Medieval Emergencies and the Contemporary Debate

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ABSTRACT

The contemporary debate on emergencies and the state of exception often relies on historical examples. Yet the most recent discussions on the state of exception (a legal construct that deals with emergencies) also assume its modern inception. This article shows that medieval France formulated its own state of exception, meant to deal with emergencies, based on the legal principle of necessity. This article challenges the historical narrative on the modern inception of the state of exception, showing its centrality in the long process of creating the early-modern French state. This article points to several historical insights that this state of exception has for the contemporary debate: just as some scholars fear in the present, the French medieval state of exception often served as a pretext meant to change the legal order, turning the exception into the ordinary. Ultimately the medieval state of exception was limited in use since the crown had to negotiate with and retain the approval of political elites.

TABLE OF CONTENTS

I. INTRODUCTION

Illegitimate repeated use of emergency powers finally elicited a dramatic confrontation. Converging from all over France, the political elite demanded that the regime immediately cease its attempts to continue collecting a tax that originally had been demanded as an emergency measure for a war that was now already over. At first King Philip IV was unbending. He wanted to continue collecting the tax, and remained recalcitrant through most of November 1314. Leagues established to resist and protest against the tax collection grew stronger throughout that month. By the end of November the king, faced by collective resistance and suffering from an ultimately fatal illness, called a stop to the collection. The protest was successful.[1]

One could have thought that this dramatic protest against a perceived illegitimate use of emergency powers was taking place today. It seems all too relevant. Why then is this event and others like it completely absent from the contemporary debate taking place on the

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[1] These events are well-known. See, for instance: ELIZABETH A. R. BROWN, POLITICS AND INSTITUTIONS IN CAPETIAN FRANCE 112 (1991).

uses and abuses of emergency powers? Why is it that even when alluding to historical models of regulating emergency powers, the examples are almost all taken from the modern post-French revolution period, or, from ancient republican Roman times (the famous dictator model)? Why does the medieval history of the state of exception (a legal construct that deals with emergencies) remain unstudied and ignored by contemporary jurisprudential debates? The present article rehabilitates the medieval history of emergencies and their legal regulation in the specific context of France. This history of a medieval state of exception is described for the purposes of gaining some insights on the conception of the state of exception today.

Medieval France formulated its own state of exception, meant to deal with emergencies, based on the legal principle of necessity. This article challenges the historical narrative on the modern inception of the state of exception, showing its centrality in the long process of creating the early-modern French state. This article points to several historical insights that this state of exception has for the contemporary debate: just as some scholars fear in the present, the French medieval state of exception often served as a pretext meant to change the legal order, turning the exception into the ordinary. Ultimately the medieval state of exception was limited in use since the crown had to negotiate with and retain the approval of political elites. These aspects of the medieval state of exception shed an edifying historical light on the ways executives use the state of exception today.

II. The Contemporary Debate and the Middle-Ages

In the aftermath of the terror attacks of September 11, 2001, the U.S. and other Western regimes adopted various harsh methods to combat terrorism. These harsh measures sparked anew a lively academic discussion on emergencies. One of the central problems that scholars and policy makers discuss focuses on the regulation of emergency powers. Namely, how should a liberal democratic state regulate the use of emergency powers in a way that would keep the rule of law and its democratic character intact? On the one hand, it seems an unavoidable necessity to grant the executive in emergencies almost unlimited powers to preserve the life and safety of the citizens. On the other hand stands the distrust of authority that is inherent in the democratic regime, exemplified by Lord Acton's saying, "Power tends to corrupt, and absolute power corrupts absolutely." How could we avoid abuses of emergency powers if they are almost unchecked by the ordinary checks and balances inherent in liberal democratic regimes?

This problem is not new but rather inherent in the democratic regime. Yet it receives a new emphasis and urgency, according to some writers such as Bruce Ackerman, because of the novel nature of emergencies today. Formerly part of the justification for granting almost unlimited emergency powers was their strict time-limit. In the case of terrorism, however, emergencies are no longer time-limited (as were past wars or natural disasters), and they tend to recur. Thus the former

premise that the ordinary state of affairs will return after the end of the emergency is no longer valid. Emergency powers might turn out to be unlimited in time and not only in scope. Many of the questions discussed by scholars, such as whether the legal order (the constitution for instance) should grant emergency powers to the executive, emerge from this problem.[2]

The problem is otherwise stated by scholars who discuss the nature of the "state of exception." The "state of exception" is a legal construct that deals with emergencies. Yet is it truly law? The state of exception suspends the ordinary legal order in the face of an emergency. If the legal order is suspended, could we call its suspension "law"? This metaphysical discussion on the nature of the state of exception often relies on the writings of Carl Schmitt, the twentieth-century (Fascist) scholar. Schmitt solved the issue by placing the sovereign outside the law, stating that the sovereign is whoever decides that a state of emergency exists. By placing the sovereign outside the legal order, Schmitt sought to solve the contradiction inherent in the very idea of a state of exception, i.e. a legal construct that is itself outside ordinary law. The sovereign, according to Schmitt, serves as a link between the state of exception and regular civic norms.[3]

One of the most influential views on the state of exception today is that of Giorgio Agamben. Partly through a critique of Schmitt, Agamben developed the idea that the state of exception is a thing with the force of law without actually being a law.[4] Agamben disagrees with Schmitt. The state of exception, in Agamben's view, is not one of the constitutive elements of the legal order through the sovereign. Agamben thinks that the state of exception reveals a basic dialectic relation between two different fundamental elements of European political entities that have existed since Roman times: *potestas* and *auctoritas*. *Potestas* is the legal element of the state manifested in acts of parliament, the king and so forth. *Auctoritas* in Agamben's view is the meta-legal element of the state, the feature that gives authority to the legal order. The state of exception is the meeting of these two elements. The *auctoritas* element (the meta-legal element) can be empowered only by annulling the *potestas* element (the legal element). Agamben's main argument is that the problem with current Western regimes is that they have started to use the fiction of the state of exception as a regular means of government. They have eliminated the buffer zone that separates and maintains the balance between the two dialectical elements. In such a way they use illegal violence, while claiming that they use it according to law.[5]

The sophisticated metaphysical discussion on the state of exception, only barely touched upon here, has been informed by its historical

[2] See especially: Bruce Ackerman, *The Emergency Constitution*, 113 THE YALE LAW JOURNAL 1029 (2004); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 THE YALE LAW JOURNAL 1753 (2004). For a survey of the discussion see William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14(1) THE JOURNAL OF POLITICAL PHILOSOPHY 61 (2006).

[3] See Scheuerman, *supra* note 2, at 62-68.

[4] GIORGIO AGAMBEN, STATE OF EXCEPTION 55-63 (trans. Kevin Attell, 2005).

