

EXCEPTION AND NECESSITY: THE POSSIBILITY OF A GENERAL THEORY OF EMERGENCY

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I. Emergency, law and security

A key element to explain and justify the rule of law is to provide legal certainty.¹ That is, the conduct in the political community is normalized. In the case of a government official, he must be able to know with certainty if the act in which he wants to engage is allowed or not by the law. For the rest of the citizens, determining whether an act is permitted or not, enables each individual to make decisions knowing the consequences that their actions may have in order to determine if they want to engage in them, avoid them or modify their behavior.

Now, the legal order in itself accounts for situations in which such certainty is disrupted by situations that because they exceed the suppositions of normalization are referred to as "exceptional", "emergency" or "unexpected." The reality then is that legal certainty entails certain conditions of normality under which it is possible to provide predictability to the consequences of individual behavior. Altered or eliminated such conditions, the promise of certainty cannot be fulfilled.

There may be several ways in which conditions of normality cease to operate effectively, being occasionally the result of a combination of a material conflict and the circumstances in which it develops. The origin of the conflict precedes by nature the normative and is based on factual relationships and situations that require attention or resolution. The material nature of the problem can manifest itself in different ways. For example: 1) the legal order does not contain a

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¹ ANTONIO-ENRIQUE PÉREZ LUÑO, LA SEGURIDAD JURÍDICA (2da ed. 1994).

provision that provides solution to the conflict, 2) identifies a rule that appears to address the conflict, but its content or scope is not clear, or 3) identifies a solution to the conflict that seems appropriate according to the nature of the problem, but is prohibited in the system.

On the other hand, in regard to the circumstances affecting the conditions of normality, they are essentially of a temporal nature. Effectively addressing the conflict entails making immediate decisions, otherwise irreparable damage could happen.

If we are deprived of legal certainty in an emergency, what are we to do? The question can be addressed from different approaches. For example, the subject of the question. The question can be asked by the person who must act to resolve a conflict, but does not have a clearly stated normative solution for it. Similarly, the question may be asked by the state itself by developing awareness about this type of situation and choosing to provide criteria about how the legal system assesses potential responses.

My primary interest is to address the second case, the manner in which the state itself understands the uncertainty that takes place in emergency situations. In short, the aim of normalizing uncertainty through the creation of a rule of law designed to address the emergency; the aspiration that the uncertainty, the exceptional, be tamed.

It is customary to consider this type of reflection when discussing the emergency powers claimed by a ruler or as part of the analysis of what is known as the state of exception. Viewed in this way, the approach is usually associated with issues of constitutional theory or theory of the state, in any case primarily as a public law matter. It is so presented when analyzing a state of siege, the global war against terrorism, the response to natural disasters or the international financial crisis. This approach from public law is discussed in Part III of the essay.

However, and this is one of the main statements in the paper, the treatment that the legal

order provides to emergency is present in legal issues and debates not necessarily associated with state authority in a leading role. For example, in Part IV of the essay we will see how emergency situations can create a state of necessity under which criminal law recognizes as legitimate for a person to transgress what the legal order has established as a general rule of conduct.

Finally, Part V compares different doctrinal aspects in order to examine whether, beyond the classical theoretical debate associated with exception, it is possible to identify common elements of a general theory of emergency that will overcome the distinction private law / public law, as well as common law / civil law boundaries.

II. Paradigm of the state of exception as crisis

A. The limits of normality

In recent years a wide range of comments has developed regarding the political and legal significance of the so-called state of exception.² Clearly this is directly related to the surge after September 11, 2001, of the issue of terrorism, the declaration of a global war against it and the debate about what such a position meant for protection of civil rights. Part of the discussion led to the rescuing of previous discussions, some developed from historical contexts equally critical, others, the product of reflections about the evolution of the rule of law itself.

Perhaps the best way to explain the state of exception is by reconstructing the problem, at least in the way it is presented in the case of modern liberal democracies. We start with a constitutional order built on a scheme of separation of powers and a list of individual rights enforceable by individuals against the state. If a problem arises between members of this

² See the particular influence of GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Transl. Kevin Attell 2005). In some aspects this debate gained insights from several works published during the last three decades concerning a renewed interest in the German public law jurist Carl Schmitt. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (Trans. George Schwab 1985) (2nd ed 1934). On Schmitt's ideas, see *LAW AS POLITICS. CARL SCHMITT'S CRITIQUE OF LIBERALISM* (Ed. David Dyzenhaus 1998).

political community, in an adequate governability framework we would expect it to be addressed by public bodies according to the constitutional division of functions. This would be so either because the situation in dispute is governed by general rules of conduct adopted by the legislature, because it only requires that the executive put into force the existing norm or because it is necessary that the judiciary adjudicate a dispute as to the content or scope of the norm. The exercise of each of these functions is, in turn, limited by respect for individual rights of the members of the community.

This describes a legal-political order operating normally. Suppose, however, that there is a problem whose solution cannot be achieved under the normal distribution of powers or being the case individual rights must be respected. For purposes of this part of the discussion and in order to understand the main points of discussion, assume that the problem in question has the character of a crisis, an emergency that jeopardizes the very existence of the state or the political community. Consider the case of an invasion by a foreign enemy or a natural disaster like the earthquake in Haiti in January 2010.

To this scenario then add that the only way the crisis can be overcome is through measures that would not be permissible under the existing legal order. This would be so because they entail acting contrary to the scheme of the division of powers, as would be recognizing that the executive branch can legislate, or because they require limiting constitutional rights of individuals, as in the case of preventive detention.

From the point of view of the normative system, the above situation could have a clear answer: none of the alternatives really exist because the legal order does not support actions contrary to it. However, when we are dealing with critical circumstances that endangers the very existence of the legal order or the political community, it is suggested that the situation of

necessity would force the need to act, even where this involves a transgression of the established legal order.³ We must then ask: Is this a reality that goes beyond the legal and operates as a necessary act, or can this type of alternative exist within the legal order itself?

