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The State of Exception in the Brazilian Constitutional Experience

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Abstract

This essay examines Brazilian constitutional history regarding the various attempts to regulate the state of exception. It explores the different models of exceptionality in constitutional texts and legislation. Drawing from the conceptual frameworks of Giorgio Agamben and Carl Schmitt, the article posits that the various attempts to regulate the state of exception reveal a political, not a legal concept. The essay employs, as methodology, a historical-comparative approach, analyzing constitutional and related legal texts concerning the state of exception across different periods of Brazilian history (from the 1824 to the 1988 Constitution). By confirming its hypotheses, the article adds a nuanced understanding of the historical relationship between law, power, and democracy in Brazil.

Keywords

State of Exception, State of Emergency, Brazilian Constitutional History, Sovereign Unaccountability, Suspension of Law

1. Introduction

This essay explores the multifaceted concept of the "state of exception" within Brazil's historical and constitutional framework. It situates the discussion within broader theoretical debates surrounding the concept, primarily drawing on the work of Agamben (2005) and Schmitt (2006, 2007).

For Agamben (2005), the state of exception would be a legal condition in which the sovereign (the government) suspends the rule of law to deal with an emergency. Moreover, the state of exception would be a paradigm of modern power. Schmitt (2006, 2007), on his turn, posits that the sovereigns decide on the exception, suspending the normal rule of law. This discretion is a core element of sovereignty, revealing the true nature of political power.

One can say that these theorists highlight the inherent tension between the rule of law and the potential for sovereign power to suspend those rules in times of crisis or perceived threat.

The essay examines how this theoretical tension has manifested in the practical realities of Brazilian constitutional development. The focus is on analyzing the various attempts to legally regulate the state of exception across different periods.

Concurring with Agamben and Schmitt, this essay challenges that perspective that treats the state of exception as primarily a legal phenomenon. By applying the concerned theoretical frameworks, we argue that the state of exception in Brazil should be viewed not just through the lens of legal regulations but also as a fundamentally political construct. We notice that the existing literature lacks a comprehensive analysis of the political dynamics underlying the invocation and application of exceptional measures. This essay seeks to fill that gap. Furthermore, while previous studies may touch upon individual instances of states of siege or emergency, a holistic examination of the evolution of the concept across Brazil's history and its inherent contradictions is lacking.

Thus, the central question driving this essay is how the interplay between legal attempts to regulate the state of exception and the underlying political realities shaped the concept's understanding and application in Brazil's constitutional history.

As to its methodology, the essay employs a historical-comparative approach, analyzing the legal texts (constitutions, decrees, laws) relating to the state of exception across different periods of Brazilian history (from the 1824 Constitution to the 1988 Constitution). It uses these legal texts to illustrate how the state of exception has been defined, justified, and implemented in practice. The essay also integrates historical events and relevant political context to demonstrate the political dimensions of the phenomenon, enriching the understanding of the legal instruments.

The essay is structured as follows. The section "The State of Exception in Brazilian Constitutional History" provides an overview of the evolution of the concept, emphasizing the different terminologies used to describe exceptional measures (e.g., state of siege, state of emergency, state of defense). The following one, "The Measure to Save the State in the Constitution of 1824" delves into the earliest legal provisions concerning exceptional powers, focusing on its limitations and ambiguities. The next sections analyze each of the constitutional texts (1891, 1934, 1946, 1967, and 1969), up to the Constitution of 1988.

The conclusions emphasize how this analysis contributes to a more nuanced understanding of the historical relationship between law, power, and democracy in Brazil.

2. The State of Exception in Brazilian Constitutional History

In Brazilian constitutional history, the *state of exception* unfolds discursively through a wide range of terminology, including expressions such as *state security*

(Constitution of 1824), *state of siege* (Constitutions of 1891, 1934, 1946, 1967, 1946 and 1988), *state of emergency* (Constitution of 1937), *state of war* (Constitution of 1937), *state of defense* (Constitution of 1988). The *state of exception* marked four moments in Brazil's political history, Floriano Peixoto's dictatorship, disguised as a return to legality (Caronne, 1988: p. 23); the Estado Novo coup, camouflaged by Getúlio Vargas as a plan to combat integralists and communists (Henriques, 1961: p. 395), and the two major military interventions of 1964 and 1968 (Gaspari, 2002).

Terminological options are never neutral, especially in the sense that *"terminology is the properly poetic moment of thought"* (Agamben, 2005: p. 15). In other words, various vocabulary options have tried to justify in our history the hypotheses of using types of suspension of guarantees.

In 1824, rebellion and invasion by enemies could justify the *state of exception*; in 1891, foreign aggression and serious domestic commotion; in 1934, the imminence of foreign aggression and the emergence of an armed insurrection; in 1937, external threat, imminent internal disturbance, conspiracy or plan to disturb the security of the state, citizens, public peace, as well as structural danger to institutions; in 1946, external war and internal commotion with the characteristic of a civil war; in the Military Era, great disturbance of order and the threat of war breaking out. Nowadays, serious commotion with national repercussions, ineffectiveness of measures taken during the state of defense, declaration of a state of war, or response to foreign armed aggression justify the *state of exception*.

In addition to the constitutional explanations, various legal documents dealt with the *state of exception* casuistically, such as Decree No. 1 of November 15, 1889 (intervention by the provisional republican government), Decree No. 19 of November 11, 1930 (intervention by the provisional Vargas government), Institutional Act No. 1 of April 9, 1964 (intervention by the military coup) and Institutional Act No. 5 of December 13, 1968 (the so-called radicalization of the military dictatorship period).

These documents prove the compulsion of Brazil's institutional arrangements to regulate the various *states of exception*, some of them of significant duration, such as the Institutional Act No. 5, in force for ten years, and formally repealed by Constitutional Amendment No. 11 of October 13, 1978, a circumstance that marked the process of political opening.

The study of the *state of exception* must also deal with the various *national security laws*. The texts vary in the extent to which they limit rights and guarantees, especially procedural ones. Law No. 38, of April 4, 1935, for instance, provided normative instruments for the organization of the Estado Novo. Law No. 1802, of January 5, 1953, in some way reflected the international context of the Cold War. Decree-Law No. 314, of March 13, 1967, and Decree-Law No. 898, of September 29, 1969, gave legal grounds to the military dictatorship's persecution of opposition groups.

Law No. 6.620 of December 17, 1978, and Law No. 7.170 of December 14, 1983

mitigated a situation that paved the way for a relatively lenient transitional process. The content of Law No. 6.683 of August 28, 1979, the *Amnesty Law,* should also be reviewed and explained, given how Brazilian law dealt with cases that occurred during the *state of exception* in force during the military era. Contrary to the Argentinian model, where a landmark judgment prosecuted and convicted military personnel who violated human rights (Bianchi, 2007), Brazil applied an *Amnesty Law* with a consequent lack of accountability processes, despite the evidentiary reports of the "Truth Commission".

And if Carl Schmitt's thesis is plausible, for whom sovereignty is defined and measured by who has the competence to establish the *state of exception*, the trajectory of Brazilian models for regulating the matter suggests a very eloquent political oscillation, with indications of periods of extreme authoritarianism. In one case, it was the Legislative's or the emperor's prerogative if the Assembly was not in session (1824). In other cases, it was a National Congress' or President's competence, when the latter was not in session (1891, 1946). In another circumstance, it was exclusive to the Legislative Branch, which would authorize the President to declare a state of siege (1934). In other cases, it was exclusively under the President's will in all circumstances (1937, 1967). Later, it was the Union's competence, with Congress to approve or suspend the President's decision (1969). Currently, it is also under the Union's power, with the President hearing from the Council of the Republic and the National Defense Council, and then asking Congress for authorization (1988).

