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The Return of the Exception

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To the memory of Professor Tomasz Bekrycht

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INTRODUCTION: THE RETURN OF THE EXCEPTION

Abstract. The history of the 20th 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 20th 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 Aiolaín 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 cate-gories that question or inquire into all the previous categories. Johansen's paper concludes by discuss-ing 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 19th 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 Eighteen 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 if the 4th 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 succed 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

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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THE BLIZZARD OF THE WORLD: COVID-19 AND THE LAST SAY OF THE STATE OF EXCEPTION

Abstract. The paper aims to grasp the COVID-19 pandemic as a socio-political catastrophe in the Benjaminian sense. As argued in the article, 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. The 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. As a conclusion the paper 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.

Keywords: COVID-19, state of exception, biopolitics, sovereignty, necessity.

ZADYMKA ŚWIATA: COVID-19 I OSTATNIE SŁOWO STANU WYJĄTKOWEGO

Streszczenie. Celem artykułu jest ujęcie pandemii COVID-19 jako socjopolitycznej katastrofy w sensie Waltera Benjamina. Zakres i natura kryzysu związanego z COVID-19 są nam niedostępne z racji naszej bliskości do jego centrum. W tym szczególnym momencie zaciemnieniu ulegają polityczno-prawne ramy wspólnoty międzynarodowej, w których suwerenność i turbokapitalizm łączą się w celu stworzenia biopolitycznych urządzeń. W artykule dokonano przeglądu zastosowań stanu wyjątkowego w poszczególnych państwach; jego konkluzją jest ogólne zaniedbanie kwestii praworządności nawet w krajach, które głoszą do niej przywiązanie. Bez wątpienia kluczową rolę zaczęła ponownie odgrywać suwerenność – podważając parlamentaryzm oraz swobody obywatelskie w imię konieczności. Prawo międzynarodowe okazało się niezdolne nie tylko do odpowiedzi na to zjawisko, ale nawet do wyegzekwowania odpowiedzialności Chin za złamanie reguł WTO. Artykuł zamyka konkluzja, zgodnie z którą COVID-19 otworzył nowe-stare ścieżki zarządzania żywymi, które odegrają planetarną rolę w przyszłych walkach o dominację i przeobrażą funkcjonowanie kapitalizmu.

Słowa kluczowe: COVID-19, stan wyjątkowy, biopolityka, suwerenność, konieczność.

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1. INTRODUCTION

Identifying Kafka as an essentially contemporary writer, Walter Benjamin made the following claim about the possibility of perceiving the catastrophe:

> If one says that he perceived what was to come without perceiving what exists in the present, one should add that he perceived it essentially as an *individual* affected by it. His gestures of terror are given scope by the marvellous *margin* which the catastrophe will not grant us. But his experience was based solely on the tradition to which Kafka surrendered; there was no far-sightedness or "prophetic vision." Kafka listened to tradition, and he who listens hard does not see. (Benjamin 1969a, 143)

The perception of the catastrophe not as a singular event, but as the permanent essence of the development of history is of course a key to Benjamin's latest version of historical materialism (Benjamin 1969b, 257). But in the above-cited fragment he rather links the ability to perceive a catastrophe with the possibility of occupying some "marvellous margin". Kafka was able to notice the catastrophe precisely because he was immersed in (Jewish) tradition. By this very fact he was sensitive to apocalyptic sounds coming from afar, just like the people of Israel who listened to the godly voice; but between him and the catastrophe lay the margin that – Benjamin adds – won't be "granted" to us. "We" see the catastrophe from too close a distance, experiencing it in all its impact, and without the mediation of the tradition that would shield it from us.