[5] AGAMBEN, *supra* note 4, at 85-87.

understanding or narrative. The historical narrative on the state of exception is still grounded on outdated views of ancient, medieval and modern times, originally promoted by Renaissance thinkers. The historical survey on the state of exception typically starts with its Roman Republic counterpart – the dictatorship. The dictator supposedly used unlimited emergency powers for a fixed period of six months, in which the regular republican order was suspended. According to this typical historical narrative, Renaissance and enlightenment writers, such as Machiavelli, rediscovered this historical institution. The modem state of exception, from the French Revolution onwards, is either modeled after that Roman example, or completely new.[6]

Another version of this historical narrative harkens back to Schmitt and his theory of basing sovereign power on the state of exception. Supposedly the modern state's paradigm of power is deeply linked with emergencies and the states of exception that deal with them. In this version of the narrative, the state of exception is the theological ground on which the secular modern state (since Hobbes) was founded and on which it stands to this day.

Both these narratives accept a Renaissance-dominated view of the Middle-Ages, making this period irrelevant to the discussion on the state of exception as opposed to modern and ancient Roman times. Since the Renaissance even historians saw the Middle-Ages as the "Dark Ages." A time supposedly without republican or democratic governments seems irrelevant to a discussion on how to keep the rule of law in emergencies. A discussion on the problems inherent in the modern state's paradigm of power apparently has little use with feudal and religious entities. While historians have for decades withdrawn from theses problematic views of the Middle-Ages, the jurisprudential discussion on the state of exception implicitly still embraces them. It is now time to turn to unveiling the flaws in these historical assumptions and generalizations.

III. The State of Exception in Late Medieval France

Giogio Agamben in his influential book on the *State of Exception* takes a cursory glance at the Middle-Ages. Focusing on refuting the relevance of the principle of necessity ("necessity has no law," or, *necessitas legem non habet*), Agamben examines its treatment in the works of Gratian and Thomas Aquinas. He concludes that this medieval principle was simply a dispensation from the letter of the law for a particular case when the public-good purpose of the law would

[6] See especially: John Ferejohn and Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004). See also: Claire Wright, *Going beyond the Roman Dictator: A Comprehensive Approach to Emergency Rule, with Evidence from Latin America*, 19(4) DEMOCRATIZATION 713 (2012); Nomi Claire Lazar, *Must Exceptionalism Prove the Rule?: An Angle on Emergency Government in the History of Political Thought*, 34(2) POLITICS & SOCIETY 245 (2006); OREN GROSS AND FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 17ff (2006); Stephen I. Vladeck *Emergency Power and the Militia Acts*, 114 THE YALE LAW JOURNAL 149 (2004); CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

otherwise fail. According to Agamben, only with modern jurists the state of exception becomes part of the law.[7]

Agamben's generalization on the medieval application of the principle of necessity is, at the very best, inaccurate. Historians have long known that necessity has been used in late medieval public law not simply as a private particular case dispensing a person from the letter of the law. Necessity formed an essential part of what we would call today public law, especially as it governed the legitimate ways of raising taxes.

The history of the principle of necessity in late-medieval France is beyond the scope of this article.[8] Still, some general comments are in order. First one must understand the legal constraints of the French monarch. Political society and legal principles expected him to live of his own for much of the thirteenth century. He could of course raise revenues from his domain,[9] but taxes were mostly illegitimate. Since property was based on natural law and customs, jurists in the thirteenth centuries understood royal taxes as an illegitimate infringement on property.[10]

The French crown could not, or, would not, truly rely only on revenues from the domain. Policies of centralization and attempts to enhance royal power necessitated more and more funds. Wars and their rising costs (such as the high costs of maintaining and financing heavy cavalry) also necessitated more and more funds. Moreover, the French monarchy had to deal not only with incessant wars, but also with the social and material products of other long-term crises: environmental (the Little Ice Age began at around 1300); demographic (famine struck time and again since 1315; the Black Death recurred several times after 1348-9; the "Hundred Years' War" in 1337-1453); and economic (cereal yields dropped in the period between 1350 and about 1450, in some areas by more than sixty percent).[11] The French monarchy had to respond to these recurring emergencies that threatened to tear its social

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[7] AGAMBEN, *supra* note 4, at 24-26.

[8] One of the best works on this issue in English, even if focused on an earlier period, is, still, GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100-1322 (1964).

[9] On the king's domain and its revenues, see GUILLAUME LEYTE, DOMAINE ET DOMANIALITE PUBLIQUE DANS LA FRANCE MEDIEVALE (XII^{E} - XV^{E} SIECLES) 153-195 (1996).

[10] K. Pennington, *Law, Legislative Authority, and Theories of Government, 1150-1300*, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT: C. 350 – C. 1450 424-426 and 438 (J. H. Burns ed., 1988); J. P. Canning, *Law, Sovereignty and Corporation Theory, 1300-1450*, in THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT, *ibid*, at 454-455. On natural law and other such constraints on rulers, seer Brian Tierney, *"The Prince is Not Bound by the Laws", Accursius and the Origins of the Modern State*, 5 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 378, 380 and 389-395 (1963); 5 R. W. CARLYLE and A. J. CARLYLE, A HISTORY OF MEDIAEVAL POLITICAL THEORY IN THE WEST 99 (1962).

[11] For the environmental processes, see EMMANUEL LE ROY LADURIE, HISTOIRE HUMAINE ET COMPAREE DU CLIMAT: CANICULES ET GLACIERS XIII^{E}-XVIII^{E} SIECLES 31-89 (2004). On the 1315-1317 famines, see WILLIAM CHESTER JORDAN, THE GREAT FAMINE: NORTHERN EUROPE IN THE EARLY FOURTEENTH CENTURY 7-39 (1996). On recurrence of the plague, see ROBERT S. GOTTFRIED, THE BLACK DEATH: NATURAL AND HUMAN DISASTER IN MEDIEVAL EUROPE 133 and 156 (1983). On economic processes see Hugues Neveux, *Déclin et reprise: la fluctuation biséculaire 1330-1560*, in HISTOIRE DE LA FRANCE RURALE: L'AGE CLASSIQUE DES PAYSANS 1340-1789 41-87 (ed. Emmanuel Le Roy Ladurie, 1975).

fabric as well as its very existence.[12] And so, beginning with the last decades of the thirteenth century, the French crown searched for creative means of increasing its revenues. One of the legal solutions was the principle of necessity.

Granted, people used the principle of necessity at the time as a specific dispensation from following the letter of the law. A contemporary chronicle, for instance, tells how the provost of merchants of Paris (essentially its mayor), heading a mob of rioters that stormed the regent's palace in late 1380, excused himself, on his knees, citing the principle of necessity (claiming that the mob forced him to head it).[13] Yet the crown also commonly used this principle to justify levying taxes as extraordinary revenues in times of emergency. In these cases, becoming more and more common from the end of the thirteenth century, the principle of necessity took the form of a formal, at times written, legal rule.