The levels of regulation also vary substantially, including or not limits on government action, the possibility of immunity, liability for abuses, and the possibility (or not) of judicial intervention. One can observe the expansion of the regulation of the model, which was extremely synthetic in the 1824 Constitution, to superlatively analytical in the 1988 Constitution. The latter contains even a title to deal with the *Defense of the State and Democratic Institutions.* This is a great paradox. The *state of exception*, conceived to defend democratic institutions and combat tyranny, has historically become an instrument of tyranny and a resource for undermining the institutions it was designed to defend.

3. The Measure to Save the State in the Constitution of 1824

The Constitution of 1824 was the vehicle for a liberal proposal for progress and modernization (Wolkmer, 2007: p. 98). Pedro I of Brazil granted it, and a liberal atmosphere that resulted from the aborted Assembly of 1823 built its principles (Mello, 1996). French public law also exerted a strong influence on the Constitution of 1824 (Alecrim, 2011), especially the Constitutional Charter of June 4, 1814, a political document that characterized the interregnum of Louis XVIII, during the hesitations of the return and defeat of Napoleon Bonaparte. In this case, the most important influence received by Brazilian constitutionalism derived from the definition of the Catholic religion as the official religion of the state (French Constitutional Charter of June 4, 1814, article 6. In the original: "la religion

catholique, apostolique et romaine est la religion de l'Etat").

The concept of the *state of exception* was reintroduced into the tradition of French constitutional law, especially since the Constitution of the Year VIII, which provided that in cases of armed revolt, or uprisings that threatened the security of the state, the law could suspend, in places and for a time determined by it, constitutional protections. The French, employing an additional act, dated 1815, provided for *a state of siege* in the event of invasion by a foreign force or civil uprisings; for the first case, a mere government order was enough, in the second case, there was a reservation of law. The Constitution of January 14, 1852, maintained this tradition, granting the President of France the prerogative to declare a *state of siege.* The Constitution of the Fifth Republic of October 4, 1958, kept it.

In Brazil, the Emperor exercised the Moderator Power and could, among other things, extend or postpone the General Assembly, dissolving the Chamber of Deputies, to *save the state*, at which point the emperor would immediately convene another Assembly, replacing the one he had dissolved (Constitution of 1824, article 101, V). This circumstance was political, and the organization of Brazilian parliamentarianism was very peculiar (especially when compared to the English model). In England, the majority party nominated the Prime Minister in the elections; in Brazil, the Emperor nominated the Prime Minister, who organized the elections, which resulted in the affirmation of the party anointed by the emperor; the so-called *Parliamentarism in reverse*. This model was the basis for organizing the politics of the Second Reign: the emperor summoned deputies, to whom he listened about crises that had already been pronounced (Figueiredo Júnior, 1998: p. 61).

One commentator of the time said that this intervention was *"an indispensable prerogative and essentially linked to the Moderator Power* […] *a serious measure, already in itself, already in its origin, which may lie in bad policy, or the abuses of the ministry"* (De São Vicente, 2002: p. 287). The exercise of the Moderator Power made the emperor the arbiter of a political dispute that pitted liberals against conservatives (Nogueira, 2012: p. 33), even though these two factions represented relatively convergent interests (Mattos, 2004). The Moderator Power was a metaphor with which absolutism was constitutionalized (Bonavides & De Andrade, 1991: p. 96), even though our experience of the Second Reign was apparently very peaceful (Besouchet, 1993: p. 448).

Article 179, XXXIV of the 1824 text stated that the constitutional powers could not suspend the Constitution, especially about individual rights, except in the cases and circumstances listed at the time. These situations included cases of rebellion or invasion by enemies, when the security of the state was in danger when some of the formalities guaranteeing individual freedom would be dispensed with for a certain period, which would be done by a special act of the Legislative Power. The original prerogative of the Legislative Power Our built our tradition. The Executive (or the Moderator) could only intervene when the Assembly was in recess.

In other words, if the Assembly was not meeting, and *the homeland was in imminent danger*, the government could take the necessary measures, as a measure then defined as provisional and indispensable, following article 179, XXXIV of the 1824 Constitution. The measure would be suspended immediately when the motivating urgent need ceased; in both cases, the matter would be returned to the Assembly as soon as it met, at which time it would receive a reasoned account of the arrests and other preventive measures taken; abuses would be investigated and punished.

The main interpreter of the 1824 Constitution took the view that the suspension of constitutional guarantees was an abnormal act, of the utmost importance to the representative system, and that in theory it should not be admitted or even tolerated; by suspending guarantees it was attested that society was in an extraordinary position, which required means outside the ordinary or regular means (De São Vicente, 2002: p. 522).

There were also provisions in the Criminal Code of 1830, such as Article 285, which criminalized what was known as an "i*llicit gathering*", in which three or more people would have grouped, with the aim, among others, of illegally depriving someone of the enjoyment, in the exercise of some right or duty. The penalties were more serious if the illegal gathering aimed to prevent the collection of taxes or the execution of a law, as stated by Article 287 of the Criminal Code of 1830. This normative formula, *unlawful assembly,* although somewhat timidly, it seems, could be an agile and more simplified model for the government to make exceptions to the protection of individual freedoms. The progress of liberal ideas observed by an important 19th century author, *"had reached its greatest expansion in the Penal Code of 1830*" (Nabuco, 1997: p. 53).

The 1830s were marked by periodic insurrectionary movements (Ellis Júnior, 1990), without it being necessary to use constitutionally prescribed formulas of political exceptionalism. Much later, advising the Princess Regent, the Emperor recommended indulgence towards the Press, which also meant the very limited use of exceptional formulas (Carvalho, 2007: p. 90). The revolutionary crises we went through during the second half of the 19th century were dealt with without the government making use of the constitutional permissive *of state security* (Sodré, 1998: p. 118 ff.), even in the face of the republican coup of 1889.

4. The State of Siege in the Constitution of 1891

The Proclamation of the Republic was immediately consolidated on a legal level by Decree No. 1 of November 15, 1889, which established the federative republic as the form of government of the "Brazilian nation". There was no armed resistance to the new order, which was consolidated due to the exhaustion of the second reign (Da Costa, 1999: p. 447 ff.); the people, in the view of a contemporary, had watched the coup, bestialized, as if it had been a military parade (Carvalho, 1987).

The republican utopia was also realized through symbolic proclamations,

marked by the return to the heroism of Tiradentes, along with a flag and an anthem, elements that the positivists used to build a strong popular imaginary, precisely because *"the development of an imaginary is an integral part of the legitimization of any political regime"* (Carvalho, 1990: p. 10).

The Decree No. 1 of November 15, 1889, installed the new order and stipulated, among other things, that in any of the states, where public order was disturbed, and where the local government lacked effective means to repress disorder and ensure public peace and tranquility, the Provisional Government could intervene, with the support of the public force, to ensure the free exercise of citizens' rights and the free action of the constituted authorities (article 6). The typical script of the *state of exception* was formed, that is, the possibility of suspending order in defense of the order itself was announced. The regular public force was subordinated to the Provisional Government, which was to article 8 of the Decree the organization of a civic guard.

