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LIBERALISM AND EMERGENCY POWERS IN LATIN AMERICA. REFLECTIONS ON CARL SCHMIT AND THE THEORY OF CONSTITUTIONAL DICTATORSHIP

Introducción

Liberalism and Emergency Powers in Latin America

Reflections on Carl Schmitt and the theory of Constitutional Dictatorship

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Resumen

El presente trabajo analiza diferentes factores ideológicos e institucionales involucrados en el diseño e instrumentación de poderes de emergencia. De acuerdo con Carl Schmitt, argumentamos que la teoría liberal carece de una adecuada apreciación del problema de las emergencias en la vida política. La experiencia de la primeras constituciones de Latinoamérica corroboran dicha afirmación. La ideología liberal de los primeros constitucionalistas de América Latina, los llevó a rechazar la idea de un gobierno constitucional de emergencia. Sin embargo, bajo la presión de intermitentes conflictos políticos, los poderes de emergencia fueron adoptados tardíamente sin un modelo válido que guiara su diseño: los presidentes fueron investidos con la capacidad de actuar y decidir durante las emergencias sin suficientes límites constitucionales. Este diseño, sugerimos, fue vulnerable al abuso y la usurpación. Con base en la experiencia histórica de la República de Weimar, analizamos la contribución que Schmitt mismo hizo al entendimiento del funcionamiento de poderes de emergencia en una constitución. Argumentamos que su interpretación de la dictadura constitucional como una comisión de acción ilimitada, junto con su visión del presidente como único defensor de la constitución, conlleva numerosos riesgos en sistemas donde tanto por sus poderes institucionales como por su forma de elección, los presidentes pueden reclamar por sí un monopolio de poder frente a una situación de emergencia. Concluimos con algunas propuestas normativas sobre el diseño de los poderes de emergencia en una democracia constitucional.

Abstract

This paper analyzes different ideological and institutional factors involved in the design and implementation of emergency provisions. In agreement with Carl Schmitt, we argue that liberal theory lacks an adequate understanding of the problem of emergencies in political life. The experience of early Latin American constitutions tests this assertion. The liberal ideology of early constitution-makers in Latin America led them to reject the idea of constitutional emergency rule. Under the pressure of intermittent political conflicts, however, emergency.provisions were later adopted without a valid model to guide the task of design: presidents were invested with the capacity to decide and act on emergencies with few constitutional constraints. This design, we suggest, has been vulnerable to abuse and usurpation. Using the comparative experience of the Weimar Republic with emergency powers, we analyze Schmitt's own contribution to the problem of constitutional emergency

rule. We argue that his interpretation of constitutional dictatorship as an unconditional commission of action along with his view of the president as the sole defender of the constitution entails several risks in systems where both by their institutional powers and mode of election, presidents can claim a monopoly of power in emergency situations. We conclude with some normative proposals about the design of emergency powers in constitutional democracies.

> The practice of the freest nation that ever existed induces me to think that there are cases in which a veil should be drawn for a while over liberty, as it was costumary to cover the statues of the gods.
> Montesquieu, *Spirit of the Laws*, Book XII, Chapter. 19.

Introduction

The ongoing process of democratization in Latin America has made scholars acutely aware of the impact of certain institutional designs on political stability. What constitutional arrangements are likely to foster or hinder democratic rule? Some of the long established political traditions of these countries are now being called into question. Some observers, for instance, claim that the presidential scheme that prevails in all Latin American countries is an obstacle to democratic stability. For some others, the long history of authoritarianism has left its entrenched legacy in Latin American constitutions. One of these legacies seems to be the maintenance of broad emergency provisions that all too often provided legal basis to the construction of dictatorial regimes in moments of exception.

In this paper, we analyze the ideological and institutional factors that may lead to a defective design and implementation of emergency provisions. We argue, following Carl Schmitt, that liberalism —the political theory that informed Spanish American constitution-makers—traditionally lacked an adequate theoretical framework to address the problem of emergencies in political life. Following the model of European and Anglo-American liberalism, Latin American constitution-makers initially rejected the necessity or convenience of discretionary powers to deal with emergency situations. However, under the intermittent occurrence of internal conflict, the absence of emergency provisions left authorities with no choice but to act against the constitution they were supposed to defend. Emergency provisions were later included in most constitutions. But in the absence of a valid model, an improper design led to abuse and usurpation. Presidents were usually invested with the capacity to declare emergencies or determine the extension of their own

emergency powers with few checks from other branches and no temporal restrictions.

Although a critic of the liberal rejection of discretionary powers and advocate of the republican tradition of emergency government, we argue that Schmitt's own view on the problem of emergency does not really solve the deficiencies of liberal theory. His contribution to the debate surrounding the application and interpretation of article 48 of the Weimar constitution is highly illustrative in this respect. We will focus on two aspects of this debate: the type of institutional checks placed upon the use of emergency powers by the President and the role of the President within the structure of the Weimar constitution. We argue that Schmitt's interpretation of constitutional dictatorship as an unlimited commission of action along with his view of the President as the sole defender of the constitution validated the practice of emergency powers that in the end subverted the meaning and purpose of the Weimar constitution.

This essay is divided into three sections. Section **I** presents an assessment of the liberal view on emergencies, particularly that of Benjamin Constant, the most influential political theorist in early nineteenth-century Spanish America. Section **II** analyzes the impact of the liberal rejection of emergency powers on the making of the first Spanish American constitutions, and the reasons that later led to an ill-advised design of emergency powers. Section **III** and **IV** discuss two aspects of Schmitt's theory of emergency rule that have direct relevance for the discussion of emergency powers in Latin America: the theory of commissarial dictatorship and the theory of the President as the guardian of the constitution. We finally conclude by assessing the lessons of the Weimar experience.

I. Liberalism and emergency powers

According to Carl Schmitt, it has been a typical trait of liberal thinking to ignore the problem of emergency.[1] This criticism, perhaps, is not valid against John Locke, who recognized in the prerrogative of the King the possibility of dealing with the exception "without the prescription of the Law, and sometimes even against it".[2] Schmitt's criticism, however, is on the mark when directed against the mainstream of liberal-constitutional theory since the XVIII century. Starting with Montesquieu, liberal theory rejected Locke's idea of discretionary power as well as the convenience of general constitutional provisions to deal with emergencies by

[1] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty,* Cambridge, MIT Press, 1985, p.14.

[2] John Locke, *Two Treatises of Government,* Cambridge, Cambridge University Press, 1993, Second Treatise, Chap. XIV, section 160. On the interpretation of Locke's doctrine of the prerrogative as an original theory of the exception that stands in between absolutist decisionism and liberal rationalism, see Pasquale Pasquino's "Locke on King's Prerrogative", in Political Theory, Vol. 26, No. 2, April 1998, pp. 198-208.

extraordinary means. From this perspective, only the rule by standing universal laws could be accepted as a standard of legitimate government.

