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## INTRODUCTION: THE RETURN OF THE EXCEPTION

**Abstract.** The history of the 20<sup>th</sup> century, and more recently the two-decades long war on terror, have taught us the lesson that the normalisation of the state of exception (intended here as the proliferation of legal instruments regulating emergency powers, and their constant use in varied situations of crisis) is never immune from the risk of leaving long-lasting impacts of legal and political systems. With the “Return of the Exception” we intend to bring to the fore the fact that in the pandemic the state of exception has re-appeared in its “grand” version, the one that pertains to round-the-clock curfews and strong limitations to the freedom of movement and assembly, all adorned by warfare rhetoric of the fight against an invisible enemy – which, given the biological status of viruses, it cannot but be ourselves. But “return” here must be intended also in its psychoanalytic meaning. Much like the repressed that lives in a state of latency in the unconscious before eventually returning to inform consciousness and reshape behaviour, the state of exception is an element that remains nested in law’s text before reappearing in a specific moment with forms and intensity that are not fully predictable. Still, it remains cryptic whether the pandemic inaugurates a new epoch of liberal legality – the post-law – or just augurs its structural crisis.

**Keywords:** state of exception, COVID-19, pandemic, liberal legality.

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## WPROWADZENIE: POWRÓT STANU WYJĄTKOWEGO

**Streszczenie.** Historia XX wieku, a ostatnio trwająca dwie dekady wojna z terroryzmem, nauczyły nas, że normalizacja stanu wyjątkowego (rozumianego tu jako mnożenie instrumentów prawnych regulujących kompetencje nadzwyczajne i ich stałe stosowanie w różnych sytuacjach kryzysowych) nigdy nie jest wolna od ryzyka pozostawienia długotrwałych skutków dla systemów prawnych i politycznych. W niniejszym tomie poświęconym *Powrotowi stanu wyjątkowego*, pragniemy zwrócić uwagę na fakt, że w czasie pandemii stan wyjątkowy pojawił się ponownie w swojej „pełnowymiarowej” wersji w postaci całodobowej godziny policyjnej i znaczących ograniczeń swobody poruszania się i zgromadzeń, a wszystko to przyozdobione wojenną retoryką walki z niewidzialnym wrogiem, którym, biorąc pod uwagę biologiczny status wirusów, możemy być tylko my sami. Ale „powrót” należy tu rozumieć także w jego psychoanalitycznym znaczeniu. Podobnie jak wyparte, które pozostaje w stanie latencji w obrębie nieświadomości, by w końcu powrócić, by wpłynąć na świadomość i zachowanie podmiotu, podobnie i stan wyjątkowy jest elementem, który pozostaje w stanie latencji w tekście prawa, by powrócić w sposób jawny w konkretnym momencie, przejawiając się w nie dokońca dających się przewidzieć formach i intensywności. Wciąż jednak nie wiadomo, czy pandemia inauguruje nową epokę liberalnej legalności – epokę postprawa – czy tylko wróży jej strukturalny kryzys.

**Słowa kluczowe:** stan wyjątkowy, COVID-19, pandemia, liberalna legalność.

In his second short volume on the pandemic titled *PANDEMIC! 2 Chronicles of a Time Lost*, Slavoj Žižek writes:

In the Marx Brothers’ *Duck Soup*, Groucho (as a lawyer defending his client in court) says: “He may look like an idiot and talk like an idiot but don’t let that fool you. He really is an idiot.” Something along these lines should be our reaction to those who display a basic distrust of the state by seeing the lockdown as a conspiracy designed to deprive us of our basic freedoms: “The state is imposing lockdown orders that curtail our liberty, and it expects us to police one another to ensure compliance; but this should not fool us—we should really follow the lockdown orders.” (Žižek 2020, 9)

The typical taste for anecdotes that Žižek masters perhaps as nobody else in contemporary Western philosophy – which admittedly at times results in sterile quotationism – serves here to expose one of the many ethical and political paradoxes that the pandemic has produced: it is true that humankind is experiencing the widest curtailing of civil (and in certain cases also political) liberties, but the threat is so serious that contesting and opposing the state’s lockdown order appears as something essentially foolish. Coming from both left and right, the claims to quash the pandemic states of exception to restore our liberal freedoms, Žižek claims, show the substantial attitude of “not-wanting-to-know: if we ignore the threat, it will not be so bad, we’ll manage to get through it...” (Žižek 2020, 9).