The COVID-19 pandemics is one catastrophe among others, another link in the chain of "anthropocenic" troubles that late capitalism keeps producing. It is particularly legal scholarship that should see it as another stage in the continuous catastrophe that reels before our eyes – and not a one-off break in the otherwise continuous normalcy that will be soon restored. Yet the Benjaminian trouble affects us as well: our tradition – especially the legacy of Schmittianand Agambenian thinking on the state of exception – allows us to hear, but not see. When we occupy "the marvellous margin" we are blind, but at the same time the catastrophe is already here, before our eyes. To see the current pandemic – in its legal dimension – as a mere recurrence of exception-based measures is to say too little; but without this perspective we see just the catastrophe, without knowing its nature.

Accordingly, the already considerable COVID legal scholarship straddles between hearing and seeing. In this position, it can hardly make a move, as the key to our riddles lies ahead of us. With the benefit of the 20th century legal and philosophical thinking we can easily recognise the contours of what is happening: but at the same time the recurrence of states of exception, priority of the executive over the legislative and the judiciary, sovereign-centrism, mobilisation of populist reason against democracy is painfully sobering. It does not mean that these concepts and the intellectual traditions that inform them are useless; on the

contrary, they allow us to hear the ongoing catastrophe, but do not form a bridge with our position of seeing it.

In its legal dimension, COVID-19 could be used as a palpable example of Luhmann's theory of autopoietic systems (Luhmann 2004): each state reacted to it according to its own internal dynamics and systemic specificity. Although some general patterns were recognisable in many countries (lockdowns, increase in penal reactions, priority of the executive, extraordinary legislation, national segregation), they were introduced with the use of various methods, each time according to the internal logic of Leibnizian monads. The adopted measures demonstrate, first of all, the possibility of suspending some basic liberal guarantees; what remains striking is the swiftness with which they were implemented, often without a clear link with diminishing the medical emergency. The sovereign state has always been here and the return of the state of exception may only prove the proponents of the post-Westphalian order wrong. Its return cut across the current political *episteme* that today make us see the political scene as divided between the significantly undermined liberal order and the populist onslaught on reason: legal criticism of emergency measures ran the risk of being identified with unreason indulging in conspiracy theories.

Nonetheless, the greatest conspiracy theory we could think of is clearly visible for our eyes: the nature of currently existing states – with their extraordinary politico-legal weaponry behind their backs – squares well with contemporary capitalism and is not on the wane. For financial markets the year 2020 was astonishingly profitable, whereas the almost universal recession will throw masses of people into the conditions of yet bigger poverty and dependence (Bohoslavsky 2020). State power is on the rise, methods of control have been tested out. Legal scholarship on COVID is on the mount, dealing with issues as diverge as the fate of legal professions and economic consequences of the pandemic, but focusing on constitutionality of the adopted measures.

This paper will venture a risky attempt of passing from hearing to seeing the catastrophe, whose impact and scope are still unclear to us. First, I will reanalyse the concepts of necessity and exception, in their link with specific responses to COVID-19. Then I will address the practical differences in handling the pandemic by liberal and illiberal states. Finally, I will take a quick detour to international law in order to look at its possible responses to COVID.

2. SNEAKY NECESSITY AND THE OVERWHELMING EXCEPTION

In Kazuo Ishiguro's recent novel, *The Buried Giant*, protagonists live in a post-war period under some kind of spell which make them forget about past feuds. Their memory is eclipsed with a mist of forgetfulness that brings peace for the sake of helpless oblivion. The current pandemic produces a comparable kind

of mist: we are willing to rake out exceptional measures as if the feuds and wars to which their use lead in the past were shrouded by forgetfulness.

