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Internal State of Exception and the Puerto Rican Economic and Financial Crisis

Abstract:

This paper analyzes the legal and political policies employed by the Puerto Rican government to address the economic and financial crisis that has been affecting Puerto Rico since 2005. This analysis is built upon the concept of the internal state of exception; a concept that aims to provide a better understanding of the correlation between neoliberalism, colonialism, economy, and law. This paper proposes: 1) a depiction of the state of exception and its uses as an economic and financial crisis management dispositive; 2) an exposition of the Puerto Rican government's uses of the internal state of exception as a dispositive to tackle the economic and financial crisis between 2005 and 2016; and 3) an analysis of the uses of the internal state of exception by the Puerto Rican government in 2017. Thus, this paper reinterprets the uses of the state of exception as a strategy to manage economic and fiscal crises from a colonial and global south experience and proposes a new understanding of this legal and political paradigm.

Recourse by states to the frames of emergency and exception has never been limited solely to the sphere of “national security”. It has been integral to economic law and policy in consolidating hegemonic financial interests, and has been invoked in order to



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salvage finance capitalism from the wreckage of its own crisis on more than one occasion (Reynolds, 2012:86).

[...] the austerity drive is the movement whereby capital secures its speculative investments and valorizes its fictions (Konings, 2018:13).

Introduction

On October 17, 2017, twelve years after the economic and financial crisis began, and less than a month after hurricanes Irma and María struck Puerto Rico (PR), Puerto Rican governor Ricardo Rosselló-Nevarés sent a bill to the Legislative Assembly entitled “Bill to Create the New Government of Puerto Rico”¹. This bill aimed to allow the governor to restructure the executive branch without consulting the legislative branch. Thus, the bill was intended as an emergency measure that would allow the governor to exercise his executive law-making authority to deal with the economic and financial crisis, as well as with the aftermath of hurricanes Irma and María. Additionally, this delegation of power would last ten-years, and it would be implemented not just to restructure the executive branch, but also to further externalize and privatize services traditionally provided by the local government. On December 2017, after several amendments and a bitter debate between the executive and legislative branch, the bill became Law 122 of 2017.

¹ The bill was presented in the House of Representative as the PC 1275 and in the Senate as PS 653.



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Simultaneously to the discussion of the bill at the Legislative Assembly, governor Rosselló issued two executive orders (OE-2017-65 and OE-2017-69) with the intention of creating the Central Recovery and Reconstruction Office of Puerto Rico² (henceforth CRRO). This new office was created under the guise of the state of emergency declared as a result of hurricane María³, and was placed under the umbrella of the recently created Puerto Rico Public-Private Partnership Agency⁴. This new office would be in charge of administering emergency funds and recovery efforts, operating as an emergency manager and facilitating disaster capitalism⁵ as colonial theft.

The enactment of Law 122 and the creation of CRRO portray the current normalization of what Alford (2017) has called the overbroad executive authority. That is, as a result of the economic and financial crisis and hurricane Maria, PR is witnessing the normalization of the exercise of unchecked executive power under the guise of the

² Two of the main arguments to create this new office were: 1) to organize the recovery efforts under one agency; and 2) to guarantee transparency on the spending of federal funds, especially after the numerous cases of corruption or mismanagement of public funds in the aftermath of Hurricane Maria (see as an example the \$300 million contract to Whitefish). For more details, see: <https://www.elnuevodia.com/english/english/nota/centralrecoveryandreconstructionofficeofpuertorico-2370014/>

³ This new office was also created under the legitimation of Law 221 of 1999 “the Puerto Rican Emergency Management Agency Act”; the Act 5 of 2017 “Puerto Rico Financial Emergency and Fiscal Responsibility Act; and under the executive orders: OE-2017-47 and OE-2017-53

⁴ This agency was first created in 2009, under Fortuño’s administration under Law 29 of 2009. On January 2017, the Rosselló administration passed Law 1 of 2017 with the intention to amend Law 29 of 2009. For an analysis of the Public Private Partnerships trend and its implications in the neoliberal understanding of the state, see Grimsey and Lewis (2005).

⁵ For an in-depth analysis of disaster capitalism and the role of emergency administrators, see the work of Klein (2007) and Loewenstein (2017).



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emergency. This paper aims to shed light on the socio-legal and politico-economic processes that preceded the approval of Law 122, as well as its future implications. Therefore, this paper's aims are not to defend the colonial state of PR and its anti-democratic structures –established in 1950 under the US Public Law 600 and the Constitution of PR (1952)–, but rather, to depict the neoliberal rationality⁶ and criminogenic⁷ dimension behind the uses of the state of exception as a dispositive to administer and tackle the current crisis.

A telling example of such neoliberal rationality is that the language implemented in Law 122 and the CRRO is deeply embedded in neoliberal ideology and the understanding of the role of the state⁸. As a result, Law 122 of 2017 and CRRO normalized and legalized the exceptional solutions implemented by local governments to deal with the crisis, such as: structural adjustment, budgetary cuts, austerity measures, privatization of public assets, and the crafting of economic discourses that give precedence to paying the debt before any other aspect of public life. In short, the

⁶ For an analysis of the concept of neoliberal rationality, see Brown (2015).

⁷ My contention is that the CRRO as a relief and recovery administration would create the conditions for a series of State-Corporate Crimes (especially corruption, collusion and fraud) given the lack of transparency with which contracts will be awarded (i.e. Whitefish among others).

⁸ Holborow (2007) has shown how neoliberal ideology and language have radically influenced our current understanding of the state and of the production. A similar analysis can be found in Jason Hirthler's piece, The language of neoliberalism: <https://www.counterpunch.org/2013/10/25/the-language-of-neoliberalism/>



law is facilitating the state of exception's normalization and the legitimation of the violence of austerity⁹.

Moreover, the process of redefinition of the governmental structures, the suspension of the rule of law, and the weakening of the internal democracy take place at the same time that Puerto Ricans are deprived of the most basic services, when the shock and trauma generated by hurricane María are still vivid, and when the violence of austerity has been displacing people from the archipelago¹⁰. As Klein (2007) has pointed out, every emergency is the right time for the government to exploit fear, disorientation and trauma in order to enhance its power. Emergency situations thus provide the conditions for the exploitation of fear as a biopolitical tool, resulting in the production of broken subjectivities, or what Agamben (1998) calls *bare life*¹¹.

