

EXCEPTIONALISM AS A COLONIAL TOOL IN MODERN INTERNATIONAL LAW

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ABSTRACT

In this paper I argue that states of emergency are a residue of the colonial idea involved in the making of international law, which is also a product of modern law; the colonial dynamics are not carried on anymore just in a transnational way. That is, they are not only a matter of imposition of European or North American ideas to the rest of the globe. Colonial dynamics are also a way by which domestic policies are carried on. Thus exceptionalism is a way to deal with the 'other' either in a transnational or national context. To show this, the article will be divided in to three main parts. The first one attempts to precise how the term modern law will be understood in this paper. The second part will address the problem of international law as a modern project and thus as a colonial one. In the third section a connection between modern international law and the presence of exceptionalism will be sketched, using a concrete example of Colombia's last declaration of a state of exception. The last part will offer the main conclusions of this text.

Key words: colonialism; exceptionalism; international law; states of emergency.

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EL EXCEPCIONALISMO COMO UNA HERRAMIENTA COLONIAL EN EL DERECHO INTERNACIONAL MODERNO

RESUMEN

En este artículo sostengo que los estados de emergencia son un residuo de la idea colonial que subyace al nacimiento del derecho internacional, el cual también es un proyecto del derecho moderno; las dinámicas coloniales no son llevadas a cabo ya desde una óptica transnacional. Esto es, ellas no son solamente una cuestión de la imposición de las ideas europeas o norteamericanas al resto del globo. Por ello, el excepcionalismo es una manera para lidiar con el 'otro' bien sea en el contexto transnacional o en el nacional. Para mostrar esto el artículo se divide en tres partes principales. En la primera se intenta precisar qué se entiende por derecho moderno a lo largo de este escrito. La segunda parte se dedicará al problema del derecho internacional como un proyecto moderno y por ende colonial. En la sección tercera se esbozará la conexión entre el derecho internacional moderno y la presencia del excepcionalismo, a través del ejemplo concreto de la última declaración de un estado de excepción en Colombia. Al final se ofrecen algunas conclusiones.

Palabras clave: *colonialismo; derecho internacional; estados de emergencia; excepcionalismo.*

INTRODUCTION

After the end of the Cold War, most of the countries in the Third World went through a “restoration” process that, at least in Latin America, was interested in establishing free elected governments in which the rule of law was duly respected. Part of the task was achieved when most of the countries, by the mid 1990s, had issued

new Constitutions in which the core declaration was the respect of fundamental rights and liberties. This constitutional process cannot be explained referring exclusively to the particular conditions of each South American country involved in the “restoration”. Authoritarianism had been a well established strategy in different countries of the region; even though Chile and Argentina have been the most acknowledged cases of this authoritarian rule¹, also many other countries established repressive governments in which political dissent was fiercely punished. This was the accepted way by which the fight against communism was addressed.

One of the least sounded repression cases, perhaps because of the appearance of democratic institutions through most of the twentieth century, is Colombia. Even though after 1957 no military regime was in power and all the Presidents were, from that year on, elected on a democratic fashion, between 1978 and 1985 repression was the way to deal with political dissent. In 1978, the President, using emergency powers, issued what was called the “Security Statute”, which enabled military tribunals to judge civilians with a minimum of due process guarantees, and with no possibility of appealing their decisions, criminalizing in a very broad and ambiguous fashion some conducts. The main aim of the Statute was to deal with uprising political dissent represented, especially, by a guerrilla group called the M-19, which had popular support in some cities around the countries because of their Robin Hood-style actions². After 1982 the Statute was no longer valid, but the practice of repression in Colombia did not end. In November 1985, the M-19 entered the Supreme Court building and took the judges as hostages in order to press the government to comply an agreement the President had signed with the group some months before. Even though the action of the M-19 was brutal and against

1 The first one because of the long period in which Augusto Pinochet was in office as President (nearly seventeen years) and the second because of the brutality of repression; 30.000 people disappeared is the shameful record.

2 Stealing a milk truck and giving milk cartons to people living in very poor conditions was one of their most sounded actions. See, David Bushnell, *Colombia. Una nación a pesar de sí misma*, Planeta, Bogotá, 1997.

any standard of international law (such as the Convention against the Taking of Hostages), the reaction of the government through the military forces was not either an example for future interventions. In order to take control of the building, artillery tanks entered the construction firing in an indiscriminate way with no consideration whatsoever that lives of civilians were also at stake. The outcome of this tragic event is that some judges of the Supreme Court were killed by bullets fired by the military forces and fifteen persons remain missing to the day³.

