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# Emergency powers and constitutional change in the late Middle Ages

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## Summary

This article gives an account of late medieval theories and practices of emergency powers. More particularly, it examines the relation between emergency powers and constitutional change. It thus seeks to explain how, in the course of the 13th and 14th centuries, European rulers began using their emergency powers to gradually expand their fiscal and legislative competences at the expense of local authorities and the church. As is demonstrated in this article, it was essentially the *normalization* of emergency powers that made the transition towards a more centralized government possible. This can be explained by a combination of factors, including the government's claim to an exclusive right to judge what constituted a public necessity, the new focus on prevention and preparation for *future* necessities, and the increasing identification of necessity with more general claims to 'public utility' and the 'common welfare'.

## Keywords

state of exception – emergency powers – necessity – defense of the realm – constitutional change

## Introduction

In the late Middle Ages, it was commonly held that in times of public necessity, when the realm was threatened by war or foreign invasion, the governing authorities were temporarily invested with emergency powers that allowed them

to derogate from the laws. While under normal circumstances, their powers were narrowly circumscribed by the laws, in cases of 'supreme necessity', when the community's survival was at stake, they were authorized to take extra-ordinary measures to meet the danger and assure the public safety, even if those measures were contrary to the laws. As the canon lawyers observed, 'if something is done out of necessity, it is done licitly, since what is not licit in law necessity makes licit'<sup>1</sup>. This principle was adopted by secular lawyers to argue that in times of war, the governing authorities could do many things that were not allowed in times of peace. They could even act 'contrary to the common civil and canon law', if the 'necessary defense of the realm' required it<sup>2</sup>. While the laws were normally believed to contribute to the public safety, in times of war, they could become obstacles to swift and effective emergency responses. Hence, in 'supreme necessities', when the realm was imperiled, rulers were temporarily released from their normal legal obligations, such that they could effectively protect the public safety and preserve the realm.

However, in the course of the 13th and 14th centuries, European rulers such as the German emperor and the kings of France and England began using their emergency powers to gradually expand their legislative and fiscal competences at the expense of local authorities and the church. In some cases, they even deployed these powers with the very purpose of liberating themselves from the many restrictions on their power that derived from customary, feudal, canon and civil law. While in times of peace, these rulers remained bound by ordinary usage, in times of war, they were allowed to make new statutes for the 'common profit of the realm'<sup>3</sup>. By appealing to public necessity they could thus claim new legislative competences, even if they violated customary law. Moreover, by invoking the 'necessary defense of the realm', they could impose new taxes on their subjects. If there was a threat to the public safety, no one, not even the clergy, could claim exemption from taxation; instead, all were expected to contribute their share to meeting the necessity. Hence, from the 13th century on, rulers increasingly appealed to public necessity to avoid the traditional restrictions on their power, and gradually expand their legal and fiscal competences.

In this article, I will give an account of late medieval theories and practices of emergency powers. More particularly, I intend to examine the relation

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1 *Decretum divi Gratiani cum glossis*, Lugduni 1553, gloss to pars 1, dist. 48, c. 1: 'si propter necessitate aliquid fit, videtur quod illud licite fit; quia quod non est licitum in lege, necessitas facit licitum'.

2 Pierre Dubois, *De recuperatione terre sancte*, ed. Ch.-V. Langlois, Paris 1891 [1307], 123, 77.

3 Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon, Paris 1900 [1283], 49, 1510.

between emergency powers and constitutional change. My main aim is to understand how, in the 13th and 14th centuries, the frequent use of emergency powers contributed to the gradual emergence of a more centralized government that claimed, among other things, new legislative and fiscal competences at the expense of local authorities and the church. Of course, several studies have been devoted to the changing nature of governmental power in the late Middle Ages<sup>4</sup>. However, in contrast to these studies, I will focus on the role of emergency powers in these constitutional changes. My main hypothesis is that it was essentially by *normalizing* their emergency powers that late medieval rulers were able to gradually expand their legislative and fiscal competences, and claim a superior right to take all measures necessary for the public safety. This normalization of emergency powers depended on changing interpretations of the legal concept of the necessity, which gradually shifted from *actual* necessities to *regular* administrative needs<sup>5</sup>.

Before exploring these questions in more detail, a caveat should be made: first, I will use the term ‘constitution’ as referring to the legal framework of the state, and, more particularly, the laws regulating the king’s legislative and fiscal competences. However, it is important to note that in the Middle Ages, the term ‘constitution’ or *constitutio* had a more narrow connotation: it referred to a particular administrative enactment, and was used interchangeably with other words such as *lex* or *edictum*<sup>6</sup>. More particularly, the term *constitutio* was often used to distinguish such particular enactments from *consuetudo* or customary law. By contrast, if medieval lawyers wanted to convey the political meaning of a constitution, they used phrases like *status reipublicae* or *jus publicum regni*. It was not until the beginning of the 17th century, that the modern concept of a constitution first appeared, and *constitutio* came to denote the whole legal framework of the state<sup>7</sup>. In what follows, I will use the terms ‘constitution’ and ‘constitutional change’ as analytical concepts to explain changes in the legal framework of the state, without, however, confusing these modern concepts with those of the past itself.

4 For instance, K. Pennington, *The prince and the law, 1200–1600, Sovereignty and rights in the western legal tradition*, Berkeley 1993; G. Post, *Studies in medieval legal thought, Public law and the state, 1100–1322*, Princeton 1964; H. Wieruszowski, *Vom Imperium zum nationalen Königtum, Vergleichende Studien über die publizistische Kämpfe Kaiser Friedrichs II. und König Philipps des Schönen mit der Kurie*, Munich and Berlin 1933.

5 Cf. E.H. Kantorowicz, *The king’s two bodies, A study in medieval political theology*, Princeton 1985, p. 286.

6 Ch.H. McIlwain, *Constitutionalism, ancient and modern*, Ithaca 1966, p. 24

7 *Ibid.*, p. 24–25.

Secondly, in my analysis, I will use generic terms such as ‘law’, ‘the law’ or ‘the laws’, even though the medieval lawyers themselves often distinguished between the various types of law to which they referred. For instance, when the 13th-century lawyer Philippe de Beaumanoir argues that in emergencies, the king is temporarily allowed to derogate from the laws, he seems to refer primarily to customary law (*les coutumes qui ont esté usees et acoustumees de lonc tans*)<sup>8</sup>. By contrast, when the early 14th-century lawyer Pierre Dubois claims that in emergencies, the king is allowed to demand extra-ordinary subsidies from the church and ecclesiastics, he refers to the *ius commune*, and, more particularly, the canon and civil law (*jus commune canonicum et civile*)<sup>9</sup>. As I will try to demonstrate, in both cases, such exemptions from the laws, whether they be from customary law or the *ius commune*, could contribute to constitutional transformations once they were no longer exceptional, but tended to become the rule.

### The King’s emergency powers in theory: Thomas Aquinas

Medieval ideas about emergency powers originated from the doctrine of necessity that was first developed by the canon lawyers. Central to this doctrine was the principle ‘necessity has no law [*necessitas non habet legem*]’, which was included in Gratian’s *Decretum* (ca. 1140)<sup>10</sup>. It appeared in a passage in which Gratian discussed a law prohibiting the celebration of the mass outside of

8 Beaumanoir, *Coutumes de Beauvaisis* (*supra*, n. 3), 49, 1510.

9 Dubois, *De recuperatione* (*supra*, n. 2), 123 (77).

10 Compare the excellent account of the theological origins of the adage *necessitas non habet legem* in F. Roumy, *L’origine et la diffusion de l’adage canonique ‘necessitas non habet legem’, VIIIe–XIIIe s.*, in: *Medieval church law and the origins of the western legal tradition*, A tribute to Kenneth Pennington, ed. W.P. Müller and M.E. Sommar, Washington 2006, p. 301–319. As Roumy explains, the principle that ‘necessity has no law’ originated from early-medieval theological beliefs that the rules of canon law were to be applied with a certain flexibility in cases of necessity. For instance, in his commentary on the Gospel of Mark, written between 725 and 730 AD, the Venerable Bede suggested that the rules of the Church lost their strictness if a necessity occurred. He referred to the example of David, who had been forced by hunger to enter the Temple and eat the showbread. Bede invoked this example to justify that a sick person was allowed to break the fast, arguing that ‘what is not licit by law is made licit by necessity [*quod licitum non erat in lege necessitate factum est licitum*]’. Much later, the principle was adopted by Bernard of Pavia and included under *De regulis iuris*, 1 Comp. 5.37.12 (X. 5.41.4): ‘quod non est licitum in lege, necessitas facit licitum’. Among other things, the gloss to X. 5.41.4 explains that in a ‘time of necessity all things are common [*tempore necessitate omnia sunt communia*]’, a

sacred places. Gratian argued that this law did not apply to cases of 'supreme necessity [*summa necessitas*]: 'it is preferable not to sing or listen to the mass than to celebrate it in places where it should not be celebrated, unless it happens because of a supreme necessity, for necessity has no law'<sup>11</sup>. Although Gratian suggested that necessity justified derogation only from a particular law, i.e., the law prohibiting the celebration of mass outside of holy places, the principle was formulated in general terms and it was soon received outside its original context to justify derogation from other laws as well. More particularly, from the 13th century on, it was frequently invoked to justify uses of emergency powers by secular rulers; they thus claimed the right to derogate from the laws if there was a 'supreme necessity', such as the 'necessity of defending the realm'<sup>12</sup>.

In the second half of the thirteenth century, the theory of emergency powers culminated in Thomas Aquinas's *Summa theologiae*. Aquinas regards the state of necessity as a *legal* space, in which those invested with emergency powers remain subject to divine and natural law, even if they are temporarily allowed to derogate from the laws of man. In Aquinas's understanding, man is by nature a social animal who is inclined to live in communities<sup>13</sup>. It is, therefore, a prescription of natural law that the community, in which man realizes his natural potential, is preserved at all times. Normally, human laws, if they are just and reasonable, contribute to the preservation of the community. However, in exceptional circumstances, those laws may become obstacles to the community's survival<sup>14</sup>. Hence, in these exceptional cases, the authorities may temporarily derogate from the laws to protect the public safety and pre-

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principle that was later applied to secular contexts and used to justify, among other things, royal emergency taxation. See note 24.

