Yale Law School
Yale Law School Legal Scholarship Repository

SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers

Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers

1-1-2002

CONSTITUTIONALISM AND TERRORISM

Pablo Ruiz-Tagle
University of Chile

Follow this and additional works at: http://digitalcommons.law.yale.edu/yls_sela

Recommended Citation
Ruiz-Tagle, Pablo, "CONSTITUTIONALISM AND TERRORISM" (2002). *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers.* Paper 11.
http://digitalcommons.law.yale.edu/yls_sela/11

This Article is brought to you for free and open access by the Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Pablo Ruiz-Tagle Vial
Law Faculty – University of Chile
SELA 2002 –SEMINAR IN LATIN AMERICA ON POLITICAL AND CONSTITUTIONAL THEORY
Draft –may not be reproduced or cited without permission by the author

CONSTITUTIONALISM AND TERRORISM*

This paper consists of six parts and argues against the supposed need for constitutional provisions on terrorism, in particular in Chile. In part one, I try to define the problem and the questions it may give rise to. Part two provides a brief historical overview of some of the rather paradoxical relations that have existed between constitutionalism and terrorism, and the difficulties in defining the latter concept. In part three, I present a comparative and non-exhaustive analysis of approaches to terrorism in Great Britain and the United States. In part four, I extend the comparative analysis to some continental European countries, such as Germany, Italy and Spain. Part five focuses on article 9 of the Chilean Constitution. In part six, I develop some ideas about State terrorism and try to show how, in Chile, we may still be under the spell of this kind of political organization which is so difficult to eradicate. Finally, I present some conclusions which, like the rest of the paper, are preliminary and only meant to stimulate discussion on this issue.

1.- PRESENTATION OF THE PROBLEM AND SOME QUESTIONS.

Questions about the specific nature of constitutional law cannot be answered without taking into consideration aspects of domestic and international law. Both legal structures partake in a process that sometimes proceeds, sometimes retrocedes on the way to fulfillment of the ideals of constitutionalism.

The beginnings of constitutional law are the same in America and Europe. This is clearly not the case for other areas of law, such as civil law for instance, which began its development much earlier in Europe; and it is doubtful whether enlightened criminal law or other legal areas can be said to have developed at the same time in Europe and America. Constitutional law developed simultaneously because the European continent acknowledges its being influenced by the North American experience.[1] At the same time, Latin American countries acknowledge the influence of both Europe and North America in matters of constitutional law.

The Latin American experience with constitutionalism, however, has remained largely unknown in Europe and the United States. And although we all know that the history of the world is highly unjust in making only passing reference to the countries south of the Rio Grande, its blind

* I thank Alfredo Jocelyn-Holt for providing me with bibliographical information, and the group of assistants of the Law Faculty of the University of Chile, María José Meneses, Paloma Infante Mujica, Paz Irarrazabal G., Pablo Fuenzalida C., J.Guillermo Sandoval, C., Osvaldo Artaza V., Juan Pablo Bulnes. D., Patricio Martinez A., Claudio Ruiz G., Mario Valderrama, G., Felipe Leiva F., Diego Gil M. and Juan Pablo Manialich R., for their comments on the first draft. Thanks are also due to Joke Klein Kranenberg for her translation of the Spanish original into English.

[1] Mr. Rafael de Mendizábal, Justice of the Spanish Constitutional Court, acknowledged on the occasion of his 1998 visit to the Law Faculty of the University of Chile the influence of the North American and Mexican constitutions in Europe. However, on being asked about the influence of Latin American constitutionalism in Europe, he could only cite as relevant the Constitution of Querétaro adopted in Mexico in 1917. The text of this Constitution is known for its efforts towards nationalization, its early separation of Church and State and its recognition of social and economic rights. See the excellent exposition on the origin and application of the 1917 Constitution of Querétaro in COSSIO, J.R. DOGMÁTICA CONSTITUCIONAL Y REGIMEN AUTORITARIO, Biblioteca de Ética, Filosofía del derecho y Política, Editorial Fontamara, México, 2nd ed. (2000). On the history of the Constitution of Querétaro KRAUZE, E. BIOGRAFIA DEL PODER, CAUDILLOS DE LA REVOLUCION MEXICANA (1910-1940) Editorial Tusquets, Barcelona , Spain 229-238 (1997).

spot for Latin American constitutionalism seems justified. The truth is that constitutionalism in Latin America has its own characteristics that have often been deplorable and that are very much our own.

When, for example, Andrés Bello compared Chilean politics with politics in the United States, he acknowledged that, in our country, property is in the hands of a very few people, that respect for constitutional rights is weak and that there exists a powerful lobby against constitutionalism.[2] Juan Bautista Alberdi, when comparing the constitutions of Peru, Chile and Argentina, finds that the concentration of power in the executive branch in Chile was appropriate for the first period of our Republic, but criticizes both Chile and Peru for their restrictions on nationalization, limitations on access to public office to foreigners, and the priviliged status of the Catholic Church.[3] Much more recently, Eduardo Novoa described the law in Latin American as an obstacle to social change, although his thesis was rejected by Ernesto Garzón Valdés for being exaggerated and not taking due note of the law that actually structures our societies.[4]

I share Garzón Valdés' observations, which make us aware that, although any constitutional regime must subscribe to universal constitutional principles, it must also make room for some provisions that correspond to each country's idiosyncrasy, due to its specific political situation. In the Latin American context, one of the more remarkable characteristics of constitutional texts is their inclusion of provisions on constitutional emergency regimes.[5] Starting from the final decades of the last century, and closely related to this generous acceptance of emergency regimes in Latin American constitutions, we may now also find provisions that explicitly refer to terrorism.[6]

---

[2] BELLO, A, see Las Repúblicas Hispanoamericanas (1836) on p.125-130 in ESCRITOS JURIDICOS, POLITICOS Y UNIVERSITARIOS, Editorial Edeval, Valparaiso, Chile (1979). Bello says on p.126: *"Others, on the contrary, have even denied us the possibility to gain our proper existence under the protection of free institutions, which they considered entirely incompatible with all elements that should constitute hispano-american governments. According to them,the principles of representation that have enjoyed such happy application in the United States, and that have made the English colonies a great nation that every day increases its powerin industry, commerce and population, could not have the same results in Spanish America. The situation of both peoples at the moment of acquiring independence would be essentially different: whereas the former had divided property, one could say, with equality, the latter accumulated property in the hands of a few. The former was used to the exercise of great political rights, whereas the latter had never enjoyed them, nor could appreciate their importance. The former could elevate the liberal principles to the high status they now enjoy, whereas the latter, although emancipated from Spain, still had to count with a numerous and influential class whose interests clashed with these principles. These have been the principal motives for the adversaries of our independence to feign despair of the consolidation of our governments."*

[3] See also ALBERDI, J.B. BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACION POLÍTICA DE LA REPÚBLICA ARGENTINA, Ciudad Argentina, Buenos Aires, p.133-140 (1998) and the reflective and excellent paper by GARGARELLA, R. LAS AMENAZAS DEL CONSTITUCIONALIMSO: CONSTITUCIONALISMO, DERECHOS Y DEMOCRACIA SELA (2001).