However, all of the previous processes do not take place in a vacuum; Puerto Rican economic, political and legal development has been based on a colonial state of exception (Atilas, 2016). That is, the normalization of the exceptionality and expansion of executive power in PR takes place as a result of the support and control of the US

⁹ I am using the concept of the violence of austerity as developed by Cooper and Whyte (2017).

¹⁰ In May 29, 2018, a study on the mortality in PR after hurricane María was published. It argued that over 4,500 or more people died as result of the negligence of both the local and the federal governments (Kishore et al 2018).

¹¹ Even though studying the biopolitical articulations of fear and trauma when considering the effects of the state of exception is of great importance, given the space limitations, this paper focuses only on the articulation of power, rather than its effects. That is, I will be exploring the internal state of exception using a top-down approach. For an approach from below, see Atilas (2016).



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colonial government and of the Financial Oversight and Control Board (henceforth Control Board), appointed by President Obama under the Public Law 114-187 of 2016 “Puerto Rican Oversight, Management and Economic Stability Act” (henceforth PROMESA).

Scholars, such as Ong (2006), Reynolds (2012) and Whyte (2010), have shown that a common practice in current neoliberal politics is using the state of exception as a dispositive to deal with economic crises. Following these scholars, this paper aims to develop an interpretation of the neoliberal uses of the state of exception as a legal frame to legitimate corruption and fraud. That is, what Mattei (2010) has called emergency-based predatory capitalism. My contention is that the state of exception has not only been used to address economic crises, but also to constitute the legal framework that enables corruption. However, as I have shown elsewhere, in PR¹², a double exceptionality operates: a colonial state of exception, which refers to the US’s uses of this paradigm as a colonial domination technique (exemplified by the Control Board, PROMESA and the legal-colonial design of PR); and an internal state of exception, which refers to the uses of this paradigm by the Puerto Rican government as a dispositive to tackle economic and financial crises (exemplified by Law 122 of 2017 and CRRO). In previous work, I have developed the concepts of the colonial state of

¹² See Atilas (2016).



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exception and the internal state of exception (Atilés, 2016); therefore, this paper aims to focus on the uses of the internal state of exception by PR's local government in 2017. My contention is that by focusing on Rosselló's administration and its uses of the internal state of exception, this paper can shed light on colonial-neoliberalism, the political, socio-legal and economic transformations PR is experiencing, and the normalization of exceptional measures *as* government policies.

The paper is divided into three sections: (1) an overview of the paradigm of the state of exception and its uses as an economic and fiscal crisis management dispositive; (2) an exposition of the Puerto Rican government's uses of the internal state of exception as a dispositive to tackle the economic and financial crisis between 2006 and 2016; (3) and an exposition of the uses of the internal state of exception by Rosselló's administration. That is, this paper discusses the most recent stage in the development of the internal state of exception in PR and the possibility of abandoning exceptionality as a means to deal with economic, financial and humanitarian crises.

1. Economic-fiscal state of emergency as a legal frame for corruption

In liberal democracies, the state of exception has been traditionally understood as the suspension of the rule of law to deal with a situation that exceeds the "normal" function of law and democracy. Hence, the uses of the state of exception can be found under



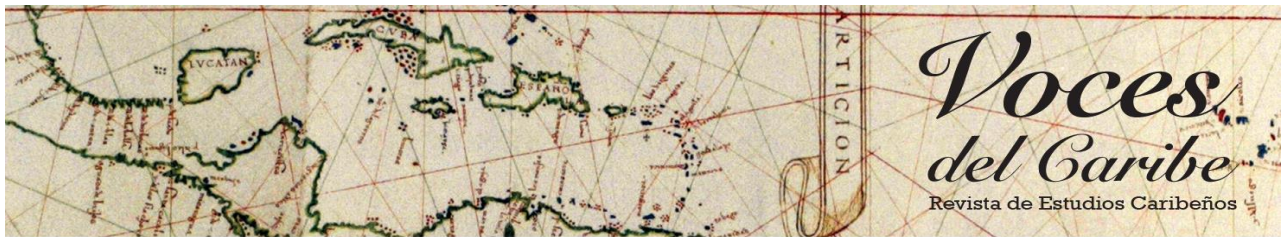
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three circumstances: threats to internal security by scenarios of political violence; natural disasters; and economic crises. All of these phenomena have required governments to take on special powers that allow them to effectively respond to periods of crisis. In short, the implementation of the state of exception takes place when the Sovereign considers the suspension of the rule of law as necessary (Schmitt 2005). As Mattei has shown:

In a state of emergency, ordinary political life is suspended. To exit from a state of emergency by curing its causes or addressing its consequences is the “target” constructed as being in the interest of everybody and as the end that everybody must pursue. In a state of emergency, no critique is acceptable, and there is no place for a loyal opposition. Everybody must be on board in pursuit of the target. The state of emergency thus is a desirable condition for power. It is a highly effective way to avoid opposition— perhaps the only effective way in a pluralist political scenario such as a parliamentary democracy or the unstructured global political arena (Mattei, 2010: 89).

Agamben (2005) shows that the history of the state of exception is the history of its progressive separation from periods of crises in order to become the administrative paradigm of contemporary democracies. Furthermore, Agamben (1998, 2005) argues that from WWI onward, the state of exception has become the norm, leaving behind its



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provisional and temporary character. For Agamben (2005), this separation from its earliest definition triggers the technification of governmental power and the depoliticization of politics. In short, what Agamben's (2005) analysis shows is that the state of exception is not exceptional or reactionary to an emergency situation, but rather, it has become, particularly in the post 9/11 era, the foundation of contemporary liberal democracies. Therefore, the state of exception has become the permanent state. To be sure, the state of exception is no longer a paradigm that allows governments to react to emergency situations, but rather, it is the form-of-government of contemporary democracies.

This argument can be found in the implementation of the state of exception in colonial contexts, where the dispositive makes colonial domination possible and gives legal legitimation to such domination (Atilas, 2016). Hence, the state of exception is the constitutive legal dispositive of colonialism. Mbembe (2003) has shown that colonial states have used the state of exception as a dispositive of colonial rule. Similarly, Morton (2013) has shown that the first manifestation of the state of exception can be found in the colonies and not necessarily in global north states. As Reynolds (2012: 88-89) suggest,



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The state of emergency has its colonial origins. The colonial account of emergency cannot be written without reference to capitalist expansion [...] The use of emergency measures as a form of class repression evolved in concert with colonial expansion, in the context of the broader, mutually interactive relationship between capitalism and colonialism. Marx and Engels show this relationship to be an organic one, in which colonialism is an outgrowth of the wider processes of capitalist transformation of European society.