- 11 Gratian, *Decretum Gratiani*, in: Corpus iuris canonici, ed. Emil Friedberg, Graz 1959, pars 3, dist. 1, c. 11: 'satius ergo est missam non cantare, aut non audire, quam in his locis, ubi fieri non oportet; nisi pro summa necessitate contingat, quoniam necessitas legem non habet'.
- 12 For instance, Laurentius Hispanus, a canonist of the early thirteenth century, observed that 'for the defense of the fatherland, many things are lawful which otherwise are unlawful', and concluded that a man who was required to kill his own father for the necessary defense of his *patria* was to remain unpunished. Gloss of Laurentius to the *Decretum*, c. 23, q. 8, c. 8, quoted in Post, *Studies* (*supra*, n. 4), p. 263.
- 13 Thomas Aquinas, *Summa theologiae cum textu ex recensione Leonina*, ed. P. Caramello, Rome 1952, 1a, 2ae, q. 94, art. 2, resp. and q. 95, art. 4, resp. For English translations, I have consulted Thomas Aquinas, *Summa theologiae*, trans. Th. Gilby, London 1966, vol. 28.
- 14 Aquinas gives the example of the duty to return someone else's goods to the owner, a duty which, under normal circumstances, will contribute to the preservation of the community. However, in exceptional circumstances, this duty may have the opposite effect, for

serve the community. In doing so, they do not act extra-legally, for in making an exception to the laws of man, they remain faithful to the laws of nature, which prescribe that the community must be preserved under any circumstances.

This notion of the state of necessity as a legal space implies that, for Aquinas, there are legal limitations to the use of emergency powers deriving from the law of nature. The most important of these follows from its purpose: the use of emergency powers can only be justified if it is necessary for preserving the community. In other words: only if derogating from the laws is necessary to protect the public safety and preserve the community can the use of emergency powers be legal and legitimate. If, on the other hand, emergency powers merely serve to promote the private aims of those in power, it is illegal and illegitimate, an act of violence that should not be obeyed<sup>15</sup>. Indeed, according to Aquinas, emergency powers in the technical sense, i.e., the powers to derogate from the laws, should be granted only in cases of 'supreme necessity', i.e., existential threats to the community's survival. If such a necessity is lacking, there can be no derogation, but only violation of the law<sup>16</sup>. If there is no such existential threat, the claim of necessity becomes an excuse for tyranny, which threatens the community instead of protecting it. On Aquinas's view, then, there is a thin line separating legal uses of emergency powers from illegal acts of violence, which is determined by the laws of nature.

Aquinas discusses the state of necessity and emergency powers in the section of his *Summa* that deals with the binding force of human laws<sup>17</sup>. Here, he raises the question whether there are circumstances in which someone who is subject to a law may rightly act against its letter. Addressing this question, Aquinas begins by observing that 'every law is ordained for the common wellbeing [*omnis lex ordinatur ad communem hominum salutem*]', from which it derives its legal quality and validity<sup>18</sup>. This implies that a law that no longer serves the common wellbeing may lose its binding force<sup>19</sup>. This may occur especially in circumstances that have not been foreseen by the legislator. As Aquinas observes, the legislator cannot foresee every possible situation, and even if he could, it would be unwise for him to regulate these possibilities in

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instance, when it can be expected that the owner will use his goods to attack the community: *Ibid.*, q. 94, art. 4, resp.

15 *Ibid.*, 1a, 2ae, q. 96, art. 4, resp.

16 Cf. F. Saint-Bonnet, *L'état d'exception*, Paris 2001, p. 121.

17 *Summa theologiae*, 1a, 2ae, q. 96, art. 6.

18 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp.

19 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp.: 'secundum vero quod ab hoc deficit virtutem obligandi non habet'.

detail, for it would cause the law to become inflexible. Therefore, the legislator designs the law to fit the majority of cases, his purpose being to serve the ‘common wellbeing’. However, in some cases, which the legislator did not take into account, the application of the law may become harmful to the common good. In those cases, the law may temporarily lose its binding force; it does not apply as long as the circumstances that make application of the law harmful continue to exist<sup>20</sup>.

As Aquinas suggests, these exceptional cases, in which one is allowed to act against the letter of the law, are ‘cases of necessity [*casus necessitatis*]’. He gives the example of a decree that the city gates are to be kept closed during a siege. This decree will be useful in the majority of cases, because it contributes to the public safety and the preservation of the community. However, if those who defend the city outside of its walls are pursued by the enemy, it would be harmful to the community were the gates to remain closed to them. Therefore, in this particular case, Aquinas argues, it is allowed to act against the letter of the law; it is allowed – indeed, even a duty – to open the gates, against the letter of the decree, in order to ensure the very public safety which the legislator had in mind when he issued the decree<sup>21</sup>. Thus, in cases of necessity, the purpose of the law, i.e., the common wellbeing, may require that one derogates from the law. In those cases, the law simply does not apply, as it would be harmful to the public safety. As Aquinas explains, those who are forced by a supreme necessity to act against the letter of the law, do not question the law itself, but merely judge the particular case that confronts them; they identify it as an exception to the law, which follows from its purpose<sup>22</sup>.

Aquinas does not distinguish sharply between cases in which the *collective* safety of the community is at stake (for instance, the siege of a city) and those in which the life of *individuals* is threatened (as, for instance, in the case of theft from poverty, which Aquinas discusses elsewhere in his *Summa*<sup>23</sup>). Both are described as *casus necessitatis* and are thus subject to the same logic of exception: once there is a pressing necessity, whether it be individual or collective, it is justified to act against the letter of the law. Indeed, on Aquinas’s view, the state of necessity is only the most extreme manifestation of a logic of exception that seems to permeate the entire legal order. Thus, on his under-

20 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp.

21 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp.

22 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp. ad. 1: ‘Ad primum ergo dicendum quod ille qui in casu necessitatis agit praeter verba legis non iudicat de ipsa lege, sed iudicat de casu singulari, in quo videt verba legis observanda non esse’.

23 *Ibid.*, 2a, 2ae, q. 66, art. 7.

standing, there seems to be no morally or legally relevant difference between the individual who is forced by hunger to steal a piece of bread and a king who is forced by the threat of war to impose extra-ordinary taxes on his subjects<sup>24</sup>. In both cases, acting against the letter of the law is justified and even required by the law of nature for the sake of individual and collective self-preservation respectively.

However, in cases of *public* necessity, it is primarily the competence of the governing authorities – Aquinas uses the term *principes* – to give dispensation from the laws. By contrast, lower authorities and private persons may deviate from the laws only in cases of ‘sudden danger [*periculum subitum*]’, that is, urgent threats to the community that admit of no delay and call for instant decision. If there is no such sudden danger, lower authorities are not allowed to derogate from the laws, but have to consult the governing authorities and wait for their permission<sup>25</sup>. There is a reason why lower authorities (as well as private persons) must wait for official dispensation from the laws if an urgent necessity is lacking: the subjects of law cannot be allowed to make exceptions to the very laws to which they are subject, for this would undermine the force of law and the public safety itself. Nor is it for anybody to construe the law and decide whether it is or is not of service to the community, for this remains the prerogative of the governing authorities. Therefore, the subjects of law can be allowed to deviate from the laws only in cases of urgent necessity, when the

24 The example of the poor, who were forced by their poverty to take away someone else's possessions, was widely discussed among the canon lawyers. Many of them believed that, in doing so, the poor did not commit a crime, as the necessity seemed to cancel the possibility of guilt. Referring to natural law, these canon lawyers argued that in times of supreme necessity, all things temporarily became common, so that the poor did not violate private property rights, but merely used what belonged to all. Aquinas concurred, observing that, ‘in necessity all things are common and it is not considered to be a sin when a person takes somebody else's property which necessity has made common again so far as he is concerned’ (2a, 2ae, q. 66, art. 7: ‘in necessitate omnia sunt communia, et ita non videtur esse peccatum, si aliquis rem alterius accipiat propter necessitate sibi factum commune’ (trans. modified, MdW)). It is perhaps not surprising – although, to my knowledge, this has not been recognized in the literature – that, half a century later, these ideas about the natural communality of all property in cases of ‘supreme necessity’ were expressly invoked to justify that governing authorities could confiscate private property in public emergencies. Cf. Petrus Jacobi, *Practica aurea libellorum Petri Jacobi*, Coloniae Agrippinae 1575 [1311], rubrica 65, 9, p. 294. On the canon lawyers' interpretation of theft by the poor in cases of necessity, compare G. Couvreur, *Les pauvres ont-ils des droits?, Recherches sur le vol en cas d'extrême nécessité depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (1231)*, Rome 1961.

25 *Summa theologiae*, 1a, 2ae, q. 96, art. 6, resp.

community is faced with a sudden danger that requires their immediate response. In those exceptional cases, Aquinas observes, ‘the very necessity carries a dispensation with it, for necessity knows no law’<sup>26</sup>.

To prevent lower authorities from discarding the laws too easily in a necessity, Aquinas proposes another important restriction: they may derogate from the laws only if it is *evident* that applying the laws would be harmful to the public safety, or, as he carefully puts it: if ‘it is *evident* from the prospect of the damage that would follow that the lawmaker would have [them] act otherwise’<sup>27</sup>. Here, the notion of ‘evident necessity [*necessitas evidens*]’ is introduced to prevent lower authorities from taking refuge in emergency powers too quickly. Thus, only if it is *evident* – that is, beyond doubt and universally acknowledged – that applying the law would jeopardize the public safety in ways the lawmaker could not have intended, are lower authorities allowed to act against the letter of the law. If, on the other hand, they have any doubts as to whether derogating from the law is necessary to protecting the community, they should observe the letter of the law and consult their superiors<sup>28</sup>. Hence, for Aquinas, the notion of evident necessity indirectly refers to the idea of the law’s purpose. Thus, lower authorities are allowed to derogate from the laws only in cases of ‘sudden danger’ and if they remain faithful to the legislator’s intentions.

Interestingly, Aquinas suggests that fidelity to the law’s purpose is required not only of lower authorities, but also of the governing authorities themselves. In a passage that recalls the important function the Romans attributed to *fides publica* as constraint on emergency powers<sup>29</sup>, Aquinas argues that the governing authorities may grant dispensation from the laws only if they remain *faithful* to their purpose: ‘he whose office it is to rule the people has the power to grant dispensations from the human laws that rest on his authority, so that for persons and cases where the law is wanting he may give leave for it not to be observed. If, however, he grants permission without these reasonable grounds and of his own pleasure, then he will not dispense faithfully [*non erit fidelis in dispensatione*] and he will be unwise, untrustworthy [*infidelis*] if his intention is not the common good, foolish if he disregards the reason for dispensation’<sup>30</sup>.

26 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp: ‘ipsa necessitas dispensationem habet annexam, quia necessitas non subditur legi’.