[4] GARZON VALDES, E., see Las funciones del derecho en Latinoamérica, p. 201-234, in DERECHO, ETICA Y POLITICA, Centro de Estudios Constitucionales, Madrid, Spain (1993). On p.227: *"..the significance of constitutional order as either obstacle or impulse for social development is very limited and both the optimist position of Alberdi and the pessimist position of Novoa Monreal are difficult to accept."*

[5] LOVEMAN, B. LAS ARDIENTES CENIZAS DEL OLVIDO. VIA CHILENA DE RECONCIALICIÓN POLITICA 1932-1994 (two volumes) LOM Ediciones, DIBAM, Santiago de Chile (1999-2000) and also in PALMA, E. EL DERECHO DE EXCEPCION EN EL PRIMER CONSTITUCIONALISMO ESPAÑOL University of Valladolid, Valladolid, Spain p.160-161 (2002).

[6] See for example article 9 of the Chilean Constitution that will be discussed in this paper; article 2 N° 24 of the Peruvian Constitution and article 4 viii of the Constitution of Brazil. Each of these provision has a different format, but they all directly refer to terrorism.

The incorporation of norms on terrorism at the constitutional level presupposes a novelty. This, however, is only relative, because the history of terrorism is sometimes confused with the history of constitutionalism. The purpose of this paper is to discuss terrorism from the point of view of constitutionalism. This topic has gained more actuality after the terrible facts, known to us all, of September 11, 2002, which day, as we Chileans know, is not the only September 11 that demands our reflection.

A new wave of constitutionalism has established itself during the last decades in Latin America and Eastern Europe.[7] Nonetheless, these recently emerged constitutions have not incorporated the very significant changes in European constitutional norms since the second half of the Twentieth Century, and when compared to these, their provisions are hardly original. They are more of the same, except for the creation of constitutional courts, the amplification of constitutional jurisdiction in countries where the court had little significance, or by giving more power to judicial organs in constitutional control. This recent wave of constitutionalism has also led to an inflation of recognitions and warranties of certain fundamental rights.

As an exception to this general picture of little innovation, at least some Latin American constitutions have added substantive and procedural norms related to terrorism, as in Chile[8] and Peru[9]. Some of these constitutional norms compare to articles of the Spanish Constitution of 1978, and have generated to date some court decisions. The application of anti-terrorist norms is sometimes assigned to the military justice system, sometimes to constitutional justice. The constitutional assignment to a special court does not necessarily entail the right to due process. Nor is there any justification for a special constitutional obligation of the legislator to respect certain rights of persons who have been accused of committing terrorist acts. On the one hand, because the rights established in the constitution apply to all citizens alike; on the other hand, because the constitution itself allows for infringements of these rights under exceptional circumstances defined by the constitution. Thus, a special mandate for terrorist acts constitutes an unjustified exception to these two modes of arrangement: the regulation of normal situations and the regulation of exceptional situations that affect all citizens alike.

---

[7] ELSTER, John, OFFE, Claus and PREUSS, K., Ulrich et al , INSTITUTIONAL DESIGN IN POST-COMMUNNIST SOCIETIES REBUILDING THE SHIP AT SEA p.63-151 Cambridge University Press, Cambridge, United Kingdom (1998).

[8] See article 9 of the Chilean Constitution and the part of this paper that is dedicated to its discussion.

[9] In Peru, apart from constitutional provisions that refer to terrorism, the government of A. Fujimore developed a complex and controversial policy on terrorism. See in this respect A. Fujimori "Terror, Society and Law:Perú Struggle against violent insurgency" Harvard International Review 20 No.4, Fall (1999) 58-61. Fujimori himself summarizes in this text his anti-terrorist politics in the following terms: *"In 1992, as President of the Republic of Perú, I enacted a comprehensive counter-terrorist strategy based on an extensive emergency legal framework. It included a law that called for military and faceless tribunals, a repentence law, a new penal policy, and rondas campesinas (armed civil defense groups in remote regions prone to terrorist attacks). These components were designed to decrease the number of terrorist attacks by stiffening the penalties for insurgency and protecting innocent civilians from harm. Furthermore, the new legislation fostered better better civil-military relations for the sake of protecting the general population. Another fundamental element in my strategy was an effective intelligence gathering system, to replace the intelligence services destroyed in the early 1980s."* On the case of Peru, consult COSTA, G. *La propuesta de nueva ley orgánica de la policía nacional del Perú; novedades y limtaciones*; ROSPIGLIOSI, F. *Informe Nacional: Carencia de Control Democrático sobre las fuerzas armadas de Seguridad en Perú* and ALEGRIA, C. *Policía y sistema nacional en el Perú* in FRUHLING, H. CONTROL DEMOCRATICO EN EL MANTENIMIENTO DE LA SEGURIDAD INTERIOR Centro de Estudios del Desarrollo, Ediciones Segundo Centenario, Santiago de Chile (1998).

Norms against terrorism are part of an international effort to prohibit this kind of acts, through investigative cooperation and the administration of various legal conventions that may have preference over ordinary law. These conventions may have constitutional status due to their point of contact with the text of the constitution. [10]

Various questions may be raised on the proper relationship between constitutionalism and terrorism. For xample, we may ask whether we need to incorporate specific references to terrorism in the Constitution, or whether, under the rule of law, suffice that norms on terrorism be part of ordinary legislation. This relates to the question whether constitutionalism should provide for its own suspension, as in the so-called emergency regimes which allow for certain limitations of fundamental rights under specific circumstances, for instance for reasons of State security. As mentioned before, such emergency regimes are a common characteristic of Latin American constitutions.[11]

If limitations of fundamental rights are accepted in exceptional situations, what should be the relation between these general rules of exception and the specific measures against terrorism? We may also ask whether these measures against terrorism should allow for limitations of fundamental rights only in the first stage of the judicial proceedings, in order to prevent or investigate past or future terrorist acts, or whether they may assign jurisdiction to special courts, introduce special forms of proof or permit more severe sanctions. Finally, with respect to constitutionally determined sanctions for terrorist acts, should these only affect only the political rights that were abused, as in the German Constitution, or also limit access to public or private functions as is presently the case in Chile? We must also take account of so-called State terrorism and the problems it presents for constitutionalism.