The jurist Philippe de Beaumanoir wrote in the late thirteenth century the important *Coutumes de Beauvaisis*, a compilation of the customary norms of a region, but also an important theoretical treatise on law in the period. In one of the book's chapters he discusses "laws" (*establissemens*) in "times of necessity" (*tans de necessité*), explaining that "some times are exceptional," in which one cannot follow regular usage and customs. Such are "times of war or fear of war," in which kings, princes, barons and other lords may act in ways that in other times would have been wrongful, but they are excused by these "times of necessity." (§ 1510) He proceeds to discuss emergencies caused by famine, and details what the authorities may do then. (§ 1511) Even though none but the king may regularly create new customs or laws (*establissement*), even barons may create them in "times of necessity." (§ 1512) He then goes on to discuss other measures that may be used in times of necessity, including taking from everyone according to their estate for the purposes of public works (such as fortifications before a war).[14] (§ 1514) In short, Beaumanoir describes what he sees as the legal norms governing the projection of public power in times of emergency. In other words, he recognizes a special area of law governing extraordinary times, or, a state of exception.

The French crown increasingly used this medieval state of exception for times of war in the late thirteenth century and early fourteenth century. In general it used two sources of law. First, a vassal had to grant his lord aid in four non-recurring events, among them a "case of necessity" (*casus necessitates*) or "necessity of the realm" (*necessitas regni*) (the others were knighting of the lord's eldest son, the marriage of his daughter or the ransom of the lord).[15] Helped by the

[12] On rising social tensions and social violence in this period see for instance: CLAUDE GAUVARD, VIOLENCE ET ORDRE PUBLIC AU MOYEN AGE 206-213 (2005); MICHEL MOLLAT AND PHILIPPE WOLFF, ONGLES BLEUS JACQUES ET CIOMPI: LES REVOLUTIONS POPULAIRES EN EUROPE AUX XIVE ET XVE SIECLES (1970).

[13] 1 CHRONIQUE DU RELIGIEUX DE SAINT-DENYS 20 (Bernard Guenée ed., 1994).

[14] 2 PHLIPPE DE BEAUMANOIR, COUTUMES DE BEAUVAISIS 261-265 (Am. Salmon ed. 1900); JACQUES KRYNEN, L'EMPIRE DU ROI: IDEES ET CROYANCES POLITIQUES EN FRANCE XIIIE-XVE SIECLE 270 (1993)

[15] See ERNST H. KANTOROWICZ, THE KING'S TWO BODIES 284 (1957).

rising concept of the feudal monarchy (according to which the king was feudal overlord of all the lords of the realm), in the late thirteenth century the French monarch increasingly used this feudal law to justify taking extraordinary revenues from his subjects (not only his direct vassals) in times of war.[16] The second source of law was the principle of necessity in Roman law (as elaborated upon by jurists such as Beaumanoir). The French monarch, again from the late thirteenth century, justified decreeing extraordinary taxes based on a "case of necessity" in the "defense of the realm." His wars certainly necessitated more funds and his ordinary domain revenues did not suffice. Thus the justification, or, excuse, of defense of the realm helped him to fund his wars.

Just as modern jurisprudence calls the "state of exception" as it does, to distinguish it from the regular legal state (from which it is the exception), later medieval French jurisprudence also distinguished between "ordinary" revenues and the exceptional "extraordinary" revenues based on the principle of necessity. Yet more and more the crown came to regularly raise these "extraordinary" revenues. Again, the scope of this article would not allow me to tell the history of late-medieval French taxation.[17] Instead I will survey it in very general and simplistic terms, returning below to some points in more detail. In the reign of Philip IV (r. 1285-1314), the crown decreed various direct taxes based on the justification of "defense of the realm" in a "case of necessity." Rebuffed by public resistance in 1314-1315 (alluded to in the introduction), the heirs of Philip IV moved from decreeing direct taxes (based on evident necessity) to negotiating on them and receiving consent, most often on the local level.[18]

Due to the crisis of the monarchy in mid-century because of the war with England (not to mention the Black Death), the crown had to seek more general consent through central means: general assemblies, or, "Estates General." Since the monarchy needed more and more funds, it used taxation and it devalued the currency, measures which were abhorred by the mercantile elite of Paris. Beginning with the estates of 1355, but more importantly with the estates of 1356-1358, the burghers of Paris sought to bring more formal controls and efficiency to the administration. The theoretical case was based on Aristotelian influences and language. The king should rule for the common good according to law, thus establishing the case of a more limited monarchy, especially though not exclusively in terms of taxation.[19]

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[16] See JOHN BELL HENNEMAN, ROYAL TAXATION IN FOURTEENTH CENTURY FRANCE: THE DEVELOPMENT OF WAR FINANCING, 1322-1356, 17-19 (1971).

[17] For the history of French taxation in the fourteenth century see especially: ALBERT RIGAUDIÈRE, PENSER ET CONSTRUIRE L'ÉTAT DANS LA FRANCE DU MOYEN ÂGE (XIII^{E} - XV^{E} SIÈCLE) (2003); JOHN BELL HENNEMAN, ROYAL TAXATION IN FOURTEENTH-CENTURY FRANCE: THE CAPTIVITY AND RANSOM OF JOHN II, 1356-1370 (1976); JOHN BELL HENNEMAN, ROYAL TAXATION IN FOURTEENTH CENTURY FRANCE: THE DEVELOPMENT OF WAR FINANCING, *supra* note 16; JOSEPH R. STRAYER, MEDIEVAL STATECRAFT AND THE PERSPECTIVES OF HISTORY (1971); JOSEPH R. STRAYER AND CHARLES H. TAYLOR, STUDIES IN EARLY FRENCH TAXATION (1939).

[18] I borrow this periodization from RIGAUDIÈRE, *supra* note 17, at 546.

[19] On the theoretical issues see KRYNEN, *supra* note 14, at 419-431. On the practical side of politics see RAYMOND CAZELLES, SOCIETE POLITIQUE, NOBLESSE ET COURONNE SOUS JEAN LE

Ultimately the crown overcame these almost-revolutionary years. The royal council established permanent taxes to support the new permanent military of the 1360s and 1370s. Yet again, the crown originally levied these taxes as an emergency measure, a classic "case of necessity," namely to pay for the ransom of King John II in the 1360s (captured and held by the English), but then kept them as permanent taxes.[20] The public again rebuffed the crown in the tax uprisings of 1380-3,[21] and the tax regime was shattered by the civil war of the early fifteenth century and the English invasion (beginning in 1415). During that period King Charles VII (r. 1422-1461) had to negotiate with local, regional and, at times, general assemblies to convince them of granting him taxes.[22] My study of some of these negotiations in the 1410s and 1420s at the local level shows how central was the language of "necessity," and "defense of the realm" and the "commonwealth" (*la chose publique*) – both for the crown and, for instance, the towns of Lyon or Troyes – for justifying these taxes as emergency measures.[23] Yet as a legal principle, evident necessity was no longer the basis for taxation, but rather consent. Finally in the 1440s Charles VII reestablished a permanent tax regime (*the taille*), connecting it with the need of financing the permanent military (*compagnies d'ordonnance*) essential for the war with England.[24]

Throughout this period, even when taxes came to be de-facto permanent, they mostly kept the name "extraordinary" revenues as opposed to the "ordinary" revenues from the domain. Their exceptional nature remained. In the 1370s, for instance, the jurist Évrart de Trémaugon wrote an important treatise named the *Songe du vergier*, commissioned by King Charles V. Among other things, Trémaugon discussed taxation in the context of the king's authority. He explained that the king may tax only "for the defense of the commonwealth (*la chose publique*) and with the permission [of his free subjects] when the

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BON ET CHARLES V 183-225 and 242-274 (1982). For the 1340s origins of this movement, see RAYMOND CAZELLES, LA SOCIETE POLITIQUE ET LA CRISE DE LA ROYAUTE SOUS PHILIPPE DE VALOIS 253-261 (1958).