At first sight, such an argument can be embraced with no hesitation. In a time like the one we are living in, when the truth has become a moment of the false and science is increasingly looked upon with suspicion, denying or

downplaying the seriousness of the threat of the COVID-19 pandemic cannot but be an expression of a will-not-to-know, often masked and covered by theories and paradigms whose “stupidity” and “groundlessness” make their labelling as “conspiracy” a euphemism. However, there are other chains of threats and risks ignited by the pandemic that cannot be minimised or simply accepted as a necessary *pharmakon* for our security: those brought about by the prolonged implementation of emergency powers and exceptional laws. The history of the 20<sup>th</sup> century, and more recently the two-decades long war on terror, have taught us the lesson that the normalisation of the state of exception (intended here as the proliferation of legal instruments regulating emergency powers, and their constant use in varied situations of crisis) is never immune from the risk of leaving long lasting impacts of legal and political systems. Overlooking the effects of the restrictions on liberties that have characterised states’ reaction to the pandemic, would amount to opposing to the attitude of “not-wanting-to-know” another gesture of “not-wanting-to-know”: if we ignore the state of exception, it will not be so bad, we will manage to get through it... In a sense, such an attitude coincides to an act of faith in the wisdom and redemptive power of state institutions; while it is sadly evident that the in the planetary catastrophe of the Anthropocene – from global warming to the current pandemic – the state along with capital are the determining factors.

Those who still care (and dare) to interpret critically the current state of our form of life are therefore faced with a two non-mutually exclusive refusals: neither with “not-wanting-to-know” the threat of the virus, nor with accepting uncritically the predictable exceptional (re)action of state authority. The acceptance of the dire reality of the pandemic – we argue – must be coupled with a strong resistance to the “imaginative blockage” (Toscano 2020, 4) that the mediatisation of the scale and seriousness of the threat is naturally producing. But besides this more ethical and political stance, looking into the abyss of the emergency is needed also for a more “epistemological” or (forgive us the term) scholarly reasons. Crises have always a revealing potential: they expose the presence of something abnormal, dialectically bringing to light what counts (or should count) as the normal, and finally call for the elaboration of strategies for their solution. Indeed, as Georges Canguilhem put it, what generates “theoretical interest in the normal” is properly the abnormal: “norms are recognised as such only when they are broken. Functions are revealed only when they fail. Life rises to the consciousness of science of itself only through maladaptation, failure and pain” (Canguilhem 1991, 209).

In this context, this special issue aspires at offering a number of critical views on the evolving nature of the pandemic emergency, shedding light on its revealing potential while at the same time proposing a reflection on the form and limits of the dominant legal and political paradigms. It is worth spending here some words on the title we have chosen. With the “Return of the Exception” we intend to bring to the fore the fact that in the pandemic the state of exception has re-appeared in

its “grand” version, the one that pertains to round-the-clock curfews and strong limitations to the freedom of movement and assembly, all adorned by warfare rhetoric of the fight against an invisible enemy – which, given the biological status of viruses, it cannot but be ourselves. But “return” here must be intended also in its psychoanalytic meaning. Much like the repressed that lives in a state of latency in the unconscious before eventually returning to inform consciousness and reshape behaviour, the state of exception is an element that remains nested in law’s text before reappearing in specific moment with forms and intensity that are not fully predictable, simply because they are rooted in the contingency of human events.

