

//Enfoques//

The State of Exception in the Age of Terror:

The Legal, Political and Social Consequences of Necessity

**By Emmanuel Guerisoli.*

'It is a lesson which all history teaches wise men, to put trust in ideas, and not in circumstances'.

Ralph Waldo Emerson

'It is precisely in times of national emergencies that civil liberties must be defended and protected most forcefully. If not, then governments will be given incentives to constantly create crises, or perceptions of crises, and declaring "official states of emergency" in order to grab more and more power and money and destroy more and more liberty and prosperity'.

United States Supreme Court
(*Ex Parte Milligan*. 1866)

Introduction

Since the September 11 attacks, the notion of *state of exception* has been used in order to coin the legal and political repercussions of the 'War on Terror'. These, by being labeled within the *state of emergency's* legal -or extralegal- framework, have been able to be constitutionally justified and, also, ethically criticized. Proponents of draconian measures consider that, in certain circumstances, necessity dictates policies aimed at protecting the State from terrorist attacks. They deem terrorism an imminent and serious threat capable of destroying the institutions that give political cohesion to society. Denying, suspending and limiting certain individual rights amount to a *lesser evil*; compared to the, apparently, almost certain *greater evil* that terrorists embody. On the other hand, advocates of the inviolability of the rule of law believe that under any situation a democratic government should allow urgency and peril prevail over the constitutionally recognized political and human rights. For them, counterterrorism should not rely on extralegal actions 'legitimized' by the state of exception. The State already has the legal and adequate tools, provided by the police and criminal justice, to persecute terrorists. Democracies that recur to lesser evil arguments to fight terrorism always end up committing more damage than the one they were trying to prevent.

This essay will analyze the state of exception by studying the legal and the political-social natures of it. Various arguments, in favor and against the exception, will be showcased by continuously referring to the War on

Terror and its effects on the legal system and democracy. Lastly, a conclusion will address the importance of this debate in current politics and society.

The State of Exception

The state of exception or emergency can be studied under two different kinds of views: the legal and the political-social ones. The former defines the state of emergency, within the various constitutional frameworks of current modern democracies, as a temporary measure that limits or suspends certain individual freedoms within the territory of the State. It is prompted by a critical and imminent, domestic or foreign, threat to the State's existence. Under this scenario, necessity overcomes the 'normal' rule of law. Consequentially, individual freedoms are limited while police, security and military agencies' powers are enhanced. The debate regarding the state of exception's legal aspect circles around the constitutionality of its enactment, the variety of faculties attributed to the State's security forces and, more importantly, the personal rights suspension's lawfulness. Politically and socially, the state of emergency is conceived either as the pivotal attribute that defines the sovereign body as such; or, either as the transitional step required for -'legitimately'- transforming a democracy into a dictatorship. The former perception links the state of exception with the concept of *sovereignty* understood as the State's existence as an organized polity. The latter one considers any type of restriction to individual freedoms as a permanent damage to the fabrics of democracy.

The Legal Nature of the State of Exception

The legal, and political, origin of the state of emergency is to be found in ancient Roman law. According to the *lex de dictatore creando*, whenever the Roman Republic was in grave danger, the Senate designated an extraordinary magistrate that was invested with absolute and total authority over the Republic. Subsequently, a provisional dictatorship was instituted that lasted for six months or until the threat passed. The republican and the dictatorship authorities, to the Romans, were complementary; quite the opposite of how democracies and authoritarian regimes are understood today. However, Roman dictators quickly learned how to indefinitely prolong their authority by perpetuating foreign wars through the creation of an Empire.

The institution of the Roman provisional dictatorship is the historical legal inception of the various types of state of emergency that are currently present within modern constitutions. Broadly speaking, in every constitution the state of exception is declared by the head of the executive power whenever the normal functions of the State's institutions are no longer guaranteed because of foreign attack or domestic unrest.

Fundamental liberties and rights -such as habeas corpus, freedom of movement and public gathering among others- are suspended or severely restricted. In most cases, the executive is entitled to order the arrest of individuals and to set military commissions for their trials. The security

forces' faculties are enhanced and the military is allowed to take on police activities. Depending on the country, the state of emergency could be declared to last for days, months or years and it can even be extended indefinitely number of times.