Bearing in mind this kind of actions, it was not strange that in the process of restoration to democracy in South America, the introduction of the discourse of human rights was a rather hopeful panorama. Countries, in which the practice of ‘disappearing’ people was used as a political tool saw the human rights discourse as a one in a lifetime opportunity to cease arbitrariness of oppressive regimes. Although this was the initial hope, the Colombian example in most of the twentieth century had shown that it was possible to establish repressive regimes inside democratic legality by the constant declaration of a state of emergency⁴. Further on, most of the instruments of international law, that after 1991 were understood as an integral part of the Colombian Constitution, actually contain the possibility of declaring a state of emergency. Therefore, there is no logical contradiction between a democratic regime and the violation of human rights; democracy does not ensure the protection of human rights and, as the international regime is concerned, violations against human rights are not seen as a deviant conduct in some cases. Why have states of emergency –or exceptionalism– continued to be a part of our political systems even though after the restoration process? Why, if it is acknowledged that emergency powers are

3 See the Preliminary Report of the Truth Commission at: <http://enmediodelruido.googlepages.com/PalaciodeJusticia-ComisindeLaVerdad.pdf>

4 Mauricio García & Rodrigo Uprimny, “El control judicial de los estados de excepción en Colombia”, in Rodrigo Uprimny, César Rodríguez & Mauricio García (eds.), *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia*, Norma, Bogotá, 2006, pp. 531-569.

beyond any control, international law keeps on guaranteeing that right to the sovereign?

In this paper I argue that states of emergency are a residue of the colonial idea involved in the making of international law, which is also a product of modern law; the colonial dynamics are not carried on anymore exclusively in a transnational way. That is, they are not only a matter of imposition of European or North American ideas to the rest of the globe. Colonial dynamics are also a way by which domestic policies are carried on. Thus exceptionalism is a way to deal with the ‘other’, the one that cannot be integrated to the political system, either in a transnational or national context. To show this, the article will be divided into three main parts. The first one will try to precise the term of modern law that will be used throughout the paper. The second part will address the problem of international law as a modern project and thus as a colonial one. In the third section, a connection between modern international law and the presence of exceptionalism will be sketched, using a concrete example of Colombia’s last declaration of a state of exception. The last part will offer the main conclusions of this text and the direction for future research.

I. THE PROJECT OF MODERN LAW

Modern law has shaped the present beliefs of our society, as well as the possibilities of change and political transformation⁵. The project of law in the modern world has been a very problematic issue for legal history. Some see that the project of modern law starts in the Middle Ages when canonic law was established by the Catholic Church with the purpose of making law applicable through a vast territory⁶, some assert that this project was not accomplished before Absolutism concentrated political power establishing that the

5 Cfr. Robert Gordon, “Some critical theories of law and their critics”, in Robert Kairys (ed.), *The Politics of Law. A Progressive Critique*, Basic Books, New York, 1998, pp. 641-661.

6 Harold Berman, *Law and Revolution. The Formation of Western Legal Tradition*, Harvard University Press, Cambridge, 1983.

sovereign was the unique source of law⁷, while others argue that in the history of Continental Europe, the project of Civil Codes, that was possible thanks to the “Age of the Revolution”, was the definite step in order to ensure the inexistence of gaps in the law⁸. The dispute about the origins of the first system of modern law has a strong political entity, especially if one bears in mind that the effect of placing the origins in one or another historical moment has the effect of erasing whatever happened before. In history, and especially in legal history, the struggle for the origins is the fight to control the past and the peoples to which a particular culture feels indebted with⁹. However, what all the discussions about the origins of modern law take for granted are the characteristics that a legal system should have in order to be reputed as “modern”. In general terms, it could be said that a system of modern law is understood as a series of command issued by the sovereign that has to be obeyed by the people that inhabit a particular territory in which the sovereign rules, and that in case of disobedience a punishment for the noncompliance can be established¹⁰. In furtherance, no gap exists in law, finding that there is not any conduct outside the will of the sovereign or any territory not covered by it.

Although this definition of modern law has been drawn out especially from the history of Continental Europe, it is striking that a well spread notion of law in these terms was also characteristic in British jurisprudence. In John Austin’s definition of law, known as the imperative theory, he argued as well that law was essentially a command issued by the sovereign; this theory was a dominant view in British jurisprudence until it was consistently criticized by H.L.A. Hart in the twentieth century. According to Hart, Austin was missing a big part of the problem when he did not define law as a set

7 Hespanha, “La Revolución y los mecanismos del poder”, in Carlos Petit (ed.), *Derecho privado y Revolución Burguesa*, Marcial Pons, Madrid, 1990.

8 Mauricio Fioravanti, “Estado y Constitución”, in Maurizio Fioravanti (ed.), *El Estado moderno en Europa*, Madrid, Trotta, 2004, pp. 13-43.

9 P.G. Monateri, “Black Gaius: a quest for the multicultural origins of the ‘Western legal tradition’”, 51 *Hastings Law Journal* 479, 2000.

10 Paolo Grossi, *Mitología jurídica de la modernidad*, Trotta, Madrid, 2003, pp. 16 y 17.

of rules –and not commands– that were to be obeyed not only by the subjects of a particular State, but also by the sovereign authority that created the law. Hart sustained that Austin’s imperative theory failed to describe the way in which modern legal systems worked, since the latter did not derive their authority from the will of a sovereign but from the acceptance of a rule of recognition by the subjects of a State¹¹. Even though one can dig in these well known differences between the two of these philosophers, it is quite interesting that when Hart arrived to the problem of formulating the content of the rule of recognition, he affirmed that in England it could be stated as “what the Queen enacts in Parliament is law”¹². Hart pretended to move the validity of law from the idea of the sovereign’s will to that of the acceptance of a rule of recognition, and it must be said that he accomplished partly this purpose. He said that law was not valid because it was the will of the sovereign, but because the people and citizens accepted that what the “Queen enacted in Parliament” was law. However what is always necessary in modern law, even in Hart’s critique of Austin’s theories, is the action of a sovereign whose main goal is to apply his will –whether in the form of commands or rules– in a particular territory where he or she claims to exercise his sovereignty.