In this regard, the literature is characterized by attempting to provide explanations by dramatic dualisms. It refers to the normality – exceptional relationship,⁴ accommodation approach - strict approach,⁵ regular government – exception government,⁶ or simply to the dichotomy legal - extralegal.⁷ These dualisms are sometimes presented as normative proposals, in other occasions as descriptions of how the rule of law operates.

However, affirming that the exceptional is acting outside of normality does not end the discussion since it does not answer how exception relates to the law. Is exception a legal concept, or is it a factual reality? Or using a recurring image in these debates, is exception within or outside the law? A considerable part of the recent literature has focused specifically on the implications for the rule of law in choosing to understand emergencies under a "legal model" against the alternative of framing the discussion in a "extralegal model."

B. The "legal" - "extralegal" debate

In a crisis where the very existence of the legal order is at stake, it is stated that the exception is not an option but a duty, the only way available. Such circumstances require taking the necessary measures that would permit to preserve the state order, even when they involve a

³ “Certain situations can so threaten the constitutional(ity of the) state that the binding constitutional provisions cannot, or at least, not with the necessary speed, [...] handle state of emergencies sufficiently”. András Jakab, *German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse*, 7 GERMAN LAW JOURNAL 453, 454 (2005).

⁴ Pedro Cruz Villalón, *Normalidad y excepción*, Año 24, Vol. 71, REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 187 (mayo-agosto 2004).

⁵ Eric A. Posner & Adrian Vermelue, *Accommodating Emergencies*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 55 (Mark Tushnet ed. 2005).

⁶ John Ferejohn & Pasquale Pasquino, *Emergency Powers*, in THE OXFORD HANDBOOK OF POLITICAL THEORY 332, 336 (Eds. John S. Dryzek, Bonnie Honig & Anne Phillips 2006).

⁷ Kim Lane Scheppele, *Legal and Extralegal Emergencies*, en THE OXFORD HANDBOOK OF LAW AND POLITICS 165 (Eds. Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira 2008).

momentary or at least episodic breach of the legal system. I will refer to this as the "extra-legal model." Note that its recognition is a consequence of the limitations inherent to normality: submitting the crisis to the contours of the normal order is to condemn the system itself to destruction.⁸

Among those advocating action "outside" the legal order, there are different ways of explaining how exception is related to the rule of law. On one side there are those who argue that we are dealing with essentially different dimensions, where the exceptional simply escapes the law.⁹ Others describe the problem as a political one, and, as such, the conflict generated by the exception must be addressed within the political process.¹⁰

One of the most important proponents of the extralegal model, Oren Gross, has paid particular attention to explaining how it serves as a tool to protect the rule of law.¹¹ For him, there is no possible accommodation between the rule of law and exemption. The fact that the legal order attempts to recognize and accept an exceptional situation where there is a need to breach the order itself, is detrimental to the assumptions underlying the rule of law. The breakdown of law cannot be supported by law.¹²

In contrast, Gross invites us to recognize that response to emergency is inevitable, and contrary to the legal order. In these circumstances, his proposal is that respect for the rule of law

⁸ "The extralegalists argue that serious crises of state must be met with responses outside the law. Law, they claim, must operate by rules but the very nature of serious crises is that they cannot be predicted, rationalized, and normalized by rules (Schmitt 205, 6-7). Constraining the executive by ordinary rules of law when the state faces a mortal challenge is to deprive the state of the wherewithal to protect and defend itself in the ways it may need to in order to survive (Yoo 2005)". Schepelle, *supra* note 7, at 165-66.

⁹ "The exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law". SCHMITT, *supra* note 2, at 6.

¹⁰ Mark Tushnet, *The political constitution of emergency powers: some conceptual issues*, in EMERGENCIES AND THE LIMITS OF LEGALITY 145 (Ed. Victor V. Ramraj 2008).

¹¹ OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS. EMERGENCY POWERS IN THEORY AND PRACTICE* (2006).

¹² "[B]ringing emergencies into the law contaminates the law itself by making it accommodate practices that will of necessity spoil the law (Agamben 2005, 32-3)". Schepelle, *supra* note 7, at 165-66. *See* William E. Scheuerman, *Emergency Powers and the Rule of Law after 9/11*, 14 THE JOURNAL OF POLITICAL PHILOSOPHY 61, 70-71 (2006).

rest precisely in accepting publicly and openly the extra-legal character of the conduct. Part of his proposal rests on the idea that the publicity requirement serves as a deterrent to excesses by some government officials.¹³ Whoever decides to act in the extra-legal field must then face a public judgment, which may involve receiving an approval for their actions, resigning, facing criminal charges, civil claims or being subject to impeachment.¹⁴ In any case, this proposal seeks to address a reality, to protect a legal order and to provide appropriate accountability on the official acting under an emergency situation.

At the other extreme, the "legal model" attacks the exception based on the idea that the modern polity is defined by being organized pursuant to the rule of law. This is a consequence of valuing that liberal democracy is precisely defined by limiting the scope of action of the state for the protection of citizens.

The arguments in favor of the legal model in principle should be clear since they are the same that define the legal order in almost all contemporary societies, at least in what is known as the Western world. These are the attributes of stability, clarity, accessibility, prospectivity, consistent rules that can be obeyed and enforced.¹⁵ The problem is the alleged inability to handle emergency without violating some of these principles. After all, there seems to be a logical problem with pretending that there could be a clear norm waiting for the unexpected.

If we are to be faithful to the liberal legal-political system, it is central to recognize that there will be responses that are simply not permissible. However, it must be seen whether this position is viable given the imminence of a tragedy. In this regard, the legal model, as defended by one of its main exponents, David Dyzenhaus, recognizes that there cannot be total

¹³ Id. at 71.