27 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp. ad 2: ‘in casu in quo manifestum est per evidentiam nocu-  
menti legislatorem aliud intendisse’.

28 *Ibid.*, 1a, 2ae, q. 96, art. 6, resp. ad 2.

29 Compare M. de Wilde, *The dictator’s trust, Regulating and constraining emergency powers in the Roman republic*, *History of political thought*, 33, 4 (2012), p. 555–577.

30 *Summa theologiae*, 1a, 2ae, q. 97, art. 4, resp.

Thus, the governing authorities too are subject to the requirement of fidelity: although they may grant dispensations from the laws in public necessities, they must remain faithful to the laws' purpose, which is the common wellbeing. In other words: they may grant permission to derogate from the laws, but in doing so, they must remain faithful to the law of nature, which prescribes that the community must be preserved under any circumstances.

In sum, Aquinas regards the state of necessity as a legal space that is governed by the principles of natural law. This implies that there are legal limitations to the use of emergency powers: these powers need to be necessary for protecting the public safety and preserving the community, and the necessity must be evident and urgent, that is, beyond doubt and calling for instant decision. Moreover, these powers must be dispensed with faithfully, as they are sincerely believed to contribute to the common wellbeing. Aquinas's theory of the state of necessity and emergency powers would prove to be immensely influential. In subsequent years, his criteria of urgent danger and evident necessity, as well as the requirement of a fidelity to the law's purpose (as opposed to its mere letter), were developed into a highly sophisticated – yet ultimately ineffective – system of legal guarantees meant to prevent abuses of emergency powers by both governing and lower authorities. We will now consider these criteria in more detail to determine the legal limitations to emergency powers in the late medieval understanding of the state of necessity.

### Legal guarantees against abuses of emergency powers

Contrary to a common misunderstanding, in late medieval legal thought, the principle 'necessity has no law' did not refer to an extra-judicial necessity, that is, a purely *de facto* situation outside the sphere of law. Instead, it was developed from the outset as a legal concept; it presupposed a judgement and was necessary only in so far as it was legally judged to be so<sup>31</sup>. Hence, lawyers and legal theorists such as Gratian and Aquinas tended to qualify *necessitas* in legal terms. Not every necessity was recognized as *necessitas* in the legal sense, but only 'supreme', 'pressing', 'urgent', and 'evident' necessity. Moreover, the legal concept of *necessitas* did not refer to a lack of alternatives or inevitability; instead, it presupposed the possibility of a choice. It referred to the *necessity to*

31 Giorgio Agamben has criticized the naive conception of necessity that presupposes a 'pure factuality' by pointing out that necessity 'entails a subjective judgment, and obviously the only circumstances that are necessary and objective are those that are declared to be so': G. Agamben, *State of exception*, trans. K. Atell, Chicago and London 2005, p. 30.

act, not the incapability of acting at all<sup>32</sup>. It was in this sense that, from the 13th century on, writers of legal and political treatises adopted Gratian's doctrine to develop it into a theory of emergency powers.

In assessing the legality of emergency powers, the lawyers employed concepts from Roman law. Most importantly, they claimed that there had to be a *justa causa*, a legal ground justifying the use of emergency powers. Hence, the king's authority to act *contra legem* in emergencies could only be legal and legitimate if it was justified by a *causa necessitatis*<sup>33</sup>. Not every necessity qualified as a legal *causa*. Indeed, ordinary needs, such as, for instance, the need to levy taxes for the construction of city walls or fortifications – although certainly necessary for a community to survive in the long run – did not qualify as *causa necessitatis*, since they were not directed at preventing an imminent threat. Nor was the need to finance a military campaign abroad considered a *causa necessitatis*, as it was not required for the 'evident necessity of defense'<sup>34</sup>. Indeed, by specifying the 'causes of necessity', secular and canon lawyers attempted to articulate the legal restrictions on the king's emergency powers. Only in *actual* emergencies, when there was a *casus necessitatis* that qualified as *justa causa*, was the king allowed to use his emergency powers and derogate from the laws. In these cases, he was expected to exercise his emergency powers *casualiter*, that is, only in so far as it was required by the *casus necessitatis* that constituted its *causa*. Specious appeals to necessity were considered arbitrary and unlawful, as they lacked a 'just cause'<sup>35</sup>.

A first legal qualification of necessity was that, to qualify as legal *causa*, the necessity had to be 'public'. As Frederick Powicke has observed, for medieval lawyers, necessity referred to 'the right and duty of the king and his agents (...) to override positive law in the common interests for which they were responsible'<sup>36</sup>. In the minds of these lawyers, the necessity was 'more than a sanction of

32 J. Pichler, *Necessitas, Ein Element des mittelalterlichen und neuzeitlichen Rechts*, Berlin 1983, p. 15 and 17. Likewise, Stephan Kuttner, discussing the specific context of canon law, emphasizes the difference between, on the one hand, the philosophical doctrine, which regards necessity as an inevitability that cancels the will and, thereby, the possibility of guilt, and, on the other, the canonical doctrine which understands necessity as a distressing and menacing situation, in which the will is not cancelled 'but forced to decide': S. Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX.*, Città del Vaticano 1935, p. 292.

33 E. Cortese, *La norma giuridica, Spunti teorici nel diritto comune classico*, Rome 1962, vol. 1, p. 263.

34 Post, *Studies (supra, n. 4)*, p. 321.

35 Cf. *ibid.*, p. 306.

36 F.M. Powicke, *Reflections on the medieval state*, Transactions of the Royal Historical Society, 4, 1 (1936), p. 6.

self-protection'; instead, the king was expected to exercise his emergency powers to protect the *common* interest, even if it required transgressing the limits set by law and custom<sup>37</sup>. Hence, the king was allowed to levy extra-ordinary taxes only in cases of '*public necessity* [*necessitas publica*]', such as war or famine<sup>38</sup>. Emergency taxation, for instance, was accepted on the condition that it was necessary for the *public safety*, i.e., the 'necessity of defending the realm [*necessitas defensionis regni*]' and the 'evident utility of the state [*evidentem utilitatem reipublicae*]'<sup>39</sup>. This implied that the use of emergency powers for private purposes was contrary to law. For instance, a king who levied extra-ordinary taxes to increase his personal wealth acted illegally, unless it was with 'consent of the people' and for the 'evident utility of the state'<sup>40</sup>.

Secondly, to justify the use of the king's emergency powers, there had to be a direct and immediate threat to the public safety. Like Aquinas, lawyers argued that the king could not use his emergency powers unless there was an 'urgent' or 'imminent' necessity [*necessitas urgens* or *imminens*]. A conspiracy had to be already unfolding, a foreign invasion at hand, for emergency powers to be justified. The king was thus not allowed to derogate from the laws to protect his kingdom from future threats that had not yet started to materialize. Nor could he levy extra-ordinary taxes on his subjects to fight offensive wars abroad, if the enemy did not threaten to invade the kingdom (although such taxes were accepted for financing the crusades, which were believed to be necessary to protect the Christian community from the threat of infidelity)<sup>41</sup>. Indeed, as Boniface VIII prescribed in his bull *Etsi de statu* (1297), the clergy was not to submit to such taxes unless the danger to the public safety was so imminent and urgent that the king was forced to act at once and could not wait for papal authorization<sup>42</sup>.

37 *Ibid.*, 7.

38 Cf. Jacobi, *Practica aurea* (*supra*, n. 24) p. 278, 63, 43.

39 *Ibid.*, p. 278, 63, 43. The conjunction of *necessitas* and *utilitas publica* can also be found in John of Salisbury's justification of the 'prince's' emergency powers. He argues that in case of rebellion or high treason, the prince is allowed to do many things 'by reason of necessity or utility [*ratio necessitatis aut utilitatis*]', including subjecting those he suspects of having conspired against him to torture: John of Salisbury, *Policraticus*, 6, 25.

40 Jacobi, *Practica aurea* (*supra*, n. 24) p. 278, 63, 43. Similarly, according to Jacobi, the reason why municipal authorities are allowed to seize private goods in a public necessity is that the 'common utility prevails over the private [*communis utilitas praefertur privatae*]: *Ibid.*, p. 278, 65, 9.

41 Post, *Studies* (*supra*, n. 4), p. 284.

42 *Etsi de statu* (13 July, 1297), in: Les registres de Boniface VIII, Recueil des bulles de ce pape, eds. G. Digard, M. Faucon, A. Thomas, Paris 1884–1939, vol. 1, p. 942 (2354).

The legal criterion of *necessitas urgens* or *imminens* was specified by French lawyers such as Philippe de Beaumanoir, Petrus Jacobi, and Pierre Dubois. In his *Practica aurea libellorum* (ca. 1311), Petrus Jacobi argued that to improve a city's military defenses, municipal authorities were allowed to levy taxes, order public works, and even use private possessions. For instance, they could temporarily use the houses and lands surrounding the city walls if this was necessary to renovate or improve its walls and fortifications. However, in doing so, they remained bound by the laws; they were dependent on the consent of those affected and had to refrain from causing unnecessary damage to their properties. By contrast, in cases of *necessitas imminens* – for instance, when an enemy advanced and threatened to lay siege to the city – municipal authorities had far-reaching emergency powers which allowed them to derogate from the laws<sup>43</sup>. This implied that they could 'seize' and even damage private possessions without consent of the owners, for instance, by using wood from the houses or trees from the lands<sup>44</sup>. As Petrus Jacobi suggested, derogation from the laws was justified only in cases of 'imminent necessity'. Indeed, for him, *necessitas imminens* served as the main criterion on which the legality of emergency powers depended.

Thirdly, just like Aquinas, these lawyers argued that, to justify emergency powers, the necessity had to be 'evident'<sup>45</sup>. As François Saint-Bonnet explains in his exemplary monograph on the history of the state of exception, for medieval lawyers, the adjective *evidens* referred to a direct recognition of the necessity that was comparable to a visual impression (the adjective being related to the verb 'ex-video'), and had little to do with rational deliberation<sup>46</sup>. Moreover, *evidens* connoted a *general* impression, i.e., an impression shared by all. Hence, the criterion of 'evident necessity [*necessitas evidens*]' referred to the requirement that the necessity was beyond dispute and generally acknowledged. For that reason, the necessity was believed to exist independently of individual judgment, such that (in theory) it could not be manipulated by those in power.

43 Jacobi, *Practica aurea* (*supra*, n. 24), p. 293–294, 65, 1 and 9.

44 *Ibid.*, p. 294, 65, 9: 'Item, eadem ratione, imminente necessitate propter guerram, poterit de proximis nemoribus scindere arbores, et de domibus capere ligna, et locū palis munire, et palinas facere, cum eadem sit? ratio'.