---

[10] On the website of the United States State Department, the following conventions related to the fight against terrorism are listed: The 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft; The 1970 Hague Convention for the Unlawful Seizure of Aircraft; The 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation); The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents; The 1979 Convention Against the Taking of Hostages; The 1979 Convention on the Physical Protection of Nuclear Material; The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, (supplements the 1971 Montreal Convention); The 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (supplements the Rome Convention) The 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;. The 1997 Convention for the Suppression of Terrorist Bombings, signed by the United States on January 12, 1998, submitted to the Senate for advice and consent to ratification on September 8, 1999; The 1999 Convention for the Suppression of the Financing of Terrorism, signed by the United States on January 10, 2000 and submitted to the Senate for advice and consent to ratification on October 12, 2000. See also in relation to the constitutionality of the convention RUIZ-TAGLE, P., *Presentación: Constitucionalidad de los tratados internacionales en Chile,* in LOS TRATADOS INTERNACIONALES EN LA JURISPRUDENCIA CONSTITUCIONAL, Seminarios y Congresos, p..5-15, Law Faculty Foundation, University of Chile, Santiago (2001).

[11] In the Chilean Constitution, see articles 39 to 41. There is doctrinal discussion on whether these constitutional provisions constitute an alternative system of government in situations in which the security of the State is under threat, or whether they are only forms of regulation *ex ante* of fundamental rights under such circumstances. I incline towards the second of these alternatives, since otherwise the constitutional government itself would accept the possibility of its dissolution or mutation. For the origin of the thesis that emergency regimes are more than mere infringements of fundamental rights, see C.SCHMITT, LA DICTADURA. DESDE LOS COMIENZOS DEL PENSAMIENTO MODERNO DE LA SOBERANÍA HASTA LA LUCHA DE CLASES PROLETARIA, Alianza Editorial, Madrid, Second edition (1999).

It may be that after the incidents of September 11, 2001, constitutional provisions against terrorism have gained legitimacy. Still, they need be judged from the point of view of democracy. This is the problem I intend to discuss here, and I will start by saying that I do not see the need for such constitutional provisions. I believe that constitutions should remain silent on terrorism. To begin with, provisions on terrorism generally imply a violation of the constitutional principle of equality, because they allow for exceptionally restrictive limitations of the fundamental rights of specific persons, with the practical effect of turning them into victims in the public opinion. They even allow for more restrictive measures than under the emergency regime. Judicial and parliamentary control is weakened to such extent as to put the rule of law in danger. I believe that, in the worst of all cases, when the constitutional system runs a serious risk of being overthrown, the general provisions concerning the emergency regime suffice, and arrangements concerning terrorism should be left to the common civil or criminal legislation, or delegated to the police which is part of the executive branch in a constitutional government.

In what follows, I will discuss variations on these ideas, and will begin with an attempt at conceptual clarification of the relations that may exist between constitutionalism and terrorism. I will then also try to explain why this paper does not adopt a specific definition of terrorism.

2.-CONSTITUTIONALISM AND TERRORISM:

Constitutionalism is an intellectual and political movement that began at the end of the Eighteenth Century. Its date of origin may well coincide with the North American Constitution of 1787.[12] Constitutionalism is a historical phenomenon that is difficult to define, but that embraces the political and intellectual effort to limit power by law, in particular through written constitutions. Other instruments are also used, such as instutional controls, checks and balances, the principle of selfgovernment by the people, the construction of the concept of citizenship and the protection of fundamental rights. In the Twentieth Century, following European experiences with nazism and fascism, constitutionalism strived to limit legislative power by establishing a system of constitutional control by the judiciary.

Terrorism[13], on the other hand, is a political and intellectual phenomenon that surged in response to the regime of terror in France that started around 1793. The general use of the term 'terrorism' in the political context consolidated aroung 1795, precisely in reference to this period of French constitutional history: European constitutionalism showing its ugly face, so to say.

[12] COSSÍO, J. R., *Constitucionalismo y multiculturalismo,* ISONOMÍA, Revista de Teoría y Filosofía del Derecho, 75-83, ITAM, Mexico, No.12, April 2000. See for an excellent discussion of the primacy of fundamental rights, the recent work by VAZQUEZ, R. LIBERALISMO, ESTADO DE DERECHO Y MINORIAS, Paidos, Mexico (2001).

[13] The lemmas "terror", "terrorism" and "terrorist" appear in *The Compact Edition of the Oxford English Dictionary* vol. II, p. 3268 (216), (Oxford University Press, 1971), the lemma "terrorismo" also appears in the *Enciclopedia Universal Ilustrada Europea-Americana* volume 60, p. 4550 (Espasa-Calpe, Madrid, 1928). See also DICCIONARIO DE LA LENGUA ESPAÑOLA, Real Academia Española, Twenty-second edition, Madrid, Spain, p.2165 (2001). The dictionary defines terrorism as: *"domination by terror. 2. succession of violent acts to arouse terrorr."* On the same page it characterizes and historically situates the concept of terror: *"(from the latin terror, -oris) extremely intense fear.2.- Person or object that causes terror...3.- Rigorous method of revolutionary justice. 4.- more specifically, Period during the French revolution when this method was frequently used. II from loc. adj. said about a cinematographic or literary work and referingr to the genre to which they belong: That they seek to cause fear or anguish in the spectator or reader."*

Apparently, it was the conservative writer Edmund Burke who in Great Britain spread the notion that, during the government of Robespierre, France was reigned by terror.[14] On the European continent, Alexis de Tocqueville has elaborated the most systematic and profound analysis of the French revolution, and although his final judgment is more positive than Burke's, he also calls attention to the violence of the new system.[15] There is no doubt that the first use of the word terrorism was closely related to the idea of a political regime, i.e. the particular form of the State during the French Revolution. That is, a regime characterized by the violent way in which it imposed constitutionalism in Europe.

Thus, the first use of the term terror or terrorism relates to a negative judgment about the violent consequences of the French Revolution, and is associated to a particular form of State organization. During the Nineteenth Century, the meaning of the word terrorism changed from its original significance derived from the terror regime in France, to include the activities of all kinds of groups that seek to promote their political, religious or social cause through the use of violence.[16]

As recently argued by Adam Roberts[17], 'terrorism' evolved from a concept that applies to dictatorships or governments of terror, to a concept that refers to groups that, starting from the end of the Nineteenth Century, have dedicated themselves to the assassination of political leaders or Heads of State, and has now come to include groups that kill or kidnap policemen, local officials, take hostages, hijack airplanes or place explosives in public or private buildings. According to Roberts[18], defining terrorism is such a complicated task that the United Nations, instead of getting derailed by the problem of terminology, adopted between 1963 and 1999 a series of conventions that proscribe certain kinds of acts that are considered terrrorist acts, such as the hijacking of aircrafts or kidnapping of diplomats.