Besides the centrality of the concept of the sovereign’s will, there are also two additional concepts that have shaped the idea of modern law: the gaplessness of legal systems and the connection between the sovereign’s will and a particular territory. The former was ensured especially by Civil Codes which included provisions asserting that all conducts that were not explicitly prohibited in the rules enacted by the Code, should be understood as permitted by the legal system¹³. In the other hand, the connection between the sovereign will and a particular territory is a characteristic of modern law that helps to explain the bonds between modernity and international

11 H.L.A. Hart, “Positivism and the Separation of Law and Morals”, in Dennis Patterson (ed.), *Philosophy of Law and Legal Theory*, Blackwell, Oxford, 2003, pp. 69-90. Also see H.L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1994.

12 Hart (1994), p. 107.

13 Fioravanti (2004), p. 21.

law. One of the main characteristic of law in medieval times was pluralism of legal orders, which made an individual accountable against the Court of law that corresponded depending on his status. Thus noblemen, clergy, feudal lords, vassals, bourgeois, were judged by different Courts that applied diverse legal provisions regardless of the territory where the offense or the legal problem had arisen¹⁴. Bearing in mind this situation, one of the purposes of modern law was to eliminate these different forums by establishing connections between the person and the territory¹⁵, so that jurisdiction was no more a question of the status of a person, but an issue that depended on the place where someone inhabited. Some see that this process of elimination of forums was fully accomplished in the ‘Age of the Revolution’ when the Civil Codes and the declarations of rights established the idea of “equality before the law”, making it possible for sovereigns to judge all of their subjects according to the law of a Nation State¹⁶. The promise of equality was sold out as an emancipation process, but was also a way in which the sovereign ruling a territory ensured that his will would be applied to all of his subjects without distinction. A system of control of the territory and their inhabitants was established in which the promise of equality was a tool to concentrate power.

Up to now, a broad panorama of these characteristics shows that modern law has been a product of the sovereign’s will and that the ideas of gaplessness in the legal system, as well as the connection with the territory, are an absolutist or totalitarian project in the sense that its purpose is that no part of the territory where the sovereign rules should be uncovered by his will, neither a conduct of any of his subjects. This idea of a sovereign in a territory started to be challenged when Spain ‘discovered’ a new land and especially a different culture. International law gave answers in order to deal with this colonial encounter with the very tools of modern law as it is shown in the next section.

14 See Michael Tigar, *Law and the Rise of Capitalism*, Monthly Review Press, New York, 2000, pp. 23-58.

15 Id.

16 Fioravanti (2004), p. 22.

II. THE COLONIAL ENCOUNTER IN MODERN LAW: INTERNATIONAL LAW AS A COLONIAL PROJECT

Recent scholarship has sustained that the primitive origins of international law should be traced back to the works of Francisco de Vitoria when America was discovered by the alliance Castile-Aragon, and Europeans started dealing with different peoples that were called Indians or Barbarians¹⁷. It is a very important issue that when Columbus arrived to America –thinking he had arrived to the Indies– his expedition was not only on behalf of Castile-Aragon but also on the Pope’s name. It was understood that all the land in the world was God’s creation and that it should be ruled by God’s representative on earth, i.e. the Pope. Therefore, the Pope Alexander VI subscribed a Papal Bull in which he conceded Castile-Aragon the right to conquer, in the name of God, some of the territories ‘discovered’ by Columbus. According to the bull, the Pope recognized that he had power over every land on earth and that it was discretionary for him to give any right over the land to anyone he pleased. In that sense, the Papal Bull of 1493 stated the following:

“Being authorized by the privilege of the Apostolical grace, you may the more freely and boldly take upon you the enterprise of so great matter, we of our own motion, and not either at your request or at the instant petition of any other person, but of our own mere liberality and certain science, and by the fullness of Apostolical power, do give, grant, and assign to you, your heirs and successors, all the main lands and islands found or to be found, discovered or to be discovered, toward the west and south, drawing a line from the Arctic pole to the Antarctic pole, that is, from north to the south”¹⁸.

Thus the Pope had the *apostolical power* to give rights over the land discovered by Castile-Aragon to monarchs that were truly Christians according to the Pope. However, granting the territories was not an act of mere liberality as this abstract of the bull seems

17 Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, CUP, Cambridge, 2004, p. 13.

18 The Inter Caetera Papal Bull of May 4, 1493. See at <http://www.reformation.org/bull-of-borgia.html>

to assert. In exchange, the Pope demanded that the peoples that inhabited the newly discovered territories should be “brought to the embracing of the Catholic faith and to be imbued with good manners” so he assumed that “if they be well instructed, they may easily be induced to receive the name of our Savior Jesus Christ”¹⁹. There was no liberality in this *Inter Caetera* Bull, for the Pope was conceding some rights to Castile-Aragon under the condition that the new territories were catholicized by the conquerors.