The *state of siege* was regulated by the 1891 Constitution, which authorized it in the event of foreign aggression, serious internal commotion, or the need for the security of the Republic. A *state of siege* would be declared in any part of the Union's territory when constitutional guarantees would be suspended for a set time (in this regard, the Constitution of 1891, article 80, combined with the provisions of article 6, 3, and article 34, 21). The National Congress could declare it or, when affirmed by the President, Congress could approve it or suspend it; the President could declare it if Congress was not in session and when eminent danger was recognized.

According to a historian who took part in the Constituent Assembly that drafted our first republican constitution, *"the provisions on the state of siege were not only not discussed, but were not amended in any way other than simply worded"* (De Roure, 1979: p. 411). The French model, which had been definitively transplanted, was copied. A prestigious commentator who was also contemporary with the 1891 text also grasped the ambiguity and paradox resulting from the decreeing of a *state of siege:*

It would be contradictory, it would be inept to make a constitution and regulate in it the exercise of public power to ensure the freedom and right of the citizen, giving the authority at the same time the power to depart from the guardianship norms established for this purpose and to employ heroic means against the occurrences that can be overcome without sacrificing individual freedom, with the original resources. A constitution that allowed this would rather be a denial and a trap, a warp worthy of Tiberius and Machiavelli, than of the people's proxies to guarantee and maintain their sovereignty. It would be a constitutional suicide (Barbalho, 1992: p. 119).

According to another commentator on the 1891 Constitution, "*the power competent to declare a state of siege is the National Congress*; *if*, *however*, *it does not meet*, *the President of the Republic exercises this power*, *and he must give it to the Congress as soon as it meets*" (Lacerda, n.d.: p. 437). It was understood that the

power to declare a *state of siege* was exceptional, and that it stemmed from *"the supreme duty to ensure order and defend the honor and integrity of the country"* (Maximiliano, 1918: p. 521). Understood by the constitutionalists of the time as a *"sadly unavoidable exception"* (Milton, 1898: p. 459), the *state of siege* should be decreed with as little discretion as possible.

The 1891 Constitution (articles 80, 2nd, 1 and 2) also set limits to the *state of siege* in terms of the measures that could be taken, namely detention in a place not intended for defendants of common crimes and banishment to other places in the national territory. There was thus a restriction on exceptional measures, which the constitutional text in force at the time referred to as *measures of repression*, regarding the fate of the accused. For example, in one of the *states of siege* decreed by Floriano Peixoto in 1892, the persecuted were sent to the state of Amazonas, to São Joaquim do Rio Branco (among them, Mena Barreto and Elísio dos Reis), to Cucui (among them, J.J. Seabra and José Carlos do Patrocínio) and to Tabatinga (among them, Eduardo Wandenkolk, Pardal Mallet and Nogueira da Gama (Camêu & Peixoto, 1983: p. 293).

Throughout the Old Republic, the *state of siege* was decreed by Deodoro da Fonseca, Floriano Peixoto, Hermes da Fonseca, and, above all, Artur Bernardes, who used the instrument of exception for most of his government (Bello, 1964: p. 310 ff.). Deodoro did so for the first time, decreeing a *state of siege* for the capital and Niterói, for 60 days, ordering newspapers "(...) *not to insert any censorship of government acts*" (Camêu & Peixoto, 1983: p. 84). This order, which revealed the full powers exercised by Deodoro (Senna, 1981: p. 135), was revoked by Floriano Peixoto when he took over the presidency following Deodoro da Fonseca's resignation, recognizing that public order and tranquility were not disturbed or threatened (Camêu & Peixoto, 1983: p. 84).

Floriano, however, had repeatedly used his constitutional powers to decree *a state of siege*, which was challenged by Rui Barbosa in the Federal Supreme Court (Rodrigues, 1991: p. 19), in a trial open to the public, when there were oral arguments, marked by intense sensationalism (Viana Filho, 1965: p. 233). Rui Barbosa's writings on the subject constitute a Brazilian doctrine of the *state of exception* (Barbosa, 1956), in which the following stand out in particular: 1) the Courts have the power to assess the validity of the reasons invoked for decreeing *a state of siege*, i.e. the ultimate judgment of its constitutionality; 2) the state of siege can only be constitutional. The *state of siege* can only be repressive, and cannot be decreed preventively; 3) the *state of siege* does not authorize any measure before it has been decreed and regularly published; 4) measures taken during a *state of siege* do not constitute penalties, but merely prevent disorder; 5) measures taken during a *state of siege* do not extend beyond the period of its validity; 6) parliamentary immunities are not suspended during a *state of siege*; 7) the Courts may be called upon to ensure individual rights violated during a *state of siege;* and 8) habeas corpus guarantees personal liberty in all cases of illegal coercion resulting from the decreeing of a *state of siege* (Barbosa, 1956).

Based on the theme of confronting the *state of siege*, Rui Barbosa also developed a *Brazilian doctrine of habeas corpus* (Galvão Júnior, 2005, Lago, 2005), especially for the defense of citizens, *"imprisoned or threatened with imprisonment, some of their political enemies, imprisoned by the government, opening a campaign against the dictatorship"* (Lago, 2005: p. 9), which would have earned Rui the epithet *of the judicial boss of democratic institutions* (Nogueira, 1999: p. 151 ff.).

Rui also filed a writ *of habeas corpus* in his name to discuss the effects of the *state of siege* on his situation as a senator, a petition filed at the Supreme Court session on May 6, 1914. The petition challenged the imminent risk of arrest and banishment under the *state of siege*, which also had the effect of restricting Rui Barbosa's activities as a senator and journalist (Barbosa, 1989). The Court denied the request, taking the firm position that "(…) *freedom of the press was one of those that could be restricted in the event of a state of siege, and it was not up to the Judiciary to assess the regularity of its decree, but to the National Congress*" (Horbach, 2007: pp. 98-99).

What can be seen with some certainty is the use of the *state of siege* in the context of borderline political situations. In these situations, authoritarian political forces were revealed. Guarantees were suspended under the pretext of seeking to restore order, which was threatened by the suspended guarantees. In this sense, the recurrent use of this political method by Presidents Deodoro da Fonseca, Floriano Peixoto, Hermes da Fonseca, and Artur Bernardes, whose respective mandates were marked by intense authoritarianism:

5. The State of Exception in the Vargas Era

Once the coup of 1930 was victorious, and at the same time as setting up a Provisional Government, Getúlio Vargas issued Decree No. 19.398 of November 11, 1930, which objectively established the outlines of a *state of exception* which, among other things, coexisted until 1934 with a constitutional text whose effectiveness had been substantially suspended. Getúlio ordered the suspension of constitutional guarantees, as well as the exclusion from judicial review of acts resulting from the suspension (article 6 of the 1930 Decree); at the same time, a Special Court was created to try political and functional crimes (article 16 of the 1930 Decree), whose undisguised aim was precisely to enable the persecution of vanquished enemies, then disdainfully referred to as *carcomidos*.

The 1934 Constitution, drafted by a National Constituent Assembly, was preceded by valuable work carried out by a commission of notable jurists, called the Itamaraty Commission because the meetings were held at the headquarters of the Ministry of Foreign Affairs in Rio de Janeiro. The commission included very experienced public men such as João Mangabeira, Carlos Maximiliano, Agenor de Roure, Góes Monteiro, Castro Nunes and Temístocles Brandão Cavalcanti. The debates reveal an intense concern with the historical and political moment that was taking place, marked by ideological polarization between communist and integralist ideologies.

