State of Exception and its Derivations in Latin America

Antonio Gasparetto Júnior

Abstract 1

Normatively, the state of exception is a set of measures used to deal with serious crises and threats to sovereign States and their institutions which result in the suspension of constitutional rights and guarantees for a predetermined period. These legal measures first appeared in a national constitution in France at the end of the 18th century following the French Revolution before going on to have great repercussions in legislation around the world. In this regard, exception legislation based on the French concept of the state of siege (*état de siège*) was adopted in Latin America in the first half of the 19th century to address issues associated with the very specific context of the time. In the 20th century, the exceptional legislation that was passed in Latin America acquired greater specificity to deal with different types of crises and threats, adopting a more extensive nomenclature and more detailed definitions in light of the experiences the region had undergone in the decades before. This text aims to trace the transnational circulation of exceptional legislation, starting from its pioneering constitutional design in France through to its initial adoption in Latin American constitutions in the 19th century before culminating in a brief examination of the exception legislation that currently exists in the region. Revealing itself as a problem of the past and present, analyses of states of exception are crucially important for maintaining the rule of law in the face of legislation that facilitates arbitrary acts, greatly empowers executive agents and is designed to restrict rights. This approach is intended to result in a broad overview of how the exception problem in Latin America is manifest when confronting the constituent elements of the legislation in force in the region by highlighting its characteristics and weaknesses for the construction of normative analysis.

I. Introduction

2 Dealing with crises and threats is a commonplace reality for many societies, however, at times these crises and threats are so severe that the State must use emergency measures to deal with a situation that put the existence of its society, or a portion thereof, at risk. According to Moacyr Amaral Santos (1981, p. 27), many ancient societies, such as the Hebrews, Carthaginians and Gauls, had the custom of electing extraordinary magistrates with almost unlimited powers to overcome adversities that represented something of an existential threat to their society. In the context of these emergency practices common in antiquity, the one that has most influenced societies through the ages is the Rome's appointment of a dictator. Indeed, authors such as John Ferejohn and Pasquale Pasquino (2004, p. 211) noted that the emergency powers of contemporaneity are, to a greater or lesser extent, the modern manifestation of the ancient Roman dictatorship model. Alexandra Pierré-Caps (2016) notes that the Romans, even without a written constitution in the modern sense, foresaw that institutional practice could help the State to adapt to exceptional situations. However, the institutionalisation of the exception was not understood as a failure of the State to seek arbitration, but as a response to preserve order and peace.

3 Because undertaking such emergency measures within the established order was to deal with serious crises or threats, the role of dictator carried with it immense prestige. This stemmed from the fact that the dictator's primary responsibility was to bring the republic back to normality. His period of exceptional power was limited and could even end sooner than expected if the crisis that led to his appointment passed (Tavares, 2008, p. 49–52). The Roman dictatorship mechanism is closer to what we understand and treat as the standardised exception as foreseen in current laws.

4 In general, researches on the state of exception jump directly from ancient Rome to the French Revolution and its constitutional formulation. Research and understanding of the use of exceptions during the Middle Ages is often ignored, a gap that Guy Lurie (2015) and François Saint-Bonnet (2001) have sought to address in their works. Irrespective of this, the French revolutionary at the end of the 18th century saw the introduction of an exception in written form within a State's constitution. In 1791, France adopted a form of the state of siege, a precursor of what we would now understand as a state of exception, an action that would prove to have widespread repercussions in the other countries' legislation designed to deal with serious crises.

In this sense, the present text develops an analysis of the existing exceptional legislation in contemporary Latin America from a legal framework that began in France in the 18th century. Thus, the text initially addresses the pioneering French legislation and its effective consolidation as a manifestation of a constitutional state of exception. Subsequent to this, the reception of this legislation on the American continent during the 19th century is examined before providing an analysis of how the state of exception is verified in various constitutions in force in Latin America. 5

With the relatively commonplace use of states of exception in Latin America since the 19th century, understanding this legislation is remarkably important to understand the ebb and flow of republican, democratic and rule of law experiences throughout the region. To provide understanding at the regional level requires a transnational approach that enables the analysis to account for the phenomenon's amplitude. Therefore, the constitutions of the ten territorially largest and most populous Spanish-speaking countries in Latin America along with Brazil, the largest, most populous and only Portuguese-speaking country in the region, for the sample group for analysis. 6

II. The constitutionalisation of the exception

As noted above, emergency measures to deal with extremely serious situations that put the existence of societies at risk have been employed since ancient times. The use of such measures persisted from antiquity into the Middle Ages and, in short, saw exceptional power being granted to an individual, or small group of individuals, to address severe societal crises and threats. Before the concretisation that came with the French Revolution, various other societies over the centuries employed different measures that we would now class as a type of state of exception. However, while various institutional rearrangements were employed through the ages to defend order and society, the passage of time has seen the development of human, public and international rights, concepts that were unknown in ancient societies but that have now dramatically changed the legal landscape in which modern societies operate. 7

