*, Ed. Robert Tucker.

**Estudiante de Doctorado, New School for Social Research, New York
Maestría en Estudios Internacionales, Universidad Torcuato Di Tella,
Buenos Aires*

*Área de Especialización: Procesos de formación del Estado moderno,
sociología de la guerra, terrorismo, genocidio, conflictos étnicos,
nacionalismos y minorías. E-mail: guere469@newschool.edu*