João Mangabeira, a parliamentarian from Bahia who claimed the liberal political heritage of Rui Barbosa, was notable for the emphasis with which he defended liberal and democratic positions throughout the debate, understanding the state of siege as a necessary measure that should be observed in cases of armed insurrection by the people and the military, especially during war and in the context of its aftermath (Azevedo, 2004: p. 271). Góes Monteiro, who was a military officer and represented the Army's ideals on that Commission, however, argued that the constitutional text should establish the conditions under which a *state of siege* could be decreed by ordinary law and that the Executive should not be given too broad powers to decree it; on the other hand, he insisted that the *state of siege* should be very clearly distinguished from the *state of external war,* because even in the case of war, he observed, there could be a need to extend the *state of siege* to other areas far from the scene of war, *the theater of operations,* due to Brazil's territorial extension (Azevedo, 2004: p. 272). Agenor de Roure wanted a constitutional construction that would limit the use of the *state of siege*, preventing various abuses, so that its decree should be the responsibility of the Legislative Branch (Azevedo, 2004: p. 273).

Later, in the National Constituent Assembly, deputies Levi Carneiro, Prado Kelly, and Carlos Maximiliano intensely debated how the *Constitution would regulate the state of siege*. Among other things, they discussed the problem of authorizing the seizure of newspapers during a *state of siege*, which these constituents understood to be conditional on judicial authorization, to guard against the *arbitrariness of governments* (Carneiro, 1936: p. 374).

The conclusion of the Assembly's work approved that a *state of siege* could be decreed in cases of imminent foreign aggression or an armed insurrection emergency (Constitution of 1934, article 175). It was up to the Legislature to authorize the President to decree a *state of siege,* Congress also had the prerogative to approve it, suspend it, and extend it (Constitution of 1934, articles 40 and 175). The President had the power to decree a state of siege if Congress was not in session, which, however, required the prior consent of a Permanent Session of the Federal Senate; Congress had to meet within 30 days to deliberate on the *state of siege* already decreed, regardless of whether it had been convened (Constitution of 1934, article 175.6).

It was stipulated that it could not exceed 90 days and could be extended once for an equal period (Constitution of 1934, article 175.1). There was also a limit to the measures that could be taken, which consisted of banishment, detention (even though detention alongside common defendants was prohibited), censorship of correspondence and communications, suspension of freedom of assembly and of demonstrations from the benches, as well as authorization to search and seize homes (Constitution of 1934, article 175). The Constitution established that the State could not banish anyone to a deserted or unhealthy place in the national territory, nor to a place more than 1000 km from where they were at the time of the order (Constitution of 1934, article 175.1). All those affected had to be brought

before commissioned judges within five days of the restrictive measure, who had to be appointed for this purpose (Constitution of 1934, article 175.3).

In the 1934 Constitution, measures of exception during the *state of siege* could not affect a group of political authorities, thus designing, for the first time, a system of immunities in Brazilian law, in the environment of measures of exception. Therefore, the *state of siege*, and the consequent measures restricting freedom, would not affect deputies, senators, ministers of the Federal Supreme Court, the Military Supreme Court, the then Superior Court of Electoral Justice, the Court of Auditors, Governors, and Secretaries of State, as well as members of Legislative Assemblies and State Courts (Constitution of 1934, article 175.4). One could not amend the Constitution during a *state of siege* (Constitution of 1934, article 178.4).

In the mid-1930s, Brazil experienced intense ideological polarization, marked by dissent between right and left, between integralists and communists, grouped around the Brazilian Integralist Action and the National Liberation Alliance, respectively. Getúlio took advantage of this extreme ideological antithesis, preparing the political environment for his coup d'état in 1937. Integralism was organized in a paramilitary way, with very strong symbolism, including an oath ceremony (Cavalari, 1999: p. 169). Integralism initially brought together important names from the legal intelligentsia, such as Miguel Reale (Reale, 1987: pp. 85-94), Goffredo Telles Júnior (Telles Júnior, 2004: p. 105 ff.), and Santiago Dantas (Dutra, 2014: p. 203 ff.). Integralism qualified as a *caboclo fascism*, created by Plínio Salgado, and which enjoyed intense support from the middle classes.

Simultaneously with the growth of the integralists, there was an intense advance by the communists, whose most representative name was that of Luís Carlos Prestes, a hero of the "tenentista" movement, who had returned to Brazil with the aura of the undefeated revolutionary leader (Prestes, 2015: p. 162 ff.). Getúlio oscillated between the two factions, later eliminating them through successive declarations of emergency situations (Dulles, 1967: p. 199 ff.), justifying and protecting himself with the argument that he maintained a strong nationalist stance (Sodré, 1988: p. 33 ff.).

Getúlio first passed a National Security Law, promulgated in 1935, authored by Vicente Rao, which defined crimes against the political and social order. Vicente Rao had fought alongside the São Paulo Constitutionalists and had gone into exile in France, where he studied comparative law. When he returned to Brazil in 1933, he dedicated himself to law and teaching, lecturing at the Law Faculty of the University of São Paulo. One of the founders of the Constitutionalist Party of São Paulo, he collaborated with Armando de Sales de Oliveira, whom Getúlio had appointed as an intervener in 1933.

Getúlio appointed Vicente Rao Minister of Justice in 1934, which resulted in a great deal of collaboration, of which the national security law is one of the most emblematic documents. In 1936 Vicente Rao headed the National Commission for the Repression of Communism. Getúlio was obsessed with measures to prevent

public order from getting out of hand (Vargas, 1995: p. 401). Vicente Rao was an exacerbated nationalist, having adhered to a prosaic *doctrine of the flag,* centered on the concept of a strong state, in which well-known figures from the Brazilian intelligentsia also participated, such as Afonso Taunay, Menotti del Picchia, Paulo Prado, Paulo Setúbal and Plínio Barreto (Martins, 1978: p. 73).

Extremely draconian, the law of exception drafted by Vicente Rao (Law No. 38, of April 4, 1945) punished imprisonment for 6 to 10 years for anyone who tried to directly change the Constitution of the Republic by violent means (Law No. 38, article 1), a crime certainly committed by Getúlio himself during the 1937 coup d'état. Public servants who went on strike would lose their jobs (Law No. 38, article 8). The State could sentence those who instigated collective disobedience to comply with public order laws to 1 to 3 years in prison (Law No. 38, article 9). Incitement to hatred, violence, class struggle, religious struggle, and attacks for doctrinal, political, or religious reasons would also be severely punished (Law No. 38, Chapter II).

It was stipulated that the propaganda of violent processes to subvert political or social order would not be tolerated (Law No. 38, article 22). If these crimes were committed by the press, without prejudice to competent criminal action, the respective editions would be seized (article 25). The existence of parties, centers, or associations aimed at the subversion, by threat or violence, of the political and social order was prohibited (article 30). At the request of the Chief of Police, sent to the Minister of Justice, the recognition of unions and professional associations that violated the national security law could be revoked by the reasoned act of the Minister of Labor (article 31). Naturalizations could be canceled in the event of naturalized foreigners committing crimes described in the law (article 37). The crimes punishable by the national security law were non-bailable, in the event of prison sentences of more than one year (article 40).

One can see adherence to the conceptual aspect of the typology *of states of exception* in the determination that prison sentences should be served in establishments other than those intended for criminals who have committed common crimes (Law No. 38, article 42). Article 43 established that in the interests of public order, or at the request of the convict, sentences could be served outside the district of guilt. Federal Court would prosecute crimes in individual trials under the national security law (article 44). This law remained in force until 1953 when Getúlio Vargas himself replaced it. Vargas established a presidential policy of autocracy, through which the concentration of powers in the hands of the head of the Executive Branch was absolute, which gave rise to the perception of a Brazilianist, for whom we had *His Majesty the President of Brazil* (Hambloch, 2000).