When first considering the introduction of emergency measures, revolutionary France sought interlocutions both from classical antiquity and from neighbouring England. At the outset, the French Constituent Assembly 8

debated a democratic model with references from antiquity and, from this debate, the term *siège* (siege) was embraced to describe a certain type of engagement in which a force is surrounded and isolated by an enemy that seeks its surrender.[1] From England, the French constituents incorporated the English Riot Act[2] 1714, which contained provisions on martial law, becoming the *Loi Martiale* in France. This latter law was adopted by decree on 21 October 1789 as a policing law with strict provisions and consequences that was administered by the civil authority. The law was expanded by decrees issued on 26–27 July and 3 August 1791 before being used later in the same year to revolting troops.[3] This measure, which would be repeatedly applied in and around Paris, was used against public meetings, riots and disorder, legalising the intervention of the State's armed forces against its own citizens and providing immunity for the authorities to use such force. Unlike the English Riot Act, the French version even allowed the death penalty for those falling afoul of the law and it had no defined limits or place of application.[4] The *Loi Martiale* was poorly received by the populace and its rigorous use further increased its unpopularity, eventually leading to the Convention abolishing it on 23 June 1793.[5]

9 The state of siege was, originally, a technical provision with military law that was introduced by the Constituent Assembly as a part of the military reforms that were underway at the time. The law was drafted between the 8–10 July 1791, with the first provisions of the state of siege decree dealing with the preservation of military posts. It was the first time that the term "state of siege" was adopted to define a condition previously established in a constitutional text. The law that became the basic point of reference for the exception was elaborated through a decree of the National Constituent

1 Bartolomeu, Danieli di. Fatal Attraction. The Classical Past at the Beginning of the French Revolutionary Republic (1792–1793). In: Revista de História Constitucional, nº 16, 2015.

2 The Riot Act was a law passed by the British Parliament in 1714 that allowed local authorities to declare any group of more than 12 people illegally assembled to be dispersed or be subject to punitive action. It was designed during a period of civil unrest in Great Britain to deal with recurrent riots and uprisings. The law entered into force on 1 August 1715.

3 Romain, Paul. L'État de Siège Politique. Thèse de Doctorat (Droit). Impr des Orphelins-Apprentis, 1918, p. 33-36.

4 Meléndez, Florentín. Los Derechos Fundamentales en los Estados de Excepción Según el Derecho internacional de los Derechos Humanos. Tesis Doctoral (Derecho), Universidad Complutense, Madrid, 1997, p. 21.

5 Romain, L'État de Siège Politique (n 3), p. 33-26.

Assembly on 8 July 1791 and sanctioned by King Louis XVI two days later on the 10 July. The preservation of military posts was something applicable in cases of previously declared war and enemy troops invasions, giving exclusive command to the military authority. There were no provisions on the occupation of internal communes[6] or about attacks by French revolutionaries, insurrections or civil war. The state of siege of the French Revolution period also dealt with the regulation of relations between civil and military authorities in strong squares through the clear enumeration of 109 fortified squares and 59 military posts in which the military could act.[7]

The laws of 10 and 19 Frutidor of the year V provided new concepts 10
to the law of 1791. Firstly, in this regard, they completely assimilated the interior communes to the battlegrounds. Secondly, and in a very significant way for the history of the institute, they also classed assaults by rebels as being equivalent to assaults by foreign troops. If the law of the 10th subordinated the state of siege to the state of war, treating it as a purely military situation, the law of the 19th subjected the communes to an exceptional regime without the need for previous military criteria, even in the absence of a state of war. From this application two prominent issues emerged, the power of the executive to declare a state of siege and the creation of a fiction to qualify a non-military state of siege as a situation requiring a military response. Of course, the latter issue is not so salient in modern times as a clear distinction is now drawn between a real military siege (*état de siège réel or militaire*) where a stronghold is surrounded by a foreign enemy, and a political state of siege (*état de siège fictif or politique*) where, for example, the communes and open cities of France were threatened by sedition in the 18th century[8]. This distinction was not present in the legislation of 1791 and, as such, the effect of a real siege and that of a political state of siege was

6 Inner communes, also called open cities, marked the distinction for battlegrounds. These represented specific points that served to protect the country in the event of armed conflicts arising from foreign attacks. War squares were previously defined as locations for military purposes holding battles during the war. The open cities were in the interior and were not part of a certain military architecture for the defense of the territory, Le Gal, Sébastien. Réprimer les "Villes en Ébullition". Les recours aux legislations d'exception en France (XVIII-XX siècle). In: Bergel, Pierre & Milliot, Vincent (Orgs.). La Ville en Ébulittion: sociétés urbaines à l'épreuve. Rennes: Presses Universitaires de Rennes, 2014.

7 Schmitt, Carl. La Dictadura. Madrid: Revista de Ocidente, 1968, p. 234.

8 It is interesting to mention that the English language literature on the state of exception refers to the development of the state of siege in France using the terms *actual state of siege*, caused by an external military threat that demands military intervention at

the same, namely a transfer of police powers from the civil authority to the military authority. In the period that began with the French Revolution in 1789 and went until the final defeat of Napoleon in 1815, the concept of the state of siege was gradually reinterpreted so that it shifted from being purely military-centric to being an alternative legislation. In the years following Napoleon's defeat the notion of exception was consolidated and expanded upon, however, the all-encompassing view of what constituted a state of siege in France did not receive significant further regulation and refinement until the mid-nineteenth century.