Against the view of republican thinkers such as Machiavelli or Rousseau, Montesquieu saw in the precedent of the Roman dictatorship a door open to arbitrary power, an instrument of abuse rather than an exceptional mechanism to rescue republican institutions in moments of danger.[3] The Roman dictatorship implied only a temporary suspension of normal procedures and was based on a division of authority between the organ that declares the emergency (the senate) and the one which appoints the dictator (the consulate). Montesquieu, however, could not help to see in the late dictatorships of Sulla and Caesar the inevitable destiny of this institution.[4] It is for this reason that he only accepted as safe for public liberties the temporal suspension of the *writ of habeas corpus* in cases of emergency.[5] This was the institution that prevailed in liberal countries like Great Britain and was later adopted by the American framers in 1787. It is significant, however, to recall Montesquieu's odd line where he seems to recognize —almost as an afterthought— that under certain circumstances a veil should be cast over liberty as it was done in Rome with the statues of the gods.

During the nineteenth century, the rejection of emergency provisions became closely associated to the work of Benjamin Constant. The French Revolution produced among liberals a deep distrust of political power, particularly of unlimited political power. Constant always thought that one of the most dangerous maxims ever coined was that ancient one, *Salus populi suprema lex esto.*[6] The logic underpinning this distrust was that, "the constitutional powers existing only under the constitution cannot suspend it. [...] every time constitutions have been violated it is not the constitutions that are saved but the governments".[7]

In Constant's work, the rejection of emergency powers was based on what might be called the theory of "self-defeating dictatorships". Constant rejected the view of a "dualistic" mode of operation of the constitution, that is, the separation between constitutional provisions for normal and extraordinary circumstances. Constant contended that there was one and only one mode of operation. No right warranted by the constitution to the individuals could be legally suspended for any length of time. Constant criticized extraordinary measures as myopic, short-term responses, to political upheaval. Eventually, Constant asserted, these actions would only make things worse than they were.

[3] For Machiavelli and Rousseau's view on dictatorship see Niccolo Machiavelli, *Discourses on Livy,* New York, Penguin Press, 1983, Book I, Chapter 34 and, Jean Jacques Rousseau, *On the Social Contract,* New York, St. Martin Press, 1978, Book IV, Chapter 6.

[4] See his *Considérations sur les causes de la grandeur des Romaines et leur décadence.*

[5] *The Spirit of the Laws*, Book XI, Chapter 6.

[6] Guy H. Dodge, Benjamin *Constant's Philosophy of Liberalism. A Study in Politics and Religion,* Chapel Hill, The University of North Carolina Press, 1980, 103.

[7] Benjamin Constant, "De la suspension et de la violation des constitutions" in *Réflexions sur les constitutions, la distribution des pouvoirs et les garanties dans une monarchie constitutionelle*, 1814, quoted by Dodge, Benjamin Constant's, 102.

According to Constant, no coup d'état had ever preserved a people or a family from ruin: "the execution of the accomplices of Catiline without a judgment was the coup d'état of Cicero, who saw the fall of the republic which he wanted to save".[8] It is easy, Constant asserted, in the midst of a political crisis, to "talk about the usefulness of illegal measures and of extra-judicial expedition which, by leaving no time for the seditious to rally, reestablishes order and maintains peace". Because this temptation existed, the classical examples had to be revisited:

> The Gracchi, we are told, put the Roman republic in jeopardy. All legal procedures were impotent against them. The Senate resorted twice to the terrible law of necessity and the republic was saved! That is to say: it is from that time that we can date its fall. All rights were disregarded, every form of constitution subverted. The people had merely demanded equal rights: it swore to punish the murderers of its defenders, and the ferocious Marius came to preside over its revenge.[9]

In *The Spirit of Conquest and Usurpation and their Relation to European Civilization*, Constant states that when governments employ emergency provisions to prevent a conspiracy from breaking out,

> the evil which has been postponed for a few hours returns more terrible, aggravated by the evil which has now been committed. There are no justifications for those means that serve equally for all intentions and all aims and that advocated by honest men against brigands, reappear in the mouths of brigands with the authority of honest men, with the same apology of necessity, the same pretext of public safety.[10]

The idea that the delayed consequences of emergency measures only aggravate the initial conditions of crisis is central to Constant's fatalistic theory of self-defeating dictatorships. On numerous occasions he insisted on this "perversity effect" of emergency measures:

[8] Benjamin Constant, "Coups d'état", Le Temps, 1830, cited by Dodge, p. 102.

[9] Benjamin Constant, *The Spirit of Conquest and Usurpation and their relation to European Civilization*, in Benjamin Constant. Political Writings, edited by Biancamaria Fontana, Cambridge, Cambridge University Press, 1993. p. 133.

[10] Benjamin Constant, *The Spirit of...* p. 137. "During crises of this nature", Constant elaborates, "the culprits who are punished are always a small number. Others remain silent, conceal themselves, and wait. They take advantage of the indignation that violence has aroused in men's spirits. They take advantage of the consternation that the appearance of injustice arouses in the minds of men of scruples. Power, by emancipating itself from the laws, has lost its distinctive character and its happy pre-eminence. When the factions attack it, with weapons like its own, the mass of the citizens may be divided, since it seems to them that they only have a choice between two factions. We will be challenged by citing the interest of the state, the danger of tardy procedures, public safety. Have we not heard these expressions often enough under the most execrable of regimes? Will they never be exhausted? If you admit these imposing pretexts, these specious words, every party will identify the interest of the state with the destruction of its enemies, see the dangers of delay in an hour's work of inquiry, and public safety in a condemnation pronounced without judgment and without proofs". *Ibid.* p. 136.

> Liberty, they argued, had to be postponed until factions died down; but factions only die down when liberty is no longer postponed. Violent measures, adopted dictatorially in advance of a public spirit, prevent that spirit from coming into being. It is a vicious circle.[11]

This argument bears some similarity with the Tocquevillian idea that the evils of democracy can only be cured by more democracy.[12] Constant explicitly acknowledged the existence of emergencies. His quarrel, however, was with the *responses* that governments gave to these events:

> There are, no doubt, for political societies, moments of danger that human prudence can hardly conjure away. But it is not by means of violence, through the suppression of justice, that such dangers may be averted. It is on the contrary by adhering, more scrupulously than ever, to the established laws, to tutelary procedures, to preserving safeguards. Two advantages result from such courageous persistence in the path of legality: governments leave to their enemies the odium of violating the most sacred of laws, and the more they win by the calm and assurance that they display, the trust of that timid mass that would remain at least uncertain, if extraordinary measures were to betray, in the custodians of authority, a pressing sense of danger. Any moderate government, any government resting upon regularity and justice, is ruined by every interruption of Justice, by every deviation from regularity. As it is in its nature to soften sooner or later, its enemies wait until then to take advantage of memories armed against it. Violence seemed for a moment to come to its rescue, instead it has made its fall the more inevitable, since, by delivering it* from some of its opponents, it has generalized the hatred that these opponents felt for it.[13]

In this view, dictatorial measures will inevitably cause, in the long run, the downfall of the regime. It is only in liberty that citizens can learn to make good use of political freedom. According to Constant: "it is only when a constitution is old, observed for a long time, known, respected and cherished that it can be suspended for an instant, if a great emergency requires it. But if a constitution is new and not in practice nor identified with the habit of a people, then every suspension, either partial or temporary, is the end of that constitution. Habeas corpus can be suspended in England because in that country the institutions, the corps, the prerogatives, the rights have a stability guaranteed by 150 years of existence".[14]

[11] Constant, *The Spirit of...* p. 111.

