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THE DEFENCE OF THE DEMOCRATIC CONSTITUTION IN EXTRAORDINARY CIRCUMSTANCES: THE LAW OF EXCEPTION IN COMPARATIVE LAW AND IN SPANISH CONSTITUTIONAL HISTORY

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SUMMARY

ABSTRACT

In this paper we examine the meaning of the *law of exception* and how it fits into the Spanish constitutional system. To this effect, we have examined the models of comparative law that Spain has followed to restore its disrupted constitutional system. Historically speaking, it was basically at the time of North American and French Revolutions when concern arose about how to incorporate the institutions related to constitutional protection into the constitution itself. British singularity was also manifested in the way in which specific protection for the defence of the constitution and the law of exception were understood and included, using institutions such as *martial law* and *habeas corpus*. The suspension of *habeas corpus* as an extraordinary instrument for protecting state organisation was considered in the American Constitution of 1787 and is thought of as a precedent of Article 55.1 of the current Spanish Constitution of 1978. During the period between 1812 and 1869, the *law of exception* considered in historical Spanish constitutions covered only the *suspension of guarantees*. The Republican Constitution of 1931 preserved the framework of the Constitution of 1869, with certain major alterations. The most significant regulatory instruments of this legislation were the Law of Defence of the Republic and the Law of Public Order of 1933. After the publication of this latter law, which became the extraordinary regulation that has been put into practice most often and most in depth, Spain experienced an almost permanent state of "constitutional abnormality". It is important to highlight the fact that many of the precepts of the Law of Public Order for the defence of the constitutional regime established by the Second Republic could be transferred, with very similar content, to the Francoist Law of Public Order that managed to remain in force until much later. It was finally repealed by the Organic Law for the Protection of Public Security, L.O. 1/1992.

KEYWORDS

Defence of the democratic constitution. Law of exception. Comparative law. Martial law. *Habeas corpus*. Spanish constitutional history. Suspension of constitutional guarantees. States of prevention, alarm and war. Public Order Acts.

I. THE DEFENCE OF THE DEMOCRATIC CONSTITUTION IN EXTRAORDINARY CIRCUMSTANCES: THE LAW OF EXCEPTION IN COMPARATIVE LAW

In the following pages we analyse the meaning of the *law of exception* and how it fits into the Spanish constitutional system. More specifically, we examine what this area of law is and how that which is abnormal, extraordinary and unpredictable fits into the Constitution (designed to deal with that which is normal, ordinary and foreseeable), In short, our purpose is to determine what the *law of exception is* and how it fits into the Spanish Constitution. To this end, we have considered the models of comparative law that Spain has followed to restore order to its disrupted constitutional system. It is well known that the issue of the law *of exception* and *the suspension of guarantees* is part of the study of the different instruments employed in the defence of the constitution and, more specifically, in *defence of the democratic constitution*.

Over time, the multiple meanings and diverse content that have been included in the concept of the *defence of the constitution* give the impression that major theoretical, doctrinal and practical difficulties exist in trying to draft a definition that is consistent with specific constitutional techniques and a univocal purpose. However, the truth is that, generally, defending the constitution - especially when one is fully aware of its democratic nature - involves a set of concerns and a series of legal responses, with a greater or lesser degree of technical filtering. These concerns and responses have been present throughout two centuries of constitutionalism, including the most recent Spanish constitutional process.

If the "liberal concept" of constitution is the only one that gives meaning to the term constitutionalism and that makes it possible to draft a true legal concept of constitution, transforming it into real law, or, in other words, valid and effective regulations, the fact is that the meaning of constitutional texts has not always been the same in different periods nor in different places. Therefore, neither can it be claimed that the establishment of the mechanisms capable of protecting constitutions has always been unanimous, not even when referring to the shared meaning and purpose of their safeguards, to which the inevitable process of searching for historical antecedents must be added. To a great extent, all this information explains the vast panorama of institutions that can be mentioned doctrinally when it comes to drawing up a minimally systematic study on the *defence of the constitution*, as well as the inaccuracies and lines of continuity existing between these institutions[1].

In short, as has been shown, the formulation of a possible univocal concept of *defence of the constitution* is likely to be extremely complex inasmuch as the concept of constitution has not remained unchanged in either meaning nor in content since the bourgeois revolutions of the late eighteenth century and the beginning of the nineteenth century . It may be easy to identify the common roots, but, nevertheless, it is the process of the legal delimitation of the concept of constitution that enables us to define the specific constitutional techniques that are introduced into constitutional texts, so that they can be safeguar-

1ARAGÓN REYES, M.: "Constitucionalismo." in: GONZÁLEZ ESPINAR, J.J. (dir.): *Diccionario del sistema político español*. Madrid, Akal, 1984, pp. 134-142.

ded by legally regulated procedures.

Thus, perhaps the decisive time between the two world wars is the most significant period in this respect, as in so many others, and the controversy between Carl Schmitt and Hans Kelsen was a decisive moment in the process of the "rationalisation" and juridification of multiple aspects of the social and political life of societies organised according to representative democratic criteria, and of course, in the *defence* of constitutional texts. Proposing the existence of an entity to defend the constitution or entrusting its *defence* to some type of court capable of acting through legally established procedures was not without repercussions. These would affect the very "structure" of the constitution, which was considered to be in need of defence and, in short, there would be repercussions on the constitutional organisation of the different powers of the state and, therefore, on the relationship between these powers and the public[2].

In this regard, the events following the Second World War allowed the continuation of a process initiated at that time, which dealt with several events, with well-known, immediate , and in some cases, spectacular repercussions for western societies, as occurred in many well documented areas. These situations are reflected in current constitutional texts and, in particular, the regulation of states of exception in the text of the current Spanish Constitution of 1978.

However, in this context, the decisive factor continued to be the legal delimitation of the concept of constitution, or, as E. Aja called it when dealing with the characteristics of current constitutionalism, the fact that the "current" constitutional texts contain "a degree of regulation far superior" to those that preceded them. This has allowed unquestionable "progress in the strict regulation of institutions and procedures," to be made. He mentions the fact that in a broad sense, recent constitutions include "strict regulation" of the *states of exception* and *emergency legislation*[3].

At this point, precisely for this reason, analysing the exact characteristics that constitutional texts have incorporated to delimit such exceptional situations is crucial. It is also necessary to analyse the general and individual nature of these texts and the consequences associated with them that are linked to the substantial elements that have defined a constitution as being a written legal text since Article 16 of the Declaration of Rights of Man and the Citizen of 1789. This is especially relevant when considering the basic core of rights and freedoms that may be affected, but also in relation to the very "structure" of the constitutional text. P. Cruz Villalón rightly emphasised that no constitution exists that is "resistant to the situation of exception", in other words, there is no aspect of the constitution that "cannot be temporarily sacrificed" for the requirement of overcoming danger[4].

Historically, concern about the incorporation of the institutions related to constitutional protection into the constitution arose with the North American and French Revolutions. The revolutionaries, once their initial euphoria had passed, understood that the survival of "the legal values"

2 2 Herrera, C.M.: La polémica Schmitt-Kelsen sobre el guardián de la Constitución. *Revista de Estudios Políticos (nueva época)*, 86, 1994, pp. 221, 223 and 225.

3 Aja, E.: "Estudio Preliminar". In Lassalle, F.: *¿Qué es una Constitución?* Barcelona: Ariel, 1.989, p. 8.

4 Cruz Villalón, P.: *Estados excepcionales y suspensión de garantías*. Madrid: Tecnos, 1984.

contained in the constitution had an obvious aspect that went beyond the strictly legal perspective. Therefore, it was declared that the "people", and not the judicial organs, were the protectors of the constitution[5].

Naturally, this first and "mandatory connection of the people to the defence of the constitution" continued to have legal consequences. Indeed, when the "revolutionary" struggles decreased, and "constitutional ideology" was accepted, there was an urgent need to establish a legal rather than a political public entity whose mission it was to protect the constitution from future aggressions. In other words, it seemed "natural and logical" for the aforementioned body to be related to the legislative body that was "the most directly representative and democratic power of the constitutional state." On the contrary, in North America, a " new and homogeneous" social organisation formed by settlers could be found, in which there were no notable social conflicts, and it was assumed that, as the constitution was not suffering from attacks or being called into question, it did not need to be protected[6].

Indeed, the United States was the first country where the constitution emerged as the supreme law, proclaiming the principle of constitutional supremacy in Article VI, section 2 of the American Constitution of 1787[7]. Thus, by creating a more complicated channel to amend the constitution than that needed to change ordinary legislation, the distinction between "constitutional law" and "ordinary law" was produced at a procedural level, with the constitution becoming a higher law[8].

At a later date, the creation of the specific instruments necessary for the distinction between "constitutional" and "ordinary" legal regulations and between "constituent power" and "constituted power" was sought to achieve complete legal effectiveness. In this way, along with the notion of supreme law, *constitutional rigidity* arose. In this sense, J. Bryce, taking the Constitution of the United States of America as a basic reference point, created his classic distinction between *rigid and flexible* constitutions[9].

Nevertheless, the original idea of American constitutionalism, which was to advocate that if the "new and homogeneous " constitution did not receive attacks, it did not need to be defended, brought about a kind of "magical constitu-

5 VEGA GARCIA, P. on: "Supuestos políticos y criterios jurídicos en la defensa de la Constitución: algunas peculiaridades del ordenamiento constitucional español." In: *Revista de Política Comparada*, nos. 10 and 11. 1984, p. 4.

6 Ibidem, p. 412.

7 "This Constitution, and the laws of the United States that are made in accordance with it, and all treaties concluded or celebrated under the authority of the United States, will be the supreme law of the country and the judges of each state will be obliged to observe them, despite anything in opposition to it found in the constitution or laws of any state." In: CASCAJO CASTRO, J.L. and GARCIA ALVAREZ, M.:
Contemporary foreign constitutions. Madrid: Tecnos, 1988, p.31. (Translation into English is ours)

8 VEGA GARCIA, P.: "Supuestos políticos y criterios jurídicos ..., op. cit., p. 406. This same idea is reflected in this author's other work: *La reforma constitucional y la problemática del poder constituyente*. Madrid: Tecnos, 1,985. This issue is also referred to in his work: "Reforma constitucional." In: GONZALEZ ENCINAR, J.J. (dir.): *Diccionario del sistema político español*. Madrid: Akal, 1,984.

9 The "specific character" of the first type lies in the fact that they "possess a superior authority to that of other laws of the State" and "are amended by different procedures to those by which other laws are issued and annulled." While the "distinctive merit" of the second type is their "elasticity", that is, that they "can be extended or adapted" according to "the circumstances without their structure breaking." Referring to rigid Constitutions, J. Bryce asserted that "the Republic of the United States has not only presented the modern world with the most notable example of this type of constitution, but thanks to its success, has

tional utopianism" that also influenced Europe throughout the nineteenth century. At this time, as a result of the agreement of "liberal doctrine," "the ideological pacification between aristocracy and bourgeoisie, between monarch and people" occurred. Indeed, in Europe, towards the end of the nineteenth century, the assumption of constitutionalism by conservative politicians, by virtue of the construction of the doctrine of the neutral power of the king, led to the acceptance that the constitution, having neither opponents nor adversaries did not need to be protected. Therefore, "the constitutional utopia" had been historically achieved[10], as had previously happened in North America.