Put simply, in the colonies the state of exception is the norm. Elsewhere¹³, I have argued that the US implemented a colonial state of exception in PR as a dispositive for the administration of the colonial territory, as well as for creating the conditions for capitalist and imperialist domination. But it is precisely this dimension of the state of exception that has been scarcely developed in political-philosophy, socio-legal and political economy traditions. One of the earliest scholars who studied this dimension was Carl Schmitt (2006), demonstrating how the uses of presidential powers as a means to deal with capitalist-economic crises were reshaping liberal democracies. Schmitt (2006) named this process the “economic-financial state of emergency”. As Reynolds (2012: 97) points out,

¹³ For a development of the concept, see Atilés (2012, 2016, and 2018 Forthcoming).



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Schmitt, indeed, did accurately highlight the tendency of liberal discourses post-First World War to equate economic and financial crises with the threats posed by military attack or armed rebellion. In this conflation, security of capital becomes entwined with the state of emergency in the same manner as national security. Governmental assumption of emergency powers to pursue pervasive economic measures is justified on the same premise of necessity. This engenders the class component of the story of emergency.

As this paper shows, the economic-financial state of emergency has become the norm in PR, institutionalizing the uses of warlike metaphors to refer to the economic crisis. Additionally, the implementation of the economic-financial state of emergency in PR has played a central role in guaranteeing colonial and class interests, and therefore, it constitutes the legal framework for systemic corruption. That is, Schmitt's foresight in identifying the conflation between securing capital and national security has become the norm in PR.

Agamben (2005), following Schmitt, suggests that the state of exception has been used as a political and legal strategy to tackle periods of economic crisis. He suggests that the state of exception was used to deal with the regulation of inflation in France and Germany and the US's Great Depression, among other global north experiences. Additionally, I have identified three important works that delineate the



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relationship between exceptionality, neoliberalism, economic crises and the concomitant normalization of corruption. Firstly, Ong (2006) has shown that neoliberalism works through exceptional laws to facilitate the control and “optimization” of economic development. Secondly, Whyte (2010) has analyzed the correlation between the state of exception, plunder, corruption and neo-colonial economy in the context of the Iraq invasion. In his analysis, Whyte (2010) has shown the uses of the state of exception to facilitate the establishment of a capitalist economy based on foreign corporations.

Thirdly, Reynolds (2012) argues that the development of the state of exception in the colonies cannot be understood without considering its direct relation to the capitalist economy. As Reynolds reminds us, “[e]mergency intervention in the economy by the Western state has long been common in contexts of war or insurrection, and in contexts of race and class domination in the colonies” (Reynolds, 2012: 97). That is, the uses of the state of exception as a dispositive to manage economic and financial crises have become the norm after the meltdown of 2007. This technique has been implemented by governments and international organizations, such as FMI and the Troika in Greece, Ireland, Portugal, Italy and Spain¹⁴. The arguments heralded by

¹⁴ We should be reminded that the uses of the state of exception to “regulate” the economic crises that global north states are now facing, were first tested in the global south by the IMF and the World Bank. From Jamaica, to Argentina and Indonesia, the state of exception was a key dispositive in securing capital and corporate power, by creating the conditions for plunder and theft.



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the crisis managers have been the same: given the economic and financial crises, the debt and the deficit, the governments have to implement austerity measures and budgetary cuts to save the economy and the state. However, every time such policies are implemented under the legitimation of the state of exception, inequality increases; appropriation, theft and corruption become normalized; and the violence of austerity becomes a general phenomenon.

The US imposition of PROMESA and the Control Board in PR is concomitant with these international practices and techniques of crisis management and governmentality. Likewise, at the local level, this has been the case with the implementation of the internal state of exception by the local government as a dispositive to protect colonial-capitalism. In what follows, I analyze the way in which the internal state of exception became the crisis management dispositive, and, therefore, the colonial-neoliberal form-of-government.

2. Internal State of Exception as economic and financial crisis management dispositive

The last decade of Puerto Rican history has been characterized by: 1) the intensification of neoliberal policies, such as the reduction of administrative and regulatory structures, privatization of public services, and implementation of austerity measures (Ayala and



Bernabe, 2011); 2) the financialization¹⁵ of the colonial economy and the exponential rise of the public debt¹⁶; 3) the ever-increasing accumulation of power by the local executive branch and the corresponding weakening of the republican structure and of constitutional and civil rights (this is precisely what Agamben (2005) has described as the practices that have normalized the state of exception in western democracies); and, 4) as a result of the concentration of power by the executive branch, the normalization of authoritarian and antidemocratic discourses and state-corporate criminality. These four aspects have been possible through systematic uses of emergency declarations (mainly executive orders) and through emergency laws. Thus, the executive orders, the emergency legislation, and the state of exception have served as legal frameworks for the systematic appropriation and redistribution of wealth from the working and poor Puerto Rican classes to the US colonial and local ruling classes. As Mattei suggests:

[...] the state of emergency is a stabilizing political strategy, a true foundation of “predatory capitalism”, which is how I define the realized form of the current system of global production. A state of emergency thus serves as false consciousness. A thick ideological layer constructs as in the interest of everybody what is in fact a project of domination of the powerful few over the powerless

¹⁵ For an analysis of how the processes of financializing the economy have led to a systemic crisis, see the work of Krippner (2011), Langley (2008) and Lapavistas (2013).

¹⁶ For an exposition of the rise of the public debt, see Merling et al. (2017).



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many. In this project, the law serves a double purpose as at the same time a coercive and an ideological apparatus of domination—a stick and a carrot (Mattei, 2010:89-90).

In this section, I will briefly summarize the uses of the internal state of exception from 2006 to 2016. This overview of the last decade aims to shed light on the development of the internal state of exception as a crisis management dispositive and as a legal framework for the legitimation of corruption in the colonial context of PR. The local government began to use the internal state of exception not just to control and criminalize anticolonial, student, environmental and other social movements, as it has since 1952, when the Commonwealth of PR was created¹⁷, but also to regulate and administrate the economic and financial crisis and to defend the economic interests of the ruling class.