If it is asserted that international law’s seminal documents are the ones issued by Vitoria about the relations between the Spanish and the Indians²⁰, then it could be affirmed that the foundations of international law are rooted in a modern project, in the sense that its purpose is the expansion of the sovereign’s will (the Pope’s) in order to make peoples in his realms legally bound by provisions issued by him. The purpose of modern law is to impose a duty of obedience to the sovereign’s will under the idea that there is no part of the territory where it cannot be applied, nor any part of the population that is not outside of the realms of the law of the sovereign. The Bull, therefore, ordered the application of law to the newly discovered territories, and the law in this case was one based in Catholicism. The project of modern law suited perfectly the colonial desires; its purpose is the gapless and permanent imposition of a sovereign’s will to a particular territory. In this sense it can be understood the colonial foundations of international law, meaning that in the problem of how to apply the will of the sovereign to peoples and territories that were, probably, outside of its imagined realm the discipline started to be shaped.

Bearing in mind what has just been said, Vitoria’s argument to make European law, and not only the Pope’s will– legally binding for the Indians was an argument that, apparently, untied the validity of it from religious foundations and bonded it with reason. For Vitoria, there was a universal law that should be followed by every human being for it was inspired in rationality; any human being was bound

19 Id.

20 Supra, note 18.

to act within some particular parameters of universal rational law (*jus gentium*), so the point was to determine whether the Indians were human beings that could use reasons to identify the valid legal norms for them. This universal rational law was seen by Vitoria as the principal source of international law²¹. At this point it could be said that this argument drawn by Vitoria shatters the idea of law as merely the will of the sovereign; however it could also be read as a way in which the sovereign evaded any sort of accountability for his actions since he was only doing what rationality ordered. It was a way to dilute his personal responsibility by attributing it to an abstract entity called reason. Also, it was interesting how Vitoria's argument had no distinct consequence for the Indians since evangelization was not under discussion; what was implicit now in his thesis was that the evangelization was not a mere order from the Pope but also a command from rationality.

Therefore, Vitoria carried on his reflections about just war saying that Indians were human beings that possessed reason; in consequence, Indians had the ability to distinguish a lawful act from an illegal one. If the Indian carried on acting illegally, i.e. against reason, then the conqueror had the right, by any means even war, to re-convert the Indigenous to rationality²². The Indians were uncivilized and in some cases legends of cannibalism were used to picture the savagism attributed to them by the conquerors²³. Further on, the Indian and the territories inhabited by them were seen as lawless lands before the colonial encounter; the presence of the conqueror was necessary to civilize the peoples and the territories, and to drive them again towards the rational *jus gentium* (or international law). The colonial encounter made it possible for international law to develop as a legal system that appeared to be beyond the will of a particular sovereign, but by the fiction of rationality it was more oppressive for the peoples of the Americas. Since the Indians were uncivilized, until their civilization (through

21 Anghie (2004), p. 20.

22 Id., p. 23.

23 Joseph Fontana, *Europa ante el espejo*, Crítica, Barcelona, 2000, pp. 107-108.

evangelization) was ensured by the conqueror, there were not able to be sovereigns (thus subjectes) in the realm of international law; if this was a system based in reason, it was impossible to admit in it sovereigns and peoples that were rational but acted in an irrational way²⁴. It is not strange that in this encounter the population of the New World was divided into two broad kinds of population: the “Indians”, that were the original inhabitants of the lands and the category was used to name all of them regardless their differences; in the other hand, there were the original conquerors and their heirs, as well as some Spaniards that came afterwards to America, which were called “peoples of reason” (*gentes de razón*)²⁵. The colonial encounter characteristically divides the society between “them and us” and this is accomplished thanks to a vision of modern law, which was pushed by international law in which the way by which the application of a gapless law is possible is by excluding the different. The different (them) is a part of the law by ways of the exclusion.

It may be argued that this could have been true in the early days of international law when the colony was a reality, but as of the twentieth century, the discipline involves a totally different dynamic. In furtherance, United Nations covenants as the ICCPR guarantee the right to self determination in article 1 (1) by stating that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

However, the ICCPR contains another provision that can be understood in an open contradiction with the right to self determination; that is the states of emergency. States of emergency in the ICCPR²⁶ is the recognition of the possibility that a State

24 Anghie (2004), p. 54.

25 Eric Wolf, *Europa y la gente sin historia*, FCE, México, 2005, p. 165.

26 It must be noted that status of emergency is not an exception in the ICCPR. It must be said that it is almost a common rule that international human rights covenants expressly rule the possibility declaring a state of emergency in which some fundamental rights are suspended. See, for instance, article XXX of the European Convention of Human Rights and article XXX of the American Convention of Human Rights. However, the African Charter has no express mention to this possibility.

has to suspend fundamental rights by the declaration of a state of emergency. The provision that rules this figure states the following in article 4 (1):

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

This possibility of emergency or exceptionalism is the tool by which the totalitarian project of modern law is still possible through international law. In the next section I will argue that the state of emergency is the way by which particular Nation States deal with colonial encounters inside their territories, just as the Spaniards did in the sixteenth century.