[12] "...in the immense complication of human laws it sometimes comes about that extreme freedom corrects the abuse of freedom, and extreme democracy forestalls the dangers of democracy", Alexis de Tocqueville, George Lawrence, translator, *Democracy in America*, New York, Harper & Row, 1969, vol. 1. p. 195. Stephen Holmes has explored this assertion, Stephen Holmes, "Tocqueville and Democracy", unpublished manuscript.

* "it" here refers to the government that has deviated from the path of regularity.

[13] Constant, *The Spirit of...* p 136.

[14] Benjamin Constant, "De la liberté des brochures" p. 471, cited by Dodge, p. 101. But in general, Constant asserts, "Presented initially as a last resort, to be used only in infinitely rare circumstances, arbitrary power becomes the solution to all problems and an everyday expedient. At

In sum, Constant accepts the principle of suspension but only for constitutions that proved to be stable for a long time. It is implicit in his view that what really prevents the abuse of emergency powers is not a wise institutional procedure but a well-entrenched belief about the value of constitutions. In between the lines, we can read that Constant believed that society's true safeguard against tyranny were Tocquevillian "mores" and not institutions *per se*. The problem that Constant does not address, however, is how constitutions become stable in the first place. If the initial establishment of constitutions is affected by permanent crises, would the absence of emergency provisions make them more legitimate and accepted? The experience of early constitutions in Latin America, which explicitly adopted Constant's views, seems to provide a negative answer to this question. Other fundamental assumptions of the theory are questionable. Since any present event can be explained as the result of some delayed backlash of a past occurrence, there is no way for ruling out causal spuriousness in Constant's theory, and some of its claims of inevitability may appear to be rather weak.

II. The legacy of liberalism in Latin America

The liberal rejection of emergency powers was a critical juncture in the evolution of constitutional political theory. Until the XVII century it was part of traditional constitutional thinking to admit either a sphere of prudential and discretionary power among regularly constituted authorities or the necessity to create an extraordinary magistracy to cope with emergencies. But except for the suspension of the *writ of habeas corpus*, no provision for emergencies was accepted as part of liberal constitutions by the early nineteenth century. It was precisely at this point that the American colonies of Spain gained their independence.

Within two decades, more than twenty constitutions were written, most of them following the scheme of representative government that Constant and other liberal thinkers had laid down. Accordingly, the 1811 Venezuelan constitution, the 1815 Argentinean charter, the 1818 Colombian constitution and the Mexican 1824 charter did not include broad emergency powers. In the Mexican case, not even the liberal suspension of *habeas corpus*.[15] Our claim is that the application of the monistic model of operation in Spanish America made evident that the absence of emergency powers was a flaw in the edifice of liberal constitutionalism.

Different from the relatively fast and peaceful process of institutional consolidation that followed the creation of the American constitution, the aftermath of independence in Latin America led to a protracted process of factional struggle in

that point, not only does the number of the enemies of authority increase along with that of its victims, but its distrust also grows out of all proportion to the number of its enemies". *The Spirit of...* p. 135.

[15] On this subject see: José Antonio Aguilar Rivera, *El manto liberal: emergencias y constituciones*, Política y Gobierno, Vol III, No 2, (1996): 327-362.

which the legitimacy of newly established regimes was constantly challenged by warring elites. In this context, resort to exceptional measures was a permanent necessity. In the absence of adequate legal mechanisms, however, governments were usually forced to act beyond or against the constitution hoping that they could later justify these measures given the constraints of the situation.[16] This was a dangerous expedient. Given the chronic character of emergencies, their resolution by extra-legal measures not only undermined the legitimacy of the same constitution that was supposed to be preserved, but it also provided authoritarian leaders with an opportunity to do away with the legal order all together.

In some cases it was not until the mid nineteenth century that emergency provisions were regularly included in Latin American constitutions. Their inclusion, however, was less the reflection of an ideological shift among the elites than a desperate response to an urgent need. In the place of an intellectual debate about the best way to face emergencies without suppressing the constitution, constitution-makers usually delegated to the executive the capacity to suspend constitutional rights in times of crises. This particular design, in the context of a presidential system, was an important factor to explain why emergency powers were later abused. While provisions for legislative control were adopted, most of the time it was the executive the authority entitled to take the initiative in declaring the emergency and determining the extent of the measures to be taken. The intervention of the legislative assembly was usually required after the emergency was declared or, if its initial authorization was necessary, the executive was entitled to act alone during the long periods in which the assembly was in recession.[17]

The Chilean constitution of 1833 provided for a congressional proclamation of state of siege (the first such provisions in a Spanish American nation) and the suspension of civil liberties and rights. It also allowed Congress to delegate extraordinary powers to the president. On his own authority, however, the president could declare a state of siege in cases of external aggression, and if the Congress was not in session and with the approval of a council of state (appointed by the president), he could also do so in the cases of internal disorder. Since congress was in ordinary session for only three months, the president had exclusive authority to decide on emergencies during nine months of the year. No provision required the immediate convocation of Congress in the case of an emergency. Although emergency powers were widely abused during the nineteenth century, a similar design allowing for executive dominance in emergencies persisted well into this

[16] The experience of Abraham Lincoln during the civil war is very telling. Facing the option of observing a constitution that only allowed for the suspension of the habeas corpus or using the measures that he considered necessary to finish the war, he took the second option. Had the United States been affected by civil war as many times as Latin American countries were, the American constitution might not have survived for a long time.

[17] For a review of emergency provisions in Latin America, see: Diego Valadés, *La Dictadura Constitucional en América Latina,* México, Universidad Nacional Autónoma de México, 1974, and Brian Loveman, *The Constitution of Tyranny: Regimes of Exception in Spanish America,* Pittsburgh, University of Pittsburgh Press, 1993.

century, both in the democratic constitution of 1925 and in the authoritarian constitution of 1980.[18]

In Argentina, the 1853 constitution, which followed the example of the Chilean constitution of 1833, suffered from similar flaws. According to Article 23, while the president was authorized to declare the state of siege in case of foreign invasion, congress was the authority in charge of declaring it "in the case of internal commotion" throughout "the province or territory in which order is disturbed". Similar to the Chilean constitution, however, the president could act alone during the recession of congress (also for nine months) and no provision required its immediate convocation. The declaration of state of siege required no limit for the duration of the state of siege, and established no restrictions to the type of rights that could be suspended during the emergency. The only limit was the prohibition on executive determination of criminal culpability and the imposition of penalties. In the use of this provision, presidents often declared emergencies during the recession of congress and placed no temporal limits to the duration of emergency measures.[19] In addition, a judicial interpretation considering the declaration of emergency a "political question" left unrestrained the authority of the president to decide the proportionality between the measures adopted and the nature of the emergency.[20]

According to the Mexican constitution of 1857 (article 29), while Congress had to approve the suspension of guarantees and grant the executive extraordinary faculties, the president was vested with the power of declaring the existence of an emergency, and of suspending guarantees. Obviously enough, the president had a strong incentive to declare emergencies and decree suspensions, since his powers were significantly broadened during critical situations. Under this design, the executive also had a powerful incentive to put pressure on Congress to ratify the suspension of guarantees or to grant him extraordinary faculties. Since no term limit was provided, the return to normalcy was extremely difficult. The president could always force Congress into renewing his extraordinary powers *ad infinitum*, as in fact often happened during Juárez's rule.[21] The emergency provisions of the 1857 constitution informed the 1917 charter, which still rules the country. Emergency powers were used to sidestep ordinary legislative procedures during the 1920's and 30's and fell into discredit.[22]

[18] See Loveman, *The Constitution of Tyrann*, *op. cit.*, pp. 333-335.