¹⁴ GROSS & AOLÁIN, *supra* note 11, at 134-62.

¹⁵ Victor V. Ramraj, *No doctrine more pernicious? Emergencies and the limits of legality*, in EMERGENCIES AND THE LIMITS OF LEGALITY 3, 11 (Ed. Victor V. Ramraj 2008). See BRIAN Z. TAMANAHA, ON THE RULE OF LAW. HISTORY, POLITICS, THEORY (2004).

inflexibility in terms of addressing emergency in the same way as an ordinary problem. In contrast, he proposes creating imaginative institutional experiments, which would entail flexibility, but under the possibility of judicial control.¹⁶

The latter is essential because the legal model rests on the role of judges as guardians of the rule of law. This is a controversial approach in the context of the historical experiences of judicial intervention in conflicts that revolve around emergencies. Even among those who advocate respect for the rule of law, it is believed that the role of judges is very limited because in this type of situation they tend to give total deference to the political powers. The emblematic case is the decision of the Supreme Court of the United States in *Korematsu v. U.S.*, 323 U.S. 214 (1944), where the Court gave deference to national security considerations and sustained the decision of interning in concentration camps United States citizens of Japanese ancestry.

However, from what seems to be a negative precedent in terms of lack of will of a judicial forum to vindicate the control of emergency powers, Dyzenhaus makes an argument for the legal model noting that the legal order itself provided the space for dissenting opinions in this case.¹⁷ To Dyzenhaus, this is testimony that, while not always prevailing, the legal order is able to articulate positions that respect the rule of law.

Finally, if earlier we indicated that the legal model recognizes the need for flexibility over the interests of the state to deal with emergencies; this does not answer how to draw limits. In the case of systems with a written liberal constitution, the limitations are set by the constitutional text in accordance with the interpretation that the courts may make of rights contained therein. The normative reference is not present, however, in countries like the United Kingdom, which have no written constitution. It has been suggested that in these cases the limits

¹⁶ David Dyzenhaus, *The state of emergency in legal theory*, in GLOBAL ANTI-TERRORISM LAW AND POLICY 65 (Victor V. Ramraj, Michael Hor & Kent Roach eds. 2005).

¹⁷ DAVID DYZENHAUS, THE CONSTITUTION OF LAW. LEGALITY IN A TIME OF EMERGENCY 63 (2006).

must be sought on the fundamental values of "the rule of law" or what has been called a constitutional "common law".¹⁸

C. Some observations

1. Historical Context

However interesting the previous debate might be, its utility is conditioned to understanding the context and historical experiences. This is so since it is usual for contemporary constitutions to include provisions that explicitly seek to address the issue of emergency powers. Sometimes the doctrinal debate does not seem to adequately recognize this context.¹⁹

Undoubtedly the first thing to consider is that attention to emergency situations and exception has been present in the historical development of political and government processes.²⁰ A first historical and normative reference of particular value is the "Roman dictatorship." Around 500 BC, the executive function in the Roman republic rested on two consuls, who wielded great power, but had to operate as a body and to occupy the position for a non-renewable term of one year. However, in times of emergency the Senate could determine that it was necessary to appoint a "dictator."²¹ Norberto Bobbio explains it as follows:

he was appointed by one of the consuls in exceptional circumstances, as might be the conduct of war ("dictator rei gerundae publicce cause") or the suppression of a revolt ("dictator seditionis sedandae cause") and they were attributed to him by the exceptional situation, extraordinary powers, consisting mainly in the disappearance of the distinction between imperium domi, that was sovereign control exercised within the walls of the

¹⁸ Thomas Poole, *Constitutional Exceptionalism and the Common Law*, 7 INT. JNL. OF CONSTITUTIONAL LAW 247 (2009).

¹⁹ Schepelle, *supra* note 7, at 166..

²⁰ See Jean-Francois Kervégan, *Estado de excepción*, en DICCIONARIO AKAL DE FILOSOFÍA POLÍTICA 258 (Philippe Raymond & Stéphane Rials Eds. 2001) and John Ferejohn & Pasquale Pasquino, *The law of the exception: A typology of emergency powers*, 2 INT. JNL. OF CONSTITUTIONAL LAW 210, 211 (2004).

²¹ GROSS & AOLÁIN *supra* note 11, at 17-26 and CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP. CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 15-28 (1948).

city, as such not subject to constitutional limits. The exorbitant power of the dictator was counterbalanced by its temporality: the dictator was nominated only for the duration of the extraordinary task that he was entrusted, and in anyway not more than six months or the term of office of the consul who had nominated him. Thus, the dictator was a special magistrate, yes, but legitimate, because his institution was provided by the constitution and his power was justified by the state of necessity[.]²²

This scheme allows separating various aspects of constitutional design in terms of how to handle emergencies. Note how the Roman dictatorship rested on a distinction / division of labor: the declaration of emergency (the Senate), the power to appoint the dictator (one of the consuls) and the exercise of special powers (the dictator). This is important when compared with later developments, where the trend has been to concentrate emergency powers on the executive.

In more recent times, France developed the tradition of providing formal legal frameworks to emergency powers by declaring the so-called state of siege.²³ The continued attempt to recognize these processes within the legal system itself has given rise to the French approach being labeled as a neo-Roman model.²⁴ In this case, however, the duties of the state of emergency are vested in one person: what is missed about the Roman dictatorship in terms of dividing powers, would be compensated by the fact that the official with the task has political legitimacy, being an elected official. The contemporary version of this practice is contained in the following Articles of the Constitution of the Fifth Republic of 1958:

Article 16

When the institutions of the Republic, the independence of the Nation, the integrity of its territory or the compliance with its international commitments are threatened in a serious and immediate manner and regular operation of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council. He shall inform the nation through a message. Such measures must be inspired by the

²² NORBERTO BOBBIO, *ESTADO, GOBIERNO Y SOCIEDAD. POR UNA TEORÍA GENERAL DE LA POLÍTICA* 206 (Trad. José F. Fernández Santillán 1989) (1985).