III. STATES OF EMERGENCY AND COLONIALISM

The fact that states of emergency have a very close relationship with colonial rule is not a new statement. Indeed, Rajagopal²⁷ has argued that article 4 of the ICCPR was proposed by the United Kingdom in the drafting process of the treaty with the purpose of suspending civil liberties in cases of mutinies and popular uprisings, which were common by the mid twentieth century in British colonies. The article, thus, was a way by which the nationalist liberation movements in the colonies were controlled in order to erase the more radical ones and promote the moderate ones. The British and Europeans in general, argued that radical movements could be a return to the savage and primitive past of the colonies that were already civilized by white men's intervention²⁸. Therefore, the doctrine of emergency was a means to a particular end: perpetuate

27 Balakrishnan Rajagopal, *El derecho internacional desde abajo*, ILSA, Bogotá, 2004.

28 *Ibidem*, p. 212.

colonial rule with the excuse of the necessary control of law and order. Colonizers, then, had the authority to out rule any anti colonialist movement that could rise, by establishing that they were obnoxious for the existence of civilization. Therefore, primitive as these radical movements could be, no rule of law was to be applied in controlling these savage uprisings, apparently generating a gap in law's application²⁹.

This birth of the doctrine of emergency in the Human Rights' system puts forward two main problems that are going to be addressed in this section. The first idea to be discussed is the one that argues that exceptionalism (or states of emergency) is a gap of law in which legal rules are not applied. If this were to be true, then exceptionalism is the crack of modern law which, as it was shown above, had the purpose of applying the will of the sovereign in a consistent fashion in every part of the territory under his or her jurisdiction. The second point which can be discussed is the relationship between exceptionalism and colonial rule since, as it is argued by Rajagopal, the doctrine of emergency is understood as an appropriate tool used by the colonizer to control population's discontent. Thus, as soon as the colonial rule is over, the doctrine of emergency loses its meaning.

In order to analyze this two highlighted ideas, the section will be divided into two separate parts. In the first one it will be argued that exception is not the crack of modern law, but rather, one of the way by which the project of modernity is fulfilled. In the second part, it will be shown how exceptionalism certainly continues to be a common trend in politics and it will be as long as the colonial encounter is not over³⁰. In the present, the colonial encounter has merely transformed making it impossible for exceptionalism to disappear from modern law; as long as the colonial encounter continues to exist, exceptionalism continues to be one of the ways by which the project of modern law is enshrined.

29 Ibidem, p. 214.

30 For an explanation of the term of colonialism, see also section B of Part III of this article.

A. EXCEPTIONALISM AND THE PROJECT OF MODERN LAW

States of emergency is the name by which international law recognizes the possibility of declaring a state of exception. In recent times, some have seen that the abuse of this instrument has been one of the causes that explain why some societies have not been able to achieve social justice³¹. Therefore, the argument goes, state of exception should not be a tool of easy use by the executive but a mechanism controlled by the judiciary, in order to be used under strict scrutiny of the latter so that the exception does not turn to be the rule³². Under this analysis, the problem is not exceptionalism as a particular structure, but the arbitrary use of it; the State has to have a tool in order to defend itself from extraordinary situations and its particular attribution is the suspension of some guarantees.

The idea that exceptionalism should be an extraordinary tool only to be used in times when the situation *really* is a threat to the existence of the State, as well as the view that the rights limited in these times of emergency should be limited to the minimum extent, is shared by General Comment No. 29 of Article 4 of the ICCPR adopted in 2001. In terms of the General Comment N. 29,

“A fundamental requirement for any measures derogating from the covenant, as set forth in article 4 paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of this situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restriction or limitations allowed even in normal times under several provisions of the Covenant”³³.

In this quote, it is clear how the United Nations have tried to restrict the measures of derogations establishing a difference

31 Gabriel L. Negretto & José Antonio Aguilar-Rivera, “Liberalism and emergency powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship”, in 21 *Cardozo Law Review* 1797, 2000.

32 García & Uprimny (2006), p. 565.

33 CCPR/C/21/Rev. 1/ Add. 11, 31 August 2001, para. 4.

between restrictions of some rights and the limitation which proceed in normal times. Therefore, it is understood under international law that the realm of exceptionalism only appears when there is a formal declaration of a state of emergency, while other situations are merely restrictions or limitations but not exceptions of the legal order. This formalistic view appears to be a very restricted one, since it can be argued that as long as international instruments continue to limit in this way states of emergency, States will not declare the exceptional situation, but rather show breaches of rights as a “limitation of them”. Therefore, limitation is also a use of exceptionalism in the sense that there is no full commitment to the protection of an ethical minimum represented by rights, making it possible for the sovereign to make non-declared exceptions in different cases for particular rights.

For instance, a particular right that can be limited is liberty of movement. According to article 12 of the ICCPR everyone lawfully within the territory of a State shall have the liberty to move inside the territory, *subject to restrictions necessary to protect national security and public order*. There are some important limitations in this right that can be understood as an exception to the broad idea of liberty of movement. First, the idea of protection of this right only if a person moves lawfully; this has put refugees and illegal immigrants in a very difficult situation in the countries in which they are received. The first ones have to put up with administrative requirements of the ‘receiving’ country and in some places it is the will of a public official the one that determines whether a person is to be recognized as a refugee, and as a consequence, can have his or her rights³⁴ recognized in that particular country³⁴. Refugees are an example of persons that personify the idea of exception, in the sense that the gapless system of legal provisions is not applied to a particular human being, but rather suspended in order to deal with him or her. In this sense, some recent debates of exceptionalism have stated that,

34 In Colombia, article 13 of the Decree 2450 of 2002 states that the recognition of the refugee condition is a discretionary decision by the Foreign Affairs Ministry.