The new International Criminal Court established by the Treaty of Rome might become the forum where this kind of acts will be judged. There remains, however, the problem of definition, even after the tragedy of September 11, 2001; for example, a document published after this date by the North American Congress did not consider as a terrorist act, the use of violence in order to receive financial benefits, nor damages inflicted on computational systems.

Roberts[19] also argues that a group cannot easily be labelled terrorist when only one of its factions or subgroups has adopted this strategey, since in that case the African National Congress might have to be considered a terrorist group, as in fact it was by the British and North American governments between 1987 and 1988. Without going any further back, at this very moment we may

---

[14] BURKE, E., REFLECTIONS ON THE REVOLUCTION IN FRANCE, Doubleday Anchor Book, New York, (1973)

[15] TOCQUEVILLE, A., THE OLD REGIME AND THE FRENCH REVOLUTION Anchor Books, Doubleday, New York et al. (1995). On pages 206 and 207 it says: *"This contrast between theory and practice, between good intentions and acts of savage violence, which was a saliente feature of the French Revolution, becomes less startling when we remember that the Revolution, though sponsored by the most civilized classes of the nation, was carried out by its least educated and most unruly elements."*

[16] See FRUHLING, H. ed. EL ESTADO FRENTE AL TERRORISMO, Centro de Estudios del Desarrollo, Editorial Atena, p.7 and p.9-45 (1995). Terrorism is defined as a: *"subversive strategy of a military kind, used by small groups to attack preferably civil targets, and whose fundamental object is to weaken the State and create the conditions for its collapse."* This definition excludes State terrorism as a form of terrorism and seems to me defective in that sense. See for the religious roots of Basque terrorism, in the same publication, the paper by ARIAS, P. Terrorismo separatista en España. Las políticas utilizadas para enfrentarlo, p.249-295.

[17] ROBERTS A. DEFINE TERRORISM Oxford Today, Hilary Issue p.18-19 Oxford University (2002).

[18] ROBERTS A. Ibidem supra note 17.

[19] ROBERTS A. Ibidem supra note 17.

see the word terrorism being used in the Middle East to describe the activities of Palestine groups that attack the Israelean government, while those same Palestinians accuse Israel of terrorism for adopting political and military measures that impede the construction of a State that would ensure their peace and security.

In what follows, I will refer to constitutional practices or provisions adopted in Great Britain, the United States, Germany, Italy and Spain against terrorism, to show the variety of possible solutions that have been given in these countries, and thereby highlight the extremity and inefficiency of article 9 of the Chilean Constitution. Article 9 of the Chilean Cosntitution only serves as legitimation for a State organization that, paradoxically, may degenerate into a form of State terrorism. To show some of the effects of terrorism on constitutions and legislation, without pretending full coverage, I will describe some characteristics of constitutional treatment of terrorism in Great Britain and the United States, as well as in Europe and some Latin American countries. I will then discuss the topic of State terrorism and finally present some conclusions.

3.- TERRORISM IN GREAT BRITAIN AND THE UNITED STATES

As one of the pillars of constitutionalism, the English legal system anticipated the Writ of Habeas Corpus in the Petition of Rights of 1628, which prohibited the king to arrest a person without reason and established his obligation to bring the arrested person before a court.[20] Moreover, starting in 1679, with the so-called Habeas Corpus Amendment, England created a procedure to avoid arbitrary detention, consisting of a fixed time period for presentation of the arrested person before a court, the establishment of responsibility of the officials who carry out the arrest, and the possibility to present a writ of Habeas Corpus, at any time and place, in defence of the arrested person.[21]

It was precisely to fight terrorism that the English Crown, from 1970 onwards, decided to adopt special rules on Habeas Corpus for Northern Ireland, none of which contributed to the establishment of peace. Among these measures were the following: arrest without judicial order for interrogation or on the ground of mere suspicions, and provisional detention or even definitive imprisonment of persons in order to protect the peace.[22] Additionally, in 1972, theBritish authorities assumed all Parliamentary and Provincial powers in Northern Ireland, authorized the Crown to legislate by decrete and created a Secretary of State that replaced the Parliament in Belfast.[23]

Based on these special powers, norms were issued on the detention of terrorists, that included the extension of the duration of detention and amplification of police powers, the supervision of detention by an administrative body called the *Commissioner*, and the establishment of limited rights of defense with respect to communication and information of the charges and the creation of special courts without juries, known as the "Diplock Courts".[24]

---

[20] PALMA, E. EL DERECHO DE EXCEPCION EN EL PRIMER CONSTITUCIONALISMO ESPAÑOL University of Valladolid, Valladolid, Spain p.160-161 (2002).

[21] Ibidem, p.160. See also in PALMA op.cit. how the English institution influenced the constitutional formula that was adopted in Spain in the Constitution of Cadiz of 1812.

[22] Civil Authorities Act of 1922 and Decrees 11 and 12 of 1956 and 1957.

[23] See Norteen Ireland Temporary Provisions Act of March 30, 1972.

[24] Detention of Terrorist Northern Ireland Order of November 7, 1972 later derogated in part by the Northen Ireland Emergency Provisions Act of August 8, 1973, by the Amendment of August 21, 1975, the norms of June 30, 1978 and

The United States Constitution of 1787 practically incorporated the institution of Habeas Corpus but, different from the English system, expressly delegated the responsibility for its regulation to Congress, and accepted possible suspension of the Writ of Habeas Corpus under exceptional circumstances by stating in Article 1, Section 9, No. 2 that: *"The Privilige of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."*[25]

In the United States, this norm was only held up for that part of the population that did not suffer racial discrimination, and this difference lasted until the second half of the last century. This explains why the North American Supreme Court, after delegation by Congress to President Roosevelt, accepted that military authories would decree the confinement of citizens of Japanese ascendence during the Second World War on suspicion of espionage, as occurred in the Korematzu case.[26] These were perhaps the most famous special measures with respect to the principle of Habeas Corpus that have been adopted within the United States, although in many immigration procedures, even after Korematzu, methods of detention, confinement or person registration were sometimes used that violated the standards of Habeas Corpus and that were only accepted because the persons involved were not considered citizens. However, these measures of confinement were not adopted to prevent acts of terrorism, because the United States territory, unlike the rest of the world, was to a major extent safe from this violent political strategy.[27] I say the United States territory, because unfortunately North American politics, during the Nixon administration and in cooperation with some transnational companies like ITT, did partake in various terrorist actions, such as those destined to block President Allende's access to power culminating in the assasination of the Chief commandor of the Chilean army, General Rene Schneider, and assistance to acts of sabotage once President Allende took office.[28]

In these last months, after the attack on New York, a series of specific measures against terrorism were presented, that include the formation of special (military) courts, and the amplification of certain investigative powers that may affect fundamental rights.[29] In the

---

for the entire territory of Great Britain the Prevention of Terorism (Temporary Provisions) Act of November 29, 1974. See for a detailed exposition on these norms REMOTTI, J.C. CONSTITUCION Y MEDIDAS CONTRA EL TERRORISMO La suspensión individual de derechos y garantías, Editorial Colex, Madrid p.33-40 (1999).