The 1937 coup inaugurated the dictatorial period known as the New State (Castro, 2003: p. 367 ff.). Francisco Campos, a politician from Minas Gerais known for his vast knowledge of public law, influenced the construction of this political text. Campos considered the text a paradoxical *technique of the totalitarian state at the service of democracy* (Campos, 2001: p. 29). In the Constitution of 1937, the *state*

of exception terminology turned to *state of emergency* and *state of war* (article 74).

The exclusive competence of the President of the Republic, which reflected the hypertrophy of the Head of the Executive Branch, the *state of exception* could be decreed in the event of an external threat, imminent disturbance of internal order, conspiracy, or conspiratorial plan to disturb public peace, the need to guarantee the security of the state and citizens, that is, it was an instrument for use at all times when the President saw a danger to the structure of institutions (Constitution of 1937, article 74 and 166). Strictly speaking, the entire Estado Novo period, from 1937 to 1945, consisted of a permanent *state of exception.*

Under the terms of the 1937 Constitution, the President did not need parliamentary authorization to decree a *state of emergency*; nor could Parliament suspend it (Constitution of 1937, article 166.1); however, it is important to recognize the empirically empty nature of the constitutional rule, bearing in mind that there was no parliamentary activity during the Estado Novo. Among the measures that could be adopted by the President, the 1937 Constitution provided for detention in a building or place not intended for defendants of common crime, banishment, forced residence, as well as the deprivation of freedom to come and go; there could be censorship of correspondence of all communications, oral and written, the suspension of freedom of assembly and search and seizure in the home (article 168).

Radically regulating the issue, the 1937 Constitution authorized the President, during a *state of emergency*, to ask Congress for permission to suspend the immunity of parliamentarians if they were suspected of being involved in a conspiracy that threatened the security of the state (Constitution of 1937, article 169). The delay by Congress—the period it had to express its opinion was twelve hours, very short, on purpose—meant that the President, in his judgment, could order the arrest of parliamentarians, regardless of whether any of the Chambers had been informed, which could only express their opinion in such cases after the *state of emergency had* ended (articles 169.1 and 169.2).

The ban on the Judiciary on matters relating to the *state of emergency for* the duration of the measures (Constitution of 1937, article 170) accentuated the radicalism of the model. The text stipulated that during a *state of war,* the parts of the Constitution indicated by the President would cease to apply. Finally, crimes committed against the security of the state would be subject to exceptional judgments (articles 171 and 172).

There are three very symbolic records of the formulas of exception used by the Getúlio Vargas dictatorship. We are referring to the trials of Olga Benário Prestes, Genny Gleiser, and Ernesto Gattai, all judged by the Supreme Court, which also reveals the role of the judiciary in the so-called *state of emergency.* Olga was a communist militant, German, Jewish, and a *harmful foreigner*, in the context of the dictatorship's images (Morais, 1989: p. 187). Arrested by the repressive forces commanded by Filinto Müller, the government intended to hand her over to Nazi Germany. For this reason, Heitor Lima, Olga's lawyer, filed the writ of habeas

corpus No. 26.155 (1936) with the Federal Supreme Court.

The measure was characterized by the unusual nature of the request. The habeas corpus is a remedy aimed at the patient's freedom; in Olga's case, on the contrary, it was intended that she remain imprisoned in Brazil, especially because she was pregnant. It was even argued that the sentence would transcend the person of the accused. Heitor Lima argued that Olga should be punished after being tried if convicted and not expelled before any trial, even a summary one. The government deported and handed over Olga to the Germans, where she died in a concentration camp.

The Federal Supreme Court, then presided over by Edmundo Lins, rejected the request by a majority of votes. Justices Bento de Faria, Edmundo Lins, Hermenegildo de Barros, Plínio Casado, Laudo de Camargo, Costa Manso, Octávio Kelly, and Ataulfo de Paiva did not consider the request. Carlos Maximiliano, Carvalho Mourão and Eduardo Espínola heard the case and rejected it on the merits. The reasons for the rejection were Article 2 of Decree No. 702 of March 21, 1936, which declared that serious domestic commotions throughout the country were equivalent to a state of war for 90 days, thus prohibiting the granting of habeas corpus.

It was a normative document that established *the state of exception.* The government issued it in response to new inquiries and investigations that revealed a serious upsurge in subversive activities, in Getúlio's opinion. The decree allowed the government to take measures that were considered indispensable, energetic, preventive, and repressive, because it was the state's fundamental duty to defend the then-dominant principles of authority and social order. The decree suspended various constitutional guarantees, including habeas corpus.

The case of Genny Gleiser, a young Romanian immigrant and communist, is also indicative of police violence in the *state of exception*, as well as the leniency of the judiciary towards the measures taken at the time. The issue reached the Federal Supreme Court, in the form of the writ of habeas corpus No. 25.906 (1935), filed by the lawyer Sylvio de Fontoura Rangel. The patient had been arrested in São Paulo, held *incommunicado*, and accused of being a communist. The Federal Supreme Court ruled that Genny was a foreigner and that, once her harmfulness to public order had been proven, a decree of expulsion was justified. As for the mistreatment she had received from the police, it was decided that this matter should be discussed with the responsible authorities, i.e. the São Paulo state police.

The Federal Supreme Court also considered a similar matter, in the writ of habeas corpus No. 26.643 (1937) filed by lawyer René Souza Aranha Lacazé, in favor of Italian immigrant Ernesto Gattai, accused of making anarchist propaganda. Naturalized Brazilian, the Estado Novo authorities persecuted Gattai. He managed to avoid deportation because of his naturalization, although he left prison in a sorry state, dying soon afterward, in 1940, at the age of 54, according to information in the *memoirs* of his daughter, Gattai (2007: p. 23).

The ideas of Francisco Campos, who was responsible for the doctrinal and philosophical foundation of the Estado Novo, prevailed, and for whom, the state had ceased *to be* "(…) *the night watchman, whose sole function was to watch over the sleep of private individuals, guaranteeing public quiet, to assume functions of creation and control in all areas of human activity*" (2001: p. 89). Francisco Campos went out of his way to defend the regime, proclaiming the appropriateness of the acts of exception, which provoked a reaction from Osvaldo Aranha, then Brazilian ambassador to the United States, who complained to Getúlio Vargas in a telegram about the difficulties of defending Brazil among democratic nations, given the ostentatious way in which Francisco Campos apologized for the dictatorial regime. In response, Getúlio ordered Osvaldo Aranha to interpret and comment on the repercussions of Francisco Campos' speeches according to Brazil's interests (in accordance with a telegram from Oswaldo Aranha addressed to Getúlio Vargas, dated November 29, 1937, kept by the Center for Research and Documentation of Contemporary Brazilian History (CPDOC) of the School of Social Sciences of the Getúlio Vargas Foundation. Microfilming: roll 5 photos 0719-2 z 0720-2).

A large body of memoirist literature (Ramos, 1994; Lima, 1974: p. 122 ff.), as well as repeated references to painful experiences in exile, such as the one suffered by Octávio Mangabeira (Oliveira, 1971: p. 129 ff.), criticize the permanent *state of exception of* Getúlio Vargas' dictatorship, especially as defined and implemented during the Estado Novo.