“Modern totalitarianism can be defined, in this sense, as the instauration, by means of the state of exception, of a legal civil war, which permits the physical elimination not only of political opposition, but of broad categories of citizens that, for any reason, cannot be integrated to the political system. Thereafter, the deliberate creation of a permanent state of exception (even though not declared in a technical way) has turned to be one of the essential practices of contemporary States, including the self-called democratic”³⁵.

This idea is useful for the purposes of this article since it argues that in recent times states of exception have become a common trend in Western legal politics and they are not necessarily declared. It is a way by which the legal order and guarantees are not applied to people that cannot be integrated to the system; exception is a way to maintain the differences between different kinds of citizenship that cover two opposite extremes: one when full citizenship with all rights and guarantees to be enjoyed, and the other one is the idea of a void citizenship in which the person holds no possible right at all; the latter is what has been called the bare life³⁶ in which not even the right to life can be spared. Thus the ICCPR has been a coherent legal frame with the idea of limitations and derogations of rights –or ethical minimums– which have had the result of erasing from the phase of the earth, both legally and physically, large groups of population. The way in which states of exception are not anymore a formal declaration but a particular suspension of rights is the case not only of refugees, but also of enemy combatants, prisoners of war, kidnapped persons in armed conflict, among others.

If the last ideas are correct, then, producing a gap in the application of law is not a defeat of modern law’s project, since, even though a gap is produced in the application of law, it is produced by the will of the sovereign and not by the nature of legal order. There is always a decision to put someone or some territory in a state of exception, whether declaring it or just taking decisions that have the same practical effect as if it was formally declared. Thus the gap is

35 Giorgio Agamben, *Estado de excepción, Homo Sacer II,1*, Pre-textos, Valencia, 2004, p. 11 (free translation).

36 Giorgio Agamben, *Homo Sacer. El poder soberano y la nuda vida*, Pre-textos, Valencia, 1998.

produced by the sovereign, although it has a very particular entity. It has been argued that the state of exception does not represent the inexistence of the legal rule; the latter exists although it is not applied directly, but suspended. That is why it is not to be said that the legal rule does not exist where and when the exception appears; the legal rule exists in the place and in the time of the exception but the decision of the sovereign is the non-application of it³⁷. In terms that can be clearer, it has been said that,

“It would be an error to consider the state of emergency as categorically outside the rule of law. After all, even in legal systems with a constitutional provision for the exception, such as the German case of *Notrecht*, we should not move too quickly over the peculiar way in which law contemplates and provides for its own failure. Indeed, whether one considers the word *emergency* and the way it contains within itself the interior sense of the emergent or one considers the exception (*ex capare* [taken outside]) that attempts to spatialize the situation of danger as outside the rule, there is always a question of relation”³⁸.

It could be shown that the gap is created by the sovereign’s will and the way by which the same gap is filled is by a decisional moment of the same sovereign, leaving no place or time with the absence of law as we defined above, i.e. the will of a sovereign. There is no gap in the existence of states of emergency or exception, but rather the permanent possibility for the sovereign to express a particular will that helps to deal with the integration of people whom apparently are in contradiction with a political system. It is a way of reaffirming sovereignty under the idea that no land or peoples can be outside the realm of law as the will of the sovereign. The resemblance with the colonial project is striking.

37 Agamben (2004), pp. 55-62.

38 Nasser Hussain, *The Jurisprudence of Emergency. Colonialism and the Rule of Law*, The University of Michigan Press, 2006, p. 20.

B. THE PERSISTENCE OF THE COLONIAL ENCOUNTER

In a broad sense, colonialism can be defined as “the conquest and control of other people’s lands and goods”³⁹. The experience of colonialism has not been of a particularly localized kind; most of the world has endured diverse phases of this phenomenon since it occurs in different modes and at different times⁴⁰. Since it has been present in different eras of world’s history it has also been formed by dissimilar processes depending the time and geographical location one chooses to analyze; recent scholarship has centered its view especially in the colonial process that started in the seventeenth century by England, France, and Germany on Southern and Eastern territories, making the expression *Orientalism* a wide accepted term in Postcolonial studies⁴¹. The common trends by which seventeenth century colonialism has been analyzed, as well as the analysis about the earlier one that started in the sixteenth century in Spanish America, have shown that colonialism is narrowly bond to a regime in which the political and legal bureaucracy designed by a metropolis is established abroad in a colonial territory. This can be an explanation why in some Latin America’s recent debates about an agenda for critical studies. some academics state that in order to understand this part of the world’s legal field it is important to establish its origin in the nineteenth century when the independence process began in many of the countries of the region, and the colonial legal field had a crisis⁴².