²³ Schepelle, *supra* note 7, at 168-69.

²⁴ Ferejohn & Pasquino, *supra* note 20, at 213.

desire to provide the constitutional public authorities, in the shortest time, the means to accomplish their mission. The Constitutional Council shall be consulted about it. Parliament shall convene as of right. The National Assembly shall not be dissolved during the exercise of extraordinary powers.

Article 36

The state of siege shall be decreed by the Council of Ministers. Its extension beyond twelve days may only be approved by Parliament.

Note that this is a relatively simple arrangement that does not include a definition of the powers to be used by the President of the Republic. Other countries have sought, however, more fully structured processes to emergencies, such as Germany. The Constitution, for example, covers in detail everything related to the proclamation of a state of emergency and its duration, different stages in which it might be develop, its termination, the distribution of responsibilities in public bodies, it delimits the powers to be used and subjects the use of powers by the executive to a legislative mandate recall.²⁵

It must be observed that in this case the legal treatment that different countries give to the subject corresponds to their respective legal traditions. The common law countries have developed it through the judicial doctrine of martial law, understood as the transfer of authority to the military to restore domestic order.²⁶ Meanwhile, French and German cases show a willingness to codify these powers in general rules.²⁷

The constitutional dimension is not, however, the only area for regulating emergency powers. Even in countries that do not have specific constitutional provisions, it is common

²⁵ Jakab, *supra* note 3. German specificity is historically related to their negative experience with emergency provisions in the Weimar Constitution. ROSSITER, *supra* note 21, at 33-73.

²⁶ William Feldman, *Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege*, 38 Cornell Int'l L.J. 1021 (2005); Schepelle, *supra* note 7, at 168-69; and PEDRO CRUZ VILLALON, *EL ESTADO DE SITIO Y LA CONSTITUCIÓN: LA CONSTITUCIONALIZACIÓN DE LA PROTECCIÓN EXTRAORDINARIA DEL ESTADO (1789-1878)* 121-22 (1980).

²⁷ More than half of the 28 European constitutions regulate in some way emergency powers. Anna Khakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe* 11 (2009), Geneva Centre for the Democratic Control of Armed Forces, Policy Paper No. 30.

nowadays to find statutes that seek to regulate certain processes relating to declarations of emergency and its consequences.²⁸ Similarly, there are important international agreements that while acknowledging state authority to derogate rights in emergency situations, seek to establish limitations on certain guarantees that even in those cases could not be violated.²⁹

2. Emergency: identification and problems

The emergency around which most of this debate revolves is that "extreme situation" that jeopardizes the very existence of the legal order.³⁰ In this regard it should be recognized that there may be another type of unforeseen situation, for which there may be no solution in the legal order, not reaching the rank of "emergency."³¹ There is not an impediment, however, to using the concept of emergency even in these cases. Therefore, "when emergency powers are used, they are almost never the sort of total emergencies that cover even all or even most aspects of political life as one might imagine from the theory. Many fly under the radar of constitutional alarm."³² There are, therefore, normal emergencies and exceptional ones.

Another point to consider is the claim that the emergency is identifiable because it has objective attributes. There is no doubt that certain events can be easily classified as emergencies due to their origin and magnitude. Think of great earthquakes or a pandemic.

However, even these cases may be debatable as long as we distinguish for what purpose we intend to attribute the nature of "emergency" to an event. In this sense, Jaime Curbet notes that "a new vision begins to emerge that is not limited to contemplating disaster and violence as

²⁸ Kent Roach, *Ordinary law for emergencies and democratic derogations from rights*, in EMERGENCIES AND THE LIMITS OF LEGALITY 229 (Victor V. Ramraj ed. 2008).

²⁹ Comments, Laura Conn, *The Enumeration of Vital Civil Liberties Within a Constitutional State of Emergency Clause: Lessons from the United States, the New Democracy of South Africa, and International Treaties and Scholarship*, 10 JOURNAL OF CONSTITUTIONAL LAW 791, 809-14 (2008). Khakee, *supra* note 27, at 9.

³⁰ Kervegan, *supra* note 20, at 260.

³¹ Schmitt himself was aware of this: "not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order." SCHMITT, *supra* note 2, at 12.

³² Schepelle, *supra* note 7, at 174. See also Ferejohn & Pasquino, *supra* note 20, at 216.

natural phenomena or inevitable, but looks at risks and conflicts, socially produced, of which the disaster and violence are merely extreme manifestations.”³³ The idea of disaster as a manifestation of a previous situation is of particular importance because it is also related to the allocation of responsibilities at the time of structuring the emergency measures. So “the root causes that explain the catastrophe and, in particular, conditions of access to resources that are extremely uneven for different social groups”³⁴ can be identified. This reality may be important in determining who should bear the greatest burden in regard to emergency measures.

Finally, we must also consider the political nature of the emergency. As much as one tries to frame the declaration of emergency within a regulatory framework, be it constitutional or statutory, in the end, it is possible to affirm that we are not before a “legal” problem. Rather, it seems we face a decision of an administrative-governmental type that ultimately rests on discretionary elements of whoever has the power and mechanisms to act. In the end, “the politically accountable organs will necessarily have to make the epistemic judgment of whether or not an emergency exists that would justify the invocation of emergency powers”.³⁵

The problem is how to control the rhetorical use of emergency as an excuse to achieve by its extraordinary means, what the political-legal ordinary process will not allow.³⁶ In this sense it is not unusual for rulers to make use of the discourse of crisis and emergency to generate social

³³ JAUME CURBET, LA GLOCALIZACIÓN DE LA (IN)SEGURIDAD 86 (2006).

³⁴ *Id.* at 84.