Governor Aníbal Acevedo Vilá's administration (PPD¹⁸) was the first to incorporate the state of exception as an economic and financial crisis management dispositive. In May 2006, Acevedo Vilá decreed a partial close of the government, given that it had no money to pay the employee payroll. The partial close was decreed

¹⁷ For an analysis of the uses of the internal state of exception as a dispositive of criminalization, see Atilas (2012, 2013, 2014).

¹⁸ PPD stands for the Spanish acronym: Democratic Popular Party.



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through the executive order OE-10-2006. Later, using the economic crisis as subterfuge, Acevedo Vilá's administration created the Puerto Rican Sales Tax Financing Corporation (COFINA)¹⁹, which was key in the rapid rise of the levels of indebtedness, the financialization of the colonial economy, and the generalization of the crisis. Currently, the constitutionality of the bonds issued by COFINA is being questioned by a group of bondholders (in the bankruptcy case taking place in the United States District Court for the District of Puerto Rico, under Title III of PROMESA²⁰), who claim these bonds have no legal standing²¹. This dispute shows a key aspect of the argument presented here: the state of exception serves as a legal framework that enables corruption and fraud.

In January 2009, Luis Fortuño (PNP²²) took office, continuing to implement the colonial-neoliberal uses of the internal state of exception. Fortuño's administration assumed that to maintain a good credit rating, the state and society had to move to the rhythm of transnational investment and credit-rating agencies. Therefore, Fortuño's administration developed the internal state of exception through a series of executive

¹⁹ COFINA was established under the Law 291 of 2016. It is interesting to note that the law was first called "Urgent Fund Act", which reveals the emergency nature of the legislation.

²⁰ For all of the information about the bankruptcy case, see: <https://www.prd.uscourts.gov/promesa/select-case-information>.

²¹ For more information on the COFINA bankruptcy case, see: <https://www.prd.uscourts.gov/promesa/select-case-information>

²² PNP stands for the Spanish acronym: Partido Nuevo Progresista.



orders²³. The first executive orders were the declaration of the state of fiscal emergency (OE-2009-01 and OE-2009-004 of January 8, 2009). Later, this declaration was legitimated by Law 7 of March 9, 2009, entitled: “Special Act to Declare a State of Fiscal Emergency and to Establish a Comprehensive Financial Stabilization Plan to Salvage the Credit of Puerto Rico”. The main arguments for enacting Law 7 and the state of fiscal emergency were that PR was facing a serious economic and fiscal crisis that required multiple austerity measures, budgetary cuts and the dismissal of public employees. By the same token, in February 3, 2010, the Puerto Rican Supreme Court ratified the constitutionality of Law 7 and of the declaration of the state of fiscal emergency in the case *Olga Domínguez Castro, et al. v. Puerto Rico, et al.* The ruling argued that, given the serious crisis, Law 7 and the state of fiscal emergency constituted reasonable actions to save the solvency of the Puerto Rican treasury.

However, Law 7 did more than just provide the legal ground for Fortuño’s austerity measures. It also cutback regulations that protected taxpayers against predatory financial practices. As Bhatti and Sloan (2016:4) have shown:

Prior to the passage of Public Law 7, the Laws of Puerto Rico Annotated (LPRA) prohibited the uses of refunding bonds to create new debt. The Commonwealth

²³ However, Fortuño promulgated nine other executive orders concerning the economic crisis, which are beyond the scope of this paper.



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could only use refunding bonds to refinance the outstanding principal, premium, interest, issuance fees, and other related payments for existing debt, and it was only permitted to do so if it would save money. Furthermore, Puerto Rico law limited issuance fees or refunding bonds to 2% of bond principal. Public law 7 did away with these provisions²⁴.

Thus, in the name of bonds, good credit, fiscal stability, and market and local elite interests, Fortuño's administration undertook a violent campaign of austerity with the following effects: (1) the dismissal of 20,000 public employees; (2) the reduction of the budget of the University of Puerto Rico; (3) the privatization of public services; (4) the deregulation of finances; and 5) the development of a strategy for economic growth, called Public-Private Partnerships. All of these policies were followed by an intense campaign of political violence and the criminalization of social protest.

The second constitutive dimension of the internal state of exception under Fortuño's administration was the declaration of the "state of emergency on energy",²⁵ which was made under executive order OE-2010-34. This executive order²⁶ demarcated

²⁴ Also, with the Law 7, refunding bonds were no longer required to provide savings for PR. Furthermore, the law allowed the PR government to issue refunding bonds to make interest payments on other bonds without paying down the principal.

²⁵ The declaration of the state of emergency on energy was in tune with the state of fiscal emergency declared in 2009. Both declarations revealed the administration's support for an authoritarian method of government, which does not follow democratic patterns of governability.

²⁶ This was established by Law 32 of March 14, 2011, which amended Article 12 of Law 76 of May 5, 2000.



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a new sphere of legal-political action under the state of exception; it was now applied for energy and infrastructural purposes, problems that did not directly threaten the colonial administrative structure. Fortuño's administration lost the 2012 elections²⁷, paving the way for a new PPD administration under the leadership of Alejandro García Padilla.

García Padilla's PPD administration began under an intense economic crisis, for which it had not developed an adequate economic and fiscal policy. Hence, this administration implemented the neoliberal and exceptional practices that were developed over the last decade. An example of this is that, on January 3, 2013, just two days after taking office, García Padilla's administration issued the executive order OE-2013-03 in order to control the expenditure of public funds, establishing a fiscal policy to control and reduce administrative expenditure. Subsequently, García Padilla's administration issued the executive order OE-2013-14, which allowed PR's Office of Management and Budget to impose a series of measures and fiscal adjustments to control expenditures and to ensure that the public administration did not run out of funds.

²⁷ It is important to note that on December 18, 2012, before Fortuño left office, he promulgated his last executive order: OE-2012-74, which was intended to derogate all previous executive orders.



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As PR's fiscal and economic crisis intensified in 2014, the credit agencies Moody's, Fitch Rating, and Standard & Poor's reduced the credit ratings of PR's government and its public corporations to the lowest possible level. This reduction brought about the radicalization of the violence of austerity. Hence, the administration approved a new fiscal stability law (Law 66 of June 17, 2014²⁸), with which the state of fiscal emergency was officially declared. Subsequently, Law 71 of June 28, 2014, entitled "Puerto Rico Public Corporation Debt Enforcement and Recovery Act", was passed. The law intended to address the exclusion of the Puerto Rican government and its corporations from Chapter 9 of the federal bankruptcy code²⁹. In 1984, the US government, as part of the articulation of the colonial state of exception in the economic sphere, excluded PR and the rest of its unincorporated territories from the applicability of the aforementioned chapter. The exclusion of PR thrusts it into a legal vacuum that makes it impossible to restructure its public debt. Consequently, the government of PR attempted to address this exclusion from the federal bankruptcy code by legislating a local bankruptcy law.