[20] FRANÇOISE AUTRAND, CHARLES V: LE SAGE 401-450 and 568-612 (1994); HENNEMAN, *supra* note 17.

[21] See, for instance, GAUVARD, *supra* note 12, at 206-213; LEON MIROT, LES INSURRECTIONS URBAINES AU DEBUT DE REGNE DE CHARLES VI (1380-1383): LEURS CAUSES, LEURS CONSEQUENCES (1974). For more detail on these events see GUY LURIE, CITIZENSHIP IN LATER MEDIEVAL FRANCE, C. 1370–C. 1480 68-107 (Doctoral dissertation, Georgetown University, 2013).

[22] JAMES RUSSELL MAJOR, REPRESENTATIVE GOVERNMENT IN EARLY MODERN FRANCE 29-39 (1980).

[23] For various negotiations with Lyon in the years 1416-1422, see the municipal deliberations kept at LES ARCHIVES MUNICIPALES DE LYON, BB1, ffs. 8, 51-52, 108 and 141. For Troyes and a debate there in 1429 on granting a tax "*pour le bien du roy nostre sire et de la chose publique, ainsi que necessite en est*," see the municipal deliberations kept at ARCHIVES TROYES, Fonds Boutiot, A1, f. 2v.

[24] On the way in which Charles VII established this taxation regime in 1439, see, for instance, MAJOR, *supra* note 22, at 39; JACQUES GARILLOT, LES ETATS GENERAUX DE 1439: ÉTUDE DE LA COUTUME CONSTITUTIONNELLE AU XV[E] SIECLE (thèse pour le doctorat, 1947); 1 THOMAS BASIN, HISTOIRE DES REGNES DE CHARLES VII ET DE LOUIS XI 165-166 (ed. J. Quicherat, 1866) [1473-1487]. For the tax regime in the second half of the fifteenth century, see, for instance: PHILIPPE CONTAMINE, DES POUVOIRS EN FRANCE 1300-1500 123-130 (1992); EMMANUEL LE ROY LADURIE, L'ÉTAT ROYAL, 1460-1610 71 (1987); MARTIN WOLFE, THE FISCAL SYSTEM OF RENAISSANCE FRANCE 52-59 (1972), 52-59.

ordinary revenues do not suffice for defense of the land."[25] Trémaugon wrote this very narrow definition of the king's taxation power, keeping it a strictly state-of-exception authority, despite the fact that at least some of the taxation regime at this stage was de-facto permanent, and the crown in the reign of Charles V often dispensed with gaining consent for taxation in some parts of France. Even as late as 1484, when an Estates General unsuccessfully attacked the royal taxation regime, some deputies recalled that the crown should levee taxes only in an evident necessity.[26]

This rather short survey shows that the principle of necessity served, in fact, as a medieval version of the state of necessity. Granted, as time went by the rules governing this state of exception grew lax, and a permanent state of exception became the ordinary state of affairs. Consent, at least theoretically and rhetorically, gained in importance and replaced the principle of necessity. Granted, ideas of law and the abilities of central authorities to project power were very much different than their modern counterparts, allowing only an imperfect comparison to the modern state of exception. Yet still, a state of exception of sorts existed in medieval France, as a special area of law governing extraordinary times.

Why then is this state of exception ignored? As already mentioned, one reason, perhaps, lies in a flawed perception that remains, since the Renaissance, of the Middle-Ages as irrelevant to discussions on democracies, secular states and the rule of law. In contrast, historians for decades have emphasized the continuities and relevancies of medieval forms of thought on government. Walter Ullmann, for instance, had argued for a continuous Hegelian dialectic between two legitimizing principles of government and law throughout the Middle-Ages and into modern times. The two principles – "ascending authority" from the people and "descending authority" from one "supreme organ" – fought for supremacy since ancient times.[27] In light of this continuous dialectic, it is not surprising that Ullmann had argued that "the via moderna, in matters of principles of government, is by no means as modern as we might perhaps be inclined to think. Similarly, more than mere traces and shades of the medieval manner of thinking are noticeable in our own modern society."[28]

Ullmann's argument that continuity and relevance mark the relationship between Medieval and Modern times has resonated with many historians in subsequent decades.[29] Examples of two illustrious historians will suffice here. Brian Tierney argues that the most important constitutional ideas of modern times have origins in medieval times.

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[25] Évrart de Trémaugon, *Le songe du vergier*, in 2 TRAITEZ DES DROITS ET LIBERTEZ DE L'EGLISE GALLICANE I. 140 (ed. Pierre Dupuy, 1731).

[26] See the contemporary account of this assembly in JEHAN MASSELIN, JOURNAL DES ETATS GENERAUX DE FRANCE TENUS A TOURS EN 1484 140-157 (1835). See also MAJOR, *supra* note 22, at 48.

[27] WALTER ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES (1961). WALTER ULLMANN, A HISTORY OF POLITICAL THOUGHT: THE MIDDLE AGES (1970).

[28] ULLMANN, *supra* note 27, at 26.

[29] See Cary J. Nederman, *Empire and the Historiography of European Political Thought: Marsiglio of Padua, Nicholas of Cusa, and the Medieval/Modern Divide*, 66(1) JOURNAL OF THE HISTORY OF IDEAS 1, 1-2 (Jan., 2005).