45 As Gaines Post points out, the criterion of 'evident necessity' was developed on the basis of Roman legal sources. More particularly, it was informed by a fragment by Ulpian (D. 1,4,2), explaining that the emperor should not change the existing laws unless it was for 'evident utility [*evidens utilitas*]'. This text was widely commented upon by the legists and canonists, and was eventually discussed by Henry of Ghent, among others, who used it to develop a notion of *necessitas evidens*: Post, *Studies* (*supra*, n. 4), p. 295.

46 Saint-Bonnet, *L'état d'exception* (*supra*, n. 16), p. 141.

Hence, the criterion of ‘evident necessity’ served to prevent the governing authorities from falsely claiming a necessity to expand their authority. It was intended to prevent abuses of emergency powers by making these powers dependent on an external criterion, i.e., a *shared* recognition of the necessity that could not be manipulated.

The criterion of ‘evident necessity’ plays a key role in the legal and political treatises that were written in the context of the struggles between Philip the Fair and pope Boniface VIII over taxation of the clergy. Thus, in his *De recuperatione terre sancte* (ca. 1305–1307), Pierre Dubois, a fervent supporter of Philip, claims that, ‘in case of necessary defense of the realm, which has no law [*in casu necessitatis defensionis regni, que legem non habet*]’, the king has extensive emergency powers that enable him to ‘demand and seize the goods of the church and ecclesiastics’<sup>47</sup>. However, as a lawyer, Dubois seeks to justify these emergency powers by articulating their legal conditions. He thus explains that the king may use his emergency powers only as a last resort: the goods of the church and ecclesiastics are ‘the ultimate and last subsidy that the lord king may seize’<sup>48</sup>. Indeed, as Dubois explains, seizing these goods without papal authorization would normally be ‘against the common civil and canon law’, unless there exists a *jus speciale* that justifies it. This *jus speciale*, he believes, can only be the ‘evident necessity of defense [*necessitas evidens defensionis*]’<sup>49</sup>. For Dubois, then, *necessitas evidens* serves as the main criterion to assess the legality of the king’s emergency powers: it enables him to determine whether the king may temporarily derogate from ‘the common civil and canon law’. This is not allowed unless it is justified by a temporary law of exception, a *jus speciale*, which is the ‘evident necessity of defense’<sup>50</sup>.

47 Dubois, *De recuperatione* (*supra*, n. 2), 123 (77): ‘in casu necessitatis defensionis regni, que legem non habet, dominus rex, quatinus sibi deest ad commodam defensionem, exigere et capere poterit de bonis ecclesiarum et ecclesiasticarum personarum’.

48 *Ibid.*, 123 (77): ‘Et hoc est ultimum finale subsidium quod dominus rex capere potest’.

49 *Ibid.*, 123 (77): ‘et quia, quociens capitur, contra jus commune canonicum et civile capitur, ergo cum mortali peccato, nisi subsit jus speciale cujus virtute et ratione capi possit; quod esse non potest nisi unum, videlicet evidens necessitas defensionis’.

50 Like Dubois, Giles of Rome suggests that imposing extra-ordinary taxes on the clergy without papal authorization is legal only in cases of ‘grave’ and ‘evident necessity’. He claims that the king requires papal authorization ‘unless the necessity is so grave and so evident that he cannot have recourse to the head of the church without losing his kingdom [*nisi forte tanta est necessitas et tam evidens quod sine dispensione regni non posset haberi recursus ad caput ecclesie*]’: Aegidius Romanus, *Tractatus quomodo reges et principes possunt possessiones et bona pecularia ecclesiis largiri*, in: *Opera*, 1, 37 (Paris, Biblio-

Interestingly, Dubois specifies the criterion of ‘evident necessity’ by explaining that it does not involve ‘an absolute necessity [*necessitas absoluta*], as it is necessary that the sun rises in the morning, but a conditional necessity [*necessitas conditionalis*], as food is necessary for an animal, on the condition that the animal must live and be healthy’<sup>51</sup>. Dubois’s explanation is significant for two reasons. First, it suggests that the criterion of ‘evident necessity’ should not be confused with an inevitability or lack of options: instead, as a *legal* criterion, it presupposes the possibility of a choice. Thus, it is always possible for a king not to use his emergency powers, as it is for an animal not to eat, although it would entail the risk of death. Indeed, by emphasizing the difference between ‘evident’ and ‘absolute necessity’, Dubois makes it clear that, in spite of the necessity, the king remains responsible for his decisions and deeds. Secondly, the fact that ‘evident necessity’ is a ‘conditional necessity’ suggests that it is only ‘evidently necessary’ in relation to something else: indeed, as Dubois’s example suggests, the evident necessity depends on the condition of survival. Just as food is ‘evidently necessary’ for an animal on the condition that it must remain healthy and alive, emergency powers may be ‘evidently necessary’ for a kingdom or a city on the condition that they must remain save and survive.

As Elisabeth Brown has pointed out, apart from limiting the legal ‘causes of necessity’, lawyers applied another criterion to assess the legality of emergency powers: when the *causa* justifying these powers ceased to exist, their legal effects had to cease as well<sup>52</sup>. Formulated positively, this implied, for instance, that the king was allowed to levy extra-ordinary taxes for as long as the necessity continued to exist<sup>53</sup>. In the course of the 13th century, this principle – summarized as ‘the cause ceasing, ceases the effect [*cessante causa, cessat effectus*]’ – would develop into one of the most important constraints on emergency powers. Though originally a philosophical principle developed by Aristotle<sup>54</sup>, it had been applied to emergency powers as early as the 5th century, when Innocent I decreed that if the necessity ceased to exist, its effect, the emergency

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thèque Nationale, fonds latin 6786, fol. 22–41), quoted in Saint-Bonnet, *L'état d'exception* (*supra*, n. 16), p. 150, n. 6. Compare Post, *Studies* (*supra*, n. 4), p. 289.

51 Dubois, *De recuperatione* (*supra*, n. 2), 123 (77): ‘que non est neccessitas absoluta, sicut solem oriri cras est neccessarium, sed neccessitas conditionalis, sicut nutrimentum neccessarium est animali, sub conditione si salvari et vivere debet animal’.

52 E.A.R. Brown, *Cessante causa and the taxes of the last Capetians, The political applications of a philosophical maxim*, in: Post scripta, Essays on medieval law and the emergence of the European state in honor of Gaines Post, eds. J.R. Strayer and D.E. Queller, [Studia Gratiana, 15], Rome 1972, p. 565–587.

53 Cf. Dubois, *De recuperatione* (*supra*, n. 2), 124 (77–78).

54 *Phys.* 195b; *An. Post.* 95a–96a.

authority, ceased as well<sup>55</sup>. In the 12th century, the principle was received by Gratian, who used it to assess the legality of exemptions, arguing that exemptions from laws had to be nullified as soon as the situation justifying them ceased to exist<sup>56</sup>. However, it was not until the end of the 13th century that French lawyers gave the principle a practical relevance by using it to assess the legality of emergency powers and, in particular, the practice of emergency taxation.

One of the first to apply the principle to the king's right to impose extra-ordinary emergency taxation was Pierre d'Auvergne. In his *Quodlibet*, presented in Paris at Christmas of the year 1298, he addressed the question whether a king who, in case of an 'imminent necessity', had levied an extra-ordinary tax on his subjects was required to abolish the tax when the emergency had passed. Quoting the principle, Pierre answered affirmatively: justice demanded that the king abolished the tax as soon as the emergency had ceased, unless another emergency had arisen, because when 'the cause [is] ceasing, the effect must cease [*cessante causa cessare debet effectus*]'<sup>57</sup>. As Pierre explained, a king who took more from his subjects than was necessary to cope with the emergency committed the 'sin of injustice [*peccato iniustitie*]'<sup>58</sup>. His subjects, on the other hand, did not commit a sin if they refused to pay extra-ordinary taxes that were no longer justified by their cause. Indeed, as Pierre suggested, maintaining extra-ordinary taxes after the emergency had ceased was prohibited by the decrees of the church, and this, he claimed, was true even if it was not forbidden by written law, since it was contrary to natural law<sup>59</sup>.

Like Pierre d'Auvergne, Pierre Dubois applied the principle *cessante causa* to indicate the legal limitations to the king's authority to levy extra-ordinary

55 Cf. H. Krause, *Cessante causa cessat lex*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung, 77 (1960), p. 83.

56 *Decretum*, pars 2, C. 1, q. 1, c. 41 and q. 7, c. 7.

57 Pierre d'Auvergne, *Quodlibet*, 3, q. 14, Paris, Bibliothèque Nationale, MS. Latin 14562, fol. 44–45. A transcription of the text can be found in Brown, *Cessante causa* (*supra*, n. 52), p. 585–587.

58 *Ibid.*, 3, q. 14: 'Secundo quoniam si princeps plus exigit a subditis quam sit necessarium ad salvationem rei publice secundum ordinem ad finem, peccat peccato iniustitie, non salvando equalitatem iusticie secundum proportionem, eo quod plus exigit quam requirit ipsa equalitas proportionis sicut apparet ex precedentibus, sed cessante necessitate nec alia subordiente [*sic*] equali, non est necessaria exactio vectigalis ad salvationem rei publici, cum sufficiant stipendia communia. Igitur, si princeps exigit ipsum, cessante necessitate, peccat peccato iniusticie. Tenetur igitur ipsum removere secundum rationem iustitie'.

59 *Ibid.*, 3, q. 14: 'Item dato quod non esset prohibitum iure scripto, tamen est prohibitum iure naturali'. Cf. Brown, *Cessante causa* (*supra*, n. 52), p. 569–570.

taxes, yet he went further than Pierre d'Auvergne by arguing that the king was required to pay back any taxes he had taken in excess of the needs of defense. He even claimed that a king who needed 100.000 silver marks to defend his kingdom and took 200.000 marks committed a mortal sin. To make his point, he referred to the fact that 'all sciences agree and concur in the principle *cessante causa, cessat effectus*'<sup>60</sup>. On Dubois's view, a king who took more than he needed to defend his kingdom, or failed to pay back what he had taken in excess of the needs of defense, was guilty of theft by false word or deed, since as the legal cause justifying the taxes he alleged a necessity which did not in fact exist<sup>61</sup>. If the king did this knowingly, he was a liar, and, as Dubois warned, by lying, he denied God and became the devil's son – the devil being father of all liars, as God was father of those who spoke the truth<sup>62</sup>. Thus, as Dubois argued, a king who collected more taxes than was justified by the necessity and knowingly violated the principle *cessante causa* committed a mortal sin: not only did he violate the law by exercising his emergency powers without legal *causa*, he also jeopardized faith by falsely claiming a necessity which he knew did not exist.