11 A new and reform-oriented republic was established in France in 1848, a time when the term state of siege was already the subject of public debates because of its widespread use and ongoing evolution in France up to that point. The new constitution promulgated that year did not establish the rules, effects and limits of the state of siege, rather, it determined the establishment of the exception's norms by means of a law drafted for that purpose (France, 1848, Article 106). A bill was presented the following year, on 28 July 1849, by the Minister of the Interior, M. Dufause, containing 13 articles dealing with the following provisions: a declaration in case of war or insurrection, the forms of declaration of a state of siege, the effects of the state of siege, reaffirming the transition from civil to military authority during the appeal period, the prerogatives attributed to the military power and the suspension of the state of siege. The military dimensions were maintained in the new legislation, which continued to refer to the law of July 1791 and a decree of 1811, that allowed commanders of battle stations and military posts to declare a state of siege in armed conflicts with a foreign enemy. Nevertheless, two new provisions appeared in the 1849 law dealing with declarations of a state of siege in the colonies (Article 5) and the granting of permission to military courts to adjudicate on any crimes and offences that were committed during the period of validity of the siege even after the cessation of the state of siege (Archives Nationales, C 994).

12 After several proposals were presented that successfully modified Bill No. 100 (Archives Nationales, C 3278), the law was enacted on 9 August 1849 with a broader definition for its siege regime. The changes saw the replacement of the provision that referred to a state of siege in the event of war or insurrection by the expression "imminent danger to internal and external security" (France, 1849, Article 1) and the exclusivity given to

---

the location, and a *constructive state of siege*, occasioned by internal dissent against the current governmental regime.

Parliament to declare a state of siege in France (France, 1849, Article 2), removing from the initial text that a presidential proposal was sufficient for the adoption of such a measure. Another of the proposals that modified the law involved the prerogatives given to the military authority (France, 1849, Article 4) to carry out persecutions at home, exile detainees, collect weapons and ammunition and to intervene in publications and meetings (France, 1849, Article 9). The law allowed the abolition of constitutional liberties by enumerating the rights that would be suspended during a state of siege. The new law was truly a piece of exceptional legislation as it suspended constitutional principles for a circumscribed time and place, granted the military authority extensive power to restrict public liberties and enshrined the competence of military jurisdiction over non-military people (France, 1849, Article 8). It would prove to be the law that would define the issue of exceptions in France and that would reverberate in several other legislations around the world.

III. The exception in the Latin American constitutions

Latin America has provided fertile ground for the exception and arguably more than any other region experienced the greatest repercussions from France's evolution of the state of siege. Since the first Latin American constitutions were drafted, they have included regulations for emergency situations. According to Miguel Schor[9], all Latin American constitutions authorised elected leaders to declare a state of siege in emergencies throughout the 19th century. At the end of that century, there was a trend among the civil authorities towards curtailing their respective military's power in domestic settings, however, the states of exception persisted and maintained their character of legitimacy within the region's various legal frameworks. The political instability relatively commonplace throughout the region has fomented extra-constitutional repression, replacing the preservation of democratic regimes with authoritarian ones. Juan Manuel Goig Martínez[10] notes that the profuse use of states of exception in Latin America led to the

13

9 Schor, Miguel. Constitutionalism Through the Looking Glass of Latin America. In: Texas International Journal, v. 41: 1, 2006, p. 28.

10 Martínez, Juan Manuel Goig. La Defensa Política de la Constitución. Constitución y Estados Excepcionales. Un estudio de derecho constitucional comparado. In: Revista da Derecho UNED, n. 5, 2009, p. 234-235.

derogation of constitutional regimes and led to exceptionality being seen as a normal situation. One peculiarity of Latin America that led to this turn of events was the concentration of extraordinary powers in the offices of the presidents of the various republics.[11]

14 In what should be an incongruity, the normality of exceptionality in Latin America has seen the ordinary use of extraordinary powers not only by dictators but also by democratically elected governments. The persistence and pervasiveness of this issue has brought it to and kept it in political and legal debates throughout the region. Jorge Gonzalez-Jacome[12] suggests that analysts of the region's constitutions in the 19th century justified the use of emergency powers through two lines of reasoning: The first is that the rule of law could not be fully applied in corrupt and unruly Latin America until the citizenry acquired the necessary republican virtues. The second line of reasoning held that national governments should establish strong executive powers in their constitutions to lead Latin America to economic prosperity.