[25] United States Constituction Section 9, Article 1, No.2. The idea to suspend Habeas Corpus under extraordinary circumstances such as rebellion or public invasion may have been inspired by the measures that had to be taken in England by Minister Wiliam Pitt.

[26] See KOREMATSU v. UNITED STATES 323 U.S. 214 (1944). North American citizens of Japanese origin on the West coast were forced by a General's order in March, 1942, to remain in their houses while some of them were transferred to centers of confinement or deterntion. Curiously enough, starting from this case which constituted a violation of the fundamental rights of the affected persons, jurisprudence developed a strong suspicion against any racial classification, by using the criterion of strict scrutiny for such classifications and rejecting any categories based on racial antagonism rather than on real need. The need in this case was the war with the Japanes empire. From a negative decision thus surged a list of positive criteria, and not for the first time.

[27] There have been various cases of terrorism in the United States prior to September 11, 2001, among which the assassination of the former Minister of Foreign Affairs Orlando Letelier and his assistant Ronnie Moffit stand out, for which the Chilean State paid damages and the head of the political police of Pinochet and other agents that intervened in this case received punishments.

[28] URIBE A. and OPASO C. INTERVENCION NORTEAMERICANA EN CHILE (DOS TEXTOS CLAVE) EL LIBRO DE LA INTERVENCION NORTEAMERICANA EN CHILE y ACCIONES ENCUBIERTAS EN CHILE 1963-1973 "INFORME CHURCH" Editorial Sudamericana, Santiago, Chile (2001)

[29] See among the principal decreed measures the following: 1) ORDENES EJECUTIVAS PRESIDENCIALES:

justification of these special measures, a distinction is made between North American citizens and foreigners involved in terrorist acts, and the right to due process of the latter restricted in highly dubious ways. A group of professors and attorneys of The Arthur Liman Public Interest Fellowship & Fund have sent a letter to the President of the Judicial Committee of the Senate, to express their opinion that the military decree that installed military commissions to judge those involved in terrorist acts was contrary to the Constitution, in particular to the principle of separation of powers, the right to due process, and international treaties such as the Geneva Convention relative to the Treatment of Prisoners of War. Others have justified these measures, for guaranteeing terrorists a complete and fair trial (even if before a military court), giving them the right to a defense attorney, and leaving the final decision to the President who may, if he so wishes, pass the case on to the common courts.[30]

Although we can understand the need to adopt special administrative and legislative measures to fight terrorism, we do not know of any convincing arguments to judge North American terrorists differently from those who are not citizens. We believe that Timothy McVeigh and his followers who blew up the Oklahoma Building, and the terrorists who participated in the massacre of New York, including the collaborators of Osama Bin Laden who were captured in Afghanistan, deserve to receive the same kind of process and, certainly, the same punishment.

4.- TERRORISM ON THE EUROPEAN CONTINENT

Various European countries, for instance France and Portugal, have constitutional provisions that acknowledge the existence of emergency regimes in case the security of the State stands in danger.[31] Apart from these references to emergency regimes, some countries which have suffered the most terrorist attacks during the Twentieth Century, such as Germany, Italy and Spain, have

---

Executive order 13.224 of September 23, 2001 Blocking Property and prohibiting Transactions with persons who commit, threaten to commit, or support terrorism; Executive order 13.228 of October 8, 2001 Establishing the Office of Homeland Security and the Homeland Security; Executive order 13.234 of November 9, 2001 Presidential Task Force on Citizen Preparedness in the war on terrorism; Military order of November 13, 2001 Detention, Treatment, and Trial of certain Non-citizens in the war against Terrorism; 2) MAIN RESOLUTIONS BY CONGRESS: Joint Resolution authorizing the use of US Armed Forces, 107th Congress, 1st session, S.J. Res. 23, September 14, 2001;USA PATRIOT ACT, 50 U.S.C. 1702 International Emergency Powers Act, 50 U.S.C. 1805 Foreign Intelligence Surveillance Actof 1978 among many others.

[30] LATHROP, M. A REALISTIC LOOK AT TERRORISM TRIALS BY MILITARY COMMISSION, Download version, Luce, Forward, Hamilton & Scripps LLP, November (2001)

[31] In France, some constitutional norms permit suspension of rights such as article 16 of the 1958 Constitution*: "When the institutions of the Republic, the Nation's independence, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat and the normal functioning of public constitutional powers interrupted, the President of the Republic shall take the measures required by those circumstances, after formal consultation of the Prime Minister, the Presidents of the Assemblees, and the Constitutional Council. He will inform the Nation by a message. These measures must be inspired by the desire to ensure the public constitutional powers the means to fulfill their tasks as soon as possible. The Constitutional Counsil will be consulted. Parliament has the full right to meet. The National Assemblee cannot be dissolved during the exercise of exceptional powers."* See also article 36 of the French Constitution. In general, the French solution seems to me adequate since it does not make explicit reference to terrorism and because it authorizes the suspension of rights but reenforces democracy through the obligation to give account and the meeting of constitutional powers. See also, in the same sense as the French Constitution, the Portuguese Constitution of 1976, articles 137.1, 141.1, 164.j, 182.3.f and 220.c.

made special provisions.