The emphasis in the sources on the king's faith (*fides*) can be understood if we take the question of remedies into account. Crucially, the king's emergency measures could not be contested in a court of law. Indeed, the civilians had famously invoked Roman law to claim that, as an 'emperor in his own realm', the king was 'not bound by the laws [*legibus solutus*]'<sup>63</sup>, which was taken to mean that no one could bring suit against him<sup>64</sup>. As Bracton explained for the English context, the king was both under and above the law: he was *sub deo et sub lege*, in the sense that he, too, was bound by the prescripts of the Church and the laws of the land, but in other respects he was above and beyond the law, as he was under no man and no writ ran against him<sup>65</sup>. But if no one could bring suit against the king, how could he be prevented from abusing his emer-

60 Dubois, *De recuperatione* (*supra*, n. 2), 124 (77): 'concordant et in hoc communicant omnes sciencie, cessante causa, cessat effectus'.

61 Brown, *Cessante causa* (*supra*, n. 52), p. 570.

62 Dubois, *De recuperatione* (*supra*, n. 2), 124 (77): 'Si ergo hoc facit ex certa sciencia dominus rex, mendax est; et per mendacium, quod absit, Deum negans, efficitur filius Dyaboli, qui est pater mendacii, et omnes mendaces filii ejus; sicut omnes veraces, in quantum tales, filii Dei nuncupantur'.

63 Cf. D. 1,3,31.

64 Compare for the various interpretations of *princeps legibus solutus* that circulated in the 13th and 14th centuries: Pennington, *The prince and the law* (*supra*, n. 4), p. 77–90.

65 Bracton, *De legibus et consuetudinibus Angliae*, ed. G.E. Woodbine, New Haven 1922, vol. 2, p. 33, f. 5, 11: 'ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem'.

gency powers? The 'remedy' lay primarily in the king's duty to be just, his duty to observe the laws from his own free will<sup>66</sup>. In other words: absent legal remedies, the king's faith, his *fides*, was invoked to prevent him from abusing his emergency powers. Hence, violation of legal restrictions on emergency powers could result in the accusation that the king had violated his *fides* and 'sinned the sin of injustice', which, in a context where kings derived legitimacy from their religious status, was a dangerous accusation.

Yet there were other, more profane remedies to prevent abuses of emergency powers. Although the king could not be brought before a court of law, his subjects had the right to petition him, asking him to reconsider his emergency measures or extra-ordinary taxes. As Post explains, petitioning was the proper procedure whenever the king's emergency measures were contested. Although it was considered a sacrilege to dispute or challenge the king's decisions, his subjects could appeal from a king whom they considered poorly informed to a king better informed<sup>67</sup>. More importantly, even in *evident* necessities, the king was required to seek the advice of his counsellors as well as the consent of those affected. Thus, an assembly had to be properly summoned and informed about the emergency measures, and given a hearing, which included the right to debate these measures before the king<sup>68</sup>. Although it was possible to refuse consent if the necessity was believed to be false or ill-founded, it was difficult to refuse consent if the necessity was said to be 'evident', especially since it was the king's prerogative to proclaim the necessity in the first place. Indeed, if the necessity was 'imminent' and 'urgent', in the sense that there was no time for consultation or interpretation, prior consent was not even required. Hence, the king's claims to necessity were rarely contested, and negotiations often focussed, not on the necessity itself, but on the scope of the proposed emergency measures<sup>69</sup>.

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66 Post, *Studies (supra, n. 4)*, p. 273. Compare also Brian Tierney's analysis of Accursius's reading of D. 1,3,31: 'For Accursius the emperor was "loosed from the laws" only in the sense that there existed no legal machinery for bringing him to justice if he broke them. He did not associate the words *legibus solutus* with any ideas of arbitrary government (...). He never argued that it could be licit for an emperor to break the law, nor would he have countenanced such suggestion (...). Fidelity to the law which was required of all men, had to be maintained in the case of the Prince alone through internal rather than external discipline': B. Tierney, 'The prince is not bound by the laws', *Accursius and the origins of the modern state*, Comparative studies in society and history, 5 (1963), p. 392.

67 Post, *Studies (supra, n. 4)*, p. 272–273.

68 *Ibid.*, p. 324.

69 *Ibid.*, p. 218 and 324. However, with regard to the English context, Post mentions a few examples of emergency taxes that were refused. For instance, in 1242, when Henry III attempted to levy extra-ordinary taxes to finance his military campaign against Louis IX,

In sum, in the 13th and 14th centuries, lawyers believed that emergency powers derived from, and were limited by, law. On their view, these powers could only be exercised in a legal and legitimate way if they were based on a *causa necessitatis*, a legally acknowledged cause of necessity. By specifying these causes of necessity, lawyers attempted to define the legal limitations to the king's emergency powers. First, to qualify as legal *causa* justifying emergency powers, the necessity had to be 'public'; it had to involve a threat to the 'public safety'. Secondly, the necessity had to be 'urgent' or 'imminent'; there had to be a direct threat to the community that was already unfolding, such that there was no time for consultation or deliberation. Thirdly, the necessity had to be 'evident'; it had to be generally recognized and beyond dispute, so that it was not dependent on individual judgment and could not be manipulated by those invested with emergency powers. Apart from these 'causes of necessity', there were other conditions for the lawful exercise of emergency powers. Most importantly, these powers could only be used as a last resort and they could not be continued after the necessity had ceased. Thus, applying the principle *cessante causa, cessat effectus* to the king's emergency taxation, lawyers argued that, after the emergency had ceased, the king had to pay back any taxes he had collected in excess of what he had needed to cope with the emergency.

However, if a king failed to observe these legal restrictions, there were no remedies to force him to comply. Although his decisions could be influenced through the procedures of petitioning and consultation, they could not be reviewed in court. Absent legal remedies, lawyers appealed to the king's *fides*: the king was to observe the legal limitations to his emergency powers from his own volition. If he failed to do so, for instance, if he refused to pay back emergency taxes knowing that they exceeded what the necessity required, he could be accused of violating his *fides*. This entailed the risk of provoking religious sanctions, for instance, excommunication, and losing political legitimacy. Hence, a king who had knowingly violated the legal limitations to his emergency powers, was accused of having 'sinned the sin of injustice' and become the 'devil's son'. This implied that his subjects were no longer bound to obey his emergency measures. Indeed, as French lawyers claimed, if the king used the necessity as a false pretext to demand emergency taxes, his subjects had the right, and even the duty, to refuse his demand. In that case, it was the king's violation,

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the magnates refused their consent, arguing that the king was wrong about the alleged necessity, since a military campaign overseas (in France) could not be justified by the 'necessity of defending the realm': *ibid.*, p. 321. Examples dealing with the French context are discussed by Brown, *Cessante causa* (*supra*, n. 52), p. 571 ff.

not of law, but of *fides*, which absolved his subjects from their duty to obey the king.

### The King's emergency powers in practice: From temporary to permanent necessity

Towards the end of the Middle Ages, in spite of the canon and civil lawyers' attempts to set legal limits to the use of emergency powers, these powers would be deployed on an ever larger scale. The kings of France and England and the German emperor used their emergency powers to strengthen their own prerogatives at the expense of local authorities and the church. Indeed, in some instances, they appear to have used their emergency powers with the very purpose of liberating themselves from the many restrictions on their power that derived from customary, feudal, and canon law. In the course of the 13th and 14th centuries, these rulers succeeded in gradually transforming their emergency powers into more regular powers. Most importantly, emergency taxation, though originally meant for exceptional cases of war and rebellion, was transformed into annual taxation, which was justified by the claim that the need for public defense had become permanent.

As Ernst Kantorowicz explains in a dense but brilliant chapter of *The king's two bodies*, the introduction of annual taxation was founded on the legal fiction of a perpetual necessity, a *necessitas perpetua*<sup>70</sup>. In the earlier Middle Ages, taxation had always had an extra-ordinary and *ad hoc* character; it was due because of certain events that recurred irregularly. For instance, feudal aids were due for ransom of the lord, knighting of his eldest son, dowry of his eldest daughter, and the defense of the realm in cases of public necessity. However, as Kantorowicz points out, while ransom, knighting, and dowry were unrepeatable events, a public necessity could technically be proclaimed every year, that is, as long as the threat to the public safety continued<sup>71</sup>. Hence, it was the idea that there was always a need for public defense, the pretense of a never ceasing necessity, which enabled the kings and emperor to gradually replace extra-ordinary emergency taxation with annual taxation. Thus, in the first half of the 13th century, annual taxation was gradually introduced by Frederick II, who at the beginning of every year solemnly proclaimed the *dira et*

70 Kantorowicz, *The king's two bodies* (*supra*, n. 5), p. 284–291.

71 *Ibid.*, p. 284.

*dura necessitas* of the empire to levy taxes on his subjects, including the clergy<sup>72</sup>.

At first, the fiction that these taxes were extra-ordinary was maintained; for instance, Frederick's annual taxation depended on the continuation of his struggle with the Roman pontiffs and the *casus necessitatis* had to be reaffirmed at the beginning of every year. However, by the 14th century, the pretense that these taxes were extra-ordinary was dropped and they were openly presented as regular taxes: public taxation became synonymous with annual taxation<sup>73</sup>. The introduction of annual taxation, which turned the exception into the rule, was justified by a new fiction, i.e., that the necessity had become permanent. As long as the *dura et dura necessitas* of the realm did not cease, its effect, the right to levy taxes, did not cease either: the king or emperor could thus levy taxes annually as long as the realm continued to be in danger. This also explains why, from the 14th century on, the meaning of the concept of *necessitas* itself changed: it no longer referred to the exceptional cases of 'evident and urgent necessity', but to the more or less permanent need of public defense.

As Kantorowicz points out, compared to its traditional understanding, the concept of *necessitas* thereby acquired a completely new meaning<sup>74</sup>. As legal ground for taxation, *necessitas* had traditionally referred to threats that were external, the classic examples being threats of foreign invasion and rebellion. However, around 1300, the term began to be used also to indicate the ordinary administrative needs of government. For instance, the king's task to administer justice was now described as a 'public necessity and utility', for which annual taxation could be imposed<sup>75</sup>. To meet these regular administrative needs governments and their legal counsellors took refuge in the fiction of a *necessitas perpetua*. It implied that the administrative needs of government were permanent, as were, for instance, the needs of public defense and the administration of justice, and, therefore, required annual taxation. The meaning of *necessitas* thus gradually shifted from an outer emergency to an inner administrative need. As Kantorowicz puts it, 'the state had become permanent, and permanent were its emergencies and needs, its *necessitas*'<sup>76</sup>.