6. The State of Siege in the Constitution of 1946

The fall of Vargas in 1945 reinstalled the democratic regime, in an international context that marked the end of some dictatorial regimes, even though totalitarian governments persisted in Portugal and Spain. The 1946 Constituent Assembly emerged from a movement to repudiate the Estado Novo, a "one-man dictatorship of fascist and totalitarian inspiration" (Bonavides & De Andrade, 1991: p. 349). In this sense, a liberal text with strong democratic characteristics was constructed.

The National Congress had the power to recognize a state of siege, which could do so in cases of serious internal commotion or facts that showed that such commotion was imminent, as well as in cases of external war (Constitution of 1946, article 206). The President should, after issuing a law establishing the state of siege (Constitution of 1946, article 207), immediately decree it (Constitution of 1946, article 87, XIII). This law should indicate the constitutional guarantees that would remain in force and specify the cases in which crimes against the security of the nation would be subject to military jurisdiction when committed by civilians (Constitution of 1946, article 207).

The responsibility that the Constitution of 1946 attributed to the President was markedly political, such as the total or partial mobilization of the armed forces, as well as federal intervention in the states (Ferreira, 2003: p. 209). The Legislative Power prevailed in the 1946 model, unlike the 1937 formula, which included the

hypertrophy of the Federal Executive Power. The 1946 constituents endeavored to avoid the permanent state of siege, a defining characteristic of the Estado Novo, at least in its practical aspect (Espínola, 1946: p. 462). In any case, the state of siege was an exceptional measure, effectively temporary (Maximiliano, 1954: p. 277).

Once the law instituting the state of siege had been published, the President would then have to designate by decree who would be responsible for carrying out the restrictions, as well as the areas in which the measures would reach (Constitution of 1946, article 207, sole paragraph). The President's power to decree a state of siege could only be exercised during legislative sessions (Constitution of 1946, article 208); however, once the measure had been decreed, the President of the Federal Senate had to immediately convene the National Congress to approve (or not) the President's act within fifteen days (Constitution of 1946, article 209, sole paragraph). The 1946 Constitution also regulated the measures that could be taken, namely the obligation to stay in a specific place, detention in a building not intended for defendants of common crimes and banishment to any place in the national territory, provided it is populated and healthy, censorship of correspondence or advertising, suspension of freedom of assembly, search, and seizure of homes, suspension of the exercise of public office or function and intervention in public utility companies (Constitution of 1946, article 209).

In the event of a state of siege decreed as a mechanism to combat serious internal unrest, the measures could not exceed 30 days, allowing only one extension for an equal period (Constitution of 1946, article 210). The state of siege decree should specify the regions it would cover (Constitution of 1946, article 212). When it ended, its effects would expire (Constitution of 1946, article 214). The 1946 Constitution allowed parliamentary immunity to be suspended if this was done by a vote of two-thirds of the members of the Chamber or Senate (Constitution of 1946, article 213).

In 1953, Getúlio Vargas sanctioned Law No. 1.802, of January 5, in his second government, defining crimes against the state and the political and social order The submission of the nation's territory, or part of it, to the sovereignty of a foreign state is defined as a crime, in its attempted form (Law No. 1.802, article 2). The expression "subversive" was based on a criminal type established in this law of exception; that is, anyone who attempted to subvert the prevailing order by violent means was classified as a "subversive" (article 2, IV). The penalties were extremely harsh, reaching up to 30 years in prison in the case of an attempt to submit Brazilian territory to the sovereignty of a foreign state. An attack on the life, safety, and freedom of the President of the Republic could be penalized by up to 20 years in prison (article 6, a).

It is in this law that the practice of a public act that expresses contempt, vilification, or outrage at the name of Brazil, as well as any of the national symbols, of the States and Municipalities (Law No. 1.802, article 22). The promotion or maintenance, on national territory, of a secret service aimed at espionage, could be penalized with imprisonment of up to 20 years (article 25). The simple possession

or keeping of an aero photographic camera would justify imprisonment of up to two years (article 28). Foreigners found guilty of the crimes set out in the law would be penalized with expulsion from national territory (article 33).

The provisions of this security law, which remained in force until 1967, were used to combat communists during the Cold War. Brazil sided with the US, making the Communist Party illegal in 1947, following a decision by the Superior Electoral Court, because the 1946 Constitution did not allow the existence of political parties that were contrary to the democratic regime.

An example of this obsession with fighting communism is the persecution suffered by the writer João Cabral de Melo Neto, also a diplomat, who on July 20, 1953, filed the writ of mandamus No. 2.264 with the Supreme Federal Court, through the lawyer Guimarães Menegale, challenging Getúlio Vargas' decree that placed him on inactive duty, without pay. The decree was based on the conclusion of a commission that accused the writer of being linked to subversive activities linked to the activities of the Communist Party. In 1954, the decree was annulled, and Melo Neto was allowed to resume his diplomatic activities, including the right to receive the salaries he had not been paid while the decree was in effect.

The escalation of the confrontation with communism, especially after the resignation of Jânio Quadros and the discussion around the inauguration of João Goulart, which was obstructed by a military veto (Skidmore, 1967: p. 205), led to the violation of democratic experimentation, marked by a coup d'état, which promoted a new state of exception.

7. The Regime of Exception in the Military Era

The order established by the military intervention sought legitimacy through the so-called Institutional Act No. 1, dated April 9, 1964, which provided for the maintenance of the current order, with modifications then introduced by a *constituent power originating from the victorious revolution.* The text was preceded by a declaration, in which the signatories (Army General Costa e Silva, Lieutenant Brigadier Correia de Mello, and Vice-Admiral Grunewald) stated that a new perspective was opening for the future of the country, through a revolution that reflected *"the interest and will of the nation"*. A *revolutionary constituent power* was invoked, identified as *"the most expressive and radical form of Constituent Power"*, with prerogatives to issue legal norms that were not limited by the previous order in force.

The *state of exception* that was being established was justified by stating the need to use the indispensable means *"for the work of economic, financial, political and moral reconstruction of Brazil"*. They insisted on legitimizing the rules of exception by claiming that the victorious revolution needed to be institutionalized. Inverting the logic of democratic institutional arrangements, the victors in 1964 made it clear that they understood that the Congress did not legitimize the revolution; in their view, the *revolutionary* Constituent Power that emerged from the

new order was legitimating the Legislative Branch.

The dispositive section of the act stated that the President could declare a *state of siege*, or extend it, for a maximum period of 30 days; this decision would be submitted to the National Congress, accompanied by justification, 48 hours after it was passed (Institutional Act No. 1, article 6). The act suspended the constitutional or legal guarantees of life tenure and stability for six months; a summary investigation (article 7) could dismiss the holders of these guarantees.

Finally, in defense of what was identified as *"the interest of peace and national honor, and without the limitations provided for in the Constitution"*, the movement's commanders could suspend political rights for 10 years, and could also revoke federal, state, and municipal legislative mandates. These acts could not be submitted to the Judiciary, a determination that effectively classified the *state of exception* that lasted until the opening process in the early 80s.