In addition to the declaration of the state of fiscal emergency, and the approval of the "local bankruptcy law", García Padilla's administration and PR's Legislature,

²⁸ Special Law of Fiscal and Operational Sustainability of the Government of the Commonwealth of Puerto Rico.

²⁹ The federal bankruptcy law is a statutory law covered by Title 11 of the United States Code.



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with the intention of “solving” the economic and fiscal crisis, passed the following laws: a reform of public employee retirement; the imposition of two special taxes on oil; budget cuts to all public agencies; the approval of sales taxes; and the privatization of public infrastructures and corporations, such as airports and highways, through the model of public-private alliances. Alongside these laws, in 2015, PR’s government hired Dr. Anne O. Krueger (former director of the IMF) to conduct an analysis of the Puerto Rican crisis. The resulting report (the *Krueger Report*³⁰) had two important effects: it backed up the neoliberal austerity measures taken by García Padilla’s administration and asserted that PR’s public debt was unsustainable and unpayable. Hence, the report’s recommendation was to restructure and renegotiate the debt. In addition, the report emphasizes that solutions to the crisis cannot only focus on structural adjustments, but on the implementation of new economic development policies as well³¹.

Later, the government issued the executive order OE-2015-22, which intended to implement the *Krueger Report's* recommendations. Also, the Working Group for

³⁰ Report entitled: “Puerto Rico: A Way Forward”. Available in: <http://www.bgfpr.com/documents/puertoricoawayforward.pdf>

³¹ It is important to note that Krueger proposed traditional neoliberal economic growth policies. That is, reducing the minimum wage, labor reform, tax reforms, among others. Recently, Krueger (2017) published a short paper in which she reiterated her analysis and the need for the imposition of more neoliberal economic policies.



Fiscal and Economic Recovery of Puerto Rico was created³². This working group was assigned the drafting of a fiscal and economic adjustment plan that should present a series of recommendations to tackle the economic and fiscal crisis. The plan was published on September 9, 2015, ratifying the neoliberal exceptional policies that the administration had been developing over the past two years³³.

Continuing with exceptional policies, on April 6, 2016, the Puerto Rican Legislature passed Law 21 of 2016, known as the "Puerto Rico Emergency Moratorium and Financial Rehabilitation Act"³⁴. With Law 21, the Legislature gave the governor the power to declare the non-payment of the Puerto Rican public debt. In this way, the last legislation of the internal state of exception in PR under Garcia's administration was approved. Additionally, this law created the Financial Advisory Authority and Fiscal Agency of PR, which was structured as a public corporation of PR's government. That is, an agency was created to articulate the exceptional policies issued by the executive branch, and with this, PR's Legislature renounced its constitutional power to be a counterbalance to the executive power. As Agamben (2005) has shown, this is an example of how the state of exception operates.

³² The creation of the working group was later legislated through Act 208 of December 8, 2015, also known as "Puerto Rico Fiscal Oversight and Economic Recovery Organic Act".

³³ Report entitled: "Puerto Rico Fiscal and Economic Growth Plan". <http://www.bgfpr.com/documents/PuertoRicoFiscalandEconomicGrowthPlan9.9.15.pdf>

³⁴ Act available in: <http://www.gdb-pur.com/spa/documents/ley-21-06-Abr-2016.pdf>



Finally, the approval of Law 21 gave way to the declaration of seven executive orders in 2016. That is, all executive orders related to the economic and fiscal crisis, issued in 2016, were declared under the protection of this Law³⁵. This is fundamental for the understanding of the argument hitherto presented, since these executive orders declared the state of fiscal emergency. Thus, it can be argued that all government public policies regarding the economic and fiscal crisis were based on the deployment of the internal state of exception. In short, García Padilla's administration definitively normalized the use of exceptionality.

3. Rosselló's Internal State of Exception: Privatization, Austerity and Corruption

Ricardo Rosselló³⁶ took office on January 2017, only months after Congress passed and Obama signed PROMESA, after the imposition of the Control Board, and after the US Supreme Court ruled on the cases *Puerto Rico v. Sánchez Valle*, and in *Puerto Rico v. Franklin California*³⁷. Thus, in the neoliberal understanding, the emergency conditions were set for the uses of the internal state of exception, since the local and US government's economic policies continued to be insufficient to tackle the economic and

³⁵ OE-2016-10; OE-2016-14; OE-2014-17; OE-2016-26; OE-2016-27; OE-2016-30; OE-2016-31.

³⁶ Ricardo Rosselló is the son of former Governor and colonial neoliberalist boy scout, Pedro Rosselló González. As previously discussed in this paper, Pedro Rosselló was key in the neoliberalization of Puerto Rican economy, and with it, in the exponential increase in the public debt.

³⁷ As pointed out earlier, for the purposes of this paper, I am not including an analysis of these legal developments in my discussion. For a detailed analysis, see Atilas (2016, 2018 forthcoming).



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financial crisis. In that sense, as with previous governors, Rosselló's PNP administration continued the trend of neoliberal austerity measures on the basis of the internal state of exception. However, the current administration has gone further. If García Padilla normalized the internal state of exception, Rosselló radicalized its uses as a colonial-neoliberal dispositive of economic and fiscal crisis management.

In the following section, I will be discussing the development of the internal state of exception by Rosselló's administration during two periods: from January to September 2017 (before hurricane María); and from September 2017 to January 2018 (after hurricane María). This division will shed light on how the internal state of exception has become the definite legal dispositive of colonial-neoliberalism, and with it, especially during the post-María period, I will show how its radicalization has led to the systematization of corruption and fraud.

Before Hurricane María: debt, austerity and exceptionality

In his first days in office, on January 2, 2017, Rosselló issued six executive orders aimed at tackling the economic and financial crisis. In this way, Rosselló became part of the emergency managers and of the tradition of administrating PR's economy through the internal state of exception. In this subsection, I will expose the process that



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led to the radicalization of the uses of the internal state of exception before hurricanes Irma and María struck PR. This overview is important since it allows us to see the differences and similarities with previous administrations.