[19] See Molinelli, Guillermo M., *Presidentes y Congresos en Argentina: Mitos y Realidades*, Buenos Aires, Grupo Editor Latinoamericano, 1991.

[20] See Negretto, Gabriel, *El Problema de la Emergencia en el Sistema Constitucional*, Buenos Aires, Depalma, 1992.

[21] See: "The Liberal cloak: The inclusion of emergency provisions in the constitution", in José Antonio Aguilar Rivera, *The Liberal Cloak: Emergency Powers in Nineteenth-century Mexico*, Ph.D. dissertation, University of Chicago, 1996.

[22] Much of the institution-building performed in the 1920's and the 1930's was conducted under the authority of Article 29. The misuse was so gross that the Supreme Court felt compelled in the 1940's to amend the wording of such constitutional article to prevent the use of emergency powers for purposes other than facing serious political crises. On emergency powers in Latin

We should consider, finally, the extreme form of emergency powers adopted in Colombia. Under the 1886 constitution, the militaries were authorized to "inflict immediate punishment in order to subdue a militaries insubordination or mutiny or to maintain discipline in the face of the enemy" (Art. 27). The government could "order the arrest or detention of persons seriously suspected of having committed a crime against public peace" (Art. 28). The charter provided for broad and unqualified emergency powers. Congress was authorized to invest "the president of the republic temporarily with such extraordinary powers as necessity may require or the public convenience demand" (Art. 76, sec. 10). Article 121 authorized the executive to declare "the public order disturbed, and that a state of siege prevails throughout the republic or a part thereof". Also, that article declared that "the extraordinary measures or decrees of a provisional nature within the same limits which the President may take shall be binding". By the terms of this clause of emergency powers, the "law of war" applied to "internal commotion" and "disturbance of public order", therefore the government could treat opponents as enemy soldiers.[23]

In light of this evidence, Brian Loveman asserts that the nineteenth-century provisions for emergencies of Spanish American constitutions provided the legal basis to the later emergence of populist and military authoritarian regimes in the region.[24] It is his contention that emergency provisions allowed liberalism and authoritarianism to merge: "dictators and constitutional presidents executed opponents, sent adversaries into exile, censored the press, jailed and abused authors and publishers, and confiscated property". According to his view, governments did this in accord with the constitutions that "purportedly guaranteed civil liberties, civil rights and popular sovereignty".

For Loveman, the solutions of Spanish America in the nineteenth century to the problem of political and social instability "molded twentieth-century patterns of civil military relations and political tyranny from Mexico to the strait of Magellan". Incorporating provisions for regimes of exception in the legal and political culture of Spanish America, the author claims, made them invisible yet hegemonic premises of political life. Loveman concluded that the acceptance of regimes of exception as a basic principle "was a political threshold that, once crossed, made the subsequent protection of civil liberties and rights extraordinarily difficult".[25]

America and Mexico, see Felipe Tena Ramírez, Derecho constitucional mexicano, México, Porrúa, 1987, 226-228, *La suspensión de garantías y las facultades extraordinarias en el derecho mexicano*, Revista de la Escuela Nacional de Jurisprudencia. Cursos de Invierno de la Escuela Nacional de Jurisprudencia. Curso Colectivo sobre Suspensión de Garantías y Legislación de Emergencia 7, January-December 1945, 117-123; Ignacio Burgoa, Las garantías individuales, México, Porrúa, 1988, 209-211.

[23] Loveman, *Constitution of Tyranny*, 173-175.

[24] *Ibid.*

[25] *Ibid.* 392. In Practice, Loveman claims, "no matter what constitutional limitations were put on government authority during regimes of exception, legislatures and courts found it extremely difficult to overturn decisions made for reasons of state while regimes of exception prevailed, and

The advise that Loveman gives is unambiguous: "No elections, no delicately orchestrated set of presidential musical chairs, and no transitions from authoritarian to elected governments will succeed in consolidating constitutional democracy without drastic reform of these constitutional foundations of tyranny..." Procedural constrains would not operate since "judges depended on the executive for appointments and faced intimidation when they were not creatures of the president". In the same fashion, "legislative control over executive power proved largely illusory". According to Loveman, there is no good evidence from Spanish America to support the idea that constitutional design can effectively restrain gross abuse once regimes of exception are accepted as part of the constitutional framework.[26]

Loveman's interpretation leaves us wanting in several ways. He is right to argue that since the nineteenth century (though not always nor to the same extension) emergency powers were grossly abused in Latin America. But he does not provide a good account of causality. Emergency provisions were a necessity in Latin America and part of the failure of early liberal constitutions in the region can be traced to their lack of legal instruments to deal with exceptional situations. Would repression and abuse have been less if emergency powers had never been included in the constitutions? We doubt it. It is certainly true that emergency provisions were abused, but Loveman does not explain exactly why, or if the reason of this abuse was in all cases due to the same causes.

Loveman does not recognize the existence of a critical juncture in the history of emergency powers. For him, emergency powers existed, in one form or another, in *all* political traditions. The author lumps together, under the label "regimes of exception", all kinds of measures: constitutional provisions, martial laws, sedition laws, etc. Hence, the seeds of "tyranny" existed in parliamentary England (and the United States) as well as in authoritarian Spain and revolutionary France: it was just a matter of degree. From Europe, Loveman asserts, this authoritarian strain of political thought traveled to Spanish America, where it found a particularly fertile land due to the prominent role that the military and populist leaders played in a predominantly non-democratic culture. This conclusion, therefore, is not far from the liberal thinking of Constant: in the absence of strong constitutionalist values, emergency provisions only provide legal foundations to the construction of dictatorial regimes.

Against this view, we argue that a poorly conceived institutional design was one of the major causes for the abuse of emergency powers in Latin America. As noted above, our assumption is that there was a clear discontinuity between the republican tradition and liberal constitutional thought regarding emergency powers.

even more difficult to constrain executive and military actions while the 'emergency' persisted or was declared to exist".