Even though this last view is an important effort for trying to identify what is law for Latin America, the problem that can be found in it is that it identifies the formation of Latin American legal consciousness with the end of the colonial regime, without being

39 Ania Loomba, *Colonialism/Postcolonialism*, Routledge, New York, 2005, p. 8.

40 Ibidem, p. 23.

41 Cfr. Edward Said, *Orientalismo*, DeBolsillo, Madrid, 2004.

42 Mauricio García Villegas & César A. Rodríguez, “Derecho y sociedad en América Latina: propuesta para la consolidación de los estudios jurídicos críticos”, in Mauricio García Villegas & César A. Rodríguez (eds.), *Derecho y Sociedad en América Latina: un debate sobre los estudios jurídicos críticos*, ILSA, Bogotá, 2003, pp. 28-30.

aware that the end of colonial dynamics and colonial encounter is not a clear consequence of the overthrowing of Spanish rulers. The dynamic of colonialism, that is, the permanent construction of politics and law under the basis of the distinction between “us and them”, and in the case of Spanish colony based on the premise of ancestors and pureness of blood, was not abolished by the newly independent regimes. The idea of a complete crack between colonialism and the new republics was an idea especially sponsored by *criollo* elites –heirs of Spanish but born in America– that controlled the government. This can be proved by the fact that in the times of independence in some countries of South America, public officials carefully marked a clear breakpoint in the history that can be told with official documents: 1810 is a breakpoint year in the sense that official documents before that year are alleged to be “colonial”, whilst from that date on are “republican”⁴³. This formal evidences show that the word colonial was erased from official discourses, but the dynamic in which the differences were established by *criollos* and the rest of the population were still carried on in a colonial fashion. For instance, it has been shown how, even in the beginning of the twentieth century, central elites from Bogota saw a clear difference between the people who inhabited the center of the country and those who were living in coastal areas. The former were seen as the civilized population while the latter were the primitives and savage ones, who could only be cultured eliminating the “black” element of their peoples; this was to be achieved, according to nineteenth century Colombian intellectuals, with the migration of white Europeans that could culture these primitive territories. This was especially the case of Panama which was always despised by Colombian elites and seen as a territory

43 It is to be noted that in a research of official files in the times of independence in the Americas, there is a clear division between the colonial rule, ended in 1810 approximately, and the beginning of a republic beginning from that year on. This shows how the ones who directed the independence project pretended to establish a clear breakpoint between the monarchy and the republican regime. Cfr. Annick Lempérière, “Revolución y Estado en América Hispánica (1808-1825)”, in María Teresa Calderón & Clément Thibaud (eds.), *Las revoluciones en el Mundo Atlántico*, Taurus, Bogotá, 2006, pp. 55-77.

inhabited by savages; that is why negotiations with the French and the United States ended in the building of the inter-oceanic channel and the independence of Panama in 1903⁴⁴.

Therefore, this shows that the end of colonial regime is not the end of colonial dynamics in the sense that the project of civilizing primitive communities has been common in some parts of South America as in the Colombian case. That is why it is argued that,

“The newly independent state makes the fruits of liberation only selectively and unevenly: the dismantling of colonial rule did not automatically bring about changes for the better in the status of women, the working class or the peasantry in most colonized countries. ‘Colonialism’ is not just something that happens from outside a country or a people, not just something that operates with collusion of forces inside, but a version of it can be duplicated from within”⁴⁵.

The colonial encounter is not over once independence is granted for the new regime, since it merely involves the recognition of a new sovereign which, in the realm of modern law, also wish to apply his rules in a gapless way to the territory. The ones who gain power after independence entail themselves in this colonial dynamic getting engaged in a process of inclusion and exclusion; it can be sustained that what happens in Latin American independence is the substitution of the ruling ‘class’, which after the independence decides to carry on the civilizing project that was engaged before by the Spanish, in those territories and peoples reputed as primitive.

According to Vitoria, as it was shown in the third section, the primitive should be civilized by evangelization, and if they resisted, then it was possible to endure war against them⁴⁶. The question that arises is if those primitive peoples are inside the legal order or rather they are put outside of it, making it possible for the colonizer to breach their guarantees and rights. The latter are issued to be applied in peace time, or to put in other terms, in times of normality; therefore if a territory containing some population is put under

44 Alfonso Múnera, *Fronteras imaginadas*, Planeta, Bogotá, 2005, pp. 89-128.

45 Loomba (2005), p. 16.

46 See supra, note 23.

exception or emergency, we will have to sustain that they are people outside the legal order, even outside universal international law. As we argued above, the peoples are put outside the legal order by a legal decision, which leads us to assert that the exclusion of “primitive peoples” is common to the project of modern law; exclusion is the way of including in a violent way.