The pandemic is presented as an enemy, but a sneaky one: ubiquitous, hard to detect and constituting a special kind of *necessity*. Nonetheless, legally speaking, this necessity eludes the distinction between external and external threat. In the early phases of the pandemic, it came from abroad everywhere but China – just as a classic external enemy against whom putting up fences and closing borders should be adopted. In this phase, the pandemic unleashed a sovereigntist and nationalist logic: borders were closed for all except citizens and permanent residents, air connections were shut down, 'repatriation' actions were undertaken. The lockdown was conducted in the sovereign-centred manner; the states proved that true sovereignty lies in the ultimate power of suspension (cf. Schmitt 1985, 5; Agamben 2005). The globally recognised necessity allowed the states to suspend freedom of travel without much resistance at the international level. March 2020 was a period of *universal national contraction*, in which freedoms proved nothing but *temporary concessions* from sovereignty. In this role, sovereign states positioned themselves as the ultimate interpreters of necessity. Even if COVID-19 seems to impose – from an epidemiological point of view – a chain of typical reactions (shutdown of trade, travel and movement), it is up to the sovereign power to decide on what the necessity really is. Apart from the medical emergency, there is also another kind of necessity that needs to be balanced with the COVID: economy. The dilemma of which goal to pursue: healthcare protection or economic development was decided by sovereign powers (Bohoslavsky 2020), and obviously not in order to avoid the situation in which the crisis hits the most vulnerable members of the society. The sovereign choice shrouds inequality – in its many dimensions, from economic differentiation to gender inequality (Bohoslavsky 2020) – with the aura of unquestionability.

"How it ultimately should be": that a kind of thinking that unites, at the deepest level, sovereignty and health emergency. In its reactions to autonomously defined necessity, states resorted to the classic logic of nationalism (in Anderson's and Billig's understandings – see Anderson 1991; Billig 1995) against health reasons: they admitted their own citizens from abroad, but denied access to foreigners just as if its 'own' citizens had posed less danger than all other people. Even if nowadays these measures seem to be just groping in the dark, without the full knowledge of how COVID works, it should be properly seen as an ominous sign: *a possibility* of resolving the questions of necessity, regardless of its nature, along the lines of the old nationalist and sovereigntist logic. Diversity of state reactions posed practical problems for people travelling across many countries, sometimes barring their way of return. In so doing, states revealed an intimate relationship between sovereignty and citizenship which might be omitted if we concentrate – after Agamben – on the biopolitical status of bare life. By

recalling their citizens from the entire world and barring access to non-citizens states demonstrated the tight link between inclusion and exclusion that founds citizenship. Analogously to structuralist understanding of the signifier as drawing meaning from a web of negative relations to other signifiers, citizenship proved to be *a right to be admitted due to everyone else's exclusion*.

The chain of entanglements that binds sovereignty and citizenship should be confronted with another one: the relationship between sovereignty and the executive. As diagnosed already by Schmitt (Schmitt 1988), the executive exhibits proneness to overtaking other state powers in times of emergency, most notably by eclipsing parliamentarism. In constitutional theory parliamentarism requires as its prerequisites freedom of speech, freedom of discussion and the general public that can influence the decision-making process.

All specifically parliamentary arrangements and norms receive their meaning first through discussion and openness. This is especially true of the fundamental principle that is still recognized constitutionally, although practically hardly still believed in today, that the representative is independent of his constituents and party; it applies to the provisions concerning freedom of speech and immunity of representatives, the openness of parliamentary proceedings, and so forth. These arrangements would be unintelligible if the principle of public discussion were no longer believed in (Schmitt 1988, 3).

In an almost Badiouian manner, the parliament is for Schmitt a locus of truth-production which, as soon as colonised by technical expertise – not even by an open dictatorship, but by dominance of the executive, ceases to exist truly:

If parliament should change from an institution of evident truth into a simply practical-technical means, then it only has to be shown *via facta*, through some kind of experience, not even necessarily through an open, self-declared dictatorship, that things could be otherwise and parliament is then finished (Schmitt 1988, 8).