The tradition of military intervention in Brazilian political life had been recurrent since the proclamation of the republic, as following. Officers were recruited from an aristocratic background (Carvalho, 2005: p. 20), although throughout the 1920s there was a strong presence of middle-class people, represented by the lieutenants, whose initial protest in 1922 was directed against Epitácio Pessoa, whom they accused of harming the dignity of the Army (Távora, 1973: p. 115). In addition, there was the North American influence (Bandeira, 2010: p. 331 ff.) and the conservative ideology that presented itself in certain forms, such as bureaucratic thinking, which sought to convert all political problems into questions of administration (Mercadante, 1980: p. 274). One of the masterminds of the coup insisted in his memoirs that he had repudiated a military dictatorship (Mourão Filho, 1978: p. 405), which, however, ended up happening.

The *state of exception* was imposed because there was evidence of a real danger of left-wing authoritarianism (a unionist republic), of the continuation of the anarchy *of the Pelagians* (represented by João Goulart), or of a civil war of ideological confrontation (Campos, 1994: p. 450). A new law defining crimes against national security was the subject of Decree-Law No. 314, of March 13, 1967. National security was defined as guaranteeing the achievement of national objectives against both internal and external antagonisms (Decree-Law No. 314, article 2), a vague clause that allowed the law to reach opponents of the regime, since it essentially included measures aimed at external and internal preservation, "*including the prevention and repression of adverse psychological warfare and revolutionary or* subversive *warfare*" (Decree-Law No. 314, article 3). Even civilians were subject to military jurisdiction, which had absolute competence to judge the crimes defined in this law (Decree-Law No. 314, article 44).

Francisco Julião, Carlos Heitor Cony, and Miguel Arraes are among those who were prosecuted under this exceptional legislation. Leader of the *Peasant Leagues*, the nucleus of the resistance to the military regime in the countryside, Julião went to the Federal Supreme Court to obtain his freedom, in which he was defended (successfully) by Sobral Pinto, who reversed the decision of the Superior Military

Court that had rejected the writ of habeas corpus No. 42.560 requested in favor of Francisco Julião. Cony, on his side, also went to the Supreme Court through the writ of habeas corpus No. 40.976 filed successfully by Nelson Hungria to discuss the persecution he was suffering at the time. Miguel Arraes, who was imprisoned and held incommunicado, also appealed to the Supreme Court to obtain his freedom (writ of habeas corpus No. 42.160), even though the persecution persisted with his subsequent exile.

That same year, 1967, a new Constitution was granted, which provided for the possibility of a *state of siege* being decreed in cases of major disturbance of order or threat of its interruption, or in the event of war (Constitution of 1967, article 152). In addition to the already traditional clauses allowing it to be decreed (obligation to reside in a specific place, detention in buildings not intended for defendants of common crimes, search and seizure of homes, suspension of freedom of association and assembly, censorship of correspondence, the press, telecommunications, and public entertainment), the provision for intervention in public service companies was extended to the use and temporary occupation of the assets of municipalities, public companies, mixed-capital companies or public service concessionaires, as well as the suspension of the exercise of office, function or employment in the same entities (article 152, paragraph 3).

The power to decree a *state of siege* rested with the Union (Constitution of 1967, article 8, III), exercised by the President (article 153), who had to submit the act to the National Congress, accompanied by justification, within five days (article 153, paragraph 1). In addition, it was also stipulated that to preserve the integrity and independence of the country, the free functioning of the powers and the practice of the institutions, when seriously threatened by factors of subversion and corruption, the President, after hearing a National Security Council, could take other measures, established by law (article 153, paragraph 3). It was also stipulated that during the *state of siege,* the National Congress could determine the suspension of constitutional guarantees (article 154).

Opposition to the military regime and armed guerrilla warfare provoked a violent reaction. On the pretext of a speech by Congressman Márcio Moreira Alves, who had denounced the invasion of the University of Brasilia, Institutional Act No. 5 was issued on December 13, 1968 (Alves, 1993). This was followed by intolerable arbitrariness, with absolute centralization of powers in a Military Junta and in the Presidents subsequently appointed by the Armed Forces, to the absolute detriment of the political expression of the National Congress (Andrade, 1985: p. 309 ff.). The *state of exception* installed at the time marked the so-called *Years of Lead* (Branco, 2007), institutionalizing violence against citizens (Alves, 2005).

Institutional Act No. 5 of December 13, 1968, begins with a reference to the fact that the President (Costa e Silva), after having heard the National Security Council, invoked the disturbance of order, and the imperative need to adopt measures aimed at preventing "*the higher ideals of the Revolution from* being frustrated, *preserving order*, *security*, *tranquility*, *economic and cultural development and*

the political and social harmony of the country compromised by subversive processes and revolutionary *war*". This is a typical and recurrent argument in these situations: the democratic order is suspended in the name of freedom and tranquility, justifying the measure as necessary and imperative for the maintenance of freedom, tranquility, and the values of democracy, even though it has been violated and suppressed.

It was made possible for the President to decree the recess of the Legislative Branch, "*in a state of siege or otherwise, only returning* (…) *to function when summoned*" by the President himself (Institutional Act No. 5, article 2); during the recess, the President would have full legislative competence (article 2, paragraph 1). The President was also allowed to decree intervention in states and municipalities, *in the national interest*, and "*without the limitations provided for in the Constitution*" (article 3). The political rights of any citizen could be suspended for 10 years, and federal, state, and municipal elective mandates could be revoked. Freedom under surveillance, a ban on going to certain places, and the establishment of a specific domicile were measures that could be imposed in the name of the order that was intended to be defended (articles 4 and 5).

The *state of exception* then in place made it possible to suspend the constitutional or legal guarantees of life tenure, "irremovability", and stability, which existed in some sectors of the public service, such as the Judiciary (Institutional Act No. 5, article 6). The President had the prerogative to decree a *state of siege* and to extend it, setting the respective deadline (article 7). The guarantee of habeas corpus was suspended (article 10); the Judiciary was prohibited from assessing and judging acts carried out by the Act, as well as its Complementary Acts (article 11).

Brazil then lived through a period of extreme institutional violence, reported in a wide range of memorial works (Tavares, 2012; Gabeira, 2009), historical reminiscences (Lemos, 2004) and research, such as the Projeto *Brasil Nunca Mais (Brazil Never Again* Project), conducted by the Archdiocese of São Paulo, the World Council of Churches, coordinated by the then Cardinal D. Paulo Evaristo Arns and the Reverend Paul Wright, published in 1985. There are also impressive reports of the persecution of Catholic religious, even though sectors of the Catholic Church had preached in favor of the new order when João Goulart was deposed (Serbin, 2001).

The Constitution of 1969, also known as Constitutional Amendment No. 1, maintained the general lines of the 1967 Constitution, with minor variations in detail. The competence of the Union persisted (article 8), exercised by the President (article 155), with supervening submission to Congress, which was responsible for approving or suspending the presidential act (article 44, IV).

Very serious human rights violations that occurred during the circumstantially permanent *state of exception* that prevailed during the military era were investigated by the National Truth Commission, established by Law No. 12,528 of December 18, 2011. Several central themes guided the work of the Commission,

which investigated the structures of the Brazilian state and the serious human rights violations, the organs and procedures of political repression (especially through the work of the National Intelligence Service—SNI), the methods and practices used by the sectors of repression, as well as various levels and specificities of violence practiced, along with forced disappearances, executions, deaths, sexual abuse, in a broad and macabre framework of torture. The work of the Truth Commission empirically illustrates the actions of the state in the context of the State of Exception[1].

Amnesty Law (Law No. 6.683, of August 28, 1979) barred effective punishment measures. Amnesty was granted to those who committed political or related crimes between September 2, 1961, and August 15, 1979, including civil servants and military personnel; union leaders and representatives punished based on unconstitutional and complementary acts were also granted amnesty. Crimes committed during the *state of exception* were not prosecuted and punished because of the conceptual construction of a *two-way amnesty*, which would cover opponents of the military regime as well as agents of repression.

