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Medieval Emergencies and the Contemporary Debate

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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 has two purposes. First, it challenges the historical narrative inherent in the contemporary debate, which assumes the modern inception of the state of exception. Second, it reinforces the trepidation with which many scholars today view the uses and abuses of the state of exception. This article does so by showing that the French crown used and abused the medieval principle of necessity in ways similar to current uses of the state of exception; it served similar purposes. Just as some scholars fear today, the French medieval state of exception often served as a pretext meant to change the legal order, turning the exception into the ordinary. The French crown used the state of exception to enhance its power, and it was central in the long process of building the early-modern French state.

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 with 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

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[1]These events are well-known. See, for instance: Brown (1991) 112.

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contemporary debate taking place on the 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.

Medieval France formulated its own state of exception, meant to deal with emergencies, based on the legal principle of necessity. This article has two purposes. First, it challenges the historical narrative inherent in the contemporary debate, which assumes the modern inception of the state of exception. Neither modernity nor the modern state is a necessary condition for the state of exception. Second, this article reinforces the trepidation with which many scholars view uses and abuses of the state of exception. This article does so by showing that the French crown used and abused the medieval principle of necessity in ways similar to current uses of the state of exception; it served similar purposes. Just as some scholars fear today, the French medieval state of exception often served as a pretext meant to change the legal order, turning the exception into the ordinary. The French crown used the state of exception to enhance its power, and it was central in the long process of building the early-modern French state. The crown gradually stopped using necessity as a legal measure to raise taxes, seeking instead to gain the consent of the political elites. Yet necessity had a longer influence as a factor in political and legal language, rhetorically legitimizing requests for taxation. These aspects of the medieval state of exception shed an edifying historical light on the ways executives use the state of exception today.

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, such as the "indefinite detention" of suspects without recourse to criminal proceedings (in the USA Patriot Act). 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, 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.[1]

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. The sovereign, according to Schmitt, serves as a link between the state of exception and regular civic norms.[2]

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.[3] 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. In such a way, they use illegal violence (namely, their emergency powers of government), while claiming that they use it according to law.[4]

The sophisticated metaphysical discussion on the state of exception, only barely touched upon here, has been informed by its historical 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, a product of the national constitutional and legislative projects of the nineteenth and twentieth centuries.[5]

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[1]See especially: Scheuerman (2006); Ackerman (2004); Cole (2004a); Cole (2004b); Gross (2003).
[2]See: Zreik (2008) 370-376; Scheuerman (2006) 62-68; Gross (2000).
[3]Agamben (2005).
[4]Agamben (2005) 85-87.
[5]See especially: Ferejohn and Pasquino (2004). See also: Wright (2012); Lazar (2006); Neocleous (2006); Gross and Aoláin (2006); Vladeck (2004); Scheuerman (2000); Rossiter (1948).

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 a 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 these 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.

The State of Exception in Late Medieval France

Giorgio Agamben in his writings takes a cursory glance at the Middle-Ages. Focusing on refuting the relevance of the principle of necessity ("necessity has no law"), 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 otherwise fail. According to Agamben, only with modern jurists of the nineteenth and twentieth centuries the state of exception becomes part of the law.[1]

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.

Based on Roman law, the history of the principle of necessity in late-medieval France is beyond the scope of this article.[2] 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 means for much of the thirteenth century. He could of course raise revenues from his domain,[3] including various feudal exactions or taxes. He

[1]Agamben (2005) 24-26. Modern applications of the principle of necessity are known in various areas of law, including international law and constitutional law. See, for instance, Wolf-Phillips (1979).

[2]One of the best works on this issue in English, even if focused on an earlier period, is, still, Post (1964).