One may legitimately ask whether the present instance of the return of the state of exception, is an instance of a mythical return in Benjaminian sense – a curse of recurrence in a stifling world under the vault of sovereign power – or rather the return *qua* farce, in the Marxist sense (“first as tragedy, then as farce”). In other words, should one consider the current grand return of the *Ausnahmezustand* occasioned by the pandemic as something which has haunted and will eternally (and inevitably) haunt the legal form, or rather as a farcical convulsion signalling a deep and perhaps terminal crisis of legality as such, or at least of liberal legality as we know it (cf. Cercel 2019). The question is all the more pertinent from the perspective of critical jurisprudence which informs all the papers collected in this volume. We do not aim to give a definitive answer to this question in this brief introduction but propose to read the contributions with this possible alternative in mind.

This special volume consists of a total of nine papers, as well as a conference report. In the first paper, entitled “The blizzard of the world: COVID-19 and the last say of the state of exception” Przemysław Tacik aims to grasp the COVID-19 pandemic as a socio-political catastrophe in the Benjaminian sense. According to his argument, the scope and nature of the COVID-19 crisis eludes us due to our closeness to its inner core. What is obfuscated in this moment is the politico-legal framework on which the international community is based, where sovereignty and turbocapitalism join their forces to produce biopolitical devices. Tacik’s paper looks into uses of the state of exception in particular countries, concluding that the rule of law in the pandemic was generally put on the back burner even by the countries that officially praise it. Sovereignty clearly returned to the stage, undermining parliamentarism and civil liberties in the sake of necessity. International law remained incapable of addressing this return, let alone of enforcing responsibility of China for infringing WHO rules. In conclusion, Tacik argues that COVID-19 opened new-old paths of governing the living that will play a planetary role in the future fights for dominance and imposing a new face of capitalism.

The second paper by Rafał Mańko is entitled “Legal form, Covid and the political: notes towards a critique of the *corpus iuris pandemici*” and has a programmatic-methodological character. Its aim is to investigate the possibilities

offered by critical jurisprudence with regard to analysing the legal developments occasioned by the current pandemic. The paper focuses essentially on three thrusts of critique of the *corpus iuris pandemici*: law and the political, legal form, and law and ideology.

The third paper by Alexandra Mercescu is a national case study of the *corpus iuris pandemici* in Romania, titled “The COVID-19 crisis in Romania. The paper looks at penal populism and legal culture” and seeks to present a working hypothesis to be eventually developed in a future contribution, namely that the COVID-19 crisis exposed some problematic behaviours evocative of an authoritarian ethos on the part of both public authorities and citizens which suggest that a penal populist attitude might now be part or even embedded in the Romanian legal culture. In the first part, Mercescu briefly describes Romania’s reaction (as evidenced both in the official measures taken and the attitude of citizens) to the first wave of the pandemic focusing on the role of penal and military means deployed. In the second part she offers a tentative mapping of the factors that can explain this problematic cultural reaction. Importantly, among these she includes the successful fight against corruption with the consequence that what appears to have very much consolidated the rule of law in post-1989 Romania could be shown to have had the unintended and paradoxical effect of undermining the very same ideal.

The fourth paper by Gian Giacomo Fusco is entitled “Lockdown: a commentary.” The Author notes that the *Collins* dictionary has elected “lockdown” as its word-of-the-year in 2020. Defined as “the imposition of stringent restrictions on travel, social interaction and access to public spaces”, decided by governments “to mitigate the spread of COVID-19”, for *Collins*’ lexicographers “lockdown” took the top spot because it is a unifying experience for billions of people across the world, who have had, collectively, to play their part in combating the spread of the virus. Faced with the unknown of a brand-new virus, governments all over the world reacted in a rather familiar way, by suspending the normal flow of social life through the implementation of measures that are usually categorised as a state of exception. Fusco’s contribution is a commentary that aims at placing the practice of lockdown (as a governmental administrative measure) in the context of the theory of state and government. To the extent that emergencies are always revelatory, this paper will argue that the state of exception – of which the lockdown is a sub-category – in displaying state’s sovereign power is exposing the radical impotence in which it is grounded, and from which it takes its ultimate meaning and function.