15 Latin American constitutionalism, initially inspired by the Constitution of the United States, ended up following a different path from its role model. In the case of the United States, its constitution led to republicanism and democracy, while in Latin America, constitutions generally led to authoritarianism.[13] Liberal ideas were very influential in US constitutionalism but they were less successful in shaping Latin American constitutions, which combined liberal and conservative elements. While Latin American constitutions followed the US model in terms of a system of checks and balances, at the same time they transferred additional powers to the office of the president, including the ability to declare a state of siege.[14]

16 During the 19th century, a number of Latin American countries formulated exceptional provisions based on the French state of siege model in their legislation to counter threats to the State and its institutions. These

11 Meléndez, Florentín. Los Derechos Fundamentales en los Estados de Excepción Según el Derecho internacional de los Derechos Humanos. Tesis Doctoral (Derecho), Universidad Complutense, Madrid, 1997, p. 24.

12 Gonzalez-Jacome, Jorge. Emergency Powers and the Feeling of Backwardness in Latin American State Formation. In: American University International Law Review, 26.4, 2011, p. 1074.

13 Schor, Constitutionalism Through the Looking Glass of Latin America, (n 9).

14 Gargarella, Roberto. The Constitution of Inequality: constitutionalism in the Americas, 1776–1860. In: I-CON, v. 3, n. 1, 2005, p. 22.

countries were Colombia (1821), Uruguay (1829), Chile (1833), Ecuador[15] (1839), Argentina (1853), Paraguay[16] (1870), Bolívia (1878) and Brazil (1891). This conservative constitutionalist tendency, which tended to undermine egalitarianism, manifested itself in the concentration of power in the executive, increasing the power of national presidents and attributing to them the competence to declare a state of siege.[17] The most high-profile cases for the use of the state of siege in Latin America involve Chile and Argentina.

Chile's constitution of 1833 was the first in South America to make provision for its suspension in cases of necessity. The President of Chile could ask the National Congress for emergency powers and declare a state of siege, automatically suspending the constitution. The state of siege was used in Chile to counter the impacts of civil and external wars as well as internal unrest, serving as an artifice of authority to confront political opponents, peasants, youth, immigrants[18] and labour movements as well as the press[19]. Juan Carlos Arellano[20] states that the exception was in force for one third of the period between 1833 and 1861. Manuel Montt was the longest-serving governor of the state of siege in Chile, with a total of four years and nine months between 1851 and 1861.[21]

15 See Elizabeth, Navas Mejía Alexandra. El Estado de Excepción como Mecanismo de Limitación de Derecho nel Estado Constitucional: seguridad jurídica y derechos humanos. Dissertação de Mestrado (Facultad de Jurisprudencia), Universidad Regional Autónoma de los Andes, Ambato-Ecuador, 2017 for an evolution of the state of siege in the Ecuador's constitution.

16 See Claude, Luis Lezcano. Historia Constitucional del Paraguay (Período 1870–2012). In: Revista Jurídica, vol. 3, Universidad Americana, noviembre, 2012 for a historical review of the state of siege in Paraguay.

17 Gargarella, The Constitution of Inequality: constitutionalism in the Americas (n 14), p. 1-11.

18 Kaempfer, Alvaro. Campesinos, Jóvenes e Inmigrantes: la ecuación liberal y revolucionaria chilena frente al estado de sítio em la carta a Francisco Bilbao (1852) de Santiago Arcos. In: A Contracorriente, n. 14, 1 (Fall), 2016.

19 Fritz, Karen Donoso. Las Mordazas a la Prensa Obrera. Los mecanismos de la censura política en Chile, 1919–1925. In: Revista Izquierdas, n. 28, 2016.

20 Arellano, Juan Carlos. Dictadura y Facultades Extraordinarias: un debate entre el republicanismo clássico y el liberalismo en el contexto de la guerra entre Chile y la Confederación Perú-Boliviana (1836–1839). In: Estudos Ibero-Americanos, Porto Alegre, v. 42, n. 1, jan-abr 2016, p. 257.

21 Fuente-Alba, Rodrigo Zalaquett. La Teoría de las Elites y la Revolución de 1859. In: Societas, nº 12, Santiago de Chile, 2010.

18 According to Christian Lynch[22], a group of exiled Argentine liberals living in Santiago in the mid-19th century became interested in Chile's use of the state of siege and introduced the idea to Argentina on their return, which was experiencing turbulent crises for the institutionalization of the state at the time. Among these liberals was Juan Bautista Alberdi[23], who proposed a new model of emergency powers in Argentina based on the Chilean Constitution of 1833. Argentina's constitution of 1853 adopted the same Chilean terminology that immediately suspended constitutional guarantees and individual rights with the declaration of a state of siege. As Argentines believed that the constitution should follow the US model to ensure economic prosperity, the idea developed that a state of siege would be equivalent to suspending the writ of *habeas corpus*.[24]

19 Ramón Pedro Yanzi Ferreira (2006), who is arguably the greatest expert on the state of siege in Argentine history[25], verified the occurrence of 34 declarations of a state of siege in Argentina between 1853 and 1930[26], of which only one, which occurred in 1865, was due to an external attack. All the occurrences were caused by internal unrest. In more detail Ferreira's research revealed that 12 declarations resulted from the law of the Congress of the Nation and the other 22 situations were established by executive decree. In ten situations, the entire country was placed under a state of siege[27], with

22 Lynch, Christian Edward Cyril. Estado de Sítio é Coisa Nossa. In: Insight Inteligência, julho-setembro 2009, p. 68.

23 Juan Bautista Alberdi was an Argentine politician who opposed Juan Manuel de Rosas' government of the province of Buenos Aires. As a result, he suffered political and police persecution that led him into exile, first in Montevideo and Uruguay then later in Chile. After returning to Argentina, Alberdi went on to be the intellectual author of the 1853 Constitution.