³⁵ John Ferejohn & Pasquale Pasquino, *Emergency Powers*, in THE OXFORD HANDBOOK OF POLITICAL THEORY 332, 347 (Eds. John S. Dryzek, Bonnie Honig & Anne Phillips 2006).

³⁶ “As Schmitt prophesied, crisis management constitutes a paramount activity for contemporary government, as it struggles to tackle a host of oftentimes unprecedented political, military and economic challenges, at least some of which pose major threats to the existing political and legal order. The necessity for emergency action, in short, appears more widespread than classical liberalism conceded. [nota omitida]”. Scheuerman, *supra* note 12, at 63.

cohesion behind their policies or to want to impose the "logic" of them.³⁷ The problem is when they are trying to use the same narrative to justify the formal activation of special powers.

This is precisely why Gross' extralegal model is somewhat naive to pretend that the way to safeguard the rule of law is forcing officials to make a public admission that they are acting contrary to it. For a proposal of transparency as this to have the desired effect, there must be an incentive for such admission. The reality is that there is no reason to think that this would occur while the officer may still seek some arguable justification in the rule of law.³⁸

3. Basic Elements

As discussed earlier, it is possible to identify elements common to both the emergency situation and the regulatory framework for the use of emergency powers. Regarding the former, emergency seems to be characterized by: 1) being temporary (sudden and of unknown duration), 2) the potential gravity (threat to life and livelihood), 3) perception (who declares and identifies the emergency), and 4) the response (requires immediate action, not always recognized in the legal order).³⁹

Moreover, at the time of adoption of schemes for the recognition of emergency powers, the following elements must be taken into account: who can declare a state of emergency, the procedural framework for that, duration and the rights cannot be suspended.⁴⁰ Explaining how to handle exception also requires making fundamental decisions about who should do it. The question is complex once we recognize that in reality there are several decisions to be made and as long as we seek its own answer in the political-constitutional framework.

³⁷ Juan Felipe Moreno, *La emergencia de una (nueva) lógica de seguridad política*, 62 COLOMBIA INTERNACIONAL 148 (2005)

³⁸ "After all, there is normally nothing to be gained politically –and much to be lost—by a leader's admitting to constitutional infidelity". Sanford Levinson & Jack Balkin, *Constitutional Crises*, 157 UNIV. OF PENN. L. REV. 707, 724 (2009). See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

³⁹ Harold C. Relyea, *National Emergency Powers*, CRS Report for Congress, p. 4 (Updated August 30, 2007).

⁴⁰ Conn, *supra* note 29, at 792.

III. State of Necessity

So far the discussion has focused on the public domain and the role of the state in terms of government and emergency management. One approach that we have overlooked, but that would lead us to consider the same circumstances from a “private” point of view, is the individual responsibility of officials for the decisions taken at the time of executing decisions regarding emergency situations.⁴¹ I have chosen, however, not to address that issue.

Instead, this part of the paper examines the issue of emergency from a non-governmental point of view. We will see how, in situations where damage is caused or socially reprehensible acts are performed, law relieves the actor of responsibility inasmuch as he or she had to act in a context of necessity. The so-called “state of necessity” has a recognized presence in both the criminal and in civil law. It is also recognized simultaneously in the civil law tradition, and in the common law as well.

A. Criminal Law

Civil Law Tradition

In the Civil Law tradition, the structure of criminal responsibility means that conduct conforms to two elements. First, the statutory description of the forbidden conduct, known as the penal type (“tipo penal”). Secondly, the conduct should be reprehensible in the context of a given legal order. If it is indeed reprehensible, we face an unlawful (“antijuridico”) behavior.⁴² The relation between the two concepts suggests that certain behavior may be typical, but devoid of unlawfulness.

⁴¹ See the possibility that the public official may be subject to legal claims, being administrative, civil or criminal in nature.

⁴² CLAUS ROXIN, I DERECHO PENAL: FUNDAMENTOS. LA ESTRUCTURA DE LA TEORÍA DEL DELITO 557 (2da ed. 1997).

To understand how a given behavior may be typical, but not objectionable, we should remember that law prohibits certain conduct, but provides authorization for other.⁴³ The basic point is that certain behavior may match the statutory description of the offense (the penal type), but simultaneously rely on an authorization granted by the state itself. In this case, the behavior is "justified." Although the behavior correspond with the elements of what is prohibited by criminal law, there is no unlawfulness insofar as the behavior is not disapproved by the legal system.⁴⁴ In such circumstances, "the action, even when opposes itself to a general prohibitory rule, is configured in such way that the injury or endangering of the protected object, must be accepted for the sake of higher values and the aim sought by the person should be adopted as well."⁴⁵

The classic case is the self-defense. A person kills another to defend against an attack that she is suffering. The response possibly matches the conduct prohibited by criminal law, taking the life of another human being. However, the legal order itself justifies the interest of the one who kills in not being the victim of aggression.

The state of necessity is a more general version of the above, where the person harms another person in order to avoid a higher harm.⁴⁶ Consider a person who takes away a book from someone else in order to keep a fire burning in the middle of a snowstorm. The Penal Code of Puerto Rico states as follows:

Article 27. State of Necessity. Shall not be liable person any right to protect himself or someone else from imminent danger, unprovoked by it and otherwise inevitable, infringe a duty, or cause damage to the legal interests of another, whether the harm done is considerably less than avoided and does not involve death or serious injury and permanent physical integrity of a person.

⁴³ HANS-HEINRICH JESCHECK, TRATADO DE DERECHO PENAL: PARTE GENERAL 290 (Trad. José Luis Manzanarez Samaniego 4ta ed. 1993).

⁴⁴ ROXIN, *supra* note 42, at 557.

⁴⁵ JESCHECK *supra* note 43, at 292.

⁴⁶ LUIS JIMÉNEZ DE ASÚA, LA LEY Y EL DELITO 306 (3era ed. 1986).

This justification does not benefit who by virtue of his office, trade or business is required to bear the risk and its consequences.