However, when "the great political commotion" of liberalism occurred after the First World War, the constitutional panorama changed direction. The constitutional safeguard was no longer conceived in an abstract sense, but rather in a concrete sense, as a protection of the democratic "values" enshrined in the constitution. This implies that if at the beginning of current constitutionalism, the guarantee of "constitutional legality" was what was possible in Europe with the mechanisms offered by politics, at this point, it would tend towards the protection of "political values" by using instruments and legal means. Therefore, the legal means of constitutional protection were subject to "political values" and the legitimising basis of the constitutional mechanism[11].

In this context, the differences between the North American and European evolution and the difficulty in defining the "legal" and "political" sense of the protection of the constitution appear. An example of the continuous interrelation between politics and law was clearly shown in the 1930s in the well-known controversy between Schmitt and Kelsen over what the defence of the constitution was. In fact, as stated by P. de Vega, in this controversy, Kelsen defended the "democratic principle", while Schmitt was in favour of the "monarchical principle"[12]. In this sense, the works of the two authors start out from substantially different constitutional concepts on the constitution, the people, parliament and democracy.

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converted it into the model for other Republics to imitate". BRYCE, J.: *Constituciones flexibles y Constituciones rígidas*. Madrid: Centro de Estudios Constitucionales, 1988. Preliminary study by P. Lucas Verdú, pp. 65, 64 and 31, respectively. Bryce's classic distinction has been revised by, , among others PACE, A., & VARELA, J.: *La rigidez de las Constituciones escritas*. in: Cuadernos y Debates, nº 58. Madrid: Centro de Estudios Constitucionales, 1995. pp. 26-34. (Translation into English is ours)

10 VEGA GARCIA, P. on: "Supuestos políticos y criterios jurídicos ..., op. cit., p. 412.

11 VEGA GARCIA, P.: "Supuestos políticos y criterios jurídicos ..., op. cit., p. 412. Regarding the "legal" defence, J.A. González Casanova asserts that "just as the Constitution foresees its own reform and its own exceptional suspension, so the Constitution usually foresees its legal defence." In this area, he refers to "two constitutional traditions": the North American and the French. The first attributes to the judicial power "the defence of the Constitution by means of the judgment on if a right guaranteed by it has been violated and if such violation has been produced by a regulation or an act contrary to basic law." The second grants to the legislative power (i.e. the parliamentary assemblies) "the power to decide whether a rule created by it is contrary or not to the Constitution." But, given that both currents "hold contradictory arguments ", current constitutionalism has incorporated a" third way ", consisting of attributing to a special body "the legal defence of the Constitution." In this last "way" four "models "stand out: 1)" a supreme judicial organ " such as the Japanese Constitution of 1946 ; 2) "a political organ" (for example in the French Constitution of 1946); 3) "a technical body" (this is the case of the French Constitution of 1958) and 4) "a juridical-political constitutional body" (the Constitutional Courts or Constitutional Guarantees of the Spanish Constitution of 1931, of the Italian Constitution of 1947, of the German Constitution of 1949, and of the Spanish Constitution of 1978, among others). GONZALEZ CASANOVA, J.A.: Teoría del Estado y Derecho Constitucional. Barcelona: Editorial Vicens Vives, 1980. pp. 226-227. (Translation into English is ours)

Nevertheless, a constitutional system[13] that has to defend the previously mentioned material content has a basic problem to solve, that of guarantees. This is because, as A. Posada affirmed, the "constitutional regime" of the rights of the individual sometimes undergoes alterations, called for by extraordinary political circumstances that require the interruption of the guarantee of the provisions of the constitution. An emergency may be due, logically, to an external armed conflict, to an internal violent conflict, or to serious alterations of "public order", and it requires the existence of an extraordinary, anticipated and corrective treatment of the rights of individuals, especially of civil liberties. This may be brought about by an increase in the state's executive power, and, in a regime of this type, the extraordinary procedure of rights must be provisional, and its application has to be carried out in compliance with the law[14].

In short, in the face of dangerous conduct resulting from expressions of minority opposition to the constitutional order, the constitution has defence mechanisms that are usually adapted to both security forces and bodies, as well as to criminal regulations and jurisdictional bodies. However, if the objections are so serious that the usual corrective mechanisms of protection are not sufficient, then, only "superficially", is there a breach of the constitution. Ultimately this breach means a "crisis" of the very foundations on which the constitution is based. In this case, responding with a provisional interruption of the constitutional order that is supposed to protect becomes "doubly risky"[15].

At this point, it is necessary for the purposes of this present research to draw on the examination of the different institutions that, over time, have been considered as "models" that are capable of enabling constitutions to survive in crisis situations. In this regard, given the diversity of the "instruments" related to *the defence of the constitution* in emergency situations, which can be observed in the analysis of different historical moments, the systematisation of the evolution of constitutions proposed by P. Cruz Villalón is undoubtedly very enlightening about the possible content and evolution of these instruments, without overlooking the risks inherent in any classification. At least, in this way, it is possible to discern some basic archetypes, although the doctrinal analyses show discrepancies, not only within themselves but also, even when the denominations agree, as differences also arise regarding both specific content and conceptual significance.[16]

The earliest recorded historical examples of the law of exception can be traced back to the "Spartan Ephorate"[17] originating in Sparta in the eighth century B.C.E. The Roman senatorial institution was a model imitated during the Middle Ages in various Italian states, such as the Venetian Republic.

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12 VEGA GARCIA, P.: "Supuestos políticos y criterios jurídicos ..., op. cit., pp. 395-396.

13 F. Murillo Ferrol & M. Ramírez Jiménez use both terms interchangably, "defensa del ordenamiento constitucional" and "defensa de la Constitución", MURILLO FERROL, F. & RAMIREZ JIMENEZ, M.: Ordenamiento Constitucional España. Madrid: Ed.S:M.1980 p.148

14 POSADA, A.: *Tratado de Derecho Político*. Madrid: Librería General Victoriano Suárez, 1935. Vol. II, p. 394.

15 CRUZ VILLALÓN, P.: *Estados excepcionales y suspensión de garantías*. Madrid: Tecnos, 1984, p.22.

16 Ibidem

During the absolutist period in France, the absolute state achieved the submission of military power to civil power[18] through "a slow, but inexorable process of centralisation,". What happened was that the probability of constant interference, without justification, by the absolute state, typical of the Ancien Régime, gave way to a different perspective of "public security" in revolution and constitutionalism, in which freedom would be guaranteed first. But, in this new period, unlike the previous one, interference in the field of freedom would not be legitimised except for in an extraordinary way and subsequently in the procedure established by law[19]. In matters of public order, the end of the "preventive" method belonging to the Ancien Régime occurred as a result of the French Revolution of 1789. The new revolutionary principles made the constitutional public order appear repressive and therefore, incompatible with the old principles of non-constitutional public order. Among those principles, emphasis was put on those of "natural and civic liberty", "the natural right of property", with the consequent "freedom of trade" and "the free alienation of property", "religious tolerance", "public instruction" and the elimination of the "privilege" of carrying arms[20].

The British constitutional evolution seems to have had, chronologically and conceptually, significant differences. These differences would be clarified in both the appearance of specific institutions and, for some of them, in the attribution of specific characteristics, fundamentally due to the particularities that the appearance and consolidation of constitutional government presented in Great Britain. It seems logical, therefore, that British singularity, as it has been called on many occasions, also manifested itself in how the defence of the constitution was understood and ensured, in general, and the law of exception, in particular.

Indeed, in the event of exceptional circumstances, Britain has an extraordinary legal system that is more flexible than anywhere else. This is because there is no distinction between constitution and "ordinary" law, and the postulate of parliamentary sovereignty also exists. Unlike states that have rigid constitutional texts, where the law exception is introduced into a prior law, in England, this only occurs in part and, "with greater vital logic, the exceptionality of the legal situation depends on the exceptional political situation."[21] Hence, in this country, where the instrument of *martial law* originated, the instrument leads to such a degree of agitation in the organs of state, and especially of the courts of justice that these bodies become powerless in this situation, mean-

17 For a study on the Spartan state, differentiating it from the Hellenic one, consult Jellinek, G.*Teoría del Estado*. trans. From the second German edition. Prologue by. Buenas Aires, Albatros 1970 p223. Fernando de los Ríos

18 The "legal system of the prerevolutionary period incorporated, therefore, a set of constitutional principles resolutely affirmed, at least in part: the concept that war and defence were the duty of the State and not of the armed bodies; the centralisation in the supreme constitutional organ of the State of all the military leadership powers and the technical concept of the military function itself; the articulation of a hierarchical organisation of the armed forces, at the top of which were civil servants responsible to the king [...] ". VERGOTTINI, G. in: "La supremacía del poder civil sobre el poder militar en las primeras Constituciones liberales europeas." In: *Revista Española de Derecho Constitucional*. Year 2. Nº. 6. September-December 1982, pp. 14-15. (Translation into English is ours).

19 SERRANO ALBERCA, J.M.: "Comentario al artículo 116 de la Constitución." In GARRIDO FALLA, F. et al: *Comentarios a la Constitución*. Madrid: Civitas, 1985. 2nd ed, p. 1,558.

20 Cruz Villalón, P.: *El estado de sitio y la Constitución. La constitucionalización de la protección extraordinaria del Estado (1789-1878)*. Madrid: Centro de Estudios Constitucionales, 1980, pp. 59-60.

ing that the military power can act.[22]

Furthermore, in Great Britain the institution known as the "suspension of constitutional guarantees", which entails the general interruption of the enjoyment of certain fundamental rights stands out.[23] It dates back to 1689, when the British Parliament passed a law that suspended this guarantee of personal freedom.[24] The freedom of the individual had previously been regulated in the *Habeas Corpus Act* of 1640 and in the *Habeas Corpus Amendment Act* of 1679.[25] During the eighteenth century, Parliament suspended *habeas corpus* on several occasions, through the acts known as the *Habeas Corpus Suspension Acts* or the *Suspension of Habeas Corpus Acts*. Throughout this period, the suspension of *habeas corpus*, together with the restriction of many other freedoms, made England "a true state of exception."[26] The suspension of *habeas corpus* as an extraordinary instrument of the protection of the state organisation would be considered in the American Constitution of 1787,[27]. This institution can even be considered as a precedent of Article 55.1 of the current Spanish Constitution of 1978.[27] In addition, another institution, denominated "plenary powers" has also been considered as being similar to the law of exception. It consists of a mechanism used primarily in England and the United States, with the purpose of accumulating powers within the Government owing to the fragility of the measures of martial law.[28]

Focusing on the law of exception at the birth of the constitutional state , we must highlight once again that the US Constitution of 17 September 1787, the first written constitution in the modern world, established the possibility of suspending the right of *habeas corpus*, contained in Article 1, section IX, paragraph 2, whenever "public security" requires it, in cases of "rebellion or invasion." The Constitution does not establish anything about which competent authority can declare the suspension of *habeas corpus*. It only affirms that the President of the United States, before exercising his mandate, will promise or swear in the

21 GARCIA PELAYO, M.: *Derecho Constitucional Comparado*. Madrid: Alianza Universidad Textos, 1987. 1st reis. of the 1st edn., p.322.

22 PORRES AZKONA, J.A.: "La defensa extraordinaria del Estado." In: *Revista de Estudios Políticos*, nº 216. November-December, 1977. Madrid: Centro de Estudios Constitucionales, pp. 161-162.