The debate concerning the state of exception's legal aspect comprises three main issues: its **constitutionality**; **the amount of power given to the security forces**; and, **the limits set on fundamental freedoms, individual rights and constitutional guarantees**. The state of emergency's constitutional validity considers under which cases it can be declared. As stated before, it is necessity that calls for the establishment of exception. It is necessary to give to the executive branch of government extraordinary powers and authority in order to prevent the State's breakdown from an imminent and grave danger. This peril can be prompted by a domestic or foreign threat. The latter are not sufficiently, and narrowly, defined by modern constitutions. Normally, they invoke a military invasion by a foreign country or an internal insurrection; but both of them are broad cases and can be loosely interpreted. Taking the U.S. Constitution, for example, the state of emergency is only referred to in Article I, Section 9 where it states: *'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.* Therefore, only in the cases of rebellion –domestic threat- and invasion –foreign threat- the state of exception can be enacted. Regrettably, the Constitution does not define what constitutes a rebellion or an invasion. The task was left for legal experts and the Judiciary to tackle; but, it has not been easy or even coherent.

The Supreme Court had the opportunity to take on the constitutionality of the state of emergency after President Lincoln had declared it in 1861.

In *Ex Parte Milligan*, it was decided that the suspension of the habeas corpus and the setting of military tribunals for citizens was unconstitutional because, even if a rebellion was in course, civilian courts were still operating. Additionally, the Supreme Court went even further by declaring that the theory of necessity, which justifies the state of exception, was false. It was argued that under the rule of law, guaranteed by the Constitution, the powers needed to protect the State's institutions are already set in place. Lastly, the Justices regarded the state of exception as a dangerous instrument that could only lead to despotism.

Nevertheless, the Court did not pronounce itself about the issue of defining what constitutes a rebellion or invasion. Interestingly, even if it was deemed –correctly- that necessity never justifies the suspension of the rule of law, by not defining what constitutes an emergency, the Court considered the issue a political, and not a legal, matter. Rebellion and invasion remain broad, undefined, cases open to interpretation and to malleability by politics. In subsequent cases, the Supreme Court refrained itself from approaching the issue.

The question of the security forces' enhanced powers, during the state of emergency, is a thornier one when compared to the former. Moreover, it is also deeply intertwined with the problem regarding limitations to

fundamental liberties. During the state of exception the police and other security agencies are given extraordinary faculties aimed at facilitating the expedient resolution of the crisis. Therefore, they are allowed to search within premises without warrants, to arrest suspects without a court order, to hold individuals for a long period of time with no access to a lawyer or judge, to carry out aggressive interrogations, to set up wiretapping and close surveillance with no Judiciary control.

Furthermore, it could also be the case that intelligence agencies and the military would be empowered to perform police and judicial activities. Since the declaration of the state of emergency by President George W. Bush, following 9/11, numerous enhanced and new attributes have been granted to the United States' security forces and agencies. Their faculties were augmented by several executive decrees and the three Patriot Acts. These pieces of legislation were said to be justified by the imminent and severe danger that terrorism embodied. But, are these prerogatives really needed to prevent future terrorist attacks? This is, of course, an endless debate; and one that again points out to the relationship between law and politics. As implied by the Supreme Court in *Ex Parte Milligan*, terrorists can be persecuted without declaring the state of emergency, by applying 'plain' criminal law and by letting the F.B.I -not the military- take the lead. To sum up, the 'normal' rule of law is perfectly suited for the task. However, depending on how terrorism is considered, as a war act or as a criminal one, is still a political issue.

Just like in both the question of the constitutionality of the state of exception and the empowerment of security agencies, the concern regarding the suspension or restriction of fundamental liberties is one that is ascribed within the lesser evil debate. Legally, the selection between continuing the 'normal' rule of law or enacting the state of exception weighs the possible damage that not acting would cause against the harm that limiting individual freedoms would produce. It is here where the legal concept of necessity comes into play. It is necessary to inflict or withstand a lesser evil in order to prevent a greater evil. This is the pragmatic view of constitutional freedoms: the risk of harming individual freedoms is a lesser one when compared to the possibility of not having any State that protects those liberties. The moral point of view argues that, by restricting constitutional freedoms, the State is causing an irreversible damage that may, quite possibly, be greater than the one that necessity is trying to avoid.