The premise of the state of necessity is a "conflict between two goods, the salvation of one requiring sacrificing the other. This means that the legal good to save is in imminent danger of being destroyed."⁴⁷ The peril must be "real and objective",⁴⁸ and the response, the only one available.⁴⁹ Muñoz Conde summarizes the concept as follows: 1) the harm done cannot be greater than that which is to be avoided (acknowledging the difficulty of weighing the conflicting legal interests), 2) the situation of necessity should not be provoked intentionally by the subject, and 3) the one claiming necessity, cannot, by reason of holding a position, be under a duty to sacrifice.⁵⁰

Meanwhile, Roxin states the conditions for a state of necessity: danger to a legal right, its existence must be judged *ex ante*, existence of a risk cannot be assessed in a purely subjective way, the hazard may be natural or created by man, and the danger must be "actual."⁵¹

As previously indicated, a person acting under a state of necessity must perform a balancing of the harm it seeks to prevent and the one to be caused by his conduct. A decision is expected in favor of the lesser harm. Sometimes evils can appear to be relatively equivalent, increasing the risk that the path chosen eventually could be considered a wrong one by a court of law. The Spanish Criminal Law professor Muñoz Conde indicates that cases of this sort have been treated at times with a procedural approach. "[S]ome cases of conflict of laws difficult to resolve through the state of necessity or some other specific justification are solved legislatively

⁴⁷ FRANCISCO MUÑOZ CONDE & MERCEDES GARCÍA ARÁN, *DERECHO PENAL: PARTE GENERAL* 327 (7ma ed. 2007).

⁴⁸ *Id.*

⁴⁹ *Id.* at 328.

⁵⁰ *Id.* at 328-30.

⁵¹ ROXIN, *supra* note 42, at 676-80.

establishing a procedural justification, whose compliance legitimates the intervention that would otherwise be lawful."⁵²

Common law tradition

It is worth to point how some criminal law concepts described above have counterparts in the common law. For example, it has been stated that "justified conduct is conduct that under ordinary circumstances is criminal, but which under the special circumstances encompassed by the justification defense is not wrongful and is even, perhaps, affirmatively desirable".⁵³

Indeed, common law recognizes necessity as a justification defense: "As a result of some natural (non-human) force or condition, [an actor] must choose between violating a relatively minor offense, on the one hand, and suffering (or allowing others to suffer) substantial harm to person or property, on the other hand".⁵⁴ "The necessity defense exculpates an actor for conduct that would otherwise be a crime when the actor engages in the conduct in order to prevent something worse from occurring."⁵⁵

Usually this defense lacks a statutory basis. It is recognized as a defense of last resort, almost residual, when there is no other one available. "It legitimizes technically illegal conduct that common sense, principles of justice, and/or utilitarian considerations convinces us is justifiable, but which is not dealt with -neither authorized nor disallowed- by any other recognized justification defense."⁵⁶

Criminal law professor Dressler identifies the conditions for necessity defense as follows:

1) the actor must face a clear and present danger, 2) should expect as a reasonable person, that

⁵² MUÑOZ CONDE & GARCÍA ARÁN, *supra* nota 47, en la pág. 310.

⁵³ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 208 (5ta ed. 2009).

⁵⁴ *Id.* at 289. "Necessity may not have been a common law defense in England, but it is a part of the common law tradition of the United States". *Id.* at 291.

⁵⁵ Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 192 (2007).

⁵⁶ DRESSLER, *supra* note 53, at 290.

his/her actions are effective in controlling the danger to be prevented (there must be a direct causal link between his action and the harm to be controlled), 3) there is no other effective legal mechanism to control the hazard, 4) the harm that the defendant would cause breaching the law should be less serious than that which seeks to avoid, 5) the legislature should not have anticipated the choice of evils and selected in advance between the competing values, and 6) the actor must come with clean hands (cannot be responsible for creating the emergency).⁵⁷

On the other hand, the same author identifies three limitations of this defense: 1) some jurisdictions limit the defense to natural emergencies (Dressler does not share this position), 2) it should not be available in cases of murder, and 3) some jurisdictions limit the defense to the protection of persons and property (excluding, for example, defending the reputation).⁵⁸

B. Civil Liability (Torts)

The common law tradition

If we move from criminal to private law, similar concerns will surface regarding the liability of a person who has harmed another in a situation of necessity. In fact, necessity is recognized as a defense in intentional torts. In general, it is a privilege that seeks to prevent a public disaster or imminent serious harm to the actor or others.⁵⁹

As a defense it has two variants: public necessity and private necessity. In the case of public necessity, a person can engage in an act that would otherwise be considered a trespass to property, if such act is reasonably necessary for purposes of avoiding a public disaster.⁶⁰ That would be a persona that in order to prevent the spread of a forest fire, enters his neighbor's land

⁵⁷ *Id.* at 291-93.

⁵⁸ *Id.* at 293-94.

⁵⁹ DAN B. DOBBS, *THE LAW OF TORTS* 248 (2000).

⁶⁰ JERRY J. PHILLIPS, NICOLAS P. TERRY, FRANK L. MARAIST, FRANK MCCLELLAN, THOMAS C. GALLIGAN, JR. & PHOEBE A. HADDON, *TORT LAW: CASES, MATERIALS, PROBLEMS* 204 (3rd ed. 2002), citing de Restatement (Second) of Torts §§ 196 y 262.

and destroys a plantation in order to build a barricade to stop the fire. The doctrine of public necessity has its origins in English common law.⁶¹

Meanwhile, in the case of private necessity, a serious harm against the actor himself or his property, or a third party, is to be avoided.⁶² To claim the private necessity defense the following should be present: 1) a risk, 2) a reasonable belief that there is a danger, 3) a serious harm, 4) a reasonable response in light of the threat.⁶³

It is important to point that in terms of the consequences of acting pursuant to necessity, the standard for liability varies depending on whether it is a public or private necessity. A person acting under private necessity could be liable. However, the same conduct under public necessity will not. This works as an incentive for acting in circumstances that would be beneficial to the public interest.⁶⁴

Finally, the common law is not indifferent to the origins of the emergency. It is a clear principle that the necessity defense does not apply if the danger that the actor tries to avoid through its actions, has been caused by the individual himself.⁶⁵

Civil law tradition

In the civil law tradition is also common to recognize a defense of necessity in the realm of civil liability. It should be noted that in its content and scope, the legal concept is similar to one already explained in the area of criminal law. It has been defined as "the imminent danger

⁶¹ "The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. 'It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura privata*.'" citing the Supreme Court of California in *Surocco v. Geary*, 3 Cal. 69, 73 (1853), ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 747 (2nd ed. 2007).