24 Gonzalez-Jacome, Jorge. Emergency Powers and the Feeling of Backwardness in Latin American State Formation. In: American University International Law Review, 26.4, 2011, p. 1100-1105.

25 An important study was also carried out in the 1950s by Carlos Sanchez Viamonte (1957).

26 If we extend this time frame to 2001, a state of siege was declared 57 times in Argentina, Rosenkrantz, Carlos. Constitutional Emergencies in Argentina: the romans (not the Judges) have the solution. In: Texas Law Review, V. 89:1557, 2011.

27 Paraguay had its entire territory subjected to a state of siege in 1868. Soon after, in 1874, it was Argentina's turn. In Brazil, this did not happen until 1930. See also Domínguez, Manuel. Estado de Sitio. Assunción: Talleres Nacionales, 1909; Ferreira, Ramón Pedro Yanzi. La Aplicación del Artículo 23 de la Constitución Nacional en la República Argentina, 1873–1976. In: Anuario, Universidad Nacional de Córdoba, 1999–2000; Ferreira, Ramón Pedro Yanzi. La Aplicación del Estado de Sitio en San Juan, 1861. In: Anuario, Universidad Nacional de Córdoba, 1996.

the measure being restricted to specific areas, provinces or regions on the other 24 occasions (Ferreira, 2006, p. 1). Beginning in the 1860s, Argentine governments used the state of siege to eliminate regional rivalries, reduce internal conflicts in the provinces and defeat the few *caudillos* who still challenged the authority of the national government. In the first decade of the 20th century, the Argentine government resorted to a state of siege to contain strikes and demonstrations across the country and to limit the activities of the large number of European anarchist immigrants who lived in Argentina at the time. With regard to the latter, the state of siege censored anarchist periodicals, containing popular demonstrations and curtailing freedom of expression.

Thus, the provisions on the state of siege, now notorious for their 20
harsh application and dire regional repercussions, entered Latin America via Chile's 1833 constitution. Chilean legislation gave the President of the Republic broad powers to maintain internal security and established some provisions that would become common in Latin America. The triggers for the use of the exception in Chile were external attack and internal unrest, with the President of the Republic being responsible for action concerning the former and the Congress of the Nation for the latter. The President of the Republic could only declare a state of siege in the second context if the legislature was not in session, although even then he needed the approval of the Council of State. Terms such as external attack and internal unrest, or very close variations thereof, would find their way into similar legislation throughout the region. Most significant in the Chilean norms, however, was the prerogative of the congress to grant extraordinary powers to the president and, above all, to clearly mention the suspension of the constitution. There is no doubt about the existence of a state of exception. But the only possible measures for the public authority were the arrest or transfer of the detainee to other parts of the national territory, without the capacity for conviction or application of sentences. The maximum law of 1833 was in force for 92 years in the country.

IV. The current panorama of the exception in Latin America

For an overall analysis of the current characteristics of the exception in 21
Latin American constitutions, data was collected from ten Spanish-speaking countries with the largest territories and the largest populations in Latin America and Brazil, a country of great expression. and the only one

that speaks Portuguese in the region. Considering the effective date of the 11 Constitutions, the scenario is as follows: Argentina (1853), Bolivia (2009), Brazil (1988), Chile (1980), Colombia (1991), Ecuador (2008), Mexico (1917), Paraguay (1992), Peru (1993), Uruguay (1967) and Venezuela (1999). Of the countries selected and their normative texts, it is important to emphasise that, firstly, Argentina's current constitutional framework is the oldest, dating from the 19th century but having already undergone a series of reforms, the most recent of which occurred in 1994. Secondly, the Chilean situation stands out from the other countries as it is currently undergoing a constitutional-reform process. Due to this, the analysis conducted here was based on the most recent legislation, which dates from 1980. Thirdly and finally, the legislation used for analysis, the constitutions of Mexico (1917) and Uruguay (1967) do not make any mention of the forms and institutes of exception.

22 In this context, the constitutions that establish formulations on states of exception in the region have resulted in various derivations of it. This is seen in the differences of the temporality of their occurrences, the competences on the authorship of exceptionality, the events that can trigger the exceptions' declarations, which rights are suspendable as well as which repressive measures are applicable during the exception and how these measures are enforced. Given the gravity of both the above-cited actions and their ramifications, this points to the need for Latin American countries to be able to hold their authorities both accountable and, where necessary, punishable for their actions during the state of exception period, issues that will require a specific regulating law. These above aspects touch upon the key variations of exceptionality within the analysed constitutions as, while there are threads of commonality, each country has its own specificities. Indeed, the only near universally common characteristic concerns the basic process to trigger the exception, namely that the executive can make the declaration only after receiving the legislature's consent, the only exception being the Constitution of Peru that does not mention the need for authorisation from the legislature.