When a state of exception is enacted the fundamental liberties that are suspended are, normally, the right to habeas corpus; freedom of movement; the right to public and private gathering; and the right to due process among others. The United States Government, during both the Bush and the Obama Administrations, restricted and suspended several individual freedoms and constitutionally guaranteed rights in order to effectively and speedily fight terrorism and avert further attacks. The rights to habeas corpus, to due process, to unnecessary cruel punishment and to trial by jury have been gravely and irreversibly hampered by the legalization of indefinite detention, targeted killing, aggressive interrogation and military tribunals respectively. In nearly all these cases, there is no chance of contradictory or revisionary procedures that would

allow the dismissal of their establishment by proving their unfairness or unconstitutionality. The issue, maybe, is that they are not only unfair, but that they are unnecessary and cause permanent damage. Targeted killing and aggressive interrogation, which would be better labeled as targeted assassination and torture, are completely detrimental to the rule of law and set up dangerous precedents for the future. Since both measures have to be sanctioned, in each case, by the President and there is no possibility of revision, it could be argued that the executive is taking on the exclusive attributes of the other two branches of government. The check and balances system, designed to avoid despotic power, is totally disregarded in these cases. Here, the effects of necessity are clearly the greater evil.

Depending on the country, the state of emergency or exception is labeled as martial law or state of siege (état de siège or estado de sitio). Both, however, share the same objectives and are justified by necessity. See Ignatieff, Michael; *The Lesser Evil: Political Ethics in an Age of Terror*; Princeton University Press; New York; 2004; pp. 25-28.

Schmitt, Carl; *Political Theology. Four Chapters on the Concept of Sovereignty*; Chicago University Press; Chicago; 2005; pp. 5-6.

See, Arendt, Hannah; 'Personal Responsibility under Dictatorship'; in *Responsibility and Judgment*; Kohn, Jerome (Ed.); Schocken Books; New York; 2003.

Lintott, Andrew; *The Constitution of the Roman Republic*; Oxford University Press; Oxford; 1999; pp. 110.

For example, in France l' état de siège can only last for 12 days, although the President is allowed to extend it for more time with the Parliament's confirmation. In the United States, the *National Emergency Acts* can only last for no more than two years, but the President is entitled to extend it for one more years indefinitely number of times by only notifying Congress of his decision. For the French case see Article 16 of the Constitution, available at <http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/pouvoirs-exceptionnels-du-president.html> ; for the American case see the U.S. Code, Title 50, Chapter 34, available at http://www.law.cornell.edu/uscode/html/uscode50/usc_sup_01_50_10_34.html .

See the United States Constitution, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=138>

See Neely, Mark; *The Fate of Liberty: Abraham Lincoln and Civil Liberties*; Oxford University Press; New York; 1991; pp. 179-184.

See *Ex parte Milligan*, 71 U.S. 2 (1866); available at <http://supreme.justia.com/us/71/2/case.html>

See, Roche, John; Executive Power and Domestic Emergency: The Quest for Prerogative'; *Western Political Quarterly*; Vol. 5; N. 4; December 1952.

See *Ex Parte Quirin* , 317 U.S. 1 (1942), which declared constitutional the military trials of German saboteurs during the Second World War in U.S. soil, available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=317&invol=1> ; *Korematsu v. United States*, 323 U.S. 214 (1944), which determined constitutional the Japanese Americans internment camps, available at <http://supreme.justia.com/us/323/214/case.html> ; and, *Boumediene v. Bush*, 553 U.S. 723 (2008), where it was decided that all Guantanamo detainees had the right of *habeas corpus*, available at <http://www.supremecourt.gov/opinions/07pdf/06-1195.pdf>

The national emergency was declared through Proclamation 7463 available at <http://ra.defense.gov/documents/mobil/pdf/proclamation.pdf>

See Ignatieff, Michael; *The Lesser Evil: Political Ethics in an Age of Terror*; Princeton University

Press; New York; 2004; pp. 40-44.

See, Posner, Richard; *Law, Pragmatism and Democracy*; Harvard University Press; Cambridge; 2003. It is also interesting to consider here Margaret Somers' Arendtian view of political rights versus human rights because the former are recognized and protected by the State. See Somers, Margaret; *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*; Cambridge University Press; Cambridge; 2008.

See Dworkin, Ronald; *Freedom's Law: The Moral Reading of the Constitution*; Harvard University Press; Cambridge; 1996.

Only regarding the cases of the restriction of habeas corpus and the setting up of military tribunals has the Supreme Court been able to declare their unconstitutionality and illegality. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); both available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=03-6696&friend> and <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> respectively.

For a better and more detailed analysis of the legality or illegality of targeted killings and torture see Banks, William; 'Targeted Killing and Assassination: the U.S. Legal Framework'; University of Richmond Law Review; Vol. 37; N. 667; 2002-2003; Dershowitz, Alan; 'When All Else Fails, Why not Torture?'; American Legion Magazine; July 2002; Blum, Gabriella, and Heymann, Philip; 'Law and Policy of Targeted Killing'; The Harvard National Security Journal; Vol. 2, Issue 2; 2010; and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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