⁶² PHILLIPS et als., *supra* note 60, at 208, citing Restatement (Second) of Torts § 197.

⁶³ DOBBS, *supra* note 59, at 249.

⁶⁴ *Id.*

⁶⁵ PHILLIPS et als., *supra* note 60, at 208.

that drives the agent, as a last resort, to breach the rights of others in order to escape from an evil not caused by him" and where "the state forces a collision of legally recognized interests, one of which is to yield to the other."⁶⁶

The necessity defense requirements as set forth by Benitez Caorsi are the following: 1) "there is an imminent and certain threat", 2) the "inevitability and severity of harm", 3) "the situation was not caused by the actor"; 4) "the conduct of the agent should be proportionate to the magnitude of evil faced"; and 5) "there is no professional obligation to confront the evil."⁶⁷

IV. Similarities and differences

The points of contact between the state of exception in public law and the state of necessity in the criminal and private law, should be apparent. The unexpected, real threat and the requirement of proportionality in responding to it, are common elements common to both doctrines. In this part I will address some of these issues. Before that, a fundamental difference should be discussed.

A. The limits of necessity

As previously shown, a recurrent concern in the debate about the exception is whether it occurs within or outside the law. Viewed in the context of the state of necessity, the answer would seem to be that the person who reacts to the emergency is acting within the law. After all, I have described how the necessity defense is widely recognized in both criminal law and torts. However, the issue is more complicated than merely relying on an "emergency" or a "necessity" as a justification.

⁶⁶ Juan J. Benítez Caorsi, *El estado de necesidad en la responsabilidad civil*, Año II, núm. 4, REVISTA LATINOAMERICANA DE DERECHO 27, 29 (2005).

⁶⁷ Id. at 39.

As previously explained, in continental criminal law justification defenses rest on the existence of an authorization provided by the legal order. This goes beyond an authorization pertaining to criminal law, but may be based on any norm of the legal order.⁶⁸ If we apply this to the state of exception, a ruler acting in a manner contrary to the legal system could not simply claim a "state of necessity." She would have to argue that the legal order itself authorizes her action. Such an argument is problematic in a country like the United States where, except for the suspension of the writ of habeas corpus, there is no constitutional authority for derogation of individual rights. One alternative approach in these circumstances is to recognize the duty of a ruler to preserve the existence of the state, but it is essentially of a political nature.⁶⁹ The state of necessity brings with it a cloak of legality that is not wide enough to shelter the exception.

B. The nature and source of the threat

It is repeatedly noted that the threat must be real, serious, objective and inevitable. Indeed, in both, the exception and the necessity, the concern is similar. The scenario is a person who has engaged in a conduct that adversely affects the interest of another. There is a defense recognized by law, but its aim is to exempt a person from liability for damages or to provide a judgment on legality. A person who raises the exception or necessity does not deny the harm done; only that it was a lesser evil.

However, if the danger is not real and inevitable, the damage to the other person would not only be unjustified, but in the case of the exception would be a simple abuse of state authority. In a sense, this is a more worrisome scenario in comparison to damage caused between private persons.

⁶⁸ MUÑOZ CONDE & GARCÍA ARÁN, *supra* note 47, at 308. JESCHECK, *supra* note 43, at 293.

⁶⁹ For an effort to argue this, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

In the same vein, it is important for threat to be objective. I reaffirm what I expressed before about rhetorical uses of the discourse of emergency and the need to control the potential for abuse in this regard. It remains difficult, however, to reconcile this criterion of objectivity with what I said also about the political nature of the emergency. If the emergency declaration is a political act, how then may it be subject to an analysis of objectivity? When I say that the emergency is political I do not intend to imply that it is a mere subjective exercise carried out under considerations of power and is not subject to evaluation by other members of the political community, or by other public institutions. What I want is to stress the danger of a ruler mishandling the situation to take advantage of the powers recognized under a state of emergency. So, being potentially a political decision, there is a need for accountability. This would require at least that any determination of this sort must be explained with a high degree of detail. It is an approach that guarantees a minimum of oversight by the judicial forum and exposes the decision to the public forum. In the case of the courts, although there is more deference to this kind of decision, it would still be subject to review in terms of public reasons.

This might seem a highly procedural posture merely requiring a good explanatory effort, but with limited possibilities of effective control by the courts. In one sense it seems to recall the explanation given by Muñoz Conde about situations where the balance of which is the lesser evil is so difficult that the system has chosen to recognize a procedural justification. In those cases the legal order emphasizes "more compliance with certain requirements and procedures that the justice of the decision itself."⁷⁰

This does not prevent that in certain circumstances there could be a tightening up of judicial intervention. In this regard, I consider particularly important one condition present in

⁷⁰ MUÑOZ CONDE & GARCÍA ARÁN, *supra* note 47, at 329.

virtually all aspects of necessity: those who invoke it as a defense cannot be the creators of the threat.

To prove the relevance of this principle and in order to demonstrate the importance of the requirements of seriousness and objectivity, let us take as an example the case of economic emergencies. In particular, let us compare two experiences, one in Argentina and the other in Puerto Rico.