For example, although the German Constitution makes no explicit reference to terrorism, and article 19.1 of the 1949 Constitution establishes the basic principle that prohibits the restriction, limitation or suspension of fundamental rights on an individual basis, articles 10 and 18 accept qualified exceptions to this principle in case the security of the State is endangered, and while respecting the principle of proportionality in the infringement of the fundamental right.[32] The German Constitution also accepts police arrest for suspicion and suspension of the maximum period of detention, in qualified cases determined by the judiciary, and in accordance with the law.[33] Besides these exceptions to fundamental rights contained in the German Constitution, there exists detailed anti-terrorist legislation.[34]

The Italian Constitution of 1947, although not making any reference to terrorism either, does not, as in the case of Germany, contain general clauses for the suspension of rights, but establishes specific restrictions or limitations for reasons of security, health, necessity or urgency which may affect each of the fundamental rights in a specific way.[35]

Again different from both the Italian and the German regime, article 55.1 of the Spanish Constitution of 1978 establishes the constitutional power to suspend specific rights during the state of emergency or occupation, and article 55.2 makes special and direct mention of terrorism by saying:

"By Organic Statute it may be determined in what way and under what circumstances, in individual cases and with the necessary judicial intervention and adequate parliamentary control, the rights established in article 17.2 and 18.2 and 3 may be suspended, for specific persons and in relation to investigations of the conduct of armed persons or terrorist elements. Unjustified or abusive use of the powers granted in this Organic Statute will give rise to criminal liability, due to the violation of rights and liberties established by law."

Apparently, the most convincing explanation for the inclusion of article 55.2 in the Constitution, which gave rise to heated Parliamentary debate to which Member of Parliament Gregorio Peces Barba made a particularly significant contribution, was given by Member of Parliament Rodolfo Martín Villa who explained its aim as: *"...avoiding as much as possible recourse to the state of emergency, because we were convinced that the situation of general subversion, in*

---

[32] Fundamental Law of 1949, article 19.1*: "When , in accordance with this Fundamental Law a fundamental right may be restricted by, or in virtue of, a statute, this statute must be of a general nature and may not be limited to the individual case. It must cite the fundamental right, indicating the corresponding number."* Article 10 authorizes the revision of exceptional measures of a legislative nature, as well as intervention of the media, by "auxiliary organs designed for public representation", in order to defend the constitutional regime and in accordance with a system of control that may substitute court procedure. Article 18 permits the suspension or "loss" of certain fundamental rights by decree of the Federal Constitutional Court, such as freedom of the press, freedom of education and association, secrecy of telecommunications, right to property and asylum, always respecting the principle of proportionality and under threat of sanctions in case of abuse. See also article 13 of the German Fundamental Law on the sanctity of the home and article 87.4 forbidding armed subversive groups, and authorizing the armed forces and the police to fight against them, without establishing a special regime of suspended rights.

[33] See articles 104.2 and 104.3 of the Fundamental Law of 1949.

[34] See REMOTTI, J.C. CONSTITUCION Y MEDIDAS CONTRA EL TERRORISMO La suspensión individual de derechos y garantías, Editorial Colex, Madrid p.52-56 (1999).

[35] See articles 13,14, 16, 17,18,19,20,23,24,25,30,35,36,40,42,46,48 and 51. These are specific authorizations or remissions to the legislator.

which the state of emergency has its use, would hardly ever occur." [36]

Additionally, Article 13 No. 2 of the Spanish Constitution of 1978 holds:

"perpetrators of political offenses cannot be extradited; terrorist acts are not considered political offenses."

As can be seen, European constitutions provide various solutions to the problem of terrorism. None of these has served as a stable format for the fight against terrorism, and every country that has incorporated constitutional provisions that specifically mention this violent strategy has also had to adopt various other laws, demonstrating in a way the inefficiency and inconclusiveness of the constitutional arrangement.

Just as the German solution seems to have influenced the Spanish approach, it is fair to say that the just mentioned article 13 has influenced indirectly, and only partially, the Chilean Constitution that will be analyzed in the following paragraphs.

5.- TERRORISM IN THE CHILEAN CONSTITUTION:

Article 9 is a novelty of the Chilean Constitution that is presently in force and holds:

"Terrorism, in all its forms, is by nature contrary to human rights. By law adopted by qualified majority, terrorist acts and their punishments shall be determined. Those responsible for committing these acts will be ineligible during a period of fifteen years to fulfill any public functions or offices, whether elective or not, to be rector or dean of any educational institution or fulfill a teaching position in these institutions; to own, direct or administrate any means of public communication, or fulfill any function related to the emission or promulgation of opinions or information through them; they cannot be leaders of political organizations or organizations related to education, communities, professions, enterprises, unions, students or associations in general, for the duration of this period. Such without prejudice to other ineligibilities or eligibility for a longer period of time, as established by law. The offenses referred to in the previous sentence are always common and not political, to all legal effects, and are not subject to remission, except for the conversion of capital punishment into life imprisonment."[37]

---

[36] REMOTTI, J.C. CONSTITUCION Y MEDIDAS CONTRA EL TERRORISMO La suspensión individual de derechos y garantías, Editorial Colex, Madrid p.124 (1999)

[37] See for the military origin of article 9: SILVA BASCUÑAN, A. TRATADO DE DERECHO CONSTITUCIONAL Part IV, La Constitución de 1980 Editorial Jurídica de Chile, Santiago Chile 2a. ed. p. 167 (1997): *"Terrorism was discussed at sessions 395, 404 and 411 of the Commission Ortúzar by the members of this Commission after June 1977. In the course of session 395, after the approval of some norms related to the Armed Forces, the president, Mr. Ortúzar, proposed a provision that would provide them with some mandate in case of terrorism. Subsequently, Mr. Carmona proposed that this rule be included among the first articles of the Constitution, that it would specify that terrorist offenses do not become prescribed, and that the right to asylum does not apply, nor amnesty or remission*." See also the concordances in the Chilean Constitution between article 9 and the articles 5, 13, 16 No.2, **17 No 3,** 19 No.1 and 7 e); 11 clause 1 and 5; 12 clause 4; 15 clause 5 and 19 clause 1; 23, 32, No.16; 44, 46, 54, 60 No.16, 63 clause 3 and transitory

Article 9 contains a constitutional condemnation of terrorism for violating human rights, which is nothing more than confused constitutional rhetorics, especially when considering the meaning of this sentence in the light of State terrorism. Furthermore, the legislative demand of a qualified majority for the approval of legislation on terrorist acts, followed by a list of ineligibilities to fulfill public and private positions is, to say the least, somewhat odd, given that Chilean anti-terrorist laws contain more severe sanctions than the ones imposed by the Constitution. Moreover, and in spite of the seriousness of its sanctions, the Chilean Constitution does not define terrorist acts. A typification of these offenses is given by Statute N° 18.314, promulgated in 1984 and modified by Statute Nº 18.825 of 1989 and Statute N° 19.055 of 1991, which broadened the scope of the sanctions from ineligibilities for public office to conclude inegilibilities for private occupations.