In the fifth paper, entitled “The necessity of legal typologies in crisis and emergency,” Tormod Otter Johansen notes that legal analysis necessarily uses concepts, distinctions and typologies. He points out that these tools suffer challenges when the object of analysis or application is a crisis or emergency. Johansen’s article looks into two ex-amples of legal typologies of emergencies

in the works of Gross and Ní Aoláin and Agamben respectively. Based on this, he proposes four levels of analysis for legal responses to emergencies: 1) explicit descriptions of actions by actors themselves, 2) positivist legal categories available in the context, 3) meta/comparative categories, and 4) philosophical/ontological concepts and categories that question or inquire into all the previous categories. Johansen's paper concludes by discussing how these levels of analysis overlaps, merge and needs to be combined in order to grasp the complex phenomena of law in crisis.

The sixth paper by Cosmin Cercel is entitled "Pandemic, exception and the law: notes on the shattered *nomos* of Europe." The author proposes a critical evaluation of the current European politico-legal landscape that unfolds under the conditions of the COVID-19 pandemic, reflecting on the symbolic status of legality in this context and its historical trajectory. Specifically, Cercel proposes a new genealogy of the state of exception apt to articulate the relationship between the force of law, legal normativity, and ideology in modern capitalism. His main argument is that the ongoing pandemic has operated a historical acceleration that the law, understood here as medium that articulates power symbolically in a public and ostensible manner, is not able to catch up with.

In the seventh paper, entitled "Law in times of the pandemic," Piotr Szymaniec places the COVID-19 crisis in its proper historical setting. To this end, he goes back to regulations adopted in the 19<sup>th</sup> century during the cholera epidemic. This allows him to draw similarities between then and now, pointing out that restrictions are now being introduced, modified, or mitigated not only under the influence of the threat itself (only partially known), but also of economic factors and social moods. Strengthening the executive branch and increasing the role of legal acts issued by this branch is a common phenomenon in the present situation. By itself, it does not threaten the rule of law yet and enables a quick reaction to a changing situation. However, excessively oppressive restrictions, in some way reversing the modern paradigm of thinking about individual rights, could be such a threat.

The eighth paper by Xenia Chiaramonte is devoted to a novel analysis of the oeuvre of Michel Foucault. Entitled "Notes on bio-history: Michel Foucault and the political economy of health," the paper seeks focuses on two essays of the classic of French Theory: "The Birth of Social Medicine," and "The Politics of Health in Eighteenth Century."

The scientific part of the volume is closed by the ninth paper by Christos Marneros entitled "'It is a *nomos* very different from the law': on anarchy and the law," whose aim to explore the uncomfortable relationship between law and anarchy. As Marneros notes, the so-called "classical" anarchist position – in all its heterogeneous tendencies – is, usually, characterised by a total opposition against the law. However, and despite its invaluable contribution and the ever-pertinent critique of the state of affairs, Marneros argues that the "classical" anarchist position needs

to be re-examined and rearticulated if it is to pose an effective nuisance to the current (and much complex) mechanisms of domination and the oppression of dogmatism and dominance of the law. The author examines and develops two notions of the philosophical thought of Gilles Deleuze, namely that of the institution and that of the *nomos* of the nomads. In doing so, he aims at rethinking the relationship between anarchy and the law and, ultimately, to point towards an ethico-political account which he dubs the “an-archic *nomos*” which – in his view – is an attempt at escaping dogmatism and “archist” mentality of the law.

Following these nine papers, Piotr Szymaniec recalls, in his conference report, the proceedings of the 4<sup>th</sup> annual conference of the Central and Eastern European Network of Legal Scholars (CEENELS) which was co-organised in 2019 by the Higher School of Economics (HSE) and the University of Graz. The theme of the conference was focused on legal innovations of Central and Eastern Europe, but as Szymaniec notes, the participants did not succeed to uncover too many such innovations neither today, nor in the more or less distant legal past.