[26] "Once provisions for constitutional regimes of exception exist, the difficulties in limiting government action under such provisions makes allocating authority to determine that an 'emergency' exists and the authority to implement, revoke, and terminate a regime of exception a critical constitutional design problem". *Ibid.* 395-396.

By initially rejecting the Roman precedent of constitutional emergency rule, the liberal framework was hardly adequate for the new states. Not only did the new nations suffer from political dissolution, economic stagnation and many other problems, which made the rule of law problematic from the beginning, but liberal thought did not provide them with answers on how to deal with emergencies. In those countries where social and political conditions were generally stable, as in the US, this omission went unnoticed (or at least this was so until the Civil War era). Spanish America, however, proved to be a litmus test for liberal constitutionalism. The fact that Spanish America did not live up to liberal expectations attests not only to the presence of powerful centrifugal forces in that part of the world, but also to the existence of a flaw in liberal theory.

For years, Spanish Americans refused to include broad emergency provisions in their constitutions, but when their necessity was finally accepted, constitution-makers had no institutional model to resort to. A void existed in liberal constitution theory. There was no self-evident answer to the question of how safe mechanisms were to be devised. What seemed to be the obvious answer —to empower the ordinary magistrates during critical situations— was a dangerous expediency. Once broad emergency provisions are included in the constitution, institutional design becomes a key issue. Certain arrangements are more vulnerable to usurpation than others. The model of the Roman dictatorship relayed on a structure of incentives that discouraged usurpation. The body responsible to determine that an emergency existed was the senate and once the declaration was made, the senate eclipsed. Senators had no incentives to invent threats, since they did not exercise the extraordinary authority during critical situations. Once an emergency was declared, in turn, the consuls were charged with appointing a dictator, usually a prominent citizen of Rome. The key point is that acting consuls could not become dictators and once a dictator was appointed, consuls also eclipsed from the scene.

A selection incentive operated here. Since consuls wanted to resume as soon as possible their normal position, they sought to appoint a person not likely *ex ante* to usurp their authority. Dictators, moreover, faced important limitations. The extraordinary magistrate could not change the constitution nor was he allowed to make new laws. He was appointed to accomplish a specific task, for a limited time, and as soon as the situation that gave rise to the emergency was remedied, dictatorial authority ceased. In any case, a dictator could not exceed the term of six months. Likewise, the ordinary magistrates, while deprived of their power during the emergency, were protected from dictatorial acts.[27]

Due to the long hegemony of liberalism and its rejection of constitutional emergency rule, the complex mechanism of the Roman dictatorship remained unknown to or was neglected by nineteenth-century Spanish Americans. Most Latin American constitutions either allowed or put little restrictions to the possibility of accumulating in a single agent —the President— the authority to both decide and act

[27] Clinton Rossiter, *Constitutional Dictatorship,* Princeton, Princeton University Press, 1948, Chapter 2, 15-28.

on the emergency. This fusion of authority not only paved the way to possible abuses, but also deprived the measures undertaken in emergencies of the impartiality necessary to make them acceptable to different political actors.

While initially helpful during the period of state-building, to resist challenges to the recently established political authorities, emergency provisions in Latin America soon became in many cases an instrument to check the emergence of opposition movements, restrict the levels of political competition, and to curtail civil liberties. Sometimes with perfect legal basis, presidents claimed full authority to decide on emergencies and challenged any form of judicial or legislative restriction over the extension of the rights to be suspended or over the temporal limits of the measures adopted. At the same time, whenever real emergencies occurred, the President was usually unable to act as a neutral and impartial agent. Being at the same time chief of the state and chief of government, the President was vulnerable to criticism as a partisan actor that attempted to destroy civil liberties and construct just another form of dictatorship. Under these conditions, antidemocratic forces typically resorted to the support of the military as a "neutral" power that would suspend the legal order only to make possible its restoration in a more or less distant future.[28]

III. Carl Schmitt and the theory of commissarial dictatorship

As a response to the long silence of liberal theory about the problem of emergency, Carl Schmitt revived in the early 1920s the republican theory of constitutional dictatorship in order to apply its logic to the emergency provisions of the recently created Weimar constitution. How much did his theory help to create a model of emergency government compatible with a liberal-democratic regime? Let us start by reproducing article 48 of the Weimar constitution:

> "...If the public safety and order of the German Reich are seriously disturbed or endangered, the President of the Reich may take the measures necessary for the restoration of the public safety and order, and may if necessary intervene with the armed forces. To this end may temporarily suspend in whole or in part the fundamental rights established in articles 114 (inviolability of person), 115 (inviolability of domicile), 117 (secrecy of communication), 118 (freedom of opinion and expression thereof), 123 (freedom of assembly), 124 (freedom of association), and 153 (inviolability of property). The President of

[28] As Juan Linz points out, one of the characteristics of presidential systems, different from parliamentary ones, is that they lack a moderating power to act in cases of emergency. This is one of the reasons why the military, sometimes legitimated by constitutional provisions, intervened in cases of crisis claiming to represent the role of neutral and moderating power. See Juan Linz and Alfred Stepan, *The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration,* Baltimore, John Hopkins University Press, 1978, p. 74.

> the Reich must immediately inform the Reichtag of all measures taken in conformity with sections I or 2 of this article. The measures are to be revoked upon the demand of the Reichtag. [...] A national law shall prescribe the details".

There is a curious parallel between the story just told about the final incorporation of emergency powers in Latin America and the origins of article 48. Just like emergency provisions in Latin America, this article was not so much the product of the theoretical and ideological conviction of the liberal and democratic framers of the Weimar constitution as a reflective response to the state of social and political upheaval that affected Germany at the time. As Clinton Rossiter points out, only the urgency of the moment could explain why a democratic constitution included an emergency provision whose model was the autocratic institution of the "state of war" of the late German Empire.[29] As a way of hypothesis, however, we might add another factor to explain the use of this precedent: the absence of other valid models.

The most significant element of article 48 was the authorization it gave to the President to both declare the emergency and determine the necessary measures to restore public order without specific time limits. As we argued in the case of similar provisions in Latin America, this fusion between the agent who decides and the agent who acts on the emergency was certainly a dangerous mechanism. The framers, however, intended to limit its possible abuse by surrounding it with certain controls. From article 48 we obtain the intention to limit the suspension of constitutional guarantees to certain enumerated rights, the obligation of the president to inform the Reichtag, and the authority of the Reichtag to revoke emergency powers and regulate the use of emergency powers through a federal law. Other limitations, however, emerged from the general logic of the design of the Weimar constitution.

While independent from the assembly and invested with powers that went beyond those of a constitutional monarch in a parliamentary government, the President of the Reich was not intended to play the role of the executive in a presidential government. He was properly speaking a chief of state, with certain powers of government formation, like the appointment and dismissal of the Chancellor and Ministers of the Reich. According to article 54, this appointment was supposed to rely on the support of the majority of the Reichtag, which could always remove any minister by a vote of no confidence. It is in this sense that the counter-signature of the Chancellor required for all presidential decisions (including article 48) could be considered to be a true limit on the powers of the president.