Unfortunately, the constitutional norm can hardly be interpreted as a warranty that limits the legislator in the sanctions it may impose on terrorists, because article 9 provides the legislator with an open mandate by saying: "*... Such without prejudice to other ineligibilities or ineligibility for a longer period of time, as established by law*", and because no reference whatsoever is made to the principle of proportionality. Moreover, the fact that we have not been able to find similar provisions in comparative law that delegate such ample powers to the legislator as in does the Chilean Constitution, is sufficient reason to revise the conformity of article 9 with the principles of constitutionalism.

Inspired perhaps by article 13 number 3, already cited, of the Spanish Constitution, the final sentence of article 9 of the Chilean Constitution postulates that terrorism is not a political offense, to avoid possible procedural consequences, in particular the prohibition of extradition. However, article 9 is excessive when compared to the norm of article 13 of the Spanish Constitution, because of its restriction of the right to remission, proper to common offenses, making an exception only for the conversion of capital punishment into life imprisonment. This final disposition of article 9, that permits conversion of capital punishment, is in part anachronistic, due to the partial derogation of capital punishment which only remains in force for offenses that pertain to military justice. Furthermore, by establishing sanctions for persons that are singled out in the Constitution, and by giving such a specific and restrictive mandate to the criminal legislator, article 9 constitutes an unjustifiable exception within the Constitution. To this it must be added that the Chilean Constitution threatens the same fact with multiple sanctions, including the sanction of loss of citizenship, which amounts to social exclusion and the formation of a class of outcasts, given article

---

provision 31. Furthermore, compare with Statute 16.643 on the abuse of publicitiy, articles 1 and 5, Statute 18.314 on terrorist acts, articles 1, 2, 5 and 17, Statute 18.700 on popular election, articles 1 and 150, Statute 18.838 on the National Television Council, articles 12 and 17, and the Criminal Code, articles 22, 28, 29, 39, 43, 44, 93 and 121 to 136. It is also important to verify the conformity of article 9 and the Chilean anti-terrorist legislation with the legal obligations of the Chilean State due to the American Convention on Human Rights called the Pact of San José de Costa Rica, published in the Official Journal on January 5, 1991, in particular its articles 4 No.6, and 23 Nos.1 and 2. The latest novelty of the Chilean constitutional process is the initiative to include in article 9 a reference to drugstraffic and it has even been suggested to make express reference to the principle of administrative integrity, both in article 8, now derogated, and in article 9. And thus Chilean constitutional confucionism goes on and on, and we are left with a constitution of the "Equeco" type. The "Equeco" is a domestic Andean god, represented as a robust man with a moustache, bearer of food, money, a house and other goods, who must continuously be honored, as for example by letting him smoke through a cavity in his mouth, to avoid his becoming jealous, in which case he will bring only evils upon his owner. The "Equeco" type constitution, just as the Andean god, requires continuous offerings in the form of frequent reforms, is thought to be loaded with goods and to prevent all kinds of evil.

17:
"a person loses his citizenship:..3. By being found guilty of offenses which the law qualifies as terrorist acts... Those who have lost citizenship for the reason described under 3 can only be rehabilitated by law adopted by a qualified majority, after completion of the sentence ".

From the point of view of equality, all these constitutional exceptions and counter exceptions contained in article 9 are highly controversial and contrary to the most basic concept of constitutional government that supposes the acceptance of political equality.

It must be acknowledged that after the return of democracy in Chile in 1990, article 9 has not been applied, which also goes to show that we do not need to include norms on terrorism in the Constitution.[38] And even though there has been recent discussion in Chile on the application of anti-terrorist law to the conflict in the south of the country with persons of mapuche origin, the government has discarded this possibility. Unfortunately, up to this date, no initiative has been presented to derogate article 9, even though the number of proposals to reform the Chilean Constitution has long exceeded the number of months that the Constitution has been in force. The absence of a proposal for derogation and the continued validity of this inefficient and controversial article serve to recreate a contitutional rhetorics that tends to legitimate State terrorism. In the following paragraphs, I will briefly develop this idea.

6.- STATE TERRORISM:

Ernesto Garzón Valdés has given an excellent characterization of the phenomenon of State terrorism. Its main characteristics are: a) affirmation of the existence of a war within entire society, including the international level, aimed at eliminating the absolute values of the current rulers; b) imprecise definition of punishable facts and elimination of judicial procedures for their determination; c) clandestine imposition of forbidden state sanctions, such as torture or homocide of adversaries; d) widespread use of violent measures that deprive of liberty, property or others; and finally, e) arousal of terror among the population.[39] State terrorism, according to Garzón Valdés, must dispose of certain fundamental elements in order to be efficient, such as: a) a certain ideological organization based on dogma, for example the "doctrine of national security"; b)

[38] We have found applications of the anti-terrorist law after 1990 (and not of constitutional provision article 9) in the decision by the Court of Appeals of Santiago of November 13, 1992, R.G.J. No. 149, p. 90 and the decision of the Supreme Court of November 17, 1994, R.G.J, No.173, p. 126. The only decision we could find that applied article 9 dates from the pre-constitutional period before 1990 and concerns a rejection of the resource for inapplicability brought by Clodomiro Almeyda who was sentenced on the basis of the anti-terrorist law during the military dictatorship, and which held: *"the acts to be classified by the legislator as offenses on the basis of its powers granted by article 9 clause 2 of the Constitution, must be related to terrorism, that is,serious conducts and acts that indiscriminately harm important legal goods – such as life, physical integrity, material goods, personal liberty, etc. to the purpose of causing fear or terror in the population,to submit the people and carry out the plans or propositions of the terrorists and their organization."* Decision by the Supreme Court of January 26, 1988, RDJ, T.85, section 5, p. 15.