These shifts in the meaning of *necessitas* may be illustrated by the work of Oldradus de Ponte. In his *Consilia*, written in the early 14th century, Oldradus poses the following question: 'Is a person, that is held to contribute to taxes

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72 *Ibid.*, p. 285.

73 *Ibid.*, p. 286.

74 *Ibid.*, p. 286.

75 *Ibid.*, p. 288.

76 *Ibid.*, p. 286.

imposed for the sake of [public] utility or necessity, held also to pay taxes imposed for the sake of a *habitual* necessity, though [this be] not an *actual* necessity?<sup>77</sup> Oldradus explicitly distinguishes between a regular need (*necessitas in habitu*) and an actual necessity (*necessitas in actu*). Moreover, in discussing this question, he acknowledges the fact that traditionally *necessitas* could serve as a legal ground for emergency taxation only in exceptional circumstances of *actual* necessity: therefore, it justified only *extraordinary* taxation (*indictio extraordinaria*). However, as Oldradus explains, ‘the imposition of an annual tallage is a new action: and in this respect the taxes are called ordinary [*indictio ordinaria*]<sup>78</sup>. Oldradus’s remark suggests that he is well aware of the novelty of annual taxation. Of course, both types of taxation – the ordinary and extraordinary – were intended to meet a necessity. But as the meaning of necessity shifted from *actual* necessity to *regular* need, extra-ordinary emergency taxation was gradually replaced with annual taxation.

As Kantorowicz suggests, these shifts in the meaning of *necessitas* testified to new temporal experiences as the necessity was increasingly projected into the future. Thus, the notion of a regular necessity, a *necessitas in habitu*, implied that, apart from present needs, potential future needs had to be taken into account as well. Even if a *necessitas in actu*, a direct or imminent threat to the realm, was lacking, the governing authorities had to anticipate potential *future* threats, for instance, by imposing annual taxation for the purpose of military preparation. Thus Oldradus explains that, ‘[e]ven though the army might not be summoned in every year, it is nevertheless advisable to look ahead that there be money in the treasury to pay the soldiers if [or when] an army be raised (...) For, the purpose of an army is the public good<sup>79</sup>. Here, Oldradus justifies the introduction of annual taxation by emphasizing the need to prepare for *future* necessities: even though there is at present no need to raise an army, it might become necessary in the future, and, hence, it is advisable to levy taxes to meet such potential future necessities.

77 Oldradus de Ponte, *Consilia*, 98, quoted in Kantorowicz, p. 287, n. 26: ‘contribuere si unus tenetur ad munera, quae fiunt causa utilitatis vel necessitatis, tenetur praestare munera, quae fiunt causa necessitatis in habitu, licet non in actu’ (trans. Kantorowicz).

78 *Ibid.*, 98, 4, quoted in Kantorowicz, *The king’s two bodies* (*supra*, n. 5), p. 289, n. 32. The complete phrase is: ‘licet enim talliam indicendi causa et regalia sint antiqui actus: tamen indictionis omni anno est novus: et hoc respectu ordinariae praestationis indictiones appella[n]tur’ (trans. Kantorowicz).

79 *Ibid.*, 98, n. 1, trans. Kantorowicz: ‘licet enim non semper fiat exercitus, expedit uti provisione, ut cum locus fuerit, in aerario sit pecunia, ex qua militibus satisfiat (...). Finis autem exercitus est ad bonum publicum.’

This new emphasis on prevention and preparation for *future* necessities is also announced in Beaumanoir's *Coutumes de Beauvaisis* (1283). Beaumanoir begins by stressing the binding force of custom which, he claims, should be observed in times of peace. However, in 'times of war or times when war is feared [*ou tans de guerre et ou tans que l'en se doute de guerre*]', the governing authorities are allowed to do many things which custom would not allow in times of peace. The king may thus 'make new establishments for the common profit of his realm' and demand that his subjects prepare themselves 'for the defense of his land [*pour sa terre defendre*]', for instance, by restoring their fortresses and providing themselves with arms, so that 'everyone is well-equipped to move when the king will command it'. Indeed, as Beaumanoir emphasizes, 'the king may make all these establishments and others which he and his council deem necessary for the time of war or for fear of war to come [*pour le tans de guerre ou pour doute de guerre a avenir*]'<sup>80</sup>. Strikingly, for Beaumanoir, the use of emergency powers is no longer limited to times of *actual* war; instead, these powers may also be deployed 'for fear of war to come', that is, for potential future necessities. The traditional criteria of 'urgent and evident necessity' are silently dropped and replaced by the appeal to a less immediate need to prepare for possible future necessities.

The fiction of a *necessitas perpetua* not only served to legitimize the transition to annual taxation, it also contributed to gradual, and largely implicit, constitutional changes. Of course, the pretense of perpetual necessity did not *cause* these changes (in most cases, it may have been no more than a justification for developments that had already occurred in practice), but it certainly contributed to making them more acceptable in the eyes of contemporaries. Most importantly, by allowing for annual taxation, the fiction of *necessitas perpetua* supported the transition towards a more centralized government with a continuous income that could take all the measures it deemed necessary for the public welfare. The idea of perpetual necessity suggested that there was

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80 Beaumanoir, *Coutumes de Beauvaisis* (*supra*, n. 3), 49, 1510: 'Mes ou tans de guerre et ou tans que l'en se doute de guerre, il convient fere as rois et as princes, as barons et as autres seigneurs, mout de choses que, s'il les fesoient ou tans de pes, il feroient tort a leur sougiès, mes li tans de nécessité les escuse, par quoi li rois peut fere nouveaus establissemens pour le commun pourfit de son roiaume: si comme il seut commander, quant il pense a avoir a fere pour sa terre defendre ou pour autrui assaillir qui li a fet tort, que escuier gentil homme soient chevalier, et que riche homme et povre soient garni d'armeures, chascuns selonc son estat, et que les bonnes viles rapareillent leur services et leur fortereces, et que chascuns soit appareillés de mouvoir quant li rois le commandera. Tous teus establissemens et autres qui semblent convenable a lui et a son conseil peut fere li rois pour le tans de guerre ou pour doute de guerre a avenir'.

always a *causa* for derogation from existing laws and for ‘making new establishments for the common profit of the realm’: hence, in the course of the 13th and 14th centuries, the fiscal and legislative power of the king would gradually expand at the expense of local authorities, albeit slowly and with hesitations. While emergency powers had formerly been extra-ordinary and exceptional, they were gradually transformed into regular and, indeed, *ordinary* prerogatives – to impose annual taxation, to administer justice, and, more generally, to take all measures ‘for the common utility and necessity of the realm’. Thus, between the 14th and 16th century, the foundations of the modern state were built on the new fiction of a *necessitas perpetua*.

Most importantly, the frequent use of emergency powers disrupted the older feudal relations, which were based on reciprocity, and served to redefine the position of the king as the highest governing authority. Thus, while the king remained a feudal lord in times of peace, he became a sovereign ruler in times of necessity. As the necessity was increasingly regarded as the rule, the feudal lord gradually disappeared behind the figure of the sovereign<sup>81</sup>. This transition can be traced in Beaumanoir and Petrus Jacobi. For instance, Beaumanoir attributes emergency powers not only to the king, but also to ‘princes, barons and other lords’<sup>82</sup>. Like the king, these other lords are allowed to derogate from the laws if public necessity requires it. However, Beaumanoir adds that these other lords may not employ their emergency powers against the king. In times of necessity, the king becomes the highest, though not yet exclusive, authority. By contrast, Petrus Jacobi, writing some 30 years later, suggests that the other lords are not invested with emergency powers themselves, but merely enact these powers as stewards of the king. Indeed, in times of necessity, the king does not act in his capacity of feudal lord at all: in those cases, he calls upon others ‘not as his vassals, but as his subjects [*non ut vasallos, sed ut subditos*]’<sup>83</sup>. Here, the appeal to necessity clearly serves to avoid the traditional limitations of feudal law and to construe a more direct relation between the king and his subjects, which would later become the hallmark of the modern concept of sovereignty.

These appeals to the king’s supreme authority in public necessities were not merely empty expressions of royal propaganda<sup>84</sup>. Instead, they represented real claims to power with practical consequences. For instance, under feudal law, the king’s right to impose taxation was subject to the requirement of con-

81 Saint-Bonnet, *L'état d'exception* (*supra*, n. 16), p. 148.

82 Beaumanoir, *Coutumes de Beauvaisis* (*supra*, n. 3), 49, 1510.

83 Jacobi, *Practica* (*supra*, n. 24), p. 277, 63, 38.

84 Cf. G.M. Spiegel, *Defense of the realm, Evolution of a Capetian propaganda slogan*, *Journal of medieval history*, 3 (1977), p. 115–134.

sent: the king had the duty to consult those affected. As Gaines Post explains, consent was consultative and juridical, not voluntary or democratic: the king had the right to ask for a subsidy, and the affected communities had the right to argue against it<sup>85</sup>. Interestingly, even in public necessities, this procedure of consultation was generally observed. But in those cases, the consultation had a more limited character: it was thus believed to be the prerogative of the king and his council to proclaim the public necessity and decide whether emergency taxation was necessary in the first place. The advantage lay with the royal prerogative: representatives of the affected communities might try to point out that a subsidy was not necessary or based on a false pretext (for instance, by claiming that a war waged overseas did not constitute a *casus necessitatis*)<sup>86</sup>, but the king and his council had the power of decision and if they judged there was an 'evident' and 'urgent' necessity, they could overrule pleas of the representatives<sup>87</sup>. Hence, in practice the king's decision was rarely contested. Instead, negotiations focused, not on the need for emergency taxation itself, but on the amount of taxes demanded<sup>88</sup>.

Of course, the communities could use their right to be consulted to delay the king's decision, for instance, by refusing to send representatives or by limiting their mandates. However, in a public emergency, when a swift response was required, such delay or refusal was not tolerated. Instead, the king, claiming a supreme right to demand the subsidy, required that the representatives be sent with *plena potestas*, that is, full powers of representation that allowed for quick decision and consent<sup>89</sup>. This caused the assembly to acquire a more independent position *vis-à-vis* its constituents, which was justified by the fact that there was an immediate threat to the public safety requiring a swift decision. When the community's survival was at stake, no limited mandate, nor any kind of 'reference back' or reservations of consent could be tolerated. Any delay would endanger the safety of all. Hence, the king demanded that representatives be granted full powers to make a quick decision and consent possible. As Post observes, in effect, this grant of *plena potestas* came down to consent being given by the communities in advance of any negotiations<sup>90</sup>. Thereby, the appeal to public necessity contributed to strengthening the position of the royal government at the expense of local authorities.