A recent example can illustrate the point. In 2002, a state of exception was declared in Colombia with the approval of the Constitutional Court, providing that the executive needed extraordinary means in order to attack the guerrillas and criminal organizations that operated countryside. It should not be underestimated that the declaration of this state of exception was carried out with all the legal requirements drawn by the prior holdings of the Constitutional Court and with the formal exigencies drawn, among others, by the ICCPR. What is interest about this declaration is the fact that, using the attributions conferred upon him by the declaration of a state of exception, the President declared as “Rehabilitation Zones” two parts of the Colombian territory. One of them, where human rights violations were committed was Arauca. Arauca is a department in the eastern part of Colombian territory which traditionally has been identified as a place where the armed conflict has been fought; this territories were considered, until 1991, of second class in the sense that they were not called departments as the major portions of the territory, but *intendencias*, understanding by them territories that were not fully developed in order to be sustainable without active intervention of the central State. The point of bringing up this issue is not to question the political correctness of this measure; it is merely to show this case as a way by which exceptionalism is closely tied with colonial encounters inside independent nation-states. The reasons why “Rehabilitation Zones” were necessary are found in Decree 2002 of 2002 and their bonds with colonial dynamics are evident. The decree stated that,

“There are special areas of the Country particularly affected by the actions of criminal organizations, making it necessary to name those areas as

“Rehabilitation and Consolidation Zones”, aiming to apply to them the specific measures in order to end the causes of the perturbation of public order and hinder the extension of its effects”.

Notice how the concern of the government was the extension of the effects of the crisis to other parts of the Colombian territory. It could be read that for the colonialist it is unbearable that the project of primitive peoples ends up defeating the civilizing mission of the colonizer; thus this example shows how exceptional measures can justify not only the civilization project, but also the means to avoid the extension of what is called primitive. I must emphasize that this is not a judgment of the measure as convenient or not, but rather an analysis of the persistence of the colonial language to justify the exclusion of a territory and the peoples from the legal order.

For Amnesty International, the measures taken in Arauca were clear violations of Human Rights and thus accused the Colombian government as treating this territory as a ‘war laboratory’ violating fundamental human rights; Amnesty International argued that it was necessary for the Colombian government to respect human rights in Arauca and to fulfill the requirements of the rule of law in Colombia establishing a clear policy about the protection of Human Rights coherent with the requirements of the UN⁴⁷. However it is striking that the promise of the government when the state of exception was declared and Zones of Rehabilitation were formed, was that this measures were necessary in order to fulfill the obligations of the protection of human rights. As a matter of fact, Decree 1837 of 2002, which declared the state of exception in the Colombian territory, stated that it was necessary to do so because,

47 Amnesty International stresses the fact that illegal and massive captures were carried on in the basis of the declaration of Arauca as a rehabilitation Zone. Most of the people captured had to be freed after no charge was found against them, but paramilitary groups understood that the captured persons were sympathetic to guerrilla groups and ended up killing them in strange circumstances. See, Amnesty International, Colombia un laboratorio de guerra: Represión y violencia en Arauca, available at <http://web.amnesty.org/library/index/eslamr230042004>

“The President is in charge of leading the necessary actions on behalf of public authorities against these savage forms of pressure against the Colombian society, reestablishing the public order, guaranteeing the premises of the Social State and the rule of law, and struggling to reaffirm the essential principles of respect of human rights and International Humanitarian Law”⁴⁸.

Both of the arguments, for and against the exceptional measures, were justified by the idea of protecting human rights. Thus human rights arguments, as heirs of modern international law, proved themselves as not sufficiently strong reasons in order to avoid their violation; this certainly is what some authors have shown as the inadequacy of the vocabulary of human rights to carry on human emancipation⁴⁹ or what can be noted as the indeterminacy of rights adjudication, stressing that rights can be used in different ways in order to achieve, in some times, completely opposite results⁵⁰. That can be the case if it is considered that Human Rights Law is not only an emancipating vocabulary for social movements and different subjects, but also roots its very origins in International Law; international law is a project that uses exceptionalism in order to draw a limit where an opposition to the colonial dynamics is unbearable for the sovereign (colonizer).

CONCLUDING REMARKS

This article has been an effort to connect literature about the colonial origins of modern international law to exceptional measures used in order to control uprisings and movements within a territory. It has shown, predominantly, the idea that since the colonial order has not disappeared, exceptionalism has been the

48 Decree 1837 of 2002, available at <http://www.armada.mil.co/index.php?idcategoria=244#>

49 David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism*, Princeton University Press, Princeton, 2004.

50 Duncan Kennedy, “The critique of rights in Critical Legal Studies”, in Brown, Wendy & Janet Halley (eds.), *Left Legalism/Left Critique*, Duke University Press, Durham, 2002, pp. 178-227.

place where this dynamic of serfdom is reproduced in our present times. Bearing in mind that modern states have in their domestic legislations the possibility of declaring states of exception, as well as the attribution that in the UN system the ICCPR gives to States to derogate and restrict some rights, the present structure of law has created a gap from where it deals with the colonial dynamic. This gap is not an involuntary one, but rather a decided one by the sovereign and the legal order as a whole. It is important to stress, as well, that colonial dynamics does not necessarily finish when a State declares its formal independence, since it is possible that the only thing to change is the subjects at the ends of the colonial relationship.

What has been shown in this article is that, since modern law has had a strong root in colonialism, and therefore carries on the idea of exceptionalism through the figure of states of emergency, the project of full rights' guarantees is still an incomplete one. Stated more radically, the question is if the project of the fulfillment of human rights, in the terms of modern international law, is a colonial enterprise that is fully developed when exception is declared. However, before being sure of this last assertion, it should be questioned how exception has particularly worked in different parts of the world; further research in this direction is needed.

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