In sum, different from the executive in a presidential constitution, the President of the Reich could be regarded as an independent institution whose main role was that of mediating between government and parliament. He shared with the

[29] See *Constitutional Dictatorship*, *op. cit.*, p. 33.

Chancellor the direction of the government, but the survival of the government itself depended on the confidence of the parliamentary majority. One power of the President of the Reich, however, had the potential to change the whole constitutional structure: the power of dissolution. Given the absence of restrictions to the power of the President to dissolve the Reichtag, this instrument could be used as a threat to discipline the legislative majority or even bypass legislative controls. Could the power of dissolution, for instance, be used to prevent parliamentary control over the use of emergency powers?

Given the ambiguity of the constitution itself, it is clear that the actual application and interpretation of the powers of the President would be crucial to determine the way in which the emergency provisions of article 48 could be used. During the early years of the Republic, article 48 provided an indispensable instrument for the successful resolution of insurrections that aimed at destroying the democratically elected government. President Ebert effectively used article 48 to quell the Kapp *Putsch* of March 1920, and Hitler's Beer hall fiasco of November 1923. No law was enacted then to regulate emergency powers, but the whole system worked according to the parliamentary logic intended in the original design of the constitution. In no case was the president openly acting against the will of the parliamentary majority. The only cause of concern was an expansive application of article 48, that included among emergency measures the possibility of enacting decrees of legislative content in cases of economic crisis.

According to Carl Schmitt, article 48 instituted what he called a "commissarial" form of dictatorship, whose remote precedent was to be found in the extraordinary magistracy of the Roman republic. The essential trait of this institution was, in his view, its pure technical nature. The commissarial dictator acts upon a commission of the constituted powers to adopt the measures that are necessary to restore a normal situation. In fulfilling this instrumental function, Schmitt says, the dictator can not claim to represent or incarnate any sovereign power. In this sense, the dictator cannot abrogate the existing constitution, abolish the constituted authorities, or even create or modify laws.[30] Dictatorial measures are factual and provisional in nature and must expire with the resolution of the crisis.

In this interpretation, commissarial dictatorship was sharply different from the modern notion of "sovereign" dictatorship that emerged by the late XVIII. This dictatorship "...does not merely suspend an existing constitution [...] but attempts to create a condition in which it can establish a constitution...".[31] In this sense, while "the commissarial dictator acts pursuant an unconditional commission of action emanated from a *pouvoir constitué*, the sovereign dictatorship entails an unconditional commission of action emanated from a *pouvoir constituant*".[32] In Schmitt's view, the French National convention of 1793 as well as the communist

[30] See *La Dictadura,* Madrid, Alianza Universidad, 1985, p. 37.
[31] *Ibid.* pp. 182-183.
[32] *Ibid.* p. 193.

type dictatorship represent the typical fusion of emergency powers and sovereignty that the traditional figure of commissarial dictatorhip kept separate.

According to Schmitt, the powers of the President of the Reich should be considered to be limited both by the specificity of the task to be accomplished— the removal of obstacles that make impossible the normal application of the law—and by the essential features of the existing constitutional order. Regarding the first restriction, Schmitt was particularly opposed to the emergent practice (validated by many liberal jurists of his time) of including decrees of legislative content among the measures that could be adopted during an emergency.[33] With respect to the features of the constitution that could not be altered during emergencies Schmitt sustained in a lecture of 1924 that just as the President could not abrogate the constitution neither could he suspend nor suppress the "institutional minimum" of constituted authorities presupposed by the constitution.[34] This meant, for instance, that the President could not extend his period in office or change in any way the nature of his office, eliminate the authority of the government (bypassing, say, its countersignature) or affect the immunities of the Reichtag.[35]

While it is clear that Schmitt advocated a form of emergency government aimed at the preservation of the existing constitution, some aspects of his interpretation of commissarial dictatorship are particularly problematic. Since his early work of 1921, *Die Diktatur*, Schmitt sustained the position that a commissarial dictatorship entails an "unconditional" commission of action, a type of authority with no specific juridical limits except those determined by the factual and technical nature of the function. This meant that no limits could be placed on the authority of the President to determine what measures are necessary to restore public order.

Following the authorization of article 48, the President even could, according to Schmitt, "cover cities with poison gas if in a concrete case this is the necessary measure to restore order and security".[36]Given this ample interpretation of the powers of the president in emergencies, Schmitt maintained that the enumeration of rights that could be suspended according to the second part of article 48 was merely illustrative and not exhaustive. Any right, not just those explicitly listed in the provision could be suspended. Also consistent with the idea that emergency rule has no legal limits, in his lecture of 1924, he opposed the convenience of passing a federal law regulating the powers of the President during emergencies.[37]

Schmitt was right in pointing out that article 48 was itself contradictory when it declared that the President could adopt all necessary measures, and at the same

[33] On the discussion about the legislative powers of the president during emergencies, see Frederick M. Watkins, *The Failure of Constitutional Emergency Powers Under the German Republic,* Cambridge, Cambridge University Press, 1939, p. 19.

[34] See Bendersky, Joseph, *Carl Schmitt: Theorist of the Reich,* New Jersey, Princeton University Press, 1983, p. 76.

[35] See Paulson, Stanley, "Aspects of the Schmitt-Kelsen dispute on the Guardian of the Constitution", paper presented at the 1995 Chicago APSA meeting,

[36] *La Dictadura, op. cit.* p. 258.

[37] See Bendersky, *op. cit.,* p. 75.

time tried to limit these measures to the suspension of specific rights. However, the interpretation that the President was invested with an "unconditional" commission of action did nothing to solve that contradiction in a way favorable to the principles of a constitutional state. By listing the rights that could be suspended, article 48 created the possibility to challenge emergency measures when they affected rights not explicitly enumerated. In such a situation, it would be up to the President to demonstrate, before courts or the parliament, in what sense was the suspension of those rights necessary according to the circumstances.

Schmitt's interpretation of constitutional dictatorship was highly selective. From the Roman type of dictatorship, he retained the idea that while the dictator is in power, the most essential constitutional guarantees can be suspended. This is historically correct. As Franz Neumann points out, within the limits of his commission, the Roman dictator concentrated an enormous power: the tribunician power of intercession did not apply against his acts nor could a citizen condemned in a criminal trial invoke the normal right of appeal against him.[38] The problem, however, is that *this* is precisely one aspect of the Roman Dictatorship that cannot be applied to the conditions of a democratic constitutional state, where the rights of the people must be protected under all circumstance against arbitrary acts.

From this perspective, we should see as ironic that Schmitt neglected other central aspects of the Roman institution, like the logic of mutual checks that surrounded emergency government according to traditional republican theory. Article 48 itself, it is true, reduced the intervention of parliament to an *ex post* control that, in fact, left unchecked the authority of the President to decide whether an emergency existed and what type of measures should be adopted in the situation. But one way to solve this deficiency, at least partially, was to admit that a parliamentary regulation of emergency powers was necessary to prevent the abuse of article 48. Schmitt, however, rejected this possibility by arguing that a parliamentary law regulating presidential emergency powers was against the rationale of article 48.