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85 Post, *Studies* (*supra*, n. 4), p. 117.

86 See above, n. 69.

87 Post, *Studies* (*supra*, n. 4), p. 157.

88 Saint-Bonnet, *L'état d'exception* (*supra*, n. 16), p. 152.

89 Post, *Studies* (*supra*, n. 4), p. 116.

90 *Ibid.*, p. 156.

However, as Post suggests, the frequent use of emergency powers led to even more profound constitutional changes. Most importantly, it contributed to the gradual formation of a more or less autonomous domain of public law, where ‘reasons of utility and necessity’ were increasingly used as arguments to override appeals to private rights and special interests. Whereas the king’s prerogative powers were normally subject to the laws of the land, and, hence, to private rights and privileges, in emergencies, when the safety of the realm was endangered, public law temporarily became superior to private law. The appeal to necessity thus served to articulate a new domain of public law that focused on the king’s supreme right and responsibility to protect the public safety and preserve the realm. When a king invoked the ‘necessary defense of the realm’ and asked for an emergency tax, special privileges, liberties and immunities were no longer valid, and even the church could no longer claim exemption from taxation<sup>91</sup>. Instead, as the public safety of all was imperiled, all exempt persons and ecclesiastics had to contribute their share of the subsidy. Hence, by appealing to public necessity, the king could force private rights and special privileges to yield to the higher interest of the public safety. In this sense, ‘necessity’, as Post puts it, ‘knew no *private* law’<sup>92</sup>, or at least, it made private rights temporarily subordinate to a higher public interest, i.e., the ‘necessary defense of the realm’<sup>93</sup>.

Of course, this never meant that the governing authorities were above the law, or that they were operating in a legal vacuum<sup>94</sup>. Even in emergencies, they were not allowed to rule arbitrarily without regard of the private rights of their subjects<sup>95</sup>. Thus, as Petrus Jacobi pointed out, if municipal authorities confiscated private property to meet a public necessity – for instance, if they cut down privately owned trees to strengthen the city’s fortifications – the owners had to be fairly compensated from the public treasury<sup>96</sup>. Moreover, in case of emergency taxation, the king remained under the obligation to obtain the

91 *Ibid.*, p. 18.

92 *Ibid.*, p. 317–318.

93 *Ibid.*, p. 22. An interesting example is the 14th-century jurist Philip of Leyden, who, in an important treatise dedicated to the Count of Holland, emphasizes that the ‘cause of preserving the state [*causa conservationis publicae rei*]’ overrides all private interests, privileges and immunities. The ‘prince’ may thus impose extra-ordinary taxes on church property for the ‘defense of the fatherland and the public welfare [*defensio patriae et salus publica*]’. Indeed, the church is expected to give a good example by submitting to these taxes voluntarily. Philippus de Leyden, *De cura reipublicae et sorte principantis*, eds. R. Fruin and P.C. Mollhuysen, The Hague 1915, casus vi, p. 36–38.

94 Cf. Pennington, *The prince and the law* (*supra*, n. 4), p. 82–83.

95 Post, *Studies* (*supra*, n. 4), p. 318.

96 Jacobi (*supra*, n. 24), 65, 10.

consent of all whose rights were affected according to the principle that ‘what touches all must be approved by all’<sup>97</sup>. Hence, the king’s power to derogate from the laws in public necessities did not authorize him to go outside the law or act arbitrarily. Yet, it did authorize him to temporarily override the private rights and privileges of his subjects. Hence, in an urgent and evident necessity, private property could be confiscated without consent of the individual owners (even though they had to be fairly compensated), and emergency taxation could be raised without waiting for the approval of local authorities.

The use of emergency powers also contributed to the gradual transformation of relations between secular authorities and the church. While the church and ecclesiastics normally fell under the authority of the pope, notwithstanding their feudal ties to the king, they became directly subordinate to the king’s authority in emergencies. Most importantly, if taxation was imposed to meet a public necessity that touched all, no one, not even the clergy, could claim immunity<sup>98</sup>. This principle was accepted by the Fourth Lateran Council (1215), when it decided that the Italian communes could tax the clergy in cases of public ‘utility and necessity’ if their own resources were insufficient and if the bishops were not forced, but decided to contribute voluntarily. However, to prevent abuses an important condition was added: the bishops were allowed to contribute a subsidy only if the pope had first been consulted and had given his consent<sup>99</sup>. As we have seen, royal governments interpreted this to mean that, like the Italian communes, they, too, could tax the clergy in public emergencies. Hence, from the 1220s until the 1290s, the kings of France and England repeatedly asked and obtained papal permission to tax the clergy for the ‘necessary defense of the realm’<sup>100</sup>.

97 This importance of this principle (*Quod omnes tangit, ab omnibus tractari et approbari debet*) for the emergence of a relatively autonomous domain of public law in the high and late Middle Ages is discussed in detail by Post, *Studies* (*supra*, n. 4), p. 263–340. Compare also Saint-Bonnet, *L’état d’exception* (*supra*, n. 16), p. 151.

98 Thus, in 1297, the clergy of Reims, in a letter to the pope, accepted that ‘all privilege, excuse and exception ceased [*omni privilegio, excusatione et exceptione cessantibus*]; if the king demanded an emergency subsidy ‘for the defense of the realm and the fatherland [*ad defensionem regni et patriae*]’. Letter quoted in Wieruszowski, *Vom Imperium zum nationalen Königtum* (*supra*, n. 4), p. 173.

99 Canon 46 of the Fourth Lateran Council (1215) prescribed that ‘if the bishop with his clergy should perceive such necessity or utility and without compulsion decide that the aid of the churches ought to be enlisted to meet the needs where the resources of the lay people do not suffice, let the aforesaid lay people accept such assistance humbly, devoutly, and with gratitude. However, on account of the boldness of some, let them first consult the Roman pontiff, to whom it belongs to attend to common needs’.

100 Post, *Studies* (*supra*, n. 4), p. 18.

However, in the long run, this repeated appeal to public necessity contributed to strengthening the position of the king at the expense of the Roman pontiffs. Of crucial importance was the king's claim that he had a superior right to defend the realm and ensure the public safety. Again, the advantage proved to be with the prerogative: it was the king's right to proclaim the public necessity and, if he did so, the pope had little leeway for refusing a subsidy. Although canon lawyers maintained that the church was formally independent of the king's authority, such that papal authorization was required, Boniface VIII discovered between 1295 and 1297 that he *had* to consent to Edward I and Philip the Fair's demands for emergency subsidies. As Post observes, the irony was that, to justify emergency taxation, both rulers invoked the necessity of defending their realm against the other's aggression<sup>101</sup>. In 1297, Philip taxed the clergy without even waiting for papal approval, arguing that his kingdom faced an 'imminent necessity' that allowed for no delay. That same year, in his bull *Etsi de Statu*, Boniface was forced to concede that the requirement of papal approval did not apply if a 'dangerous necessity [was] imminent'<sup>102</sup>. This implied that in cases of 'imminent necessity', the church and ecclesiastics came under the direct authority of the king. Like the vassals, they temporarily became the king's 'subjects'.

Still, in theory, lay taxation of the clergy was believed to be the exception and papal authorization the rule. Pierre Dubois, for instance, emphasized that normally any lay taxation of the clergy without papal authorization was a mortal sin, since it was 'contrary to the common canon and civil law'. Hence, 'seizing' the property of the church was only allowed in the exceptional case of an 'evident necessity of defense [*evidens necessitas defensionis*]'<sup>103</sup>. Stressing its exceptionality, Dubois claims 'it is the ultimate and last subsidy that the lord king may seize, which is clearly showed by the fact that this aid of the churches and ecclesiastical persons has only rarely or very rarely been seized until now'<sup>104</sup>. Likewise, Giles of Rome emphasizes that taxing the clergy without papal approval must remain the exception. He argues that the king is required

101 *Ibid.*, p. 19.

102 *Etsi de statu* in: Les registres de Boniface VIII, vol. 1 (*supra*, n. 42), p. 942 (2354): 'Ajicimus insuper hujusmodi declarationi nostre quod, si prefatis regi et successoribus suis pro universalis vel particulari ejusdem regni defensione periculosa necessitas immineret ad hujusmodi necessitatis casum se nequaquam extendat constitutio memorata. Quin potius idem rex ac successores ipsius possint a prelati et personis ecclesiasticis dicti regni petere ac recipere pro hujusmodi defensione subsidium vel contributionem'.

103 Dubois, *De recuperatione* (*supra*, n. 2), 123, 77.

104 *Ibid.*, 123, 77: 'Et hoc est ultimum finale subsidium quod dominus rex capere potest; quod satis apparet eo quod hoc auxilium ecclesiarum et ecclesiasticarum personarum nonquam aut valde raro hectanus captum fuit'.

to wait for papal authorization even in emergencies, ‘unless the necessity is so great and so evident that he cannot have recourse to the head of the church without losing his kingdom’<sup>105</sup>. According to Giles, then, to justify derogation from the canon rule that lay taxation of the clergy is allowed only with express consent of the pope, the necessity has to be *magna* and *evidens*, in the sense that the survival of the kingdom must depend on it.<sup>106</sup>

However, as the king claimed the exclusive right to judge what constituted a *magna et evidens necessitas*, these constraints proved to be largely ineffective in practice. Thus, contrary to the lawyers’ emphasis on its exceptionality, royal taxation of the clergy soon became the rule: for instance, in the 25 years of his reign, Philip taxed the clergy on no less than 33 occasions, each time invoking the ‘necessary defense of the realm’ as justification<sup>107</sup>. These subsidies were often demanded – and sometimes granted – for several subsequent years. Especially after 1297, Philip took recourse to taxing the clergy ever more frequently to finance the wars against England and Flanders. On his turn, Boniface, seeking royal support for the recovery of Sicily, made astonishing concessions. Not only did he concede, in *Etsi de statu*, that the king and his successors could determine for themselves what constituted an ‘imminent necessity’ and, hence, demand a subsidy without papal approval. He also appointed executors to compel the clergy to pay these subsidies. He thereby conceded what was in effect an exemption from a canonical rule, the main aim of which had been the defense of clerical liberty<sup>108</sup>. Even after the conflict over Bernard Saisset had caused Boniface to revoke *Etsi de statu* in 1301, Philip continued to impose new taxes on the clergy. A principle had been set: it was the king’s prerogative to

105 Aegidius Romanus, *Tractatus quomodo reges et principes possunt possessiones et bona pecuniaria ecclesiis elargiri*, Opera 1, 37, quoted in Saint-Bonnet, *L'état d'exception* (supra, n. 16), p. 150, n. 6: ‘nisi forte tanta est necessitas et tam evidens quod sine dispensio regni non posset haberi recursus ad capud ecclesie’.