Popular sovereignty, consent, constitutionalism, liberalism, all have origins in medieval beginnings in the twelfth century. These concepts were all developed through both political and ecclesiastical thought on such questions as the legitimacy of authority and the origins of jurisdiction.[30] Quentin Skinner, one of the most important historians in these contexts, also emphasizes continuity and relevance. According to Skinner the most important elements of the modern state came to be in thirteenth to sixteenth centuries. According to Skinner, thirteenth century Ciceronian rhetorical schools, Post-Glossators jurists' works, other works written in thirteenth- and fourteenth-century Italian city-republics, scholastics, early humanists such as Petrarch, all had critical roles in influencing the Florentine Renaissance of the fifteenth century and the rise there of republican values.[31]

Moving back to the specific context of the late-medieval French monarchy, it is now clear that it was far from an absolute or unlimited regime. Yet two further points must be stressed. First is the legalization process that French political society went through in the late Middle-Ages.[32] As Françoise Autrand explains through an examination of statutes promulgated for the "reform" of the realm in this period, there was a growing perception in the French monarchy that it must be based on legal norms.[33] Second, and perhaps most importantly, the crown ruled the French kingdom through negotiation and cooperation. The negotiated nature of the French polity throughout the period cannot be stressed enough. Legitimacy of rule (or, the legitimately accepted use of authority) was one reason for this negotiated character, and contemporaries based political legitimacy in a large measure on the old (feudal) concepts of "aid" and "counsel."[34] But a second reason for the negotiated character of the polity was that the sheer power that the rulers of the polity held – whoever these rulers were – was by far smaller than held by rulers of present-day states. The administration was not only very small but also local in character. While central administration existed, this was a very small administration for such a large territory. Thus much of the official royal power was wielded locally by local elites. In other words, power was not only negotiated, but also localized in late medieval France.[35]

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[30] BRIAN TIERNEY, RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650 (1982).

[31] 1 QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT ch. 4 (1978).

[32] See: OLIVIER GUILLOT, ALBERT RIGAUDIERE AND YVES SASSIER, POUVOIRS ET INSTITUTIONS DANS LA FRANCE MEDIEVALE: DES TEMPS FEODAUX AUX TEMPS DE L'ÉTAT 140 (1998), 140; RIGAUDIERE, *supra* note 17, at 181-208; ESTHER COHEN, THE CROSSROADS OF JUSTICE: LAW AND CULTURE IN LATE MEDIEVAL FRANCE 19-26 (1993).

[33] Françoise Autrand, *Progrès de l'état moderne ou construction de l'état de droit?*, in PROGRES, REACTION, DECADENCE DANS L'OCCIDENT MEDIEVAL 77 (eds. Emmanuèle Baumgartner and Laurence Harf-Lancner, 2003).

[34] PHILIPPE CONTAMINE, LE MOYEN AGE: LE ROI, L'ÉGLISE, LES GRANDS, LE PEOPLE, 451-1514 459 (2002); MAJOR, *supra* note 22, at 3. On the feudal origins of the principles of advice, counsel and consent see MARC BLOCH, LA SOCIÉTÉ FÉODALE 313 (1939). For Joseph Canning's subjective and ultimately individual definition of legitimate authority as involving the question "why obey?" see JOSEPH CANNING, IDEAS OF POWER IN THE LATE MIDDLE AGES, 1296-1417 195 (2011), 195.

[35] For much more on the nature of the French polity in this period see LURIE, *supra* note 21.

After establishing the existence of a French medieval state of exception, it is now time to turn to study in greater focus some of its details, to try to gain some valuable insights for the contemporary debate.

IV. The State of Exception as a Pretext

One of the issues haunting the current discussion over emergency powers is their abuse as a pretext. Was the Patriot Act, for instance, only a necessary measure in a war against terror that was forced upon the U.S? Was not at least part of the Patriot Act simply an executive "wish-list" that was implemented through the excuse of the war on terror? It is hard to say, and the debate on this issue does not seem to subside. In this context the long-over medieval state of exception holds an interesting insight, since one of the abiding issues in France was the same.

Since the very first uses of the justifications of "defense of the realm" in an "evident necessity" French jurists and scholars debated the legitimate uses of the funds raised. One of the legal principles that they very soon developed was "*cessante cause, cessat effectus*," (when the cause ceases, the effect ceases). In other words, as Pierre d'Auvergne argued in 1298, once emergency circumstances have ceased, the king must annul the tax. A few years later Pierre Dubois supported the same view, arguing that the king who took more than necessary committed a mortal sin. This principle was not just theoretical, and was accepted by the crown who applied it in the years 1302 and 1304.[36]

In the summer of 1313 arose the danger of war against the count of Flanders. At the end of June, King Philip IV ordered a tax to finance this war, but peace was reached by the end of July. Despite a bad financial state, Philip IV ordered the return of the funds raised, according to the principle of "*cessante cause, cessat effectus*." Some contemporaries doubted the king's motives, thinking that he ceased collecting taxes, only so he could collect more at a later date.[37] A year later the count of Flanders mutinied again. Philip IV decided to raise a tax to support a war against him. This tax was raised in July 1314, as part of a writ of conscription. The terms of this tax were these: each group of 100 men had to raise 18 Parisian pounds, which sufficed for the armament of 6 soldiers for a month; the choice was either to raise the funds or to provide soldiers.[38]

The war went by quickly and was over by early September. The crown did not use the armies raised through taxation. But the king needed the funds more desperately than he needed them the year before, due to financial difficulties. These years were especially difficult in France (a year later, 1315, saw an exceptionally bad harvest, famine,

[36] BROWN, *supra* note 1, at 569-572.

[37] BROWN, *supra* note 1, at 25 and 576-577.

[38] ANDRÉ ARTONNE, LE MOUVEMENT DE 1314 ET LES CHARTES PROVINCIALES DE 1315 13-14 (1912); see also Joseph R. Strayer, *Consent to Taxation under Philip the Fair*, in STUDIES IN EARLY FRENCH TAXATION, *supra* note 17, at 83-84.

and plague). He decided to continue collecting the tax despite the end of the war.[39]

Even before that, collection of the tax met with resistance. Some resistance was raised due to the fact that the collection began in advance, before the war broke out.[40] But now the similarity of circumstances to the year before, in which collection of taxes ceased, the terms of the peace which seemed very bad, all combined to produce even greater hostility.[41]

Resistance to the tax reached immense proportions in October. Nobles from the north spoke out against paying the tax. The king kept trying to collect the tax, but to no avail. On November 4 the king fell ill (he died from this illness less than a month later). It was then that the entire nobility of France assembled to demand cessation of the tax. They cried out that if the king kept trying to collect the tax, all his subjects shall rebel. The king held on to his right to collect the tax, but agreed on November 16 to cease collection temporarily, until all objections would be heard in the *Parlement* of Paris (the highest court of law) on February 15, 1315.[42]

Yet resistance did not cease. Much of the north of France entered into collective leagues aiming at stopping the tax. These leagues wrote in their founding documents of the king's various illegal taxes. They claimed that these taxes were neither used for the honor and profit of the king and kingdom nor "for the defense of the common profit" (*la deffension du profit commun*).[43] In essence they argued that the justification used by the king – "defense" – was a fictional excuse and not the real cause and use of the taxes. Or in other words, they accused the king of using an emergency as a pretext for raising illegal taxes.