As he says in *Political Theology*, "if measures undertaken in an exception could be circumscribed by mutual control, by imposing time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated".[39] Curiously enough, Schmitt seems to abandon here the separation between sovereign and dictatorial authority that, in his own view, was so essential to conceptualize commissarial dictatorship.[40]

[38] "Notes on the Theory of Dictatorship", *The Democratic and The Authoritarian State*, New York, Free Press, 1957, pp. 233-234.

[39] *Political Theology*, *op. cit.*, p. 12.

[40] According to John McComick this is not so much a contradiction as a fundamental shift in the thought of Carl Schmitt from *Die Diktatur*, written in 1921 to *Politische Theologie*, written in 1922. In the latter work, according to McCormick, Schmitt would abandon the distinction between commissarial and sovereign dictatorship. See his "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers", in The Canadian Journal of Law and Jurisprudence, vol. X, No. 1, January 1997, pp. 163-187. We should note, however, that after this work, particularly in the

This was a very risky step to take, particularly when the dictator, by virtue of his mode of election, can claim to have a popular mandate to defend a democratic constitution even beyond its formal rules. It is to this particular issue within Schmitt's theory that we would now like to turn.

IV. The President as a Defender of the Constitution

Without fully abandoning the notion of commissarial dictatorship, during the last years of the Weimar Republic, Schmitt analyzed the problem of emergency powers from a different perspective. The central theme now was not so much the exact interpretation of the logic of article 48, as the role played by the President of the Reich within the structure of the Weimar constitution. We must consider first the political background against which this debate took place.

After a period of relative ease for the Republic, the late 1920's inaugurated a process of growing polarization between parties of the extreme left and the extreme right, severe fragmentation of the party system (encouraged by a strictly proportional electoral system), and a deep economic crisis. It was also the beginning of an informal constitutional change. As a response to the inability of the parliament to support stable governing coalitions, and the presence of anti-system parties exclusively interested in joining "negative" majorities, President Hindenburg and his aides decided the transformation of the parliamentary constitution into a fully presidential system. The plan was to appoint governments based on the exclusive confidence of the President, impose legislation by presidential emergency decrees in the absence of parliamentary support, and use the power of dissolution in case the parliament used its right to revoke emergency measures.[41]

This transformation was put into effect since the appointment of Chancellor Bruning without parliamentary support on March 30 of 1930. In the following months, a financial programme rejected by parliament was enacted by emergency decree, and when the Reichstag insisted that the measures be revoked, President Hindenburg proceeded to the dissolution of parliament.[42] Since then until its final demise, legislation by presidential decree became the standard form of law-making in the Weimar republic. In this new dynamic, however, the Weimar constitution was working not merely as a presidentialist but as a "hyperpresidentialist" system. While presidentialism is predicated upon the mutual independence and balance between President and legislative assembly, the use of the power of dissolution to rule by emergency decrees, turned the President of the Reich into the only active power of the constitution.

lecture of 1924 on emergency powers, and even later, Schmitt was still attached to the distinction. In our view, the source of this seeming contradiction should be found in the fact that from the very beginning Schmitt's interpretation of commissarial dictatorship as an unlimited commission of action made very difficult the maintenance of a sharp distinction between dictatorship and sovereignty.

[41] See Bendersky, Joseph, *op. cit.*, p. 117.

[42] Paulson, Stanley, art. *cit.* p. 34.

It is in the context of this transformation that Schmitt's opinions (at this time very influential in presidential circles) are relevant to understand the dilemmas of emergency powers in systems were the authority designated to decide and act on the emergency is able to claim a monopoly of power. While still maintaining that a commissarial dictator should enact only provisional measures and not permanent laws, by 1930's, Schmitt endorsed the use of presidential legislative decrees as an entrenched practice that became part of the material constitution.[43] At the same time, Schmitt advocated the interpretation of the role of the President of the Reich as the sole "defender" of the constitution.

According to his famous work of 1931, *The Guardian of the Constitution,* the preservation of any constitution requires the existence of a neutral power able to realize the political unity of the state in cases where this unity is in danger of dissolution. In the specific case of a democratic constitution, he thought that the role of the defender is to preserve the unitary will of the people in the face of partial and antagonistic interests that attempt to control the state. Who could play this role under the social and political conditions of Germany in the 1930's? Not the Supreme Court, in Schmitt's view, because although it represents a neutral instance, its neutrality consists precisely of its dependence on the law and its inability to take concrete political decisions. Neither could this role be performed by the parliament because, although it has the capacity to adopt political decisions and contributes to the process of state will formation, it was currently fragmented by a plurality of antagonistic party interests.[44]

Following this analysis, Schmitt concludes that only the President of the Reich has the attributes of independence and neutrality that qualify to be a true defender of the constitution. Schmitt argues that this position is guaranteed by the very distribution of powers established in the constitution. In the first place, the permanence of the President in office is independent from parliamentary support. He remains in power for a fixed term and, unlike the Chancellor and cabinet ministers, cannot be removed by parliament. In addition, the President has a set of powers, like the power of dissolution, referendum and emergency powers that make him an authority with the capacity to take effective decisions in defense of the constitution. Finally, and crucially from Schmitt's perspective, the President can claim independence and neutrality from the particularistic party interests represented in the assembly because of his direct election by the whole German people.[45]

It is interesting to note that Schmitt is not arguing that the President is neutral third located *above* other institutions. This, in his view, would transform him not in a defender of the constitution, but in a sovereign of the state.[46]The president, for Schmitt, is a *pouvoir neutre* located at the same level of the other powers. In this role, the permanent function of the President is that of mediating between the other

[43] See his work of 1932, *Legalidad y Legitimidad.* Buenos Aires, Struhart, 1994, pp. 87-88.
[44] See *La Defensa de la Constitución,* Madrid, Tecnos, 1981, Chs. I and II.
[45] *Ibid.* pp. 250-251.
[46] *Ibid.* p. 215.

branches of government and only ocassionally, in cases of necessity, does he play a more active role. This equilibrium, according to Schmitt, is necessary because the President, "should not compete with the other powers by expanding his own power".[47]

This interpretation seems consistent with the original design of checks and balances intended by the framers of the Weimar constitution: a government subject to parliamentary responsibility and a presidential office with sufficient independence from parliament to play a stabilizing role in cases of conflicts between government and parliament. It is also consistent with Schmitt's previous views about the role of the President as a commissarial and not a sovereign dictator. The problem, however, is that this interpretation no longer applied to the actual practice of the Weimar constitution. By the 1930's, the President of the Reich was not simply a chief of state acting as a *pouvoir neutre et intermediarie* between parliament and government, but as a chief of government claiming the right to rule without the support or collaboration of the legislative assembly. At the same time, with the regular use of article 48 to rule by emergency decree, one of the few elements that remained to interpret the role of the president as a commissarial dictator, disappeared.