The Brazilian Bar Association challenged the Amnesty in the Supreme Court, through the so-called "ADPF" (request for non-compliance of basic principles) No. 153 in the Federal Supreme Court, reported by Justice Eros Grau. Its terms were upheld, which contrasts with the decision of the American Court of Human Rights, which ruled that it was unenforceable since torture is an imprescriptible crime[2]. There is also ADPF No. 320 filed with the STF by the Socialism and Freedom Party (PSOL), whose objective is for the STF to declare the binding effect of the decision of the Court of San José de Costa Rica in the case of the Araguaia guerrillas.

It should also be noted that the issue of the possibility of the judiciary reviewing acts produced during the *state of exception* persisted in the very rule that repealed the institutional acts. This was Constitutional Amendment No. 11, of October 13, 1978, which excluded from the jurisdiction of the Judiciary the power to judge acts carried out based on the institutional and complementary acts then repealed. At the time, it was understood that this exclusion also applied to "(...) *any violation of fundamental rights declared in the Federal Constitution* [because] *a different understanding would be granting the reforming power the possibility of contradicting the Constitution in that inviolable core that gives it a minimum of meaning in Brazilian constitutionalism* (...) (Ferraz, *apud* Clève & Barroso, 2011: p. 1342); that is, the tripartition of powers. This understanding, coupled with the provisions of the Amnesty Law, to some extent, fueled the myth that Brazil had undergone an agreed transition to democracy.

[1]This is the subject of *Transitional Justice.* Reference is made to the Reports of the National Truth Commission, published by the Commission itself in December 2014 (Brazil, 2014). See also Abrão & Genro, 2012; Torelly, 2012; Silva Filho, Abrão, & Torelly, 2013.

[2]This is the Julia Gomes Lund case, also known as the *Guerrilha do Araguaia* case, in which the Court, in a decision on November 24, 2010, ruled that crimes committed by *state* agents during the *state of exception* in Brazil from 1964 to 1985 should be investigated and punished.

8. The State of Exception in the Constitution of 1988

What was decided in the 1987-1988 National Constituent Assembly resulted from a consensus around projects, deadlocks, and postponements, translated into provisional texts recognized by sometimes prosaic nomenclature, such as the "*Frankenstein*", "*Rosemary's Baby*", "*Hercules*", "*Cabral* 1" and "*Cabral* 2" versions (Pilatti, 2008: pp. 147-192). The subject of *a state of exception* did not give rise to much topographical or conceptual variation, so it was repeatedly identified as a *state of defense* and *a state of siege*, from Substitute 1 of the Systematization Commission, remaining the same in the following versions, until the final version, and always in the context of the provisions on the defense of the state and democratic institutions (Lima, Passos, & Nicola, 2013).

The National Constituent Assembly that drafted the 1988 Constitution had been convened due to the provisions of Constitutional Amendment No. 26 of November 27, 1985, an unusual way in which an order was constructed from another order, which gave it life, in the initial contours of a text produced by a college of notables, which is why it was initially criticized as a vehicle for an "*indigestible miscellany*" (Ferreira Filho, 1987: p. 98).

The current model, promulgated on October 5, 1988, envisages a *state of defense,* the decree of which is the responsibility of the President of the Republic, after consulting the Council of the Republic and the National Defense Council (Constitution of 1988, article 136). The *state of defense* can be decreed for the preservation or reestablishment, in restricted and determined places, of public order or social peace, insofar as they are threatened by serious and imminent institutional instability or affected by major natural disasters (article 136). The *state of defense* allows for restrictions on the rights of assembly, the confidentiality of correspondence, confidentiality of telegraphic and telephone communications, as well as limitations on the occupation and use of public property Article 136, paragraph 1). During a *state of defense*, among other things, the incommunicado detention of prisoners is prohibited (article 136, paragraph 1, IV). The formula also applies to dealing with major natural disasters, a circumstance that is neutral in the political context (Cardoso, *apud* Clève & Barroso, 2011: p. 1228). *A state of siege* can be decreed by the President of the Republic after the Council of the Republic and the National Defense Council have been heard, and after authorization by the National Congress, and in the event of serious commotion of national repercussion or the occurrence of facts that prove the ineffectiveness of a measure taken during a state of defense; as well as in the event of declaration of a state of war or response to foreign armed aggression article 137). There is an innovation concerning previous models, in that the National Congress will remain in operation until the coercive measures have ended (article 138, paragraph 3).

The measures already authorized in previous constitutional texts remain, such as staying in a specific place, detention in a building not intended for those accused or convicted of common crimes, inviolability of correspondence, secrecy of communications, provision of information, and freedom of the press, radio and

television broadcasting, suspension of freedom of assembly, search, and seizure in the home, intervention in public utilities; however, innovations have been made with the permission to requisition property (article 139). During a *state of siege*, there are no restrictions on the broadcasting of statements made by parliamentarians in their legislative houses, as long as they are released by the respective Bureau (article 139, sole paragraph).

There remains a conceptual core centered on the judgment that the *state of siege* is configured as a "*special legal regime, for exceptional situations,* in *which some goods or spheres of freedom are provisionally sacrificed in the superior interest of the order and security of the State*" (Silva, *apud* Dimoulis, 2007: pp. 150). Thus, a "*constitutional system of crises*" (Silva, 2006: pp. 617) is considered, domesticating the *state of exception*, justified as a "*founding principle of necessity or temporariness*", as a means of practical response, with restricted enforceability and linked to irregularities in political life (Silva, 2006: p. 618).

9. Conclusion

The state of exception, in its various manifestations, state of siege, state of defense, state of emergency, and state of war, is a constitutional abnormality that is obsessively sought to be regulated. It is a factual circumstance that constitutional doctrine seeks to transform into a legal fact. Arising from a real or arguable state of necessity that justifies the exception, and from the limitations and constraints that the measures taken project on the people, the state of exception requires a theoretical construction to justify that necessity does not need laws.

The state of exception appears to be controllable, and manageable, just as it is written in the various constitutional and legal texts. However, its actual implementation leads the conceptual abstraction based on normality to an aggressive and hostile political and bureaucratic structure that makes the most monstrous barbarities possible. The Nazi regime, the terror of the Vargas New State, and the systematic violation of human rights during the military era in Brazil are proof of this, as are Mussolini's Italy, the Salazar regime in Portugal, the Franco regime in Spain, the US formulas for combating terrorism, the dictatorships of Argentina, Uruguay, Chile, Uganda, and countless other sad reminders.

A theorization of the state of exception, in conclusion, indicates that the intention is to regulate what, by definition, would transcend any regulatory formula. The Brazilian constitutional experience corroborates Giorgio Agamben's intuition, insofar as it is compared with the experience of our political history, to the effect that the state of exception is less an institutional arrangement of public law than a political fact, in which the democratic order is sacrificed.

At the same time, Brazil's historical experience could confirm the theoretical construction of Carl Schmitt, who pragmatically and astutely conceived the state of exception as the possibility of suspending the law to achieve effective action.

It is in this dilemma, the defense of order in the state of necessity in the face of the instrumentalization of the seizure of power with instruments for the destruction

of the enemy, that the blind spot of public law lies. For democratic theory, the state of exception is the expression of its salvation, as well as the procedure for its annihilation: it is its redemption; and, at the same time, its anathema.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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