According to Schmitt, mass democracy throws parliamentarism into a specific crisis which amplifies, but is not equivalent to, the crisis of democracy as such:

> The crisis of the parliamentary system and of parliamentary institutions in fact springs from the circumstances of modern mass democracy. These lead first of all to a crisis of democracy itself, because the problem of a substantial equality and homogeneity, which is necessary to democracy, cannot be resolved by the general equality of mankind. It leads further to a crisis of parliamentarism that must certainly be distinguished from the crisis of democracy. Both crises have appeared today at the same time and each one aggravates the other, but they are conceptually and in reality different. As democracy, modern mass democracy attempts to realize an identity of governed and governing, and thus it confronts parliament as an inconceivable and outmoded institution. If democratic identity is taken seriously, then in an emergency, no other constitutional institution can withstand the sole criterion of the people's will, however it is expressed. Against the will of the people especially an institution based on discussion by independent representatives has no autonomous justification for its existence, even less so because the belief in discussion is not democratic but originally liberal. (Schmitt 1988, 15)

In other words, the position of the parliament as the embodiment of the will of the people is no longer taken for granted. Sovereignty might be – and, practically, is – exercised in its true locus that is revealed in the state of emergency. Accordingly, in the pandemic the balance of state powers was profoundly disturbed in a multi-dimensional way. Many states drifted far from the pole connoting parliamentarism, open discussion, human rights and inclusion of individuals – towards the pole that concentrates opposite paradigms: priority of the executive, secret decision-making (often explained away with the authority of experts, even though the way from acknowledging experts' recommendations to adopting particular measures is not only long, but most importantly, political), suspension of applicable human rights and exclusion of individuals through the category of citizenship. It is in this last aspect that the profoundly political nature of response to COVID was palpable: it would be absurd to claim that nationals of a given country pose a smaller health risk than other human beings, but this is the practical effect of biopolitical devices used. The pandemic acted like a trigger, unleashing sovereignty-oriented apparatuses of the state and producing a generalised state of exception (although not everywhere the eponymous legal device was officially used).

Therefore it is crucial to perceive the multifarious, but convergent trends in response to COVID as consisting of a few key elements that are structurally intertwined. First, there is a visible swerve towards priority of the executive. As noted by Elena Griglio, 'In Europe, executive dominance in policymaking is indisputably one of the effects of the spread of the pandemic. … The participation of parliaments in decision-making has been confined in scope – since many urgent governmental measures were adopted bypassing legislatures – and in their room for manoeuvre, since their legislative prerogatives were reduced to little more than ratifying executive proposals.' (Griglio 2020, 49–50). An analogical process took place in the EU (Griglio 2020, 50). This 'hour of the executive', as Tristan Barczak calls it (Barczak 2020), was – as usual – argued in terms of a necessity of a quick and pragmatic reaction that could not be taken by deliberative, in particular parliamentary bodies. The ability "to get things done" (Petrov 2020, 78) of the executive is its well-known aura that paves the way for extralegal measures legitimised directly – and in the atmosphere of tacit conjuration – by the objective that "must be reached".

Second, the role of the legislative was severely limited in two dimensions: first, the parliaments were truncated in order to reduce the spread of the virus amongst the deputies (Griglio 2020, 53–54; Bar-Siman-Tov 2020, 14–18), but even more importantly, as usual in exceptional times they were relegated to a subsidiary role of more or less tacit acceptants and occasional overseers of measures adopted by the executive (Griglio 2020, 52, 54; Barczak 2020; Petrov 2020, 72–79; Quintana, Uriburu 2020, 691). These restrictions were materialised with additional methods of surveillance used by governments (Borovitskaja 2020, 4). As in the case of Israeli Knesset, the organisation of parliaments under COVID

also preferred their "executive" side: instead of a general freedom of expression, parliaments were monopolised by speakers, committees and party leaders (Bar-Siman-Tov 2020, 25–29; Cormacaina, Bar-Siman-Tov 2020, 9; Griglio 2020, 62). Rarely these measures were challenged in courts. In Israel, the Supreme Court ordered the parliament to reconvene, unleashing a constitutional crisis due to the disagreement of some representatives with the order (Bar-Siman-Tov 2020, 39). Only in Columbia a decree establishing the online parliamentary sessions was openly declared unconstitutional (Bar-Siman-Tov 2020, 17).