The declaration of Philip IV on November 28 calling for a permanent cessation of the tax collection, as well as his death a few days later, both failed to appease the leagues. Their demands were for full restitution and a declaration of the principle justifying raising taxes in the future.[44] Between March and May 1315 the new king, Louis X, granted charters to various regions and towns in France in order to achieve complete appeasement. The charter granted to Normandy, for instance, cemented the principle that the king could not tax unless some "evident utility or emerging necessity demands it" (*nisi evidens utilitas, vel emergens necessitas id exposcat*).[45] This provision was the clearest enunciation of the necessity principle in any of the charters, and it restrained the king's power to tax in times of peace. It is clear however, that the Normans accepted the actual principle which made it possible

[39] See ARTONNE, *supra* note 38, at 17; BROWN, *supra* note 1, at 578-581, 112, and 136; HENNEMAN, *supra* note 16, at 13-14; and Strayer, 38, at 83-84

[40] See ARTONNE, *supra* note 38, at 14.

[41] See ARTONNE, *supra* note 38, at 17-18; see also BROWN, *supra* note 1, at 112 and 578-581.

[42] For more on this famous assembly see THOMAS N. BISSON, MEDIEVAL FRANCE AND HER PYRENEAN NEIGHBOURS 97-99 AND 104-5 (1989). See more on these events in general in BROWN, *supra* note 1, at 112 and 578-581. See also ARTONNE, *supra* note 38, at 19-20.

[43] See three examples of the league's documents published in BROWN, *supra* note 1, at 130-133.

[44] See ARTONNE, *supra* note 38, at 26-29.

[45] 1 ORDONNANCES DES ROIS DE FRANCE DE LA TROISIÈME RACE 593 (1723-1849).

for the king to tax during a state of emergency. Similarly other charters restricted the power of the king to conscript (which was essentially also used as a tax) or to demand the funding of his army only in a "necessity."[46]

In other words, the resistance to the tax of 1314 arose because political society saw its continued collection as illegal. While the pretext for raising the tax was a case of necessity in defense of the realm, the king continued to collect it simply because of extraneous financial reasons. The charters did not contend with the king's emergency powers of raising taxes in emergencies. They simply tried to cement the principle that only emergencies would allow such taxes.

The leagues and charters of 1314-5 are not the only example of French political society debating if the crown used emergency as a pretext to raise taxes. In the tax rebellions of 1380-3 some of the cries to nullify the taxes were based on their illegitimacy. These taxes began, as already noted, as emergency measures to pay for the ransom of John II in the 1360s. By 1380 some elements of the political elites did not see them as legitimate anymore. In formal terms, legal tracts of the period agreed that taxation was possible only through consent.[47] Royal ordinances of the period and administrative acts kept insisting that taxation was possible only through consent.[48] Yet in practice, as already mentioned, the crown in this period often dispensed with gaining consent for taxation in some parts of France. In the period of 1380-1383 some general and provincial assemblies insisted on their legal rights or privileges to consent to taxation. The estates of Normandy, for instance, forced the crown in January 1381 to confirm their privileges not to contribute taxes except in cases of evident utility or urgent necessity (*evidens utilitas aut urgens necessitas*) before they agreed to pay taxes for a year.[49]

In short, the French medieval state of exception was not always used simply because of fear or evident necessity. Just as some scholars today suspect Western governements' intents, at least some political elites thought that it was also used as a pretext, as an excuse. Anger from these illegitimate uses of emergency powers caused the violent backlashes of 1315 and 1380-3. The french political elites accepted the legitimacy of taxation in times of emergency (or through consent). But in both of these backlashes, the justification of necessity did not go unquestioned.

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[46] *Ibid,* at 559 and 569.

[47] See, for instance, QUESTIONES JOHANNIS GALLI 80-81 (Marguerite Boulet ed., 1944).

[48] See for instance Charles VI's claim in November 1380 that his subjects gave the crown all previous taxes voluntarily, in 6 ORDONNANCES DES ROYS DE FRANCE DE LA TROISIÈME RACE, *supra* note 45, at 527.

[49] 6 ORDONNANCES DES ROYS DE FRANCE DE LA TROISIÈME RACE, *supra* note 45, at 550.

V. The State of Exception as a Means to Change the Legal Order

Another preoccupation of the contemporary debate is the transformation of the exception into the ordinary. As Agamben and others point out, governments today increasingly use the state of exception as a regular means of government. In essence, writers fear that governments use the state of exception to permanently change the legal order, dismantling at least some of the checks and balances of the democratic state, and, perhaps, the rule of law itself.

The historical example of late-medieval France holds interesting parallels. The French crown relied on the exception – the principle of necessity – to ultimately create permanent taxation. Jurists understood this process early on. The jurist Oldradus de Ponte of Padua, for instance, wrote on this issue already in the early fourteenth century. That period coincided with the first regular extensive use of the principle of necessity as a justification to raise taxes. In one of de Ponte's opinions he discusses a question posed by a French noble on a tax imposed by the French king. The noble asked whether he was exempt from the tax. The tax was called by the king for a public and common utility and necessity ("*publicae & communis utilitatis & necessitatis*"), which was repeated and fictional. In his opinion, Oldradus de Ponte legitimizes the tax while noting the novelty of collecting it annually. He accepts that the exceptional emergency use of necessity has turned into an annual ordinary use, based on the same recurring necessities or needs, mentioning other formerly singular-events feudal taxes that have become annual. The king has the power do so, explains de Ponte, based on his "imperial privilege."[50]

Oldradus de Ponte was of course correct that there was nothing new or illegitimate in the king using his power to raise taxes in a case of necessity. What is discerning in his opinion is the realization that something new is occurring in the early fourteenth century, when the king began to regularly and annually use this power. A perpetual necessity replaced the one-time event. The exception has turned into the ordinary.

Similarly, as already noted, in the second half of the fourteenth century, taxes became de-facto permanent. As the king's appointed ruler in the south of France noted in a letter in February 1381, there was no way the revenues of the domain would suffice to pay for the troops needed without supplementing them with taxes (in the face of the king's intents of annulling these taxes).[51] Yet the official version remained that the taxes were in place because of the war and for the defense of the realm. The official sanctioned royal chronicler, for instance, noted that the crowds of Paris demanded in November 1380 the abolition of the

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[50] OLDRADUS DE PONTE, CONSILIA, SEV RESPONSA, & QUAESTIONES AUREAE f. 39 (1571), § 98. This passage is also quoted and analyzed by KANTOROWICZ, *supra* note 15, at 287-289. Kantorowicz emphasizes the distinction of de Ponte between perpetual need (*necessitas in habitu*) and an actual emergency (*necessitas in actu*). While I agree that this distinction lies at the heart of the legal opinion of de Ponte, the words themselves seem only a latter addition by the editor of the 1571 edition, as they only appear in the summary and they do not appear at all in some of the earlier editions of the work, such as the 1507 edition.