23 FERNANDEZ SEGADO, F.: "Artículo 55. La suspensión de derechos." In: Alzaga Villaamil, O.: *Comentarios a la Constitución Española de 1978*. Madrid, Cortes Generales, Editoriales de Derecho Reunidas (EDERSA), 1996, VOLUME IV, pp. 578-579.

24 CRUZ VILLALON, P.: *El estado de sitio y* ..., op. cit., p. 249. Likewise, FERNANDEZ SEGADO, F.: "Comentario al artículo 55 ..., op. cit., pp. 578-579.

25 In accordance with the provisions of Article I of the Habeas Corpus Amendment Act of 26 May 1679: "When someone is the bearer of a *habeas corpus*, addressed to a sheriff, jailer or any other official, on behalf of an individual placed in their custody and said *habeas corpus* is presented to these officials or left for them in jail, they will be obliged to state the cause of this detention within three days of the presentation (unless the sentence is motivated by treason or felony mistakenly mentioned in the prison order) In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M.: *Constituciones de los Estados de la Unión Europea*. Barcelona: Ariel Derecho, 1997, p. 261. (Translation into English is ours).

26 CRUZ VILLALON, P.: *El estado de sitio y* ..., op. cit., pp. 249-251. Likewise, a classic Spanish author like A. Posada in his analysis on the suspension of the privilege of "habeas corpus", refers back to V. Dicey. See POSADA, A., op. cit., volume II, pp. 395-396.

27 Article 1, section IX, paragraph 2, of the North American Constitution of 1787 declares: "The privilege of *Habeas Corpus* shall not be suspended, except when public safety demands it in cases of rebellion or invasion." In: CASCAJO CASTRO, J.L. & GARCIA ALVAREZ, M., op. cit., p. 25. (Translation into English is ours).

28 FERNANDEZ SEGADO, F.: "Comentario al artículo 55 ..., op. cit., pp. 578-579.

29 PORRES AZKONA, J.A., op. cit., p. 162.

following terms: "I will preserve, protect and defend the Constitution of the United States, to the best of my ability."[30] Nevertheless, the Supreme Court assigns this competence to Congress, and it may only be exercised by the President when authorised by that House.[31]

As previously mentioned, the origin of this institution was in Great Britain, where, in 1689, Parliament passed a law temporarily suspending this guarantee of personal freedom, previously embodied in the *Habeas Corpus Act* of 1640 and the *Habeas Corpus Amendment Act* of 1679.[32] But, while in England this suspension was "one more instrument among any of those that Parliament would provide", in the United States, this suspension was "the only one authorised" by the Constitution.[33]

In addition to the suspension of *habeas corpus*, American constitutional law considers *martial law* as another means of suspending individual rights. Both the requirements for the declaration of martial law and its scope have been defined by the doctrine of the Supreme Court that can be summarised as follows: martial law is "legitimate" if the circumstances do not allow the normal and ordinary law to be in force; on the contrary, it is "illegitimate" if the aforementioned enforcement is probable. However, as in England, there is no general regulation regarding the faculties and powers of military leaders in the case of martial law, or the reach of suspended rights.[34]

When considering the French revolutionary period,[35] , A. Mª. Martínez Arancón affirms, with much admiration, that "a quick glance at its achievements makes us wonder still, with amazement, on how it could achieve so much in such a short time". Moreover, bearing in mind that "while giving birth to this new world", the French managed to "keep the counterrevolutionary armies at bay with remarkable success". These were armies that had the support of European countries, and yet the French maintained the "control of the interior, which was not always easy."[36]

As indicated above, with the new French revolutionary period, the implementation of criminal legislation, especially that relating to domestic "security and peace", was achieved by introducing a set of guarantees[37] that did not exist during the Ancien Régime. These guarantees defended a person from the time he was arrested until he was judged by a neutral procedure.[38] In addition, the National Constituent Assembly approved a

30 Article 1, section IX, paragraph 8. In: CASCAJO CASTRO, J.L. & GARCIA ALVAREZ, M., op. cit., p. 27.

31 GARCIA PELAYO, M., op.cit., p.449.

32"Comment on Article 55 ..., op. cit., pp. 578-579. Likewise, J.M. Serrano Alberca believes that "The study of these exceptional institutions can be traced back to the Roman dictatorship. But from the point of view that we have adopted, we are especially interested in the evolution of the institutions that have regulated the exceptional situations in the Rule of Law. [...] The immediate historical origin is found in English *Martial Law.*" SERRANO ALBERCA, J.M.: "Situaciones excepcionales..., op. cit., p. 1,959. (Translation into English is ours)

33 CRUZ VILLALON, P.: *El estado de sitio y* ..., op. cit., p. 251.

34 GARCIA PELAYO, M., op.cit., p.449-450.

35 For the general character of the constitutional history of France see: DESLANDRES, M.: *Histoire constitutionnelle de la France de 1789 a 1870*. Vol. I: "De la fin de L'Ancien Régime a la chute del'Empire (1789-1815)." Paris: Librairie Armand Colin et Librairie du Recueil Sirey, 1932. GODECHOT, J. can also be consulted: *Les institutions de la France sous la Révolution et l'Empire*. Paris: Presses Universitaires de France, 1951. For a specific examination of the institutions on this subject SCHMITT, C. can be consulted: "La práctica de los comisionarios del pueblo durante la Revolución francesa." In: SCHMITT, C.: *La dictadura*, op. cit., pp. 199-219.

decree on 23 February 1790 urging the municipal authorities to proclaim *loi martiale* (martial law) if there were a threat to public safety. Subsequently, given that the number of riots increased, this decree was modified, so that *loi martiale* would be continuously declared, and would take effect throughout the whole period.[39]

In parallel, the Law of 8 July 1791 provided for the état de siège (state of siege). With this law, France became the first state to legally regulate this instrument, since this law was the only one with its specific features: handing over civil power to military power in all the powers relating to the preservation of public order.[40] We must highlight the importance of the Consular Constitution of December 13 of 1799, or the year VIII, in the French constitutional evolution after the revolutionary period, which considered an "*alternative system*" of proclamation by the government or by the legislative power by which the "democratic" justification of the exceptions adopted was achieved.[41]

Certain political concepts continued in French constitutionalism throughout the nineteenth century, despite its fractured political systems. One example of this is the "Council of State" and "the large public administrations" whose lasting presence enabled France to overcome the enormous "revolutionary" breakdowns without difficulty. Although essential transformations occurred during this long period, they were balanced, as if they were obeying a specific development. This seemed to be a consequence of the deployment of the prevailing "social class" at the time of assuming dominance and of the abundant paradoxes that had occurred within this class, until coherence and political commitment were achieved that went beyond its split into various groups.[42]

Hence, Article 14 of the Charter of 4 June 1814, granted by Louis XVIII, reestablished the Bourbon Dynasty, and the Monarch was considered as the highest authority of the state,[43] with the power to develop regulations and ordinances that were essential for compliance with the law and the protection of the state. This precept is considered to be the forerunner of Article 48 of the German constitution of 1919.[44] Article 66 the Additional Act of 22 April 1815 provided for the declaration of a state of siege anywhere in the territory, but only in the event that the country were invaded by a foreign army or in the event of civil disorder. Despite the fact that in the Monarchical Constitution of 14 August 1830, there was no mention of *the state of siege*, it was proclaimed in 1832 , in which the government resolved to not was harm "in their general rights and freedoms" anyone who was not involved in

36 MARTINEZ ARANCON, A. Mª: *La Revolución francesa en sus textos.* Madrid: Tecnos, 1989. Colección Clásicos del Pensamiento. Estudio Preliminar, p. XV.

37 On the guarantees for the detained person, Articles 7, 8, 9 and 12 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789 stand out.

38 CRUZ VILLALON, P.: *El estado de sitio y* ..., op. cit., p. 88.

39 ROBESPIERRE, M.: "Sobre los principios del gobierno revolucionario." In: *La revolución jacobina.* Barcelona: Nexos, 1992. 1st edition, trans. and prolog. by Jaume Fuster, pp. 127-138.

40 FERNANDEZ SEGADO, F.: "El estado de excepción en el Derecho francés". In: *Revista de Derecho Público*. Nº 70. January-March, 1978. Pp. 43-65, especially pages 58-59. In this article, the author uses the expression "estado de excepción" instead of "derecho de excepción".

41 ESTEBAN, J. de & LOPEZ GUERRA, L.: *El régimen constitucional español.* Barcelona: Ed. Labor, 1980. Vol. I. pp. 229-230.

42 NUÑEZ RIVERO, C.: Chapter IV: "El régimen político francés." In: FERRANDO BADIA, J. (coord.): *Regímenes políticos actuales.* Madrid: Tecnos, 1.985. 1st ed., p. 319.

the event, because this instrument was intended to restrict, according to the regulations, the power of the military authority in both its premise its substance.[45]

The French revolutionary events of February 1848 also produced a series of consequences related to this matter at both the constitutional and legislative levels. At that point, it was not a matter of suspending freedom, but of interrupting the exercise of specific rights and political freedoms in favour of other specific rights and civil liberties which continuously embodied "the raison d'être of the state" and which legitimised its regular and exceptional protection.[46] Years later, during the Second French Empire, the Constitution of 14 January 1852 granted the President of the Republic[47] powers that meant this was a constitution in which there was no longer a need for a law to declare a state of siege, as the will of the President was enough, since he had greater powers than those conferred by the Constitution of 1848.[48] On the contrary, the Constitutional Laws of 1875[49] of the III French Republic mention nothing about the *state of siege*; nevertheless, greater guarantees were established: a *state of siege* could only be declared by means of a statutory regulation, and if the chambers of government were dissolved, the President of the Republic could not, even temporarily, declare a *state of siege*.[50]

In this context, the European constitutions after 1830, included in what E. Aja calls the third epoch of constitutionalism,[51] basically followed the model established by the French constitutions of that period. As disparate examples from different periods , we can highlight, for these purposes, the Albertine Statute of 1848[52] or the Constitution of the Kingdom of Bulgaria of 1879.[53] Nevertheless, as in many other aspects of constitutional relevance, the Belgian Constitution of 1831 deserves a separate mention, in which the classic Article 130 prohibited the suspension of the constitution in whole or in part.[54]In this regard, the Monarch could never move to suspend the laws nor be exonerated for non-compliance. In addi-

43 Article 14 established : "The king is the supreme head of the state, he commands the forces on land and sea, declares war, makes peace, alliances and trade treaties, appoints all the posts of the public administration, and makes the regulations and ordinances for the enforcement of laws and state security." In: GODECHOT, J.: *Les Constitutions de la France depuis 1789*, op. cit., pp. 219-220. (Translation into English is ours)

44 FERNANDEZ SEGADO, F.: "El estado de excepción en el Derecho francés", op. cit., nº 70, p. 51. The content of Article 48 was as follows: "1. [...] If security and public order are seriously disrupted or threatened in the German Empire, the President of the Empire can take the necessary measures for the restoration of public order and security and, if necessary, resort to the help of the armed forces. To this end, he may temporarily suspend, in whole or in part, the fundamental rights established by articles 114, 115, 117, 118, 123, 124 and 153. The President of the Empire must immediately inform the Reichstag of all the measures adopted in virtue of paragraphs 1 and 2 of this article. These measures must be provided at the petition of the Reichstag. (Translation into English is ours).