Firstly, executive order OE-2017-01 declared a state of fiscal emergency and introduced a new set of austerity measures³⁸. At the same time, the legislative branch approved Law 3 of January 23, 2017³⁹ to “Address the Economic, Fiscal and Budgetary Crisis to Guarantee the Functioning of the Government of Puerto Rico”, and Law 5 of January 29, 2017, in which the “Puerto Rico Financial Emergency and Fiscal Responsibility Act” was enacted. While Law 3 created the legal condition for imposing the austerity measures required by the Control Board; Law 5 made a legislative declaration of the state of fiscal emergency, legitimating the measures previously implemented by the governor. That is, while Law 3 provided the legal instruments for the governor to generalize the violence of authority, Law 5 legitimized the internal state of exception as the dispositive of governmentality⁴⁰.

³⁸ It is important to note that the state of fiscal emergency was extended in two more instances: 1) on April 30, 2017, with the executive order OE-2017-31; and 2) on December 28, 2017, with OE-2017-076.

³⁹ This law is particularly problematic, since its first 12 pages (of 31) consist of criticizing the previous administration of the PPD. Contrary to the liberal understanding of law, in this case it is used (in particular, the motive exposition) to openly criticize the opposition party.

⁴⁰ All of this, as portrayed in my analysis, has become a government strategy. That is, every time a new administration takes office, a new set of laws are enacted, and executive orders are issued to guarantee the exceptionality. However, the particularity of this period is that all of these exceptional measures are taking place under the presence of the Control Board. That is, under a colonial state of exception.



Together with the declaration of the state of fiscal emergency and the imposition of a series of structural adjustments, OE-207-05 imposed the policy of zero-based-budgeting⁴¹ for the confection of the budgets of all Departments and Agencies of the executive branch. This new policy aims to render the planning of the expenses of the government more efficient by drastically reducing the operating budget of the different Agencies. Later on, in May 12, Rosselló issued executive order OE-2017-33, in which the austerity measures implemented in the previous executive orders were intensified. Secondly, Rosselló's administration used the executive powers and the internal state of exception to create new and transform Departments to serve economic and financial interests. This is the case of the Puerto Rico Fiscal Agency Financial Advisory Authority (FAFAA)⁴². This agency is in charge of developing and implementing the fiscal plan and the austerity measures that would guarantee the payment of the public debt of PR. Also, FAFAA is in charge of being the intermediary with the Control Board.

Together with the FAFAA, through the executive order OE-2017-02 of January 2, 2017, Rosselló's administration created the Center for Federal Opportunities, with the intention of centralizing and facilitating applications for federal funds and grants. The creation of this office, under the guise of the economic emergency and the need for

⁴¹ On January 7, 2017, Rosselló declared the OE-2007-07, in which the administration added additional measures of fiscal control.

⁴² Created through Law 2 of January 18, 2017.



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funds, shows once again the uses of the executive power to legislate and to create new instrumentalities. Additionally, executive orders OE-2017-11 of January 10, 2017⁴³; OE-2017-14⁴⁴, OE-2017-15⁴⁵, OE-2017-16⁴⁶ of January 24 of 2017; OE-2017-18⁴⁷ of January 30, 2017; and OE-2017-19⁴⁸ of January 31, 2017 deal with the creation and definition of new agencies, positions and governmental instrumentalities. These executive orders are important, because they show the processes of transformation of PR's government, and how, more and more often, the governor used its executive power to create new agencies, without consulting the legislative branch. The general sense emanating from these practices is that the governor sees his political function more as a CEO would, and the PR government as a corporation. Thus, the CEO makes unilateral decisions and only consults the Legislative assembly (the board or the stakeholders) when some key rules have to be changed.

An additional example of this corporate view of the government is the different laws passed in 2017 to modify or eliminate existing rights. Examples of these laws are:

⁴³ Executive order to establish the functions of the Secretary of Public Affairs and Public Policy of the Governor's Office.

⁴⁴ Executive order to establish the Chief Information Officer of the Government of Puerto Rico.

⁴⁵ Executive order to create the Puerto Rico Innovation and Technology Services (PRITS).

⁴⁶ Executive order to create the Governor's Advisory Council on matters of the construction industry and to repeal OE-2014-05.

⁴⁷ Executive Order to modify the Fusion Center of Puerto Rico in compliance with the Reform of the Federal Law of Intelligence and Prevention of Terrorism and to repeal OE-2013-54.

⁴⁸ Executive order to create Chief Administrative and Operating Officer and the Chief Strategic Planning Officer.



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the so called Labor Transformation and Flexibility Act (Law 4 of January 26, 2017), which proposed a reform of the labor law for the private sector; the Administration and Transformation of Human Resources in the Government of Puerto Rico Act (Law 8 of February 4, 2017), which introduces a labor law reform for government employees; the Enterprise Puerto Rico (Law 13 of February 20, 2017), a law aiming to promote economic development and growth; two different laws to encourage private investors to move to PR (Law 45 of July 11, 2018 and Law 46 of July 19, 2018); and two laws to encourage private capital funds to move to the Island (Law 93 of August 8, 2017 and Law 94 of August 8, 2017). It is important to note that almost every law references PROMESA, the Control Board, and the economic and financial crisis as justification. While taking unilateral decisions, the public discourse of Rosselló's administration seems to attempt to excuse himself for the generalization of the violence of austerity and to point exclusively at the US, the Control Board, and previous administrations as those to blame for the suffering of Puerto Ricans.

Thirdly, Rosselló's administration issued executive order OE-2017-03 of January 2, 2017, to declare a state of emergency regarding the infrastructure of PR, and executive order OE-2017-04, to create an office that would be in charge of facilitating



the development of infrastructure projects in PR⁴⁹. That is, through this executive order and through Law 1 of January 11, 2017⁵⁰, Rosselló's administration opened the doors for the competition of Public-Private Partnerships to "rebuild the damaged infrastructure of PR". This executive order is similar to the one issued by Governor Fortuño (OE-2010-34) to declare a state of emergency on energy. That is, under the guise of an emergency, local administrations are using executive orders to assign contracts without abiding to the legal framework and the rule of law⁵¹. This further proves my contention that the internal state of exception serves as a dispositive to legitimate corruption and normalize fraud.