The starting point for both examples is the same. In *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), the Supreme Court of the United States uphold a state law being challenged for suspending the payment of private mortgage contracts. It was a moratorium adopted by the state of Minnesota under an emergency declaration, in order to alleviate the economic situation of thousands of homeowners who were in danger of losing their homes during the recession of the early 30's. Although the Court was emphatic that an emergency does not create authority, it recognized the power of government to address a financial crisis in a similar manner than a natural disaster.⁷¹ Even when the final result would impair contractual obligations, something prohibited by the Constitution of the United States.

Similar legislation was approved during the same period in Argentina. There was also a legal challenge, resulting in a decision in 1934 by the Supreme Court of that country ("Avico"), upholding the state action under criteria very similar to the one used in *Blaisdell*.⁷² Then, the principle to be outlined seems to be that economic emergencies present strong cases for state intervention in support of the public interest, even if it means limiting contractual rights.⁷³

⁷¹ "An if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes". *Blaisdell*, 290 US at 439-40.

⁷² HORACIO RICARDO GONZÁLEZ, ESTADO DE NO DERECHO. EMERGENCIAS Y DERECHOS CONSTITUCIONALES 44 (2007).

⁷³ Cf. Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539 (2007).

However, in a book addressing the issue of emergency and constitutional rights, Horacio Ricardo Gonzalez explains how decades later, in the 90's, the same argument was used by the same Court in Argentina to validate actions taken under an economic emergency of a different kind.⁷⁴ This time actions were taken by the state to suspend contractual obligations of its own under a precarious financial situation. Gonzalez denounces that now the emergency was not a threat to social sectors in need of assistance, but an emergency inside the state itself.⁷⁵ "You move from an emergency aimed at solving or respond to socio-economic crisis, more transient or more permanent, which affected various sectors of society, to an emergency aimed at preserving the State."⁷⁶

See the similarity with the controversy recently addressed by the Supreme Court of Puerto Rico in the *Dominguez Castro v. ELA*, 2010 TSPR 11. The case was a challenge to the constitutionality of a statute adopted in 2009 by the government of Puerto Rico declaring a state of fiscal emergency and taking various measures, including freezing of collective agreements, and even the dismissal of public employees. The Court upheld the constitutionality of the law and similarly quoted with approval the decision in *Blaisdell*.

However, as in the case of Argentina, the source of the fiscal crisis put forward by the government in Puerto Rico rested in large part on bad decisions taken by the state itself. Of course, the decisions had been taken by previous administrations, so in a political maneuver the new administration tried to distance itself from the historical record.

See that in both scenarios, Argentina and Puerto Rico, the state claim the existence of an emergency in order to validate taking special measures, even when the state itself was responsible for creating the threat. I am not saying emergency measures were not in order.

⁷⁴ *Supra* note 72.

⁷⁵ *Id.* at 59.

⁷⁶ *Id.*

However, if we apply to this situation the requirement of necessity under which the actor cannot be responsible for creating the danger, the result would be that the defense would not be available.

In this case the issue is different because what is at stake is not individual responsibility. To assert that the state caused the emergency does not mean that it does not exist nor prevents government from taking corrective action. However, it is questionable to allow the state to enjoy benefits that would usually be only available for someone who is guiltless as to the creation of the peril situation.

Considering that the state is facing a legal challenge, the matter should be seen in the context of the degree of deference to which the state should be entitled. Both courts in Argentina and Puerto Rico ended up being extremely deferential to the measures taken by the government. Even in the case of Puerto Rico, the Supreme Court was impressed by the fact that it was the first time in history that the Legislature used the term "state of emergency" in the context of an economic situation throughout the country.

This could be important, but could also be simple rhetoric. What I think is fundamental is that, having a crisis created by the government itself, courts should be more strict in evaluating the justifications invoked by the state and examine very rigorously the reasonableness of the measures taken to resolve it. The requirement in the necessity defense of excluding from its benefits those who create the danger proves to be a valuable contribution to be included in the analysis of the state of exception.

V. Concluding remarks

When asked if there are common elements in the way law addresses the issue of emergencies from different areas and through different legal traditions, the answer is yes. On this regard there are things to learn and I already proved the point in the previous part.

There is, however, an element that merits a special and final comment. Much of the discussion about emergency powers rest on a static view of the way in which the legal and political system is established. Hence, when evaluating whether a system is ready or not to meet an emergency, the exercise involves examining the distribution and power relations. Hence, conclusions seem to about what can be or cannot be done. This is the kind of analysis performed by Gross and that leads him to conclude that the legal system lacks the capacity to meet emergencies without being corrupted in the process.⁷⁷

The problem with this view is that it does not give a satisfactory account of the evolutionary element of political and constitutional process.⁷⁸ The difficulties of finding a compromise satisfactory to the state of exception within the legal system, should not be more problematic than many other disputes relating to establishing limits to state authority while preserving the space for institutional action needed to protect collective interest. This is a process and, as such, sometimes enables transformations, and in other cases, moves very slowly. The important thing is to always preserve the belief that the public interest requires constant searching and fight for the best solution. In this respect, we should pay attention to Perez Luño when he states that the "conceptual development of legal certainty, as in other major categories

⁷⁷ GROSS & AOLÁIN *supra* nota 11, en la pág. 228.

⁷⁸ "By reifying 'models' of emergency and 'doctrines' of necessity as either legal or extralegal, these approaches neglect the constitutive role of political contestation in producing and traversing that boundary". Leonard C. Feldman, *The Banality of Emergency: On the Time and Space of 'Political Necessity'*" en SOVEREIGNTY, EMERGENCY, LEGALITY 136, 138 (Ed. Austin Sarat 2010).

of philosophy and theory of law, has not been the result of a logical development but of political achievements of society."⁷⁹

⁷⁹ PÉREZ LUÑO, *supra* nota 1, en la pág. 481.