23 The exception has been enshrined in the constitutions under consideration using a broad range of nomenclature that includes terms such as "state of assembly", "state of catastrophe", "state of interior commotion", "state of defence", "state of emergency", "state of exception", "state of war" and "state of siege". Because exceptionality is given such a variety of titles, each with an at least seemingly different focus, the declaratory triggers of exceptionality are quite diverse and can range from reasonably specific to very

generic. For example, some of the triggers are listed as foreign threats and institutions, external attack, public calamity, serious and internal unrest, international conflict, defence of sovereignty, natural disaster, emergency, serious circumstances, external and civil wars, invasion, imminent danger, disturbance of the public, economic, social and ecological order, preservation of public order and social peace, response to aggression, restoration of normality and the security of the State, people, nation and its institutions.

In general, the established norms present the possibility of suspending some constitutional rights and guarantees, sometimes with a clear explanation of the specific involved and sometimes only that the exception has been authorised. Only the constitutions of Bolivia, Colombia and Venezuela reject any possibility of suspending fundamental rights and guarantees and most of these legislations do not allow the repressive measures permissible in Argentina, Bolivia, Colombia, Peru and Venezuela. 24

Aspects of latent functional relevance in states of exception include the temporality of actions, accountability for actions taken and the punishment of authorities for these actions. It is noticed that the concern with the duration of the exception is a constant, being convergent with the principle of exceptionality. Only the normative texts of Argentina and Bolivia make no mention of the transitory aspect of these measures. In order to avoid arbitrary resulting from the context, it is equally important that rules are defined for authorities to report their actions and for them to be held accountable for any abuses. In this regard, the constitutions of Argentina, Chile, Peru and Venezuela currently do not place no accountability requirements on the authorities and, furthermore, Argentina, Brazil, Paraguay, Peru and Venezuela have no provisions for the punishment of the authorities for the abuses committed. 25

Among the general aspects, there is the fact that the constitutions of Bolivia, Chile, Colombia and Venezuela are the only ones that present indications of the elaboration of a specific law to regulate their states of exception, demonstrating the need for further debate and more extensive formulations on the subject. 26

Turning specifically for the moment to Argentina's constitution of 1853, it adopts as an exception measure the state of siege to address internal unrest and foreign attacks, allowing the suspension of some rights and guarantees not previously informed. Given its original in 19th century norms, the text is vague by modern standards and is subject to broad interpretation, which perhaps helps account for the fact that Argentina has applied the exception on more than 50 occasions since 1853. 27

28 The 2009 Bolivian constitution adopts the expression state of exception as a measure to guarantee the security of the State, to respond to foreign threats and internal unrest as well as to help deal with natural disasters. In other words, it constitutes a notoriously broad norm for a measure of exception. In any case, it establishes the need to draft its own law for its more specific definitions and already considers the responsibility of agents for their acts and the need to be punished for any abuses that occurred under the measure.

29 The only Portuguese-speaking country in the region, Brazil uses the terms state of defence and state of siege for exceptions designed to preserve public order and social peace threatened by serious internal unrest or by a foreign threat. With a predefined temporality, the measures in the Brazilian exception can be considered as rather repressive given they suspend the right to assemble and annul the confidentiality of correspondence and communication. Authorities are required to report the actions they take but there is no indication with Brazil's constitution of any punishment mechanism for abuses. A specificity of the Brazilian case is the exception's evolution from the state of defence to the state of siege, establishing a direct correlation between the two measures of exception and the more extreme profile of the second.

30 It was Chile that introduced the exception as the most latent constitutional element in Latin America in the 19th century, a measure that even allowed the suspension of the constitution itself. This exception had appropriate contextual measures for external or internal wars, internal unrest, emergency and public calamity as well as threats to State institutions. However, Chile's 1980 constitution is the result of the dictatorship of Augusto Pinochet, which, even though the regime imposed a constant state exceptionality, used different versions of exception that were variously defined as a state of assembly, a state of siege, a state of catastrophe and a state of emergency. While Chile's use of the exceptions in this period became internationally infamous for their authorisation of detentions, they also began to specifically suspend the rights of assembly, freedom of work, association, property, movement and the confidentiality of communication. Effectively, a set of provisions were formed that hypertrophied the executive and allowed for excessive control, even though the Constitution provided limits to the duration of the measures and the accountability of the authorities. This also suggests there is a need for the elaboration of a specific law to deal with this matter in Chile which, as mentioned above, is currently undergoing a period of constitutional review and reform.

31 The 1991 Colombian constitution incorporated the expressions state of external war, state of internal unrest and state of emergency for the need to repel foreign aggression, defend sovereignty, preserve state security, make war, restore normality and deal with public calamity and with the disturbance of public, economic, social or ecological orders. Even though this represents a broad gamut of foreseen possibilities for predefined temporalities, authorities need to report their actions and are subject to punishment for the actions they take if Colombia is subject to a state of exception. There is also an indication of the drafting of a specific law.