Fourthly, in January 10, 2017, Rosselló issued OE-2017-10, which established a public policy regarding transparency and accessibility for the Departments of the executive branch. It is worth noting that Rosselló was using an executive order to enact a series of public policies to avoid corruption. However, Rosselló was ignoring that, given the antidemocratic nature of executive order, he was trying to introduce "transparency" through the same dispositive that constitutes the legal framework for corruption and state criminality. At the same time Rosselló was promoting

⁴⁹ The name of the office or working group is Interagency Group of Critical Project for the Infrastructure of the 21st century, and it is part of the Office of the Governor.

⁵⁰ Law to emendate the Law 29 of 2009, regulating Public-Private Partnerships.

⁵¹ Later on, governor Rosselló issued OE-2017-38 of June 6, 2017, which renewed the state of emergency regarding infrastructure.



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transparency, he eliminated the “Puerto Rico Commission for Comprehensive Audit of Public Credit⁵²”, previously created by García’s administration. With the elimination of the Commission, Rosselló’s administration showed his connivance regarding financial, economic and political interests, which led PR to its current crisis. Thus, the role of previous colonial administrations, the role of banks, and the corrupt practices that led PR to its current crisis were actively disguised by Rosselló’s administration. Hence, it can be argued that the internal state of exception has been used by PR’s government to protect the very corporate and financial interests that led PR to its current situation, and especially to guarantee corporate welfare and criminalize and demobilize political practices.

On April 10, 2017, Law 20 of 2017 was passed with the intention of creating the Puerto Rico Department of Public Safety (a consolidation of all the different Agencies in charge of security). This law is important because of what it stated in its article 6.10 about the extraordinary power of the governor in case of an emergency. Aside from reaffirming the power of the governor to declare the state of emergency (which has already been established by the ELA Constitution and by the Law 221 of 1999), the Law established in its article 6.10, section b that the governor can: amend

⁵² See: <http://sptpr.net/wp-content/uploads/2016/10/Second-Interim-Pre-Audit-Report-on-2013-PREPA-debt-emission-con-anejos.pdf>



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and revoke regulations, and amend and rescind orders he deems convenient to govern during the state of emergency or disaster. The regulations or orders issued during a state of emergency or disaster will have force of law while the state of emergency or disaster lasts. Furthermore, section e and f establish that the governor may acquire properties needed during the crisis by purchase, expropriation, or forced removal following his best judgement. This law, that is, confers power to the governor to acquire properties without the required due process in times of crisis, which was exactly what happened during the crisis generated by hurricane María, when Rosselló's administration used and abused these executive powers, generating several corruption scandals.

Fifthly, the last law that it is important to consider before moving to the analysis of the uses of the internal state of exception during the post-hurricane María period, is Law 109 of August 24, 2017 (Law for the Restructuring of the Debt of the Government Development Bank of PR). This law defines the mechanism to eliminate the GDB, which served as a key instrument for the economic development of PR in previous decades⁵³. All of this demonstrates how Rosselló's administration, under the guise of the economic and financial crisis, eliminated the social and political protections, as well as the economic regulations, that served PR for years. Thus, the crisis has been used as a period for radically *neoliberalizing* the colonial state, a process for which the internal

⁵³ This restructuring process took place under title VI of PROMESA, not under a local law.



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state of exception –and, thus, the suspension of democratic practices– has been a key dispositive.

After Hurricane María: new times, same violence

After eleven years of economic and fiscal crisis, and after the dismantlement of the social welfare state and its transformation into a corporate welfare state, PR was unprepared to confront and resist two hurricanes in the span of a month. After destroying the social protections needed to resist any “natural disaster”, the local administration resorted to the same old dispositive of administrating crises: the internal state of exception. That explains why Governor Rosselló issued two executive orders before each hurricane made landfall in PR (OE-2017-045 September 4, 2017; OE-2017-47 September 17, 2017), enacting the state of emergency. Moreover, the same strategy was implemented after hurricane María struck PR on September 20, 2017. Governor Rosselló’s administration quickly moved to implement the state of emergency as a strategy to exploit the crisis generated by the hurricane. However, as I will show, this strategy worsened the crisis to the point that many scholars have agreed that the hurricane left a not-so-natural disaster. Let us consider how the uses of the internal state of exception to manage this “natural disaster” worsened the living conditions of Puerto Ricans and opened the doors for rapacious disaster capitalism, corruption, and fraud.



As shown earlier, executive order OE-2017-47 of September 17, declared the state of emergency before the arrival of hurricane María. As quickly as September 27, while Puerto Ricans found themselves without power and access to telecommunications, governor Rosselló issued executive order OE-2017-51, to put on hold or suspend, for 30 days, all collective agreements of the public employee.

Likewise, on September 28, Rosselló issued executive order OE-2017-53⁵⁴, in which all rules and laws that regulate the hiring and contracting by governmental agencies were put on hold or suspended. That is, this executive order opened the doors to the contracting of corporations and contractors without the need to revise the contracts or follow the regulations of the PR Comptroller Office or the PR Office of Government Ethics. This is a clear example of how the state of exception facilitates and lays the groundwork for corruption, which was exemplified by the cases of Whitefish and Cobra energy corporations⁵⁵. Given the corruption scandals that cases such as Whitefish generated, on November 8, 2017, governor Rosselló issued executive order OE-2017-66, in which he delegated his power to regulate and to review contracts issued by PREPA to the FAFAA. That is, the governor transferred his power to decide to the

⁵⁴ Later on, in December 8 2017, this executive order was amended by the executive order OE-2017-72. This new executive order suspended Section 1 and 3 (sections that provided for the deregulation of the contracting process). Also, this executive order emendated sections 4,5,6 of the OE-2017-53, with the intention of clarifying and imposing some restrictions.