[3]Leyte (1996) 153-195.

could enforce these exactions through his small financial and judicial cadre. Yet royal taxes for the whole realm (as opposed to the smaller royal domain) were mostly illegitimate. Since property was based on natural law and customs, jurists in the thirteenth century understood royal taxes as an illegitimate infringement on property.[1]

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, demographic, and economic.[2] And so, beginning with the last decades of the thirteenth century, the French crown searched for creative means of increasing its revenues. Since taxation infringed on private property, the consent of all those touched by the tax was needed in order to raise it, according to the Roman law principle of *quod omnes tangit* (what touches all must be approved by all). One of the legal solutions was the Roman law principle of necessity.

The crown 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 legal rule. The jurist Philippe de Beaumanoir, for instance, wrote in the late thirteenth century in the important *Coutumes de Beauvaisis*, among other things, on the "laws" in "times of necessity." He explains there that "some times are exceptional," in which one cannot follow regular usage and customs. Such are "times of war or fear of war."[3] Beaumanoir describes in detail what he sees as the legal norms governing the projection of public power in times of emergency. He recognises 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. Relying on Roman law and feudal law, the crown took extraordinary revenues in a "case of necessity" or "necessity of the realm" for "defense of the realm" in times of war.[4]

Again, the scope of this article would not allow me to tell the history of late-medieval French taxation.[5] Instead I will only point to a few important junctures. Rebuffed by public resistance in 1314-1315 (alluded to in the introduction), the crown in general moved away from decreeing direct taxes

[1]Pennington (1988), Canning (1988), Tierney (1963), and Carlyle and Carlyle (1962).
[2]For the environmental processes, see Le Roy Ladurie (2004). On famines see Jordan (1996). On the plague see Gottfried (1983). On economic processes see Neveux (1975).
[3]Philippe de Beaumanoir (1900), vol. 2 at 261-265. Cf. Krynen (1993) 270.
[4]See: Kantorowicz (1957) at 284; Henneman (1971).
[5]For the history of French taxation in the fourteenth century see especially: Rigaudière (2003); Henneman (1976); Henneman (1971); Strayer (1971); Strayer and Taylor (1939).

(based on evident necessity) to negotiating on them and receiving consent of representative assemblies or political elites, most often on the local level.[1]

The royal council established permanent taxes to support the new permanent military of the 1360s and 1370s. 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.[2] The public again rebuffed the crown in the tax uprisings of 1380-3,[3] 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 to consent to granting him taxes.[4] 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" – both for the crown and, for instance, the towns of Lyon or Troyes – for justifying these taxes as emergency measures.[5] 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.[6]

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 of the domain and the exceptional "extraordinary" revenues based on the principle of necessity. Throughout this period, even when taxes came to be de-facto permanent, they mostly kept the name "extraordinary" revenues. 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 and with the permission [of his free subjects] when the ordinary revenues do not suffice for defense of the land."[7] Trémaugon wrote this very narrow definition of the king's taxation power, keeping it a strictly state-of-exception

[1]I borrow this periodization from Rigaudière (2003) 546.
[2]Autrand (1994); Henneman (1976).
[3]Gauvard (2005) 206-213; Mirot (1974). For more detail on these events see Lurie (2013) 68-107.
[4]Major (1980).
[5]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.
[6]On the way in which Charles VII established this taxation regime in 1439, see, for instance, Major (1980) 39; Garillot (1947); Basin (1866), 165. For the tax regime in the second half of the fifteenth century, see, for instance: Contamine (1992) 123-130; Le Roy Ladurie (1987) 71; Wolfe (1972).
[7]Évrart de Trémaugon, Le songe du vergier, in *Traitez des droits et libertez de l'eglise Gallicane*, vol. 2, I. 140 (ed. Pierre Dupuy, 1731). Cf. a treatise from about a decade later: Philippe de Mézières, *Le songe du vieil pelerin* vol. 2 (1968) 346.

authority, despite the fact that at least some of the taxation regime at this stage was de-facto permanent.[1]

This rather short survey shows that the principle of necessity served, in fact, as a medieval version of the state of exception. 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. It should also be emphasised that consent of the various local, regional and occasionally general representative assemblies was often more important than the principle of necessity for practical purposes. As explained above, the crown generally moved from decreeing taxes using the legal justification of evident necessity to negotiating on them and gaining consent of the political elite. Yet still, a state of exception existed in medieval France as a special area of law governing extraordinary times.