32 The 2008 Ecuadorian constitution uses the basic expression state of exception to deal with foreign aggression, international conflict, internal conflict, serious internal unrest, public calamity and natural disasters. Under this diversified set of triggers, that are all temporally defined, there is the possibility of explicitly suspending the rights of association, assembly, movement, freedom of information and the inviolability of home and correspondence. In terms of repressive measures, the government is authorised to raise taxes, use exceptional public funds, change the seat of government, use the armed forces and establish censorship as well as close ports, airports and borders. The Ecuadorian constitution is the only one among those analysed to make explicit actions that authorise the use of economic resources. Agents are required to report their actions and are subject to punishment for any abuses that occurred.

33 The 1992 Paraguayan constitution also uses the generic expression state of exception to describe the measure implemented to deal with international armed conflict and serious internal unrest. The measure provides express authorisation to suspend the right to assembly and public demonstrations while also authorising detention and exile as repressive measures. The exception has predefined time limits and the authorities must report the actions they undertook in the relevant period.

34 The 1993 Peruvian constitution uses the expressions state of emergency and state of siege, establishing temporal limitations in their applications which need to be triggered by a disturbance of the peace and internal order, catastrophes, serious circumstances, invasion, external or civil wars and imminent danger. The state of exceptions allows for repressive measures that include limitations to the freedom of assembly and movement as well as the suspension of the right to the inviolability of home. There is no provision requiring authorities to report their actions and no punishment mechanism exists to deal with wrongdoing.

35 Finally, the 1999 Constitution of the Bolivarian Republic of Venezuela uses the term state of exception for situations in which there is a need to preserve the security of the people, nation and institutions. It mentions a previously defined temporality of the exception and suggests the creation of a specific law to regulate the object.

36 The table below summarises the provisions in force on states of exception in the analysed Latin American constitutions.

Number of provisions in force on states of exception

Country	Number of Provisions	Definitions
Argentina	4	- Definition - Assignment - Motivations - Suspension of Rights and Warranties
Bolivia	6	- Definition - Assignment - Motivations - Accountability - Punishment of Authorities - Specific Law Code
Brazil	7	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Accountability
Chile	8	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Punishment of Authorities - Specific Law Code
Colombia	7	- Definition - Duration - Assignment - Motivations - Accountability - Punishment of Authorities - Specific Law Code

Country	Number of Provisions	Definitions
Ecuador	8	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Accountability - Punishment of Authorities
Mexico	-	-
Paraguay	7	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Accountability
Peru	5	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties
Uruguay	-	-
Venezuela	5	- Definition - Duration - Assignment - Motivations - Specific Law Code

V. Conclusion/Recommendations

The current Latin American constitutions that were examined deal with the issue of the exception in a much broader way than they did in the 19th century, when the measures of exception were basically restricted to the concept of the state of siege that became manifest in French legislation at the time. The exception, and its foreseeable triggers, were centred on the fear of conflict with foreign nations and internal strife that put the various fledgling republics at risk. Over time and in line with a more general trend around the world, the states of exception in Latin America came to feature in legal norms with greater specificity and dealing with issues beyond

37

internal or external conflicts, such as public calamity, natural disasters and disturbance of the economic and ecological orders.

38 Despite the specificities of the prevailing terms referring to exceptionality, four (Bolivia, Ecuador, Paraguay and Venezuela) of the 11 constitutions analysed have preserved the most generic term applied, state of exception. This highlights one of the biggest concerns regarding exceptionality, namely the extensive use of vague expressions such as severe unrest, emergency, grave circumstances, imminent danger and ensuring public safety provide so much leeway for interpretation that the terms serve no meaningful purpose and paved the way for the arbitrary use of these exceptional measures, as Latin American history has demonstrated.

39 This remarkable lack of specificity concerning such measures, especially given their often-serious consequences, has created an imperative to think about their most functional aspects, particularly those that delimit their duration, their suspension of guarantees, the ability of authorities to impose repressive measures as well as the need to establish accountability and punishment mechanism for authorities acting under them. Finding the correct balance between these elements, coupled with a clear presentation of their definitions, will not only help maintain the rule of law during times of crisis but also help countries throughout the region minimise the risk of again falling under the rule of authoritarianism. In its most traditional application, a state of exception is a temporary condition employed to help a society overcome a severe crisis in which its duration is, at least to some degree, anticipated prior to its execution. The very real danger is, of course, that an absence of temporal limitations creates a clear risk to the rule of law and democracy because, once instituted, a state of exception can suspend the checks and balances that, up to that point, served to prevent authorities from becoming authoritarian and, has often been seen, becoming a greater threat to society than the crisis that initially triggered the exception. However, while temporal limits are crucial, they are insufficient in and of themselves. Hence other mechanisms need to be in place that require executive authorities to report their actions during the period under a state of exception and impose sanctions for any abuses committed. This will require adequate legislation specifically drafted to clearly address what is needed and allowed in three distinct timeframes, namely, the time that covers the period prior to triggering the exception (previous time), the period when the exception is in force (time of the exception) and the period that immediately follows the lifting of an exception (subsequent time).