[51] 10 DOM CLAUDE DEVIC AND DOM VAISSETE, HISTOIRE GENERALE DE LANGUEDOC AVEC DES NOTES ET LES PIECES JUSTIFICATIVES 1646 (2004).

taxes established due to the war.[52] The war-basis for the taxes was also the official version of the ordinance of November 16 that abolished (for a while) these taxes: they were put into place due to the wars "for the defense of our realm."[53]

The jurists played along with this official version. The aforementioned jurist Évrart de Trémaugon discussed taxation in the 1370s in his royally commission treatise. Again, he justified the "annual" taxes on the "times of necessity of war." The king put them in place to defend the common good (*bien commun*) and the commonwealth (*la chose publique*).[54] The taxes were an exceptional measure for the war, justified through the principle of necessity, yet in place for years and years. Similarly the jurist Jean Boutillier could note in his 1390s treatise, the *Somme rural*, that the king as emperor in his realm could call a tax for the war and could in general tax his subjects for the good of the realm. These two elements, war and tax, were linked.[55]

The exception-turned-ordinary nature of taxes in this period had two important features relevant to the contemporary debate. First, their function was ultimately to increase the power of those collecting the taxes. Regular taxes meant a permanent military. Regular taxes meant a larger administration. Regular taxes, in short, meant a stronger regime. In the second half of the fifteenth century, for instance, the crown put the tax system back in place after the conclusion of the civil wars. The same period saw a rise in taxes, in public expenses and in the royal administration, including its wars.[56] The same period also saw both a greater consolidation of the monarchy, and cries that the king, Louis XI, was a tyrant who tripled the tax burden.[57] In short, the exception-turned-ordinary served to increase the powers of the crown.

Second, as noted by Oldradus de Ponte, the exception-turned-ordinary was a novelty. While the exception of the principle of necessity was old and well established, its permanent nature was new. In other words, the permanent state of exception in practice changed the regular legal order of late medieval France. Even if the law-in-books in the 1370s, for instance, remained true to the principle that the king could only raise taxes in a case of necessity for the defense of the realm, the law-in-practice was different. The crown had put into place a system of taxation that was permanent. The principle of necessity had changed from the extraordinary into the ordinary. What scholars such as Giorgio Agamben fear would happen in the early twenty-first century with regard to emergency powers had already occurred in fourteenth-century France. The regime used emergency powers as a means to increase their regular powers and to permanently change the legal order.

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[52] 6 LES GRANDES CHRONIQUES DE FRANCE 472 (M. Paulin-Pâris ed., 1838).

[53] 6 ORDONNANCES DES ROIS DE FRANCE DE LA TROISIÈME RACE, *supra* note 45, at 528.

[54] Trémaugon, *supra* note 25, at 27.

[55] 2 JEAN BOUTILLIER, SOMME RURAL 1r-2r (1494).

[56] CONTAMINE, *supra* note 24, at 130.

[57] 3 BASIN, *supra* note 24, at ch. 1.

VI. Negotiation and the limits of the State of Exception

One of the most fascinating aspects of the historical example of the French medieval state of exception is the look it grants us into its limits. The crown was not unchecked in its use of the principle of necessity. Again and again political society arose and stated where the crown could not proceed: the regional leagues of 1314-5 and the charters that limited the crown, the almost-revolutionary events of 1355-1358, and the tax uprisings of 1380-3, are just three of the best examples. In all of these events, taxation was one of the central issues, if not the only issue. In all of these events political elites demanded curtailment of taxes that were raised for wars.

Yet these confrontational examples are somewhat misleading. Instead of the confrontational model, we must seek instead to describe the relationship between the crown and the political elites in terms of cooperation. Their policies and interests were complementary, even if at times conflicts arose. The crown could not help but cooperate with the political elites. As already noted, the crown's abilities to project power were such that it had to cooperate with local elites in order to enforce its will. Indeed the political elites manned the small administration that existed: the military and the financial and legal administrators.[58]

In extreme cases the crown could pounce on a town that flaunted its disobedience, as it crushed Montpellier in late 1379 for its outright refusal to pay taxes for the war.[59] Yet in the regular course of affairs, the crown had to achieve cooperation through negotiation rather than contestation. Contemporaries thought that the crown should govern the realm through the active participation of elite groups in society: nobles and clergy; town elites; royal officers. Such participation was achieved first through the regular work of the royal council, which included the established elites, such as the highest nobility, the top royal administrators, officers of the crown, presidents of the *Parlement*, and top clergy.[60] The crown achieved active participation also through general assemblies (that gradually decayed), as well as regional and local assemblies. In these assemblies the crown often sought, among other things, public support for taxes. The men (and the occasional woman) in the assemblies often had also day-to-day legal authority. While the general assemblies and many of the regional ones decayed and did not develop into permanent institutions, their meetings were

[58] On the composition of the administration in this period see the works of CAZELLES, *supra* note 19.

[59] See the sentence announced on February 14, 1380 against the inhabitants of Montpellier for their rebellion in 6 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES (Isambert, Decrusy and Jourdan eds., 1964). For more on this revolt, see 9 DOM CLAUDE DEVIC AND DOM VAISSETE, *supra* note 51, at 872-876.

[60] As King Charles V wrote in his testament of October 1374, "we and our predecessors have always governed...through a council of a large number of wise men." He thus wrote up the names of the councilors with whom the tutors of his heirs must consult, including his top administrators, officers of the crown, presidents of the Parlement, top clergy and six burghers of Paris. See 5 RECUEIL GENERAL DES ANCIENNES LOIS FRANÇAISES, *supra* note 59, at 434-435.

forums for consultation with the men governing the realm on behalf of the king.[61]

In exchange for taxes that were emergency measures in the face of a desperate war with England, the crown still had to appease regional interests. For example, since 1361 (in the context of the funds needed to ransom King John II) the Estates of Artois (a regional assembly) assembled annually to vote their tax for the king. In exchange for the taxes voted for the "defense of the realm," the bourgeois and inhabitants of Artois, Boulonnais and the county of Saint-Pol repeatedly received assurance of their "liberties and franchises."[62]

The towns were especially important in funding the crown in exchange for economic, legal and political privileges, as well as for powers and authorities.[63] In the nadir of royal power in the 1420s and early 1430s (the wars with both England and Burgundy), at times even pleading and warning of the dire straits faced by the crown failed to convince some of the towns. On July 7, 1420, for instance, the town council of Lyon was divided on the question of granting the crown desperately needed troops. The minority in the council wanted to grant a small tax, but the prevailing majority opinion was to decline the crown's request. On January 9, 1422, a large assembly of Lyon (and the surrounding environs) heard the pleas of the crown (through a messenger) that it could not go on with the war with England without their help. Despite these desperate pleas, the assembly decided a day later to grant only 60 percent of the tax requested.[64]

In other words, the crown used the principle of necessity to raise taxes, but it would not have been able to do so without the cooperation of the political elites. Their interests coincided. The political elites, for various reasons (including national sentiments), wanted the continued survival of France, and were increasingly willing to pay for it.[65] Without

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[61] The historic literature on representative assemblies in France of this period is immense. See, for instance: MAJOR, *supra* note 22; GUILLOT, RIGAUDIÈRE AND SASSIER, *supra* note 32, at 140-202. Neithard Bulst shows with regard to the second half of the fifteenth century, in the Estates General of 1468 and 1484, that a significant ratio of the delegates of the third estate was royal officers. In the 1484 Estates General 67% were royal officers (in 1468 less than half), and 20% town officials (in 1468 more than half were town officials). In any case, both in 1468 and 1484 almost all the delegates from the third estate (87% in the latter Estates General) were either royal or town officials, or in other words had day-to-day legal authority. See Neithard Bulst, *Vers les états modernes: le Tiers état aux États généraux de Tours en 1484*, in REPRESENTATION ET VOULOIR POLITIQUES 11-18 (Roger Chartier and Denis Richet eds. 1982).