From the point of view of the actual working of the Weimar constitution, Kelsen had a point when he argued that Schmitt's theory of the President as a neutral third was highly fictitious. Being part of the government, the president acts as a judge in his own cause when deciding in controversies between parliament and government.[48] Moreover, the partisan position of the president is not changed by the fact that he is elected by the whole people. In a society as deeply divided by antagonistic interests as was Germany at the time, the president, no less than the parliament, was subject to the pressure and influence of different political forces. Only the fiction that the German people formed a "homogenous and indivisible unit" could overcome this obstacle.[49]

One could argue, of course, that in the difficult situation of the 1930's Schmitt was trying to keep, as much as possible, the original meaning of the Weimar constitution. Schmitt's own interpretation, however, contradicted this goal. At one level, the argument of Schmitt in support of the President as the sole defender of the constitution is based on the factual reality of a parliament unable to act as a center of national will formation. He does not deny, in principle, the right of the parliament to control the use of emergency powers by the President. Schmitt simply argued that in a context of extreme fragmentation and polarization, the incapacity of the parliament to act should not be an argument to impede the President to take the measures that

[47] *Ibid.* p. 220.

[48] See Kelsen, Hans, *¿Quién Deber Ser el Defensor de la Constitución?*, Madrid, Tecnos, 1995, pp. 53-54.

[49] *Ibid.*, pp. 59-60.

are necessary to solve a crisis situation.[50] This is a reasonable and acceptable position.

At another level, however, Schmitt's preference for the President as the sole defender of the constitution is based on normative grounds. In his view, it is the plebiscitary form of legitimacy the President incarnates and not parliamentary legality what constitutes the core of the democratic content of Weimar constitution. Accordingly, the intervention of the President in emergencies has a privileged position regarding other powers. As he argues:

> The Reich President is elected by the German people as a whole, and his political powers vis-à-vis the legislature (in particular, [his power] to dissolve the Reichtag and call for a referendum) are, by nature, an "appeal to the people". By placing the Reich President at the center of a system of plebiscitarian powers, neutral with respect to party politics, the Reich constitution, drawing on democratic principles, seeks to create a counterbalance to the pluralism of social and economic constellations of power and to preserve the unity of the people as a political whole.[51]

This kind of foundation for the role of the President could easily destroy the parliamentary elements of the constitution. If the ultimate justification of the President to act alone in emergencies is his position as a true representative of the popular will, then, he can permanently suspend parliamentary controls by using the power of dissolution and referendum as an "appeal to the people" to legislate over the parliament. We do not think that Schmitt really intended to justify the emergence of a sovereign dictatorship entitled to abrogate the entire constitutional order on a permanent basis. But the idea that the President of the Reich could use his plebiscitary legitimacy to act as the *sole* defender of the constitution would not prevent it either. At any rate, Schmitt's interpretation favored the construction of a hyperpresidentialist constitution that only aggravated the original defective design of emergency powers of article 48.

[50] *La Defensa de la Constitución, op. cit.*, p. 210.
[51] *Ibid.* p. 250.

Conclusions

Schmitt's critique about the insufficient attention of liberal theory to the problem of emergency is a sound one. As the early experience of Latin America may show, liberal constitutions with no or too restricted provisions for emergencies were ill-equipped to survive in contexts of extreme crisis. In the end, the liberal rejection of emergencies did not prevent the inclusion of emergency provisions under the pressure of circumstances. But what perhaps might have been a useful institutional model—the Roman dictatorship—was cloaked by liberal theory. In the context of a presidentialist system, liberal constitutions delegated to the executive discretionary powers to both decide and act on emergencies with few restrictions, thus dictatorship could easily become the norm rather than the exception.

Schmitt's own contribution to the problem of emergency powers, however, does not solve the deficiencies of liberal theory. The Weimar constitution provided the President of the republic with the initiative to declare and act on emergencies on his own authority, only restricted by the possibility of an *ex post* control of a parliament on whose confidence the government depended. Given this design, Schmitt's interpretation of constitutional dictatorship as an unconditional commission of action and of the role of the President as the sole defender of the constitution could only aggravate the risks of abuse that were already present in article 48. While the idea of an "unconditional" commission of action restricted the possible regulation of emergencies by the legislative assembly, the construction of the authority of the President as a plebiscitary dictator validated the transformation of an originally parliamentary constitution into a hyperpresidentialist one.

As in other cases of past and present democratic breakdown, it is likely that no institutional design could have prevented the final demise of German democracy in the 1930's. In a context of extreme polarization and fragmentation of the party system, the solution of emergencies by means of collaboration and mutual control between President and Parliament, was in itself too difficult to accomplish. However, to argue in favor of the exclusionary rule of the president in those circumstances does not seem an adequate solution to keep emergency rule within constitutional limits.

There are some lessons to be learned from both the Latin American experience and the downfall of the Weimar republic. It is clear that the principle of "external authorization" of the Roman Dictatorship must govern the exercise of emergency powers. With few exceptions, Latin American presidents have been usually invested with the authority declare emergencies, and of suspending constitutional guarantees with no temporal limits. Similarly, under the Weimar constitution, the President had the authority to both declare the emergency and to determine the extension of emergency measures. Constitutional rules, of course, only create sets of opportunities and constraints. They do not determine political

behavior. Under conditions of political polarization, however, rules that make possible the concentration of power in one actor or institution are likely to have a deleterious effect on democratic stability. The Latin American and Weimar experience indicate that a popularly elected president authorized to act alone in emergencies can always use his "appeal to the people" in order to marginalize political opposition and subdue other institutions.

We can also conclude that checks given *ex post* to congresses are not enough to prevent the abuse of emergency powers, particularly when the executive, as in a presidential system, is independent from the legislative assembly. In this case, the assembly must not only be the authorizing body but also have unrestricted authority to revoke emergency measures. The institution that is naturally positioned to intervene *ex post* must be the judiciary, with authority to determine to what extent the suspension of rights was justifiable in a concrete case. The judiciary, as Schmitt pointed out, might not have authority to *decide* on emergencies. But it must be in charge of protecting individual and collective rights when these have been arbitrarily restricted beyond the demands of the situation. Finally, as the Weimar case makes clear, emergency powers should not encompass the authority to rule by decree. In this respect, Schmitt's position about the factual and provisional nature of emergency measures is the correct one: constitutional dictators have no authority to create general and permanent rules. Nor should the authority empowered by these provisions be authorized to persecute ordinary magistrates.

Some of these lessons have been learned by contemporary constitution-makers. The Bonn constitution of 1949 moved toward a more clear parliamentary form of government in which emergency powers can only be exercised by the Chancellor upon previous consultation or authorization by the parliament. The French constitution of 1958, the one that more closely approximates the mixture of presidentialism and parliamentarism of the Weimar constitution, has also looked backward to learn from the fate of article 48. While the president of the republic is entitled to declare emergencies, subject to previous consultation with government and parliament, he is explicitly prevented from exercising the right of dissolution during emergencies. Given the amount of experience accumulated, however, it is surprising that Costa Rica is the only constitution in Latin America where the suspension of rights can only be declared by the legislative assembly. To the extent that presidents in this region remain as the sole actors in emergencies, the memories of Weimar will always threaten the current efforts of democratic consolidation.

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