45 Ibidem, p.53.

46 CRUZ VILLALON, P.: El estado de sitio y..., op. cit. pp. 442-443.

47 According to Article 2 of the French Constitution of 1852, " the Government of the French Republic is entrusted for ten years to Prince *Luis Napoleón Bonaparte*, the current President of the Republic" in GODECHOT, J.: *Les Constitutions de la France depuis 1789*, op.cit.p.293. (Translation into English is ours)

48 FERNANDEZ SEGADO, F.:" El estado de excepción en el Derecho francés", op. cit nº. 70 p.54

49 The Constitutional Laws were made up of the following norms: 1 Law of 25 February 1875, on the organisation of public powers, 2. Law of 24 February 1875 on the organisation of the Senate, 3. Constitutional Law of 16 July 1875 on the relationships of the public powers. These constitutional Laws were revised by the laws of 1879, 1884 and 1926 although none of these latter laws directly affect the subject of this research. In GODECHOT, J.: Les Constitutions de la France depuis 1789, op.cit. pp.331-338. (Translation into English is ours)

tion, the King could proclaim war, communicating this proclamation to the Legislative Assemblies at the moment that was opportune for the needs and defence of the state.[55]

Let us now review the law of the state of exception in the constitutionalism of the interwar period, since the period between the end of the first and the beginning of the Second World War (1919-1939) is sufficiently substantial to constitute a fourth constitutional phase, qualified by E. Aja as the constitutional texts of " unstable democracy." In general terms, the main transformations that occurred in this period brought about the extension of universal male suffrage, and even female suffrage in some countries; the elimination of elitist assemblies; the change of resistant monarchies to republican parliamentarism. In addition, this liberal model extended to Eastern Europe. Nevertheless, an inherent feature of this period was the critical environment in which it developed.[56]

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50 Articles 1, 2 and 3, respectively of the Law of 3 April 1878. In Codes et Lois, nº., op. cit., p.13.
Art. 1: "The state of siege cannot be declared except in the case of imminent danger, resulting from a foreign war or an armed insurrection. There is only one law that can declare a state of siege: This law designates the towns, districts or departments to which it applies. It fixes the duration. At the expiration of that time, the state of siege ceases to have effect unless a new law prolongs its effect." 2: In case of the postponement of the chambers, the President of the Republic may declare a state of siege, with the opinion of the Council of Ministers, but then the chambers have to meet in accordance with law some days afterwards." Art 3: In case of dissolution of the chambers of deputies and until the completion of the electoral process, the state of siege cannot be declared, even provisionally, by the President of the Republic. However, if there is a foreign war, the President ,with the consent of the council of ministers, can declare the state of siege in the territories threatened by the enemy with the condition of summoning the electoral colleges and convening the Chambers as quickly as possible." (Translation into English is ours)

51 AJA, E.: "Estudio Preliminar." In: LASSALLE, F., op. cit., pp. 19-22.

52 The Albertine Statute of 4 March 1848 established a hereditary Catholic Monarchy. Article 5 proclaims the King as Head of State and affirms that "he commands all the forces of land and sea, declares war, makes treaties of peace, alliance," and brings them to the attention of the Chambers to the extent that the interest and security of the State allow it". Article 6 provides that the Monarch drafts "the decrees and regulations necessary for the execution of the laws, without being able to suspend their observation or dispense with them." Article 36 appoints the Senate as the Court of Justice to judge "the crimes of high treason and attack on the security of the state. "In essence, the content of these constitutional precepts resembles the content of the French Constitution of 14 August 1830. In: DARESTE, F.R. & DARESTE, P.: *Les Constitutions modernes*, volume II: Hongrie à Suisse. Paris: Librairie du Recueil Sirey, 1928. Quatrième edition entire mentre fondue by Joseph Delpech & Julien Laferrière. pp. 80 and 84, respectively. (Translation into English is ours)

53 Under Article 4 of the Bulgarian Constitution of 16 April 1879, Bulgaria proclaims itself a "hereditary and constitutional monarchy", in which, under Article 11, the King is "the supreme commander of all the armed forces" , not only "in times of war" but also "in times of peace." In addition, Article 43 provides that in the event that the state " is threatened by an internal or external danger" and when the Assembly "can not be convened ", the Monarch will be empowered to adopt "the ordinance" and "order the measures", having "the executory force of the laws. "Subsequently, these" ordinances and extraordinary measures "will have to be approved by the first National Assembly convened in the shortest time possible. Nevertheless, according to Article 18, "the ordinances and decisions" approved by the King are not "valid", unless they are backed by the appropriate Ministers, who "assume all responsibility". Finally, Article 73 provides for the state of siege, which will be regulated by law "if the National Assembly is in session", or by Decree "issued under the collective responsibility of the ministers" and which must be ratified by the National Assembly. Basically, the content of these constitutional precepts reminds us of the content of the Constitutional Laws of 1875. DARESTE, F.R. & DARESTE, P., op.cit. Volume 1,pp. 374, 378,375 and 381, respectively . (Translation into English is ours).

54 This precept is: "The Constitution cannot be suspended in whole or partially" In: Cátedra de Derecho Político de la Universidad de Barcelona, op. cit., p.91. (Translation into English is ours)

55 Articles 67 and 68. In: Cátedra de Derecho Político de la Universidad de Barcelona, op. cit., p. 82.

At this stage, constitutions such as the German Constitution of 1919 and the Austrian Constitution of 1920 were passed, which inspired other constitutions approved in the 1920s (Poland, Romania, Czechoslovakia, etc.) and the 1930s (Spain during the Second Republic). In the German Constitution of 1919, better known as the Weimar Constitution, the "guarantee" offered by Article 48,[57] consisted of the fact that the President of the German Reich had to communicate "all measures taken" to Parliament. This could be simply avoided by the Executive as the German Parliament could be dissolved by the order of the President of the Empire[58] In fact, in certain situations, Parliament was forced to accept the decisions of the President, since the dilemma faced was to accept these decisions or be dissolved.[59]

Moreover, during this period, and after the fall of the Austro-Hungarian Empire at the end of the First World War, the Austrian Constitution of 1 October 1920 was approved (Federal Constitutional Law by which Austria became a Federal State),[60] as a clear example of the control of the constitutionality of laws by the Constitutional Court of Justice, an institution, whose most inspiring proponent, as is well-known, was the jurist Hans Kelsen. The "Austrian model of constitutional control" was included as a "supplementary" factor within a constitutional jurisdiction transferred, in a broad sense, from the constitutional system of the monarchy considered in the Constitution of 1867.[61]

The constitutions drawn up after the Second World War are included in what E. Aja calls the fifth phase of constitutionalism, alluding to the constitutional texts approved in France (1946), Italy (1947) and Germany (1949). In general terms, in this constitutional period, democracy was not limited to the "political plane" but extended to "economic and social" fields , producing major constitutional innovations. However, what is decisive is that the "principles" typical of this period, deployed by "the democratic movements" of the 1960s and 1970s, led to constitutional amendments to in countries such as Denmark, Switzerland, Belgium and Sweden, and they were even taken as a model in young European democracies, as in the cases of Greece, Portugal and Spain.[62]

The constitutional texts of this period feature

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56 On this matter, the work of LUCAS VERDU, P. can be consulted: *La lucha contra el positivismo jurídico en la República de Weimar. La teoría constitucional de Rudolf Smend.* Madrid: Tecnos, 1987.

57 For Martínez Sospedra, this precept, together with Article 16 of the French Constitution of 1958 are the only "two suppositions" that are considered in the constitutional history of the "constitutional dictatorship". MARTINEZ SOSPEDRA, M & AGUILO LUCIA, LI: *Lecciones de Derecho Constitucional Español*. Valencia: Fernando Torres (editor), 1981. Volume I. P. 95. (Translation into English is ours)

58 According to the provisions in Article 25 of the Weimar Constitution: "The President of the Reich may dissolve the Reichstag, but only once for the same reason. The new election will take place within a maximum period of 70 days from the dissolution." In: DARESTE, F.R. & DARESTE, P., op. cit., volume I, p. 64. (Translation into English is ours)

59 MARTINEZ SOSPEDRA, M & AGUILO LUCIA, LI: op. cit., pp. 91-100

60 As established in paragraph 1 of Article 140 of the Austrian Constitution of 1920: "The Constitutional Court of Justice decides on the unconstitutionality of the laws of the Country, at the request of the federal government; it decides on the unconstitutionality of federal laws, at the request of a government of the Country; it decides ex officio, but only when the law in question must decide the necessary element of a judgment of the Constitutional Court of Justice." DARESTE, F.R. & DARESTE, P., op. cit., volume I, pp. 331-335. (Translation into English is ours)

61 DARESTE, F.R.& DARESTE, P., op. cit., volume I, pp. 294-336. Likewise, see the work of CRUZ VILLALON, P.: La formación del sistema europeo ..., op. cit. Pages 232-276 are dedicated to the Austrian Constitution of 1920.

characteristics of the "law of exception", although the incorporation and modification of institutions existing up to that point in constitutional history would also occur in the Anglo-Saxon world. Indeed, this was even the case in Great Britain, where a constitution in the form of a single written text did not exist. During the twentieth century, according to M. Garcia Pelayo, there was a notable assumption of "anticipated exceptionality". This was the 1920 *Emergency Powers Act*[63], which considered "illegal strikes"[64]. Similarly, during the Second World War, Great Britain passed laws of plenary powers,[65] called *special statutory powers*. These powers had a time limit that exceeded that of the Emergency Powers (Defence) Act, of 1939 and 1940[66]. During the period in which these laws were in force, the government possessed enormous powers and among the regulations approved were the provisions of Section"18 B" of the Defence of the Realm Act. This section stands out as it granted power to the Home Secretary for the arrest of anyone whom he had a "rational motive" to consider as part of a specific class of "suspects". The detained could appeal their detention before an "advisory committee" appointed by the Home Secretary[67].

When talking about the Anglo-Saxon world, it is necessary to emphasise that two laws of plenary powers were approved during the Second World War in the United States: the *First War Powers Act* of 1941, and the *Second War Powers Act*, of 1942, but, according to J.A. Porres Azkona, the parliamentary control following the application of both laws was "more rigorous" in the United States than in England[68]. In this context, the US Constitution did not incorporate methods, nor did it regulate cases of "temporary suspension of individual rights for situations of military emergency". This which granted a certain "discretion" to the US Executive, causing not only a broad "suspension of guarantees" granted by Abraham Lincoln in the American Civil War, as we have seen previously, but also the partial and restricted breakdown of some rights throughout the Second World War[69].