As the legal scholarship concerning COVID-19 and the law is expanding, we hope that the papers collected in this volume – written from the perspective of critical jurisprudence – will constitute an original and refreshing contribution to the on-going debate, focusing not so much on the doctrinal analysis of the *corpus iuris pandemici*, but rather on the more general questions of legal form and the exception in the context of the progressing crisis of liberal legality as we have known it for the past decades. We leave it to the readers to make their own attempt at answering the question whether the present grand return of the *Ausnahmezustand* is but an instance of the return of the exception haunting the law, or whether it signals the premortal convulsions of liberal legal form as such.

Both avenues are not, perhaps, entirely contradictory. It is through a crack in the liberal order that we may see the world to come, precisely at the heart of revealed hypocrisy in which the rule of law takes itself for a legal fiction. What we have witnessed in the pandemic is the intimate bond between exercise of sovereign power and the rule of necessity. This combination is not necessarily fatal to the internal ideology of liberal legality produces an eclipse of its face through its suspension. Even liberal lawyers perceived the *corpus iuris pandemici* with disbelief, invoking constitutional and international norms as well as human rights. But in the majority of liberal democracies necessity took over. The situation was even more complex than the concept of the *Ausnahmezustand* would suggest: various devices of domestic law instituting the state of exception often remained unused and the norms in force were just ignored in the name of necessity. Whether this is still a state of exception – in paradoxically factual rather than normative sense – is up to debate. The *corpus iuris pandemici* might add to the age-old debate on whether exception can be framed within the law; perhaps necessity dictates its own rules that will always escape normative boundaries that are meant to bulwark them.

Yet it might be equally possible that the pandemic inaugurates a new, postmodern type of the *Ausnahmezustand*. Instead of suspending norms according to constitutional devices of the state of exception, in many countries necessity was invoked in order to establish statutory or even sub-statutory norms that just *ignored* some norms at the constitutional and international level. Just as socio-symbolic frames of reference are crumbling in our days, leaving less and less common *topoi*, maybe the law itself loses its force of integrating various sub-types of forms of exercising power. If so, the days of liberal hegemony with its dream of subjugating power to the law entirely might be over. The pandemic may inaugurate a new realm of post-law, in which the law's claim to universality and cohesion would be locally punctured with zones of *suspension-through-ignoring*. From a theoretical point of view, this vision would assume a deconstructed form of legality, ravaged by aporias, areas of ineffectiveness as well as inexplicable and non-universalizable voids. Contrary to the *Ausnahmezustand*, they would not be internalisable to the law; they would just appear within the tissue of normativity as gaping holes. Such a form of post-law would square well with the effective breakdown of public opinion and public communication between different chunks of our societies. Beyond any bridgeability, legal voids would just open at the heart of the law without any chance to explain and understand their logic in legal categories. This would be power effectively puncturing the law which is meant to curb it. What we are left with is a ramshackle tissue of normativity that power pierced through with the invocation of biopolitical necessity.

Whether we saw the glimpse of the future post-law in the *corpus iuris pandemici* remains to be seen. Perhaps we live a delayed dream of liberal hegemony, whose subsistence necessitated a patchy pattern of local perforations. Maybe the law in its liberal understanding no longer bursts at the seams or produces one big crack being the *sinthôme* of the legal order. Power might just locally *ignore it*, pretending that the normative Big Other just averts its eye for a moment without posing any logical obstacle to the entire system. The resignation from instituting a proper state of exception might signal the exhaustion of the liberal order, which no longer even desires to pretend to pay lip service to the rule of law. This is, perhaps, how the post-law deals with an exception: instead of framing it into a legal institution, it may just eclipse its validity locally and temporally, without any need of explanation other than a sheer reference to necessity. If so, the balance between power and legality would be once again disturbed in favour of the former.

Still, it remains cryptic whether the pandemic inaugurates a new epoch of liberal legality or just augurs its structural crisis that will end up either in return of authoritarianisms or some revolutionary overcoming. Whichever option our readers are closer to, one seems certain: the binding between power and legality unveiled in a new way by the *corpus iuris pandemici* is a discovery



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not to be forgotten easily. The law that had promised to last eclipsed its gaze just as if nothing had happened. Now the onus is on us to rethink *if we really saw anything*.

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