As noticed by Griglio, "executive dominance is not a novelty for representative democracies. In the last few decades, representative assemblies have been marginalised at least in their traditional role as legislators and decisionmakers" (Griglio 2020, 50). What Griglio describes is not far from Schmitt's pre-war analyses: it seems that "in the liberal legal order there is a kind of cyclicity, in which the period of decaying parliamentarism happens in purportedly 'golden' times of capitalist development, only to be revealed as already rotten when a crisis comes." In fact, the practical state of exception only reveals the hollowing out of democratic institutions that has been happening for a long time. In this vein, Schmitt's remarks only cast light on the ongoing process of deterioration that became visible when the state of exception formally came.

Accordingly, it should not be of any surprise what John Maxeiner noticed à propos the US legal system:

> America's legal system as a system of laws is failing. America's responses to coronavirus have had more in common with a reign of men than with a government of laws. […] Long before the coronavirus reached America's shores, the United States was falling short in fulfilling a rule of law. Instead of practicing the government of laws that its Founders sought, it has been suffering a government of men that they feared. (Maxeiner 2020, 215–216)

In case of the US, the imbalance between the executive and the legislative – as well as between the federal and state levels – are rooted in the inadequacies of the American constitution to present-day conditions (Maxeiner 2020, 232–233). But in other countries the pandemic revealed structural deficiencies of political and constitutional systems of their own. Constitutional states of exceptions were either modified by statutory laws (and subsequent ordinances) or ignored and replaced by sub-constitutional norms. Even in Germany, which might seem the closest to the *Rechtsstaat*-ideal, the three types of *Notstandverfassungen* contained in the Basic Law were found insufficient and a new law was adopted (*Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite*) to declare a special state of emergency – "the situation of epidemic of national scale" (Barczak 2020).

Another trait of pandemic governance was severe limitation of human rights, especially freedom of movement, right to privacy, religious freedoms and freedom of assembly (Quintana, Uriburu 2020, 691; Windholz 2020, 98–99). In the entire

world millions of people were confined to their homes, with various kinds of restrictions adopted in order to control the freedom of movement (El Fakhry Tuttle 2020; Das Neves Gonçalves 2020, 4). Apart from the intrastate restrictions, cross-border travel was severely limited (Maxeiner 2020, 213), thereby producing a Panoptikon-like ideal of the nation-state: individuals of every nationality are securely locked in their countries and in their own homes. All those who did not fit into this 'neat' classification – stateless persons or foreigners, homeless individuals – were left stranded. Limitations to human rights were coupled with increased penal measures and, quite often, excessive fines (Windholz 2020, 99). Human beings as such – depending on the categories they belonged to – were turned into a threat; as Agamben noticed, the laws turned people into potential infectors:

> Fatte le debite differenze, le recenti disposizioni (prese dal governo con dei decreti che ci piacerebbe sperare – ma è un'illusione – che non fossero confermati dal parlamento in leggi nei termini previsti) trasformano di fatto ogni individuo in un potenziale untore, esattamente come quelle sul terrorismo consideravano di fatto e di diritto ogni cittadino come un terrorista in potenza. (Agamben 2020b)

Finally, the role of the judiciary was effectively curbed. Only in few countries courts could play an active role in overseeing the exceptional measures adopted by the executive (or by the legislative acting upon the pressure of the executive). South Africa was a pioneer in this respect: by creating the post of COVID-19 Designate Judge (Petrov 2020, 80), it allowed a permanent monitoring of the emergency measures by a judicial mechanism – even if also 'executivised', that is reduced to one judge. Notably, the German Constitutional Court reacted to restrictions in the freedom of assembly, lifting the bans imposed on it (BVerfG, 29.04.2020, 1 BvQ 44/20). The BVerfG argued that general restrictions on the freedom of assembly and religion are not proportionate to the pursued goal, and they need to be nuanced as well as allowing of exceptions. Generally, however, the response from courts was patchy and minimalistic (Petrov 2020, 89–91; Golia et al. 2020, 53), just as if – against their constitutional position – they did not want to provide a concerted response to exceptional measures.