We must now consider the Constitutions of 1946 and 1958 of the IV and V French Republics. In this context, in France, once the Second World War was over, the draft Constitution of 19 April 1946 was drawn up, which was replaced by the Constitution of 27 October of the same year[70]. This new constitution only considered the declaration of war, which could be made "without a vote of the National Assembly" and without previously hearing the decision of the "Council of the Republic"[71]. It even provided that if the "metro-

62 AJA, E.,"Estudio Preliminar" In LASSALLE, F.,op. cit. pp. 2-26

63 This Law is contained in Halsbury's Statutes of England and Wales, Fourth edition. Volume 48: Butterworth,1995, reissue, pp. 933-935

64 GARCÍA PELAYO, M., op.cit.,p 322

65 The plenary powers in England during World War I are analysed in JEZE, G .: "L'Executif en temps de guerre." In: Revue de Droit Public et de la Science Politique en France et a l'etranger. Tome 34. Paris: M.Giard & E. Brière (editors), 1917. P.30. Specifically, this author states that by virtue of the Law of 27 November 1914, the Executive "receives the broadest powers in terms of the preparation of the regulations"with the purpose of "ensuring public safety and the defence of the kingdom, it can formulate all the rules that, in its judgment, public interest requires, relating to the person, to property, to commerce, to industry , etc." Nevertheless, these regulations will only serve while the war continues." (Translation into English is ours)

66 PORRES AZKONA, J.A., op. cit., p. 162. The first of these Laws is contained in: Public and General Act Command. The second of them is contained in: Command Paper 6162.

67 GARCIA PELAYO, M., op. cit., p. 323.

68 PORRES AZKONA, J.A., op. cit., p. 162.

politan territory" were totally or partially occupied by foreign forces, no revised procedure could be adopted or sanctioned[72]. Subsequently, Article 7 of the Constitution was amended by the law of 7 December 1954, which included the state of siege. In this manner, a final phrase was added to the aforementioned constitutional precept in which it was stated that the "state of war" shall be proclaimed in the legally established terms[73].

The French Constitution of the Fifth Republic of 4 October 1958, based on a project presented by General De Gaulle[74], gave rise to the most significant debates on this subject thanks to the content of Article 16, which provides that, in the event of certain exceptional circumstances that endanger the existence of the state, the President of the Republic will adopt the essential actions for this extraordinary situation[75]. In the opinion of J. Lamarque, the reiterated precept is not a consequence of history, but is due exclusively to the wishes of General de Gaulle[76]. Nevertheless, most of the doctrine usually attributes this article to the remote precedent of the old Roman Republic dictatorship, and "the clauses of extraordinary powers" or plenary powers of the US Constitution, and Article 48 of the Weimar Constitution as immediate precedents, concluding that it is not indebted to previous French constitutional texts[77]. In particular, according to M. García Pelayo, its inclusion in the constitution at the time was more due to the French situation, although its precedent is found in Schmitt's theories on "the exceptional case". These were put forward as an interpretation of Article 48 of the German Constitution of 1919, which is much more cautious in its wording than Article 16 of the current French Constitution[78].

Likewise, the concept referred to in the aforementioned constitutional precept of *constitutional dictatorship*[79] ,and even *state of constitutional necessity*, is qualified[80] in the words of G. Camus, who defines it as "the urgent and unforeseen circumstances" that make it necessary to bring powers together in order to save the state, "un-

69 GARCIA COTARELO, J.: Chapter VIII: "El régimen político de los Estados Unidos". In: FERRANDO BADÍA, J., op. cit., pp. 546-547.

70 Both texts are included in GODECHOT, J.: *Les Constitutions de la France depuis 1789*, op. cit.

71 Article 7 of the Constitution of 27 October 1946 was drafted in the following terms: "War cannot be declared without a vote of the National Assembly and the previous opinion of the Council of the Republic." In: GODECHOT, J.: *Les Constitutions de la France depuis 1789*, op. cit., p. 392. (Translation into English is ours)

72 Article 94 of the Constitution of 27 October 1946 provides: "In case of occupation of all or part of the metropolitan territory by foreign troops, no revision procedure shall be begun or continued." In: GODECHOT, J.: *Les Constitutions de la France depuis 1789*, op. cit., pág. 408. (Translation into English is ours)

73 Ibídem. p.392

74 ECHEVERRIA, R.: *La Quinta República francesa*. Madrid: Ediciones Rialp, S.A., 1962, p. 72

75 The content of this extensive precept is as follows: "When the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are threatened in a serious and immediate manner, and the regular functioning of the constitutional public powers are interrupted, the President of the Republic shall take the measures required by such circumstances, after official consultation with the Prime Minister, the presidents of the assemblies and the Constitutional Council. He will inform the Nation of this through a message. These measures should be inspired by the will to assure the constitutional public authorities, with the least delay, of the means to fulfill their mission. The Constitutional Council will be consulted in this regard. Parliament will meet automatically. The National Assembly cannot be dissolved during the exercise of exceptional powers." In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 236 (Translation into English is ours)

76 LAMARQUE, J.: "La théorie de la nécessité et l'article 16 de la Constitution de 1958." In: *Revue du Droit Public et de la Science Politique en France et a l'étranger*, nº 17. Paris: Librairie Générale deDroitet de Jurisprudence, 1961. pp. 604-605.

der the sole decision of the body called to benefit from them." Article 16 of the French Constitution was put into practice in April 1961 by General de Gaulle to try to end the military coup in Algeria, then a French colony. Although not all authors agree on the exact date of its application, there seems to be agreement that, the military rebellion was under control by 25 April. Despite this, the reiterated constitutional precept continued to be applied until 30 September of the same year[81].

In the Italian Constitution of 27 December 1947, the Government, in cases of exceptional "necessity and urgency", may order temporary proceedings "with the force of law", although both chambers have to validate them on the same day as their presentation by the Government[82]. In addition, the Legislative Chamber may accuse the members of the Government "in joint session, for crimes committed in the exercise of their functions"[83]. The President of the Republic[84] is assigned the role of declaring "the state of war" if the legislative assemblies so decide, being solely responsible for their actions in cases of "high treason or attack on the Constitution"[85]. The "accusations" directed against the Head of the Italian Republic, or its government team is judged by the Italian Constitutional Court[86].

Nevertheless Article 11 of the Italian Constitution states that it rejects armed conflict as a mechanism for attacking the rights and freedoms of individuals and as a way to resolve international tensions[87]. Moreover, Article 13 of the Constitution of 1947 establishes that in extraordinary cases of "necessity and urgency", which would be regulated restrictively through law, the "public order authority" may implement temporary actions that affect personal freedom. The judge must be informed of the actions in the following forty-eight hours, and if they are not supported by the judicial authority after another forty-eight hours, then they will be considered to be null and void and will not have any consequence[88].

Title X of the Fundamental Law of Bonn, of 23

77 FERNANDEZ SEGADO, F.: "El estado de excepción en el Derecho francés". In: *Revista de Derecho Público*, nº 71. April-June, 1978, p. 330.

78 GARCIA PELAYO, M., op. cit., p. 611.

79 The expression "constitutional dictatorship", a genuine expression of C. Friedrich, has been used by Cruz Villalón as a "basic alternative model to the exceptional state"; it also implies that "in a generally described emergency, all the powers of the State are likely to be concentrated in a single magistracy." CRUZ VILLALON, P.: Exceptional States ..., op. cit., pp. 33-34. Finally, also GONZALEZ CASANOVA, J.A., op. cit., p. 224. (Translation into English is ours)

80 Camus, G., op. cit. p.25

81 FERNANDEZ SEGADO, F.: "El estado de excepción en el Derecho francés" op. cit., no. 71, p. 339. The aforementioned author opts for 24 April. Likewise, Martínez Sospedra and Aguiló Lucia, who refer to April 23, indicate that in the events of May of 1968, De Gaulle also wanted to put into practice the measures contained in Article 16 of the Constitution, but due to "the opposition" he encountered, he did not dare do so. MARTINEZ SOSPEDRA, M. and AGUILO LUCIA, Ll., op. cit., p. 96

82 Article 77 was drafted in the following terms: "The Government, without delegation to the Chambers, may not issue decrees that have the force of ordinary law. When in exceptional cases of necessity and urgency the Government adopts, under its responsibility, provisional measures with the force of law, it must present them on the same day for conversion into law to the Chambers, which, even if dissolved, will be duly convened and will meet within the following five days. The decrees will lose all effect from the beginning if they are not converted into laws within sixty days of their publication. The Chambers may, however, regulate by law the legal relationships arising from the decrees that have not been converted into law " In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 353. (Translation into English is ours)

83 As provided in Article 96 of the Italian Constitution: "The President of the Council of Ministers and Ministers, even after having ceased in their functions, shall be subject to ordinary jurisdiction, prior authorisation of the Senate of the Republic or Chamber of Deputies, for crimes committed in the exercise of their functions. "In: RUBIO LLORENTE, F. and DARANAS PELÁEZ, M., op. cit., p. 356 (Translation into English is ours)

May 1949[89] regulates what is known as the "defence case". It is qualified as a *sui generis* suspension of constitutional rights.[90] In fact, according to Article 115a, under that denomination, the assumption considered is that the federal country is being attacked by "weapons" or that it is "in imminent danger" from that type of attack[91].

One of the effects that this situation may cause, in accordance with the provisions of Article 115c, is the approval of an *ad hoc* federal regulation for the purpose of determining a time limit different from the one constitutionally established for personal freedom. In any case, there is a limit so that a period of four days cannot be exceeded, provided that the judicial authority cannot intervene during the period of time "in force" in times of peace[92]. Under normal circumstances, basic law considers a period that cannot exceed the day following that detention. However, without ignoring the relevance of this "guarantee", it is not regulated in all the great charters of rights, since it is usually determined by ordinary legislation[93]. In this constitution, the exceptional powers are considered, but the situation was substantially different after the approval of the Law of 28 June 1968. From that date, the discussion focused on the study "of the nature and scope of rights",

84 Art. 87 of the Italian Constitution: "The President of the Republic is the Head of the State and represents national unity. Messages can be sent to the Chambers. He will indicate the elections of the new Chambers and the first meeting of the same. He shall authorise the presentation to the Chambers of the proposed government initiative law. He will promulgate the laws and will dictate the decrees with force of law and the regulations. He will indicate the date of the popular referendum in the cases provided for by the Constitution. He will appoint officials of the State in the cases indicated by law. He will accredit and receive diplomatic representatives and ratify international treaties, with the prior authorisation of the Chambers when necessary. He will have the command of the Armed Forces, will preside over the Supreme Council of Defence constituted according to law and will declare the state of war agreed by the Chambers. He will preside over the Superior Council of the Magistracy. He can grant pardons and commute sentences. He will award the honorary distinctions of the Republic." In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., pp. 354-355. (Translation into English is ours)

85 Article 90 of the Italian Constitution: "The President of the Republic shall not be responsible for acts performed in the exercise of his functions, except for high treason or violation of the Constitution. In these cases he will be accused by the Parliament in joint session and by absolute majority of its members." In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 355 (Translation into English is ours)

86 As established in Article 134 of the current Italian Constitution: "The Constitutional Court shall judge: disputes over the constitutional legitimacy of laws and acts with force of law of the State and the Regions; the conflicts of attributions between the Powers of the State and those that arise between the State and the Regions or between Regions; the accusations against the President of the Republic as provided for in the Constitution." (In this last paragraph, the Constitutional Law of 16 January 1989, No. 1, has deleted the words "and the ministers" after the President of the Republic). In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 362 (Translation into English is ours)

87 his precept provides as follows: "Italy repudiates war as an instrument of attack on the freedom of other peoples, and as a means of solving international disputes; it accedes, in conditions of equality with other States, the limitations of sovereignty necessary for an order that ensures peace and justice between nations and promotes and encourages international organisations with this goal. In: RUBIO LLORENTE, F and DARANAS PELÁEZ, M., op. cit., p. 344. (Translation into English is ours)

88 This precept considers: "Personal freedom is inviolable. No form of detention, inspection or personal search, or any other restriction of personal liberty will proceed except by a reasoned judicial authority and only in the cases and in the manner provided by law. In exceptional cases of necessity and urgency specified by law, the public order authority may adopt provisional measures that must be communicated within forty-eight hours to the judicial authority and, if not confirmed by this authority in the following forty-eight hours, they will be considered to be revoked and will not have any effect." RUBIO LLORENTE, F. and DARANAS PELÁEZ, M., op. cit., p. 344 (Translation into English is ours)

89 According to A. Rovira, on 5 May 1955, West Germany "reacquires its independence and sovereignty, after the approval of the Basic Law of Bonn." In the opinion of the aforementioned author, this may be one of the reasons why "Basic Law does not assume, in reality, the name of Constitution, but the less striking term of Basic Law (Grundgesetz) ". ROVIRA VIÑAS, A.: Abuse of fundamental rights. Barcelona: Editions Peninsula, 1983. Presentation by E. Tierno Galván. Foreword by Raúl Morodo, pp. 193-194. (Translation into English is ours)

although there are certain complications in the theory[94], given the content of Article 19.2 of the Basic Law, which states that the "essential content of a fundamental right" cannot be altered[95].