⁵⁵ For more details on the corruption scandal, see: <https://theintercept.com/2017/10/31/puerto-rico-electric-contract-cobra/>

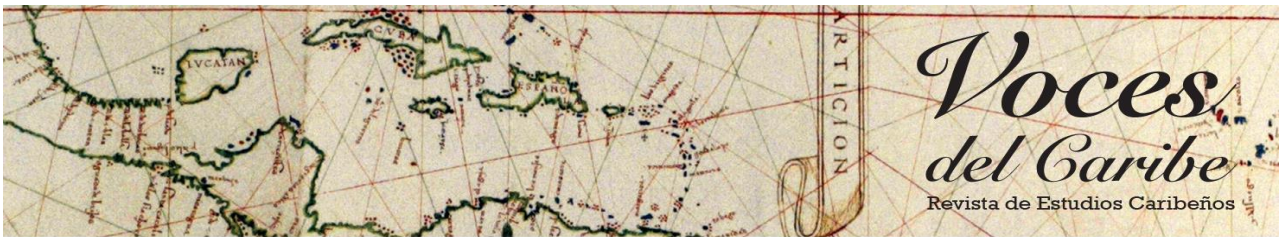


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recently created FAFAA, a move that portrayed the exceptional dimension of this office. As stated earlier, FAFAA was created with the clear intention of imposing and administrating the austerity measures needed to “end the crisis”. That is, the FAFAA was conceived as an office to fulfill the tasks of emergency managers, and this move further proves the point.

In tandem with this, Governor Rosselló issued two executive orders (as presented in this paper’s introduction, OE-2017-65 and OE-2017-69) to create the Central Recovery and Reconstruction Office of Puerto Rico (CRRO). Together with the creation of the CRRO, other executive orders were issued with the intention of declaring the state of emergency regarding infrastructure (in line with the OE-2017-03). These executive orders were: OE-2017- 78 of December 29, 2017; OE-2018-02 of January 5 2018; and OE-2018-05 of February 8, 2018, which established the “Regulations for the Processing, Evaluation and Designation of Strategic Projects”. Later, on March 20, 2018, governor Rosselló issued executive order OE-2018-11 with the intention of appointing the director of the CRRO as the representative of the Government of PR before FEMA. This appointment would be rather insignificant if we were not developing a history of how the internal state of exception has become the key dispositive of governmentality and, thus, of PR’s public and political life.



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Regarding the legislation of emergency laws, the legislative branch, once again, acted as another agency of the executive branch. This is exemplified by the approval of Law 122 of December 18, 2017, discussed above, which gave more power to the governor to decide over the administration and the structure of the executive branch without the need to consult or inform the legislative branch.

Aside from the legislation of exceptional laws and the uses of the internal state of exception, the crisis generated by hurricane María proves the utter inefficacy of the state of exception as a policy to deal with crises. That is, this authoritarian and undemocratic model has proved incapable of meeting the people's real needs. The state of emergency and the curfew decreed by Governor Rosselló were unable to address and solve the problems that hurricane María generated. Likewise, the militarization of the island by members of the Army Reserve and the National Guard did not solve the problems of shortages of fuel, water, electricity, and telecommunications⁵⁶. This shows that, contrary to the doctrine and common sense generated by colonial-neoliberalism, crises are not solved by the imposition of exceptional structures and the limitation of democracy. Crises can only be solved by a radicalization of democracy.

Conclusion

⁵⁶ To this day (July 2018), 10 months after María's landfall, there are some 500 households without electricity, considerable number of houses with temporary blue tarp, and thousands of Puerto Rican remains as refugees on the USA.



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The uses of the internal state of exception in PR show the conjunction between neoliberalism, crises management practices, and the use of exceptional laws to legitimize corrupt and fraudulent practices. As pointed out earlier, since the 2000s, PR's government imposed various exceptional legislations that unsuccessfully sought to address the economic and financial crisis. At the same time, these exceptional legislations and policies encouraged the executive branch to hoard more power, diminishing the division of powers and normalizing the state of exception as the key dispositive of governmentality. These exercises of exceptionality took place within the US colonial state of exception, and had the full acquiescence of the US government, especially after the imposition of PROMESA and the Control Board.

Furthermore, the application of the internal state of exception has proved ineffective in dealing with the economic and fiscal crisis affecting PR. As have been shown in this paper, the uses of the internal state of exception have intensified the effects of the crisis, particularly affecting the poorest and most disadvantaged sectors of the country⁵⁷. In short, it can be argued that the crisis, the violence of austerity and its precariousness, and the numerous cases of corruption would not have been possible without the internal state of exception.

⁵⁷ As a telling example, Klein (2018) has shown the uses of the state of emergency in the aftermath of Hurricane María facilitate plunder, corruption and suffering in Puerto Rico. That is, disaster capitalism. This analysis is consistent with the argument hereto presented, the state of exception has been the legal frame for corruption.



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Finally, in this paper I have focused on the legal and political development of the internal state of exception. That is, given the length limitations, I have not considered other sociopolitical and economic issues, as well as the resistances taking place against colonial-neoliberal policies and the implementation of the internal state of exception. However, it is important to point out that Rosselló's administration (as all previous administrations) has been vigorously opposed and resisted, even in the midst of the most adverse, life-threatening circumstances for thousands of Puerto Ricans after the hurricane. A particular example of this is that Rosselló's administration began his mandate with a two-month student strike at the University of Puerto Rico, social protests and mobilizations that questioned the legitimacy and the capacity of his administration to pull the country out of the crisis. Furthermore, protests and social unrest against Rosselló's administration continued in the post-María period. To this day grassroots, community base organizations (such as Casa Pueblo and Mutual Aid Project of Mariana⁵⁸) and the civil society at large have been organizing, opposing to Rosselló's administration and creating a fairer Puerto Rico. This paper aimed to show the history of colonized power. Nevertheless, we have to remember that where there is power, there is resistance.

⁵⁸ For an analysis of these process see Klein (2018).



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José M. Atilés-Osoria

University of Illinois Urbana-Champaign

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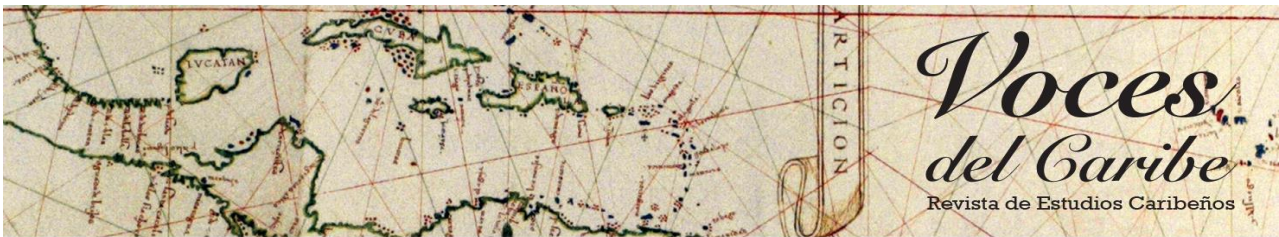
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