In the analysis conducted here, nine elements were attributed to exceptionality in the constitutions were examined (definition, duration, attribution of declaration, motivations, suspension of rights and guarantees, repressive measures, accountability, punishment of authorities and indication of a specific law). The countries that have the largest number of these elements in their normative texts today are Chile and Ecuador as both have eight of the nine characteristics. However, the Ecuadorian constitution is the more robust of the two as it contains provisions dealing with the three periods of the exception mentioned above, has established definitions for the validity of the state of exception as well as for the adequate verification of the various authorities' actions during the state of exception. However, Ecuador has also the legislation that grants greater scope for action to the executive, authorising the exceptional use of public resources and the armed forces. For its part with respect to the three periods of the exception, the Chilean constitution lacks an accountability mechanism, an important inhibitor to arbitrary action and a basic requirement to provide transparency regarding government actions. 40

On the other end of this spectrum are Peru and Venezuela, which have only five of the nine characteristics. In both these countries' constitutions there is no indication of a mechanism to hold State agents accountable, even in the time subsequent to the exceptionality, which is a serious shortcoming from a rule of law perspective. Between these two constitutions, the normative text of Peru has even more weaknesses, since, even with no subsequent inspection, it authorises the suspension of rights and guarantees. Something that is prohibited in the Venezuelan constitution and which recommends the elaboration of a specific law to regulate exceptions. 41

In short, current Latin American constitutions exhibit evidence of normative evolution regarding the constitutionalisation of states of exception since they were initially drafted in the 19th century. There is more specificity in their definitions and strictness in their applications, although there is still some way to go before this could be considered as on par with many other constitutions around the globe. Even so, there is a very heterogeneous mix in terms of motivations, ranging from international armed conflicts to local natural disasters and a certain weakness regarding accountability and sanctioning mechanisms for authorities. As such, progress has been made but constitutional approaches to states of exception in Latin America still needs further refinement, more debate and more reflection with relevant legal, political and social actors. Until these issues are resoundingly dealt with, there is a constant risk of the re-emergence 42

of authoritarianism that would sweep away the fragile democracies now finding root in the region.

Sources and legislations

Archives Nationales. **Papiers des Assemblées**. Propositions et projets de loi nº 788–798 (C 994).

Archives Nationales. **Papiers des Assemblées**. Dossier 1262: état de siège (C 3278).

Argentina. **Constitución de la Nación Argentina**. Buenos Aires: 1853.

Bolivia. **Constitución Política del Estado**. Sucre: 2009.

Brasil. **Constituição da República Federativa do Brasil**. Brasília: 1988.

Chile. **Constitución Política de la República de Chile**. Santiago, 1833.

Chile. **Constitución Política de la República de Chile**. Santiago: 1980.

Colombia. **Constitución Política de la República de Colombia**. Bogotá: 1991.

Ecuador. **Constitución de la República del Ecuador**. Quito: 2008.

France. **Constitution Deuxième République**. Paris, 1848.

France. **Loi du 9 août 1849 sur l'état de siège**. Paris, 1849.

Paraguay. **Constitución de la República del Paraguay**. Assunción: 1992.

Peru. **Constitución Política del Peru**. Lima: 1993.

Venezuela. **Constitución de la República Bolivariana de Venezuela**. Caracas: 1999.

Further Reading

Elizabeth, Navas Mejía Alexandra. El Estado de Excepción como Mecanismo de Limitación de Derecho nel Estado Constitucional: seguridad jurídica y derechos humanos. Dissertação de Mestrado (Facultad de Jurisprudencia), Universidad Regional Autónoma de los Andes, Ambato-Ecuador, 2017.

Gargarella, Roberto. The Constitution of Inequality: constitutionalism in the Americas, 1776–1860. In: I-CON, v. 3, n. 1, 2005.

Gasparetto Júnior, Antonio. Atmósfera de Plomo: las declaraciones de estado de sitio en la Primera República brasileña. Valencia: Tirant lo Blanch, 2019.

Gasparetto Júnior, Antonio & Tanagno, Pedro Ivo Dias. Democracia e Estado de Exceção: entre o temporário e o permanente. Curitiba: CRV, 2020.

Gonzalez-Jacome, Jorge. Emergency Powers and the Feeling of Backwardness in Latin American State Formation. In: American University International Law Review, 26.4, 2011.

Martínez, Juan Manuel Goig. La Defensa Política de la Constitución. Constitución y Estados Excepcionales. Un estudio de derecho constitucional comparado. In: Revista da Derecho UNED, n. 5, 2009.

Meléndez, Florentín. Los Derechos Fundamentales en los Estados de Excepción Según el Derecho internacional de los Derechos Humanos. Tesis Doctoral (Derecho), Universidad Complutense, Madrid, 1997.

Rosenkrantz, Carlos. Constitutional Emergencies in Argentina: the romans (not the Judges) have the solution. In: Texas Law Review, V. 89:1557, 2011.

Saint-Bonnet, François. L'État d'Exception. Paris: PUF, 2001.

Schmitt, Carl. La Dictadura. Madrid: Revista de Ocidente, 1968.