We should now refer to the current constitutional texts that have undergone some type of amendment or change and that incorporate some type of concept related to the *law of exception*. In this sense, it is necessary to mention the basic law of the Kingdom of the Netherlands[96], which was revised on 19 January 1983 and updated in 2002. Generally, according to Article 96, the "state of war" cannot be declared without the *a priori* approval of the Legislative Chambers. But this approval is not necessary if it has been impossible to communicate with them due to the military situation. In addition, Article 103[97] establishes that the law will regulate the cases in which it is appropriate to safeguard internal or external protection, declaring "the law of state of exception" by Royal Decree, also considering its effects. Having reached this point, the rights contained in the following precepts would be disregarded: Article 6, 2 (religious freedom); Article 7 (freedom of expression); Article 8 (right of association); Article 9 (rights of assembly and demonstration); Article 12, paragraph 2 (inviolability of the home) and Article 13 (inviolability of correspondence). Finally, it establishes the possibility of approving diverse

90 FERNANDEZ SEGADO, F. Comentario al artículo 55...op. cit. p. 581.

91 Art. 115a of the Basic Law of Bonn: "1. It is the obligation of the Federal Diet, with the consent of the Federal Council, to declare that the federal territory has been attacked by force of arms or that there is imminent danger of this kind of attack (defence case). The declaration shall be made at the request of the Federal Government and shall require a majority of two-thirds of the votes cast, which shall include, at least, those of the majority of the deputies of the Federal Diet. When the situation inevitably requires immediate action and there are insurmountable obstacles to the Federal Diet meeting in time, or it is unable to make agreements, it will be for the Mixed Commission to make the declaration by a majority of two thirds of the votes cast, representing, at least, most of its components. The declaration will be made public by the Federal President, in accordance with Article 82, in the Bulletin of Federal Legislation. If it is not possible to do so in time, the publication will be made in another way, notwithstanding its inclusion in the Federal Legislation Bulletin as soon as circumstances permit. If the federal territory is attacked by weapons and the competent federal bodies are not in a position to immediately adopt the declaration provided for in the first paragraph of paragraph 1, the declaration shall be deemed to have been made and made public at the same moment that the attack began. The Federal President will announce the moment in question as soon as circumstances permit. If the defence case is already declared and the federal territory is attacked by armed forces, the Federal President may issue declarations of international law, with the assent of the Federal Diet, on the existence of the defence case. In the cases envisaged in paragraph 2, the Mixed Commission will act in place of the Federal Diet " In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 34. (Translation into English is ours)

92 Art. 115c: "1. In the case of defence, the Federation shall have the right of concurrent legislation also in the matters that belong to the legislative competence of the States. The laws that are issued in this case will require the approval of the Federal Council. To the extent required by the circumstances prevailing during the defence case, a federal law adopted for the defence situation may be: 1) to provisionally regulate the compensation that is due to expropriations that depart from the provisions of Section 3, second paragraph, of Article 14; 2) in the case of deprivation of liberty, to establish a term different from that established in Section 2, second and third sub-paragraphs, of Article 104, with a maximum limit of four days, in the case that within the period in force at normal time there is no judge to act. When necessary for the avoidance of a current or imminent attack, the administration and the finances of the Federation and the States, regardless of the provisions of Sections. VIII, VIII a) and IX may be regulated, in the case of defence and by federal law that will require compliance of the Federal Council, , although, nevertheless, the viability of the States, of the municipalities and of the groups of municipalities must be preserved, especially from an economic perspective. The federal laws that are issued in accordance with paragraphs 1 and 2 may be applied for execution before the defence situation arises." In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 3. 4. (Translation into English is ours)

93 SERRANO GOMEZ, A.: "La detención: garantías del detenido en la Constitución española de 1978." In: *Anuario de Derecho Penal y Ciencias Sociales*. Volume XXXI. Part III. January-April 1978, p. 550.

94 PORRES AZKONA, J.A, op. cit. pp. 163-164.

legal provisions for the criminal legal system in "time of war"[98] in nº 4 of Article 113. Paragraph 2 of Article 103 is a new article introduced after the constitutional revision of 1983, formerly Article 202[99], which, although it does not allow "freedom of the press," to be restricted or eliminated, not only alludes to all the aforementioned rights, but also incorporates the probability that non-judicial authorities will temporarily take over the "criminal jurisdiction" and that those authorities may also order the deprivation of personal liberty[100].

The situation is different in Belgium, where the Consolidated Text of 17 February 1994 is in force, taken from the original Belgian Constitution of 1831, with subsequent modifications[101]. In the current Consolidated Text, the famous Article 130 of the Belgian Constitution of 1831 no longer appears. This stated that "the Constitution cannot be suspended in whole or in part." Now, Title VIII regarding *constitutional review* exists, in which Article 196 stipulates that no constitutional reform may be initiated or continued during a time of war or when the Legislative Assemblies cannot "meet freely in the federal territory." Finally, according to Article 197, the Constitution can no longer permit the powers provided for constitutionally for the Monarch to be modified while there is a regency[102].

Even more recent is the modification of the Swedish Constitution,[103] with the Law of 24 November 1994, on the revision of the *Instrument of Government*. There is a wide-ranging regulation on war in the Swedish Constitution, whose Chapter XIII (Articles 1 to 13) is called *war and the danger of war*[104]. Likewise, Articles 13 and 14[105] of Chapter II, under the heading: *Of liberties and fundamental rights*, are concerned with the possibility of certain rights being restricted. Fundamentally, for reasons related to the protection of the Swedish State or to "public order and security",

95 This precept is drafted in the following terms: "In no case can the essential content of a fundamental right be affected." (Translation into English is ours)

96 The Constitution of the Netherlands of 1815 had the French Constitution of 1814 as its model. It was later modified in 1840 and 1848. AJA, E.: "Estudio Preliminar." In: LASSALLE, F., op. cit., p. 17.

97 According to Article 103 of the Constitution of the Netherlands: "1. The law will determine in what cases to proclaim, by means of a Royal Decree, the law of exception in order to preserve the internal or external security, which will be defined as such by law, which will also regulate the consequences that follow. In this case, it will be possible to dispense with the observance of the precepts of Basic Law in matters of administrative competences of the provinces, municipalities and water authorities; of the fundamental rights established in Articles 6, insofar as this affects the exercise outside buildings and closed premises of the right described therein; 7, 8, 9, 12, section 2 and 13, as well as in Article 113, Sections 1 and 3. Immediately after proclaiming the Law of Exception, and until it is lifted by Royal Decree, the States General will pronounce how many times they deem the extension thereof necessary, deliberating and resolving it in joint session to this end." In: RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 392

98 Ibídem, p. 393. (Translation into English is ours)

99 The former Article 202 of the Constitution of the Kingdom of the Netherlands was drafted in the following terms: "For the maintenance of external or internal security, a state of war or a state of siege may be declared by the King or in his name for all or part of the territory of the Kingdom. The law will determine the manner and cases in which this can be done and will regulate the effects of the declaration. The regulation that is issued may provide that the constitutional powers of the civil authority be transferred totally or partially to the military with a view to public order and the police, and that the civil authorities be subordinated to the military. In these cases, it is also possible to dispense with the observance of Articles 7 ["No one will need prior authorisation to disseminate his thoughts in the press], 9 [" right of association and assembly "], 172 [" entry into a domicile "]] and 173 [inviolability of correspondence] of this Constitution. It may also, in case of war, dispense with the provisions of Article 170, first paragraph ["No one may be removed against his will from the judge to whom corresponds by law."] "In: Cátedra de Derecho Político de la Universidad de Barcelona, op. cit., pp. 277, 250 and 27, respectively. (Translation into English is ours)

100 RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., p. 392.

"freedom of expression" and "information" may be limited. But the restrictions placed on these liberties will only be imposed when they are required for exceptionally important reasons.

II. THE DEFENCE OF THE DEMOCRATIC CONSTITUTION IN EXTRAORDINARY CIRCUMSTANCES: THE LAW OF EXCEPTION IN SPANISH CONSTITUTIONAL HISTORY (1812-1939)

In a country like Spain, there have been very few phases of "pure constitutionalism" and the assertion that our constitutions lack "roots "has now become standard. In this way, as J. de Esteban indicated at the time, even in the periods of the restricted use of constitutional texts, they were not applied throughout the country. He wrote " the constitution was only respected in the big cities, Madrid, Barcelona, Cádiz, Valencia, La Coruña, and it is even necessary to exclude some of these cities, because, except for in Madrid, the constitutional guarantees were almost always suspended by the captain generals "[106].

Therefore , it should not be forgotten that these great charters of rights "did not take root", in some cases because they were "ephemeral, others were inauthentic; some because the recourse to violence used by their enemies did not allow time for them to take root" nor were the mechanisms of constitutional reform allowed to take effect; and others because their purpose was to cover "the shame of a political life more corrupt than authentic". The history of Spanish constitutionalism is presented as "the trajectory of frustration interrupted by moments of short-lived hope." As a result, in Spain, the breakdowns of the "constitutional state" have turned out to be both extensive and intensive[107].

There are two paradoxes in Spanish constitutional history. The first of these is that the history of the *law of the state of exception*[108] in constitutional law is a practical and complete panorama that reveals how common exceptionality has been.[109] Similarly, it is obvious that the upheavals in Spanish political history have been so frequent in its constitutional regime that it is not unreasonable to think that irregularity and unrest have been much more common than the regularity of the Constitution itself[110].

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101 Among the "most recent" and "in-depth" constitutional amendments are those of 1970, 1980, 1983, 1984,1998,1991,1993, and 2009.

102 All the precepts mentioned can be found in the work of RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., pp. 113 and 137, respectively.