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 insights on its functions.

The Functions of Necessity

Necessity as a Pretext

One of the issues haunting the current discussion over emergency powers is their abuse as a pretext or an excuse. 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?[2] 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.[3]

In the summer of 1313 arose the danger of war against the count of Flanders. 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, applying the principle of "*cessante cause, cessat*

[1]Even as late as 1484, when a general assembly unsuccessfully attacked the royal taxation regime, the deputies recalled and demanded that the crown levee taxes only in an evident necessity. See the contemporary account of this assembly in Masselin (1835) 679. See also Major (1980) 48.
[2]Abraham (2008).
[3]Brown (1991) 569-572.

effectus."[1] 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.[2]

The war went by quickly and was over without the crown using the armies raised through taxation. But the king needed the funds more desperately than he needed them the year before and decided to continue collecting the tax.[3] The similarity of circumstances to the year before, in which collection of taxes ceased, the terms of the peace which seemed very bad, combined to produce resistance to the tax.[4] Even the king's decision to cease collection temporarily (on November 16) until all objections would be heard in the *Parlement* of Paris (the highest court of law),[5] did not stop the resistance. 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 defence of the common profit."[6] In essence they argued that the justification used by the king – "defence" – was 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.[7] 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."[8] 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 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."[9] In other words, 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

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[1]Brown (1991) 25 and 576-577.
[2]Artonne (1912). Strayer (1971) 83-84.
[3]Artonne (1912) 17; Brown (1991) 578-581, 112, and 136; Henneman (1971) 13-14; and Strayer (1971) 83-84.
[4]Artonne (1912) 17-18; see also Brown (1991) 112 and 578-581.
[5]The king reached this decision following a famous assembly that protested these taxes. On this famous assembly see Bisson (1989). See more on these events in general in Brown (1991) and Artonne (1912).
[6]See three examples of the league's documents published in Brown (1991) 130-133.
[7]Artonne (1912) 26-29.
[8]*Ordonnances des rois de France de la troisième race*, vol. 1 (1723-1849), 593.
[9]*Id.*, at 559 and 569.

also based on the taxes' illegitimacy. These taxes began, as already noted, as emergency measures. While in formal terms, legal tracts of the period, as well as royal ordinances, agreed that taxation was possible only through consent,[1] in practice the crown in this period often dispensed with gaining consent for taxation. In the tax rebellions of 1380-1383 some general and provincial assemblies insisted on their legal rights or privileges to consent to taxation.[2]

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 governments' intents, at least some political elites thought that evident necessity was also used as a pretext, as an excuse. The French political elites accepted the legitimacy of taxation in times of emergency (through consent). But the justification of necessity did not go unquestioned.

Necessity 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 tool of government.[3] 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 of using the exception as a regular tool of government. 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. 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, which was repeated and fictional. Oldradus de Ponte legitimises in his opinion 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."[4] In other words, de Ponte realised that

[1]See, for instance, *Questiones Johannis Galli* (Marguerite Boulet ed., 1944) 80-81. See also Charles VI's claim in November 1380 that his subjects gave the crown all previous taxes voluntarily, in *Ordonnances des roys de France de la troisième race*, vol. 6, 527.

[2]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. *Ordonnances des roys de France de la troisième race*, vol. 6, 550.

[3]For a critical assessment of this argument, see Neocleous (2006).