106 The fact that in later sources the adjective *magna* is often added to *necessitas* – to emphasize that not every necessity justifies derogation from the laws, but only genuine threats to the state – may be interpreted as a response to the normalization of emergency powers. For instance, the 15th-century canonist Panormitanus emphasizes the church’s privilege of exemption from lay taxation which may not be invoked ‘in case of a great necessity of the state [*in casu magne necessitatis rei publicae*]’: Panormitanus, *Prima pars abbatis super decretalium*, Lyon 1509–1510, *De cons. quant.*, fol. 47.

107 Saint-Bonnet, *L'état d'exception* (supra, n. 16), p. 153, n. 1.

108 J.H. Denton, *Taxation and the conflict between Philip the Fair and Boniface VIII*, French history, 11, 3 (1997), p. 249.

proclaim the 'necessary defense of the realm', and, if he did so, the clergy was bound to aid in defense by contributing to the royal treasury<sup>109</sup>.

The frequent appeal to public necessity not only transformed the relations between secular government and the church (as the example of lay taxation of the clergy illustrates), it also contributed to a different conception of the state and government itself. More particularly, the appeal to public necessity served to justify the royal government's increasing legislative activity. This was recognized by Beaumanoir, who related the notion of the 'necessary defense of the realm' to the idea that the king could make new statutes for the common welfare. For instance, 'to defend his land', the king could issue a law ordering all men to provide themselves with arms and serve in the royal army<sup>110</sup>. Beaumanoir expressed what was in fact becoming regular governmental practice. Under Philip the Fair, for instance, legislative activity increased dramatically. The appeal to 'necessary defense' served to justify a large number of new royal ordinances dealing with the 'prohibition and regulation of exports, debasement of the currency, interference with baronial rights of coinage, prohibition of tournaments and duels, setting a royal official as warden over the subjects of a peer of France, forbidding subjects of the count of Flanders to take part in wars in the Empire – all were justified by the need to defend the kingdom'<sup>111</sup>. As these examples suggest, the plea to public necessity served to expand the state's legislative competences to new domains that were previously believed to be far beyond the king's powers, including financial and economic regulation and, more generally, everything that was believed to affect the public safety.

In sum, in the course of the 13th and 14th centuries, the German emperor and kings of France and England succeeded in gradually transforming their extra-ordinary emergency powers into regular competences, including the right to impose annual taxation and to make new statutes for the common profit of the realm. By appealing to public necessity these rulers succeeded in redefining their position as the highest governing authorities, effectively turning local authorities and the clergy into their 'subjects'. If there was a danger to the public safety, no one, not even the clergy, could claim special privileges or immunities. Instead, all were required to contribute their share in meeting the

109 J.R. Strayer, *Defense of the realm and royal power in France*, in: Studi in onore di Gino Luzzatto, ed. A. Passerini, Milan 1950, vol. 1, p. 290. This principle was in effect accepted by Boniface's successor, Benedict IX, who conceded that the clergy could voluntarily grant subsidies to the king in cases of imminent necessity without papal authorization. Cf. Denton, *Taxation* (*supra*, n. 108), p. 256.

110 Beaumanoir, *Coutumes de Beauvaisis* (*supra*, n. 43), 49, 1510.

111 Strayer, *Defense of the realm* (*supra*, n. 109), p. 294–295.

necessity. To make quick decision and consent possible, consultation of those affected was limited to the amount of tax demanded, and the clergy could be taxed even without papal authorization. These gradual (and largely implicit) constitutional changes – the introduction of general and annual taxation, the expansion of royal legislation, the limitation of consent, and the changing relations between the king and his ‘subjects’ – all depended on a different understanding of necessity: as the focus shifted from the *actual* necessities to *habitual* administrative needs, the king’s extra-ordinary emergency powers were gradually transformed into regular powers. Thus, the notion of a ‘perpetual necessity’ was invented to justify that the king could impose annual taxation and take all measures he deemed necessary to protect the public safety.

### Conclusion

In this paper, I examined late medieval theories and practices of emergency powers. More particularly, my aim was to analyze the relation between emergency powers and constitutional change. As we have seen, in the 13th and 14th centuries, the frequent use of emergency powers contributed to the emergence of a more centralized government that expanded its legislative and fiscal competences at the expense of local authorities and the church. As I have tried to demonstrate, it was essentially the normalization of emergency powers that made this transition towards a more centralized government possible. While emergency powers had formerly been limited to exceptional cases of war and rebellion, they were increasingly used outside the context of direct military threats. Thus, rulers appealed to public necessity to expand their legislative activities to new domains that were previously believed to be beyond royal power, including economic regulation and public security. Moreover, by claiming a permanent need of public defense, they could legitimize the transition towards annual taxation, thereby providing their governments with a regular income that enabled them to finance their expanding administrative needs. However, the question remains how these rulers succeeded in normalizing their emergency powers and turning them into new fiscal and legislative competences, in spite of the belief that these powers were inherently extra-ordinary and exceptional, and limited by law.

Before turning to this question let me recapitulate some of the findings of this article. I began by giving an account of the legal theories of emergency powers that were developed from the 12th century on. As we have seen, medieval lawyers adopted the principle from the canon law that ‘necessity has no

law' – a principle that had been codified by Gratian in 1140 – to argue that the governing authorities could derogate from the laws in cases of 'supreme necessity'. However, for medieval lawyers, this right to derogate from the laws was not a right to act extra-legally or arbitrarily. Instead, they held that the necessity was governed by a *ius speciale*, a temporary law of exception. Thus, Aquinas argued that there were legal limitations to the prince's emergency powers that derived from the law of nature. Under normal circumstances, the laws were believed to contribute to the public safety and the preservation of the community, in which the man could realize his natural potential for a social life. However, in times of necessity, the laws could temporarily become obstacles to quick and effective emergency responses. Hence, in 'supreme necessities', when the community was imperiled, the prince was temporarily allowed to derogate from the laws to protect the public safety and preserve the community. On the other hand, if a 'supreme necessity' was lacking and the prince used his emergency powers to promote his own private interests, he acted illegally. If he did so consciously, he was accused of violating his faith, his *fides*, and his subjects were no longer required to obey him. On Aquinas's view, then, there was a thin line separating legal uses of emergency powers – exemptions from positive law that were dictated by the law of nature – from illegal acts of violence.

From the 13th century on, lawyers and writers of political treatises used these ideas to develop a specific set of criteria to assess the legality of emergency powers. They argued that emergency powers could only be lawful if there was a *justa causa*, a legal ground justifying these powers. First of all, to qualify as legal *causa*, the necessity had to be 'public'. For instance, emergency taxation was considered to be lawful only to the extent that it was necessary for protecting the *public* safety; it was thus more than a sanction for self-protection. Secondly, to justify derogation, the necessity had to be 'urgent' or 'imminent'. For instance, emergency taxation of the clergy without prior papal approval was allowed only in cases of 'imminent necessity'; otherwise it was considered to be 'contrary to the common canon and civil law'. Thirdly, the necessity had to be 'evident', that is, beyond doubt and universally acknowledged. For instance, emergency taxation could only be imposed in cases of 'evident necessity of defense'; by contrast, if it served to finance offensive wars abroad, it was considered illegal and generally rejected. Finally, applying a principle adopted from Aristotelian philosophy, these lawyers argued that emergency powers could not extend beyond their *causa*, such that if the necessity ceased, the emergency measures had to cease as well. Thus, a ruler who had imposed emergency taxation on his subjects, had to abolish these taxes as

soon as the necessity ceased, and he was even required to pay back any taxes he had received in excess of the needs of defense.

However, as we have seen, in the course of the 13th and 14th centuries, despite these lawyers' emphasis on the legality and exceptionality of emergency powers, the German emperor and English and French kings succeeded in gradually transforming their emergency powers into regular competences, thus turning the exception into the rule. This normalization of emergency powers contributed to the emergence of a more centralized government that claimed a superior right to protect the public safety. Thus, royal governments appealed to the 'necessary defense of the realm' to claim that they could make new statutes, even if they violated ordinary usage. This enabled them to gradually transform their relations to other authorities, including local authorities and the church, whose rights and privileges were forced to yield to the king's superior right to protect the realm. The notion of 'necessary defense' thus served to justify a dramatic increase of royal legislation, for instance, regulating trade, interfering with baronial rights of coinage, prohibiting public uses of arms, and even replacing local authorities with royal officials. As we have seen, these changes were justified by a new understanding of necessity: the criteria of 'supreme', 'urgent', and 'evident' necessity were silently dropped and replaced by the notion of a 'perpetual necessity'. Claiming that the necessity of defense never ceased – that there was always a need for military preparation – these rulers justified all kinds of preventive measures, including the right to impose annual taxation and to make new statutes, which they deemed necessary for the public safety.

In explaining this normalization of emergency powers, three factors appear to be decisive. First, as we have seen, by claiming a superior right to defend the realm, the governing authorities could override appeals to special privileges and immunities. More particularly, they could reduce the influence of other authorities by claiming an exclusive right to judge what constituted a public necessity, thus limiting consent to the scope of the proposed emergency measures. Secondly, as the focus shifted from *actual* necessities to prevention and preparation for possible *future* necessities, emergency powers could be more frequently used and eventually turned into regular competences. It was thus claimed that there was always a need for public defense – a claim which served, among other things, to justify annual taxation. Finally, the appeal to public necessity appears to have been increasingly identified with more general appeals to 'public utility' and the 'common welfare'. Thus, in times of war, the rulers were believed to be no longer bound by custom, but authorized to make 'new establishments for the common profit of the realm'. This enabled them to expand their legislative activities to new domains, which were only

loosely related to what had previously been regarded as the 'evident necessity of defense'. In the end, it is most likely that it was a combination of these factors – the ruler's exclusive right to judge what constituted a public necessity, the focus on prevention and preparation for *future* necessities, and the identification of necessity with more general claims to 'public utility' and the 'common welfare' – which explains how emergency powers could be gradually transformed into regular competences, becoming a source of constitutional renewal.