103 The Swedish Constitution of 1809 was influenced by the Constitutions of North America of 1787 and of France of 1789-1791. It was modified in1866 and 1909 because of its "progressive adaptation to Parliamentary Government and democracy." AJA, E., "Estudio Preliminar", in Lassalle, F., op.cit. pp. 473 and 476-478. (Translation into English is ours)

104 RUBIO LLORENTE, F. & DARANAS PELÁEZ, M., op. cit., pp. 473 and 476-478,

105 Paragraph 1 of Article 13 provides that: "Freedom of expression and freedom of information may be restricted focusing on the security of the Kingdom, supplying public, order and security, the reputation of persons, the privacy of private life or the prevention and prosecution of crimes. The freedom of expression in economic activity may also be limited. Nevertheless, limitations on freedom of expression and information may only be established if particularly important reasons so require." In accordance with the provisions of Article 14: "Freedom of assembly and freedom of expression may be restricted in accordance with order and the security of meetings or traffic demonstrations. In another case, these freedoms can only be limited in terms of the security of the kingdom or to fight epidemics. The freedom of association may only be restricted with respect to organizations whose activity is military or similar in nature or involves persecution of a group of the population of a certain race, skin colour or ethnic origin. "In: RUBIO LLORENTE, F. and DARANAS PELÁEZ, M., op. cit., p. 460. (Translation into English is ours)

The second contradiction is that, mostly, the approval of extraordinary decisions, which entail a downgrading or reduction in "public rights and freedoms", is not designed to oppose these, but rather to guarantee them to be the basis of "a social and political order" that is supposed to protect itself against actions that put it in danger[111]. However, none of the cases make an attempt to safeguard the democratic system or rights and freedoms, "but rather, simply maintain the institutions in force, regardless of their ideological orientation"[112]. In more specific terms, constitutional history is the story of the creation of some instruments and state organisations that are especially impenetrable to democratic transformation[113].

Except for the Constitution of 1845, which resulted from the moderate terms of the Constitution of 1837, the rest of the constitutions, and their duration, breakdowns of the constitution were anticipated[114]. Nineteenth-century Spanish history, once constitutionalism had been implanted, had to endure the Carlist and colonial wars, together with a set of "pronouncement declarations, revolutionary coups, cantonalism and revolutionary general strikes." Very few years passed in which, somewhere or other in the territory, *constitutional guarantees* were not interrupted, or a *state of siege* was not proclaimed, or other dangers did not arise. The only periods of true normality occurred under the Constitution of 1845, especially during the liberal stage of O'Donnell (1858-o863), and the period in which Cánovas and Sagasta (1883-1893) alternated while the 1876 Constitution remained in force[115].

In essence, the panorama did not change over the following century. The strikes of 1901 and 1902 marked the restlessness that prevailed during the reign of Alfonso XIII. A combination of decisive factors such as anarchism, "terrorism", the Tragic Week in Barcelona in 1909, militant trade unionism and the Moroccan issue led to the establishment of the military dictatorship of Miguel Primo de Rivera (1923-1930). At a later date, the Second Republic (1931-1939) arrived, which was a period marked by wide-spread subversion reactions and a substantial number of suspensions of rights[116].

In short, in Spain, in reality, the analysis of the constitutional history of the *law of exception* consists of a constitutional narrative of Spain "turned upside down." But here, the surprise result is

106 ESTEBAN, J. Direction and preliminary study. In Esteban, J. on García Fernández, & Espin Templado, E.: *Esquemas del constitucionalismo español (1808-1976)*.Faculty of Law of the Complutense University, Madrid, 1976.

107 TOMAS Y VALIENTE, F.: Códigos y Constituciones (1808-1978). Madrid: Alianza Editorial, 1989.

108 Although Luis Sanchez Agesta in his 1984 work refers to *estados de excepción*, we shall use the expression derecho de excepción, translating it as law of exception, also used by Cruz Villalón in that same year. Madrid: Editoriales de Derecho Reunidas, 1978, pp. XVII-XVIII.

109 SANCHEZ AGESTA, L: Prologue to the work of SEGADO, F.: *El estado de excepción en el Derecho constitucional español*. Madrid: Editoriales de Derecho Reunidas, 1978, pp. XVII-XVIII.

110 CARRO MARTINEZ, A.: "Artículo 116. Situaciones de anormalidad constitucional." In: Alzaga Villaamil, O. (dir.): *Comentarios a la Constitución Española de 1978*. Madrid: Cortes Generales, Editoriales de Derecho Reunidas (Edersa), 1998, Volume IX, p. 258.

111 SANCHEZ AGESTA, L: Prologue to the work of FERNANDEZ SEGADO, F.: *El estado de excepción en el Derecho constitucional español*. Madrid: Editoriales de Derecho Reunidas, 1.978, pp. XVII-XVIII.

112 ESTEBAN, J. de & LÓPEZ GUERRA, L.: *El régimen constitucional español*. Barcelona: Labor Universitaria, 1980, p. 228.

113 SOLÉ TURA, J. & AJA, E.: *Constituciones y periodos constituyentes en España (1808-1936)*. Madrid: XXI Century, 1977, p. 4.

that this "reverse" has sometimes shown more solidity and consistency than the positive side of constitutional texts[117]. Therefore, it is a matter of checking whether, throughout our constitutional history, there have been constitutional texts which have included not only the proclamation of rights, but also, especially, their suspension, emphasising the essential characteristics of this suspension. Infra-constitutional legislation has also been examined to see if it has allowed the suspension of constitutionally guaranteed rights and freedoms, to check whether or not this legislation has respected the requirements set forth in the different historical Spanish Constitutions.

Within the constitutional history on the *law of exception*, a broad period can be identified in which, together with the particularly limiting concept of the *suspension of guarantees*, there is also an experience that is not qualified constitutionally: the *states of siege*, or *of war*. This circumstance of evident opposition between legality and political praxis has been overcome since 1869 with an archetype of the *law of exception*, which has been preserved with hardly any modifications until the present day[118].

In relation to the evolution of the suspension of rights and freedoms in Spanish constitutional history, we should mention that, during the period between 1812 and 1869, the *law of exception* considered in historical constitutions covered only the *suspension of guarantees*. When regulating this institution, the Constitutions of 1812, 1837 and 1845 shared the following characteristics:

The protection or defence of the state apparatus in an exceptional context making the suspension of certain rights necessary.

b) The suspension has to be declared by parliament (el corte); the Constitutions of 1837 and 1845 also required this to be carried out by law.

c) The suspension has to be temporary and may be applied to all or part of the national territory[119].

The suspensions of *guarantees* that protect personal freedom are made possible in all the constitutions. In addition, the Constitutions of 1837 and 1845 also provided for the suspension of the inviolability of the home, as well as the freedom of choice of domicile. From the year 1835, the *suspension of guarantees* coexisted with *the exceptional military state*, optionally des-

114 Regarding this matter, "in 1812, 1869 and 1931 the Constitution was given a protection consisting of a a special manner of regulating its process of reform; in all three cases, and in a very marked way in 1812, it was difficult to reform the constitution to guarantee the stability of supreme law [...] By contrast, the Constitutions of 1837, 1845 and 1876 were flexible Constitutions, they could be reformed with the simple majority agreement of the ordinary Parliament, without any special requirement or difficulty, not even that of a qualified majority, since nothing provided for this in their respective texts on the subject in question. [...] But apart from these technical differences, all these Constitutions, the rigid and flexible ones, coincided with each other on one single and transcendental aspect: they rarely passed from the legal document to actual practice, they rarely became social reality and rarely managed to weave a network of complementary constitutional practices." TOMAS Y VALIENTE, F.: "Los derechos fundamentales en la historia del constitucionalismo español." in: *Códigos y Constituciones (1.808-1.978)*, Madrid: Alianza Editorial, 1989, pp. 145-146. (Translation into English is ours)

115 CARRO MARTÍNEZ, A.: "Artículo 116. Situaciones de anormalidad constitucional." In: Alzaga Villaamil, O. (dir.): *Comentarios a la Constitución Española de 1978*. Madrid, Cortes Generales, Editoriales de Derecho Reunidas (Edersa), 1998, Volume IX, p. 258.

116 Ibídem, pp. 258-259.

117 SANCHEZ AGESTA, L: Prologue to the work of FERNANDEZ SEGADO, F.: *El estado de excepción en el Derecho constitucio-*

cribed as a *state of siege or war*, which, ever since then, has been drafted with the aspects that would have characterised it at that time:

a) Widespread replacement of civic public powers by military public powers.

b) Occasional temporary proclamation of the state of siege or war by army commanders.

c) Total ambiguity and uncertainty regarding the powers of the aforementioned military leaders[120].

From 1869, the constituent chambers had the right to regulate the *law of exception* from a joint

perspective:

a) By means of the *suspension of constitutional guarantees* regulated in Article 31 of the Constitution, which presented innovations from previous Constitutions.

b) The combination of *guarantees* that could be suspended was extended, since together with the *guarantees* previously examined (personal liberty, inviolability of the home and freedom of domicile), the guarantees relating to freedom of expression, the right to assembly and the right of association were also added[121].

At the same time as the temporary interruption of these *guarantees* by law, the places in which this suspension was applied would also be guided, (while it lasted), by the previously established Law of *Public Order*. In this context, the principle of the legality of sentences by civil and military authorities would continue to be complied with. Article 31 of the 1869 Constitution was developed by the Law of Public Order of 1870, which thus legalised the regime of exception, through the provision of *two exceptional states*: one civil, the *state of prevention and alarm*, and the other military, the *state of war*. The civil state is integrally identified in with the *suspension of constitutional guarantees*[122].

However, the rigorous legal system designed by the Constitution of 1869 and the Law of Public Order of 1870 did not last long when the degeneration of the existing law *of exception* occurred. Indeed, under Article 17 of the 1876 Constitution, the *extraordinary protection* of the state, in addition to being included in the constitution and legalised, was largely granted to the government. Although the *state of war* was under the power of the military authorities, it was controlled by the Executive. In addition, the *suspension of guarantees* or *state of prevention* was left in the hands of the government when the chambers were not open, and, if they were open, this was due to the goodwill of the government. This was a change in this constitution, breaking with the dynamics of the "absolute reserve of law" when it came to suspending rights and freedoms[123]. The rights or *guarantees* that were able to be suspended in this constitution remained the same as those in the Constitution of 1869.

The Republican Constitution of 1931 retained the draft of the 1869 Constitution, with some sig-

118 CRUZ VILLALÓN, P.: *Estados excepcionales y suspensión de garantías*. Madrid: Tecnos, 1984, p. 36.
119 See footnote 114.
120 CRUZ VILLALÓN, P.: *Estados excepcionales y suspensión de garantías*. op.cit, pp. 36-37.
121 CRUZ VILLALÓN, P.: *Estados excepcionales y suspensión de garantías*. op cit, pp. 401-402.

nificant amendments:

The first of these was that the Executive was the authority that, by decree, would proceed to the suspension of a combination of *guarantees* and certain rights, coinciding with those previously referred to, although it had to report to the Parliament or the Permanent Deputation if the former had been dissolved.

The second innovation was that the President of the Government could legislate by decree, in matters in which the Parliament was competent, in extraordinary cases that required a pressing resolution, or if the protection and safeguarding of the republican regime so required. In practice, this emergency regulation was accompanied by preventative measures that were so severe that it rarely became operative[124].

It is also worth mentioning that during this republican period, infra-constitutional legislation that was classified as extraordinary was approved that, to a greater or lesser extent, enabled the suspension of rights and freedoms that had been proclaimed constitutionally. The most significant regulatory instruments of this legislation were the Law of Defence of the Republic and the Public Order Law. Although the first of these laws is from 1931, it was approved a few months before the republican Constitution came into force, and it remained in force until the closing of the Constituent Chambers with the hierarchy of constitutional legislation[125]. By virtue of this, the Minister of the Interior had the power to:

a) postpone or interrupt any "meetings or public demonstrations" of a political, religious or social nature for fear that the exercise of these rights and freedoms could alter public normality and peace.

b) close any places that promoted a duty of conduct that was considered in some way to attack the republican system, such as propagating information that could harm credibility, prestige, peace or *public order*, behaving violently against fellow humans or material goods, for "religious, political or social" purposes, and the praise or eulogy of the monarchy[126].