[39] GARZON VALDES, E. EL VELO DE LA ILUSION. APUNTES PARA UNA VIDA ARGENTINA Y SU REALIDAD POLÍTICA, Editorial Sudamericana Buenos Aires p.289 and ff. (2000). See also GARZON VALDES, E. Ibidem op. cit note 5.

efficient propaganda mechanisms; c) cultivation of self-image to compensate for acts of cruelty; d) and internal discipline that excludes self-criticism.[40]

The features that Garzón Valdés attributes to State terrorism are particularly fitting for the military dictatorships that existed in Latin America up to the second half of the nineteen eighties.[41] One may ask which of these elements of State terrorism still subsist in the democratic governments that were inaugurated in Latin American countries from the end of the nineteen eighties onwards. Of course, in Chile, references to the concept of "national security" persist in the text of the constitution.[42] There also remains the nonsubordination of the military to the civil power.[43] But perhaps the most discomforting heritage in our Constitution of regimes that were involved in State terrorism, is the identification of government and political life with the person in power, that is, a personalist concept of the political.[44] To this form of personalism and monarchism must be added

[40] See GARZON VALDES, E. Ibidem op.cit. note 5. According to Ernesto Garzón Valdés, arguments for the legitimacy of State terrorism are given, among which: 1) The argument of efficacy or the idea that state terror would be the most effective way to fight urban and/or rural terrorism; 2) The argument of identifying the terrorist which would require taking diffuse measures; 3) The argument of symmetry or assimiliation to terrorism in the means that are used for its combat; 4) The argument that the measure for success in issues of public morality (different from private morality) is the efficiency of the obtained results; 5) The argument of inevitable secondary consequences that are justified by the scholastic doctrine of the double effect; 6) The argument of the tragic choices that the State is forced to make when faced with terrorism that threatens its existence; 7) The argument of the primacy of absolute values. Each of these arguments is refuted by Ernesto Garzón Valdés in the following way: 1) The argument of efficacy is invalid because terrorism is defeated by legitimation of the system and the means that are used in its defeat; 2) The second argument is also invalid because the differentiation between real and potential terrorists is fundamental for any state governed by the rule of law; 3) The argument of symmetry with terrorist means is derived from the first argument of efficacy and as such invalid for the same reasons; 4) However different public morality may be in the sense of being consequentalist, it cannot deny to treat persons as valuable in themselves and may not punish them by diffuse measures; 5)The doctrine of double effect is morally inadmissable because it creates a discretion that is not submitted to any kind of criterion. 6) The State that becomes terrorist when fighting terrorism, because it feels threatened in its existence, undermines its own legitimacy and becomes just another organization in the fight for power; 7) Moral absolutism confounds belief with the truth of a proposition, and by not founding its practical politics on persuasion and repressing conduct it considers immoral, ends up violating the rights of innocent persons in an unjustifiable manner.

[41] In the case of Chile, the core of political exclusion was expressed in the former article 8 of the Constitution that was derogated by the reform of 1989. Article 8 prohibited the political dissemination and expression of marxist doctrines and doctrines against the family and other traditional values. See for a critique of this constitutional provision RUIZ-TAGLE, P. Debate publico restringido en chile (1980-1988) in REVISTA CHILENA DE DERECHO, FACULTAD DE DERECHO UNIVERSIDAD CATÓLICA v.2 No.16 (1989).

[42] See the currently valid constitution, articles 1,16, 19 N° 11, 18, 22, 21 and 24, articles 22,32 N° 19 and 22 and 62 N° 6. See also the chapter dedicated to the National Security Council.

[43]Besides the provisions of the currently valid Constitution, cited in supra note 42, we can think of the exculpatory outcome of the constiutional accusation against Augusto Pinochet, the impossibility to remove military chiefs and problems in the accusation of former commander of the Chilean Navy, Jorge Arancibia, and the power of the Armed Froces to appoint non-elected senators.

[44] In the case of the Chilean transition to democracy, this feature has gained prominence due to the populist and personalist campaign of the right wing candidate Joaquín Lavín, which has caused the candidates of the Coalition to adopt a similiar form of politics with a personalist style. Furthermore, the weakening and lack of profile of the political parties favors personal politics. Add to this the excess of powers that the present Chilean Constitution invests in the President of the Republic, and we hace to admit that the political regime can be characterized as neo-presidentialist following the typology of Loewenstein. That is to say, the Chilean government has institutions that, under their democratic facade or appearance, hide a central and absolute power that reigns in an almost absolutist way, and thus does not qualify as a fully democratic regime in which power should not only be divided among various organs and persons,

the manipulation of mass communication in order to provide the system with permanent virtual legitimation, and the difficulty to accept criticism.

7. CONCLUSIONS

The idea of terrorism has coexisted with the idea of constitutionalism. Up to date, there is no efficient formula for the abolition of terrorism. Terrorism is a specific strategic use of violence to which no country in the world is immune, and that has various causes and takes widely different forms. Its multiple causes and pluriform character, as well as the inefficiency of existing provisions, should make us doubt whether to include in the constitution specific references to terrorism. For certain, we cannot fight and defeat this strategy by abdicating principles of constitutionalism, because that would make terrorism triumphant. A combination of legislative measures that facilitate the fight against terrorism and investigation under special circumstances, together with the allocation of resources in an international force, dedicated to the fight against terrorism while observing strict respect for the law, does not require substantive constitutional acknowledgment nor the incorporation of new constitutional organs or procedures.

On the other hand, a State which, in its fight against terrorism, modifies its constitution or exempts part of its political action from legal control, runs the risk of falling prey to, what is called, State terrorism. Unfortunately, the history of Latin America proves to show that State terrorism is a political reality that is very difficult to eradicate and constitutes the most serious threat to the ideals of constitutionalism. Latin America has known State terrorism only a few decades ago and unfortunately has not liberated itself yet from some of its most pernicious effects. This experience still affects the exercise of political power and the use that is made of the main public resources.

Part of the effort to return to the normal situation of democracy must consist in the purification of our constitutions of all substantive and procedural references to terrorism, whether committed by the State or of any other kind. Terrorism is better fought by legislative measures and decisions by executive organs that are founded on principles of constitutional democracy, and that find their expression in government by the majority with respect for the minority, based on the protection of fundamental rights. Constitutionalism cannot betray itself when confronted with a strategy that intends to challenge its foundations. Constitutional provisions against terrorism constitute a special regulation parallel to the general norms that restrict fundamental rights in normal and exceptional circumstances, which is unjustified from the point of view of democracy and the other principles of constitutionalism. Strategical problems in constitutional government belong to the sphere of the legislative branch, and particularly to the police power that is part of the executive, and should not be used to modify constitutional law.

---

but its origen and legitimacy should acknowledge the will of the people that does not necessarily coincide with the dictates of government. In the case of our neighboring countries, such as Argentina and Peru, neo-presidentialism is also very pronounced and has even led to constitutional reforms that allowed for succesive reelections of presidents Menem and Fujimori who concentrated power most disproportionately during their governments. By now, neo-presidentialism is perceived as part of the problem and for from being resolved.

To conlude, I would like to bring back to memory that the practice of constitutional law was during a major part of the previous century eroded by the phantasm of anticommunism, which distorted the activities that fall to Congress, altered the civil subordination of the police and the military that is proper to constitutional government, and discredited the impartiality of the judiciary. After the fall of the Soviet Union and the evaporation of the phantasm of anticommunism, there is a new opportunity to reenforce constitutional principles. To make good use of this opportunity, we much purify constitutional law from all provisions that explicitly refer to terrorism. #