[62] See ORDONNANCES DES ROIS DE FRANCE DE LA TROISIÈME RACE, *supra* note 45, volume 5 at 82 and 652, and volume 6 at 602. For more on this assembly see CHARLES HIRSCHAUER, LES ETATS D'ARTOIS DE LEURS ORIGINES A L'OCCUPATION FRANÇAISE, *1340-1640* 18-29 and 63 (1923).

[63] DAVID RIVAUD, LES VILLES ET LE ROI (2007); BERNARD CHEVALIER, LES BONNES VILLES DE FRANCE DU XIV^{E} AU XVI^{E} SIECLE (1982).

[64] See the municipal deliberations kept at LES ARCHIVES MUNICIPALES DE LYON, BB1, ff. 108 and 141. On Lyon in this period see CAROLINE FARGEIX, LES ELITES LYONNAISES DU XV^{E} SIECLE AU MIROIR DE LEUR LANGUAGE: PRATIQUES ET REPRESENTATIONS CULTURELLES DES CONSEILLERS DE LYON, D'APRES LES REGISTRES DE DELIBERATIONS CONSULAIRES (2007).

[65] Historians such as Colette Beaune, Jacques Krynen and Nicole Pons have argued that the period of the so-called "Hundred-Years-War" saw a rise of national sentiments. The issue remains loaded and contested. See: Nicloe Pons, *De la renommée du royaume à l'honneur de la France*, 24 MEDIEVALES 101 (1993); Philippe Contamine, *Mourir pour la patrie*, in LES LIEUX DE MEMOIRE: LA NATION 11-43 (ed. Pierre Nora, 1986); COLETTE BEAUNE, NAISSANCE

their actual or tacit consent, as shown in the cases when they did not approve, the crown's state-of-exception regime could not continue. Thus the limits of the crown's use of the principle of necessity were both external – the continued approval of the political elite – and internal, to the extent that the crown internalized the political elites' will, interests and personnel.

The crown in late medieval France had less ability to enforce a state of exception on an unwilling population compared, perhaps, to modern states. The sheer power of the modern state is greater in part because of its anonymous military and bureaucratic cadre and its impersonal technological might. Yet perhaps the limits of the medieval state of exception – i.e. the continued approval of political elites – hold today too, at least to a certain extent. We of course need to examine this hypothesis more closely, especially in states that lose their democratic character and gain totalitarian characteristics. Two questions might prove useful in these contexts: Could even totalitarian regimes quash the rule of law through the state of exception without some public support? And if they cannot, what are the exact limits of this public approval? A closer examination of the incentives of the late-medieval French regime in keeping the approval of its elites might prove useful. Such an examination is beyond the scope of this article, and will be pursued elsewhere.[66]

VII. Conclusion

A risky endeavor awaits those who attempt to learn lessons from history. The comparisons are often problematic and circumstances are rarely the same. Yet ignoring history leaves us with less understanding of contemporary institutions than we could otherwise have. It is therefore unwise to completely ignore the medieval French state of exception. Contemporary problems are all too similar to medieval issues: Was the crown using necessity as a pretext? Was necessity mainly an instrument of gaining permanent power and changing the legal order? Political elites in France faced these issues and cooperated with the crown in creating a legal exception-based order that they could live with.

DE LA NATION FRANCE (1985); Jacques Krynen, *Naturel: Essai sur l'argument de la nature dans la pensée politique à la fin du Moyen Âge*, JOURNAL DES SAVANTS 169 (1982); Nicole Pons, *La propagande de guerre française avant l'apparition de Jeanne d'Arc*, JOURNAL DES SAVANTS 191 (1982); Bernard Guenée, *État et nation en France au Moyen Age*, 237 REVUE HISTORIQUE 21 (1967).

[66] I am alluding here to the ideas of a group of scholars engaged in historical and comparative institutional analysis. They argue that governments have an economic and institutional incentive to create a constitutional order that would be credibly committed to maintaining property rights, since governments wish to encourage the public to pay taxes, and invest and lend them money; governments also want economic growth. Likewise, the general public has the same kind of incentive to create the same kind of constitutional order, since it wants to prevent infringement of its property rights. For a general survey see Avner Grief, *Historical and Comparative Institutional Analysis*, 88(2) AMERICAN ECONOMIC REVIEW 80 (1998). See also: Douglass C. North and Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49(4) THE JOURNAL OF ECONOMIC HISTORY 803 (1989).

Ultimately one of the lessons learned from the French medieval state of exception is its centrality in the long process of the creation of the modern state. I do not refer here to the argument, at times mentioned in the contemporary debate, that the state of exception is one of the central theological bases of the modern secular state. France of the fourteenth and fifteenth centuries was neither modern, nor secular, nor a state. The king was a sacral figure and the large bureaucracies and security forces that we associate with the modern state were lacking. The modern state and its conception of sovereignty, i.e. Jean Bodin's contention that sovereignty consists of a monopoly on making positive law, was also lacking, and the late-medieval French polity (as well as the early-modern French state) practiced legal pluralism.

Yet late medieval France also saw the gradual and non-linear process of the creation of some of the institutions that later became the modern state: a financial and legal bureaucracy, a permanent military, and the tax system to finance them. The principle of necessity – the French medieval state of exception – was an instrument that helped to facilitate the growth of these institutions. In this sense, the early-modern French state was historically, practically and politically built on the state of exception, at least to a certain extent. Political elites used other instruments as well, and the process had many ups and downs. Indeed the growth in this manner of French political and legal institutions was not an unavoidable and necessary process. Yet the relative centrality of the state of exception in this process is an important historical fact that resonates strongly with executive institution-building processes today, such as the strengthening of Western countries' security forces and intelligence establishments.

The historical example of late-medieval France does not hold the answer to the questions posed by contemporary scholars. We learn from history in the same manner in which we learn from literature. History grants us a look into different paradigms and human conditions from which we may in turn learn about ourselves. It deepens our understanding. Rather than giving practical knowledge, history provides edification and self-understanding. Perhaps in the context of the state of exception, history may help us to ask questions in a more poignant manner. Is the aggrandizement of executive power today truly and wholly necessary or do executives sometimes use emergencies as mere excuses? Is the executive becoming permanently stronger? Who is leading the process today and could security establishments gain power without the cooperation of political elites? The experience of late-medieval France grants these questions a fearful urgency.