The Law of Public Order of 1933[127] replaced the previous law of 1870, regulating the states of *prevention*, *alarm and war*. However, strictly speaking, only the states of *alarm* and *war* could lead to the *suspension of constitutional guarantees*. As for the level of discretion exercised by the Executive, it must be mentioned that the government had the authority to declare the first two of these categories by decree. Once both the state of *prevention* and *alarm* had been proclaimed, the Executive had the obligation to inform parliament of that declaration.

The third state, that of *war*, could be declared by the civil power, with the military power taking charge of the situation in this case. Moreover, the government and the hierarchically superior authorities would rapidly become aware of these circumstances. When the state of *prevention* was in force, the government, without defending the *suspension of constitutional guarantees*, had a se-

122 FERNANDEZ SEGADO, F.: *El estado de excepción...*, op. cit., pp. 98-99.
123 CRUZ VILLALÓN, P.: *Estados excepcionales y suspensión de garantías.* op cit, p.41. FERNANDEZ SEGADO, F.: *El estado de excepción...*, op. cit.,46.
124 Article 42 of the Republican Constitution of 1931.

ries of specific powers available to them, such as the control of all types of publications that would help to protect "political or social ideas or opinions", the suspension of demonstrations or meetings in open spaces if they were considered to be a threat to *public order*, and to make the right to strike impossible. In the *state of alarm* the suspension of a series of constitutionally provided *guarantees* was expressly provided for: those relating to detainees and prisoners, the inviolability of the home, freedom of thought and its expression, the right of assembly and freedom of association. Finally, while the state of *war remained in force*, on taking command. the military power could adopt not only identical measures to those of the civil authority, but even all the measures that were essential for restoring public order. After the publication of the Law of 1933, considered the most in-depth and frequently used extraordinary legislation that has been put into practice, Spain experienced "an almost constant state of constitutional abnormality"[128].

It is significant that the radical transformation that treating the 1978 Constitution as legal legislation imposed on our traditional system of sources (aspects that were analysed at the time, by among others, Pérez Royo[129]), it did not carry over in the same way to other significant parts of the Spanish legal system. Thus, it is worth highlighting the fact that many of the precepts of a Law of Public Order for the defence of the constitutional regime established by the Second Republic could be transferred, with very similar content, to the Francoist Law of Public Order. This became one of the fundamental axes for the survival of the previous regime, managing to remain in force until much later, finally being repealed by the Organic Law, L.O. 1/1992, on the Protection of Public Security, on which the Constitutional Court still had a chance to pronounce sentence in the Judgement 341/1993.

In summary, it has been shown that during the duration of the republican regime, public freedoms were rarely and weakly applied in real life, which contrasts with their extensive "constitutional recognition". In fact, what is significant is the fact that infra-constitutional legislation could entail a restriction or suspension of constitutionally proclaimed rights and freedoms, which is why it could be spoken of as a type of *constitutional mutation*, in the sense in which D. Lopez Garrido has analysed it. He alludes in this way to the substantial modifications that were made to ordinary legislation. These modifications were of such great importance that they significantly transmuted the constitutional frameworks and foundations, without the existence of a parallel reform of the literal terms of the Constitution[130].

III. FINAL REFLECTIONS

1. In the case of harmful conduct resulting from expressions of minority opposition to the constitutional order, the constitution usually has

125 By virtue of the provisions of Article 6, the Law of Defence of the Republic (Ley de Defensa de la Republica) began to take effect on the day after its publication in the Gaceta de Madrid, in other words, 22 October 1931. The text of this law is set out in SEVILLA ANDRES, D., op cit., Vol.II, pp.199-201. It is also known by the abbreviation, L. D. R.

126 Article 1 of the Ley de Defensa de la Republica. Collected in SEVILLA ANDRES, D., op cit., Vol.II, pp.199-200.

127 This Law was published in the Gaceta de Madrid on 30 July 1933, coming into force on the day of its publication, as provided for in its final Provision 3ª. The Decree of 18 October 1945 (B.O.E. Nº.295 of 22 October) modified this Law which remained in force until the passing of the law of public order of 1959, since the first final ruling of this regulation expressly repealed the L.O.P. of 1933.

128 FERNÁNDEZ SEGADO, F.: "La defensa extraordinaria de la República." *Revista de Derecho Político*, nº 12, 181-1982, p. 134.

adequate defence mechanisms. However, if the attitude of rejection were so serious and dangerous that the usual corrective mechanisms of protection are not adequate, then a superficial breakdown of the constitution would be established.

2. Historically, the North American and French Revolutions were the events that caused concern to arise about the incorporation of institutions related to constitutional protection into the constitutions themselves. The French revolutionaries, once their initial euphoria had passed, understood that the survival of "the legal values" contained in the constitution obviously went beyond the strictly legal meaning, which was why the people were declared as protectors of the constitution. On the contrary, in North America we find a social organszation formed by settlers, in which there were no major social conflicts, and it was assumed that as the Constitution did not suffer from attacks and was not called into question it did not need to be protected, proclaiming itself as the principle of constitutional supremacy.

3. It seems logical that British individuality also manifested itself in the way in which the understanding and specification of the defence of the constitution and the right of exception was expressed. Hence, the institution of martial law had its origin in that country, where only military power could act. Moreover, during the eighteenth century the suspension of *habeas corpus*, together with other legislation which restricted many other freedoms, made England an authentic *law of exception*.

4. The suspension of *habeas corpus* as an extraordinary instrument of the protection of state organisation was included in the American Constitution of 1787, which we can consider as a precedent of the current Article 55.1 of the Spanish Constitution (SC). In addition, another instrument, called *plenary powers*, is a restrictive mechanism, used primarily in England and the United States, with the purpose of accumulating powers for the government due to the fragility of the measures of martial law.

5. The various constitutions drafted after the Second World War also incorporated specific instruments of the *law of exception*. Title X of the Basic Law of Bonn, of 1949, regulates a *sui generis* suspension of constitutional rights in Title X. Article 13 of the Italian Constitution of 1947 provides for temporary actions by public authorities that may affect personal freedom. Article 16 of the French Constitution of the V Republic of 1958 provides that, in the presence of certain exceptional circumstances that endanger the existence of the state, the President of the Republic will adopt the actions necessary for overcoming the exceptionality.

6. In Spanish constitutional history there are two paradoxes. The first of these is that the history of the *law of exception* in its constitutional

129 Perez Royo, J.: Las Fuentes de derecho. Madrid: Tecnos, 1988. 4th edition, pp.16-18.

130 The author contrasts the diverse conception of the "constitutional mutation" in classical and modern constitutional law. Indeed, during the classical era, it was emphasised that "the originating factor of the mutation is above all a change in social reality or in unwritten political practices. This concept does not seem intended for changes produced by ordinary legislation. "At present, the idea of "constitutional change "must be widened" to accommodate the phenomenon produced by substantial changes in the ordinary legislation by this main entity, which transforms constitutional structures, although the literal text of the Constitution does not vary." LOPEZ GARRIDO, D.: *Terrorismo, política y derecho: la legislación antiterroristaen España, Reino Unido, RFA, Italia y Francia*. Madrid: Alianza Editorial, 1987, pp. 147-169, especially, pp 147 and 167-169. (Translation into English is ours)

law holds a practical and complete panorama in which it can be understood, given that it reveals how common exceptionality has been. The second contradiction lies in the fact that, in most cases, the approval of extraordinary decisions, which have entailed a reduction or downgrading of rights and freedoms are not designed to oppose them they are supposed to guarantee them against actions that put them at risk.

7. In nineteenth-century Spanish history, once constitutionalism had been introduced, there were very few years in which, in all or in some parts of the territory, *constitutional guarantees* were interrupted , or a *state of siege* proclaimed and other dangers also arose. The only periods of true normality took place under the Constitution of 1845, especially during the liberal era of O'Donnell (1858-1863), and the period in which Cánovas and Sagasta (1883-1893) alternated their authority under the Constitution of 1876.

8. In essence, the panorama did not change in the following century. The strikes during 1901 and 1902 marked the restlessness that prevailed during the reign of Alfonso XIII. A combination of decisive factors such as anarchism, terrorism, the Tragic Week of Barcelona in 1909, militant trade unionism and the Moroccan issue, led to the establishment of the military dictatorship of Miguel Primo de Rivera (1923-1930). Later, the Second Republic (1931-1939) suffered many subversive situations and numerous suspensions of rights.

9. Regarding the evolution of the suspension of rights and freedoms in Spanish constitutional history, during the period between 1812 and 1869, the *Law of exception* considered in the historical constitutions covered only the so-called *suspension of guarantees*. From 1869, Article 31 of the Constitution of 1869 was developed by the Law of Public Order of 1870, which thus legalised the regime of exception, through the provision of two *exceptional states*: the state of *prevention and alarm*, which was civil in nature and the state *of war which was military*. The civil state is identified in its entirety with the *suspension of constitutional guarantees*.

10. The Republican Constitution of 1931 retained the draft of the 1869 Constitution, with certain important amendments. It is also worth highlighting the approval of infra-constitutional legislation, qualified as extraordinary that, to a greater or lesser extent, permitted the suspension of the rights and liberties that had been proclaimed constitutionally. The most significant normative instruments of this legislation were the Law of Defence of the Republic and the Law of Public Order of 1933.

11. The 1933 Law of Public Order of 1933 replaced the previous Law of 1870, regulating the states of *prevention*, *alarm and war*, albeit that, strictly, only these two final states could lead to the *suspension of constitutional guarantees*. After the publication of the Law of 1933, considered as the most in-depth and commonly used extraordinary legislation, Spain experienced "an almost constant state of constitutional abnormality". It is worth highlighting the fact that many of the precepts of the Law of Public Order for the defence of the constitutional regime established by the Second Republic could be transferred, with very similar content, to General Franco's Law of Public Order. This became one of the basic axes for the survival of his regime, and this law remained in force until much later, finally being repealed by the Organic law (L.O.) 1/1992, of Protection of Public Security.

12. If we must learn from constitutional his-

tory so as not to repeat it, comparative constitutional law in general, and in Spain in particular, is a hotbed of unpleasant experiences that nobody wants to experience again. Being aware of this, the Spanish Constitution of 1978 regulates (with guarantees) a *law of exception* that can be summarised in two principles: the suspension of rights and freedoms and the modification of the balance of powers between the executive and the legislative bodies. Understood in this way, the *law of exception* recalls, *a sensu contrario*, the famous Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789, as well as the lesser-known Article 16 of the Declaration of Rights of Women and of the Female Citizen of 1791 formulated by Olympe de Gouges.

13. An important precedent of the state of alarm considered in the Constitution of 1978 is the *state of prevention* of the Republican Law of Public Order of 1933, although unlike this, the current state of alarm does not foresee the suspension of any fundamental right. The government will declare the state of alarm in all or part of Spain if any dangerous modifications of "normality", such as natural or health disasters, and situations of serious paralysis of public services, occur.

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