[4]Oldradus de Ponte, *Consilia, sev Responsa, & Quaestiones Aureae* (1571), f. 39, § 98. Kantorowicz (1957) at 287-289. Kantorowicz emphasises the distinction of de Ponte between perpetual need (*necessitas in habitu*) and an actual emergency (*necessitas in actu*). While I

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. Yet the official version remained that the taxes were in place because of the war and for the defence of the realm.[1] The jurists played along with this official version. The aforementioned jurist Évrart de Trémaugon, for instance, justified the "annual" taxes on the "times of necessity of war."[2] The taxes were an exceptional measure for the war, justified through the principle of necessity, yet in place for years and years.[3]

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.[4] Second, the permanent state of exception in practice changed the regular legal order of late medieval France, creating permanent taxation. 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.[5]

Negotiation and the Limits of Necessity

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,[6] and the tax uprisings of 1380-3, are just three of the best examples. In all of these events, taxation was one of the

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agree that this distinction lies at the heart of the legal opinion of de Ponte, the words themselves seem only a later 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.

[1]The official sanctioned royal chronicler, for instance, described these taxes as established due to the war. *Les grandes chroniques de France*, vol. 6, (M. Paulin-Pâris ed., 1838) 472. The war-basis for the taxes was also the official version of the ordinance of November 16, 1380 that abolished (for a while) these taxes. *Ordonnances des rois de France de la troisième race* , vol. 6, 528.

[2]Trémaugon (1731) 27.

[3]Cf. to the notes of the jurist Jean Boutillier 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. Jean Boutillier, *Somme rural* (Lyon: 1494), 1r-2r.

[4]For a demonsration of these processes with the increasing taxes of the second half of the fifteenth century, see: Contamine (1992) 130; Basin (1866) vol. 3, at ch. 1.

[5]Cf. Scheuerman's argument, that "politicians have probably always relied on the *rhetoric of crisis* to initiate legislative changes," in Scheuerman (2000) 1871.

[6]On these events and their relevancy, see, for instance: Krynen (1993) 419-431; Cazelles (1982).

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. 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.[1]

In extreme cases the crown could pounce on a town that flaunted its disobedience.[2] Yet in the regular course of affairs, the crown had to achieve cooperation through negotiation. Contemporaries thought that the crown should govern the realm through the active participation of elite groups: 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.[3] 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 participants 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 forums for consultation with the people governing the realm on behalf of the king.[4]

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. The towns were especially important in funding the crown in exchange for economic, legal and political privileges, as well as for powers and authorities.[5] 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

[1]*Id*.
[2]See the sentence announced on February 14, 1380 against the inhabitants of Montpellier for their rebellion in *Recueil général des anciennes lois Françaises,* vol. 6 (Isambert, Decrusy and Jourdan eds., 1964).
[3]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 *Recueil général des anciennes lois Françaises*, vol. 5, 434-435.
[4]The historic literature on representative assemblies in France of this period is immense. See, for instance: Major (1981); Guillot, Rigaudière and Sassier (1998) 140-202; Bulst (1982).
[5]Rivaud (2007); Chevalier (1982).

small tax, but the prevailing majority opinion was to refuse 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.[1]

In other words, the crown used the principle of necessity to raise taxes, and later to justify them, 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.[2] Without 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 internalised the political elites' will, interests and personnel. These limits also help to explain why the crown stopped using evident necessity as a legal tool to decree taxes, as already mentioned, and instead used it to justify and negotiate on taxes that were granted through consent. Decreeing taxes through evident necessity could work only with the approval of the political elite anyway.

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?

Conclusion

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

[1]See the municipal deliberations kept at Les Archives municipales de Lyon, BB1, ff. 108 and 141. On Lyon in this period see Fargeix (2007).

[2]Some historians have argued that the period of the so-called “Hundred-Years-War” saw a rise of national sentiments, but the issue remains contested. See: Pons (1993); Contamine (1986); Beaune (1985); Krynen (1982); Pons (1982); Guenée (1967).

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. Instead, in the context of the state of exception, history may help us to ask questions in a more poignant manner. Is the aggrandisement 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.

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