These reactions of particular legal systems may be seen as necessary adaptations of legal instruments – by nature, slow and inert vis-à-vis reality – to the fast changes (cf. Flood 2020). But that is an easy track of interpretation which imagines necessity as *coming entirely from the outside*. What is much more interesting is to see that the model "fast changes – delayed response" is based on two tacit presuppositions: first, the external necessity does not gain this status until the legal system recognises it to have it, and second, the law *has to* react to the necessity and gain the upper hand in the struggle with it. In the next section I'll proceed to looking more closely into particular forms of the state of exception (or emergency) introduced in different countries: but regardless of a legal form in which exceptional measures were taken, the state of exception was

preserved *as the overarching framework of the law in its relation to reality* (see also Agamben 2005, 40; 2012, 140–143; 2019, 50–51). The idea that the internal directives of the law (for example, constitutionally guaranteed rights or freedoms) may be ignored, if "necessity so demands", makes the category of necessity the *Grundnorm* of the legal system (thereby providing an obscene solution to the pre-war discussions between Kelsen and Schmitt). This feature may be called a generalised state of exception, transcending its particular incarnations in domestic legal system. In other words, the state of exception exists not only when a particular legal device of this name is triggered (be it a state of emergency or the "state of epidemic"), but when the legal system jumps ahead of its foundational regulations in order to establish exceptions (at any level) that correspond not to the official constitutional principles of a given order, but *to the necessity itself, as recognised by the law*.

The imbalance in the relations between the state powers in favour of the executive is a logical consequence of this generalised state of exception. It posits a chain of continuity between (legally established) necessity, exceptional measures, the executive and the inclusion/exclusion of human beings through the category of citizenship. What they all express is the *ultimate grip of the law*, which transcends all particular devices in which the relationship between the legal system and the reality is constructed.

3. 'LIBERALISM' V. 'ILLIBERALISM': THE PANDEMICS TAKES IT ALL

But does that mean that the establishment of exceptional measures within the boundaries of constitutionalism or outside of it is irrelevant? From the perspective of radical Agambenism, that seems to be the conclusion: no matter how the law attempts to regulate its relation to the necessity, it will be always excessive and unpredictable, so particular legal devices which are triggered do not matter. Yet this perspective is throwing the baby out with the bathwater: while the primacy of the generalised state of exception can be recognised universally, reactions of particular regimes differ. As if confirming the Luhmannian perspective on the autopoietic responses to the outside, every legal system – be it liberal or 'illiberal' (in the type proposed and propagated by Hungarian Prime Minister Viktor Orbán) – produces its own methods of addressing the necessity. Liberal reactions might preserve a bigger scope of individual freedoms, which is non-negligeable even in the context of generalised state of exception.

In the entire world, 96 countries declared some form of a state of emergency (COVID-19 Civic Freedom Tracker 2020; Bar-Siman-Tov 2020, 25). This makes the entire globe divided in half: the number of states that resorted to this device is almost equal to the number of those that did not. Naturally, one should not draw easy comparisons here: states of exceptions are not functional in all legal systems.

The decision whether to adopt a state of emergency or not is not easily attributable to the position of a country vis-à-vis the axis 'liberalism – illiberalism' (dubious as it might seem in itself). In Europe itself there have been liberal countries that did not resort to the state of emergency (Italy), and illiberal ones that did (Hungary). Hungary is a special case due to its Enabling Act, widely seen as introducing a '*koronadiktatúra*' (Petrov 2020, 72). Poland, which did not adopted any constitutionally envisaged exceptional measures, is a specific example of populist governmentality based on a vast scope of inapplicability of the law. It seems, however, that the decision whether to use the state of exception in any form is secondary: both the declaration of its state and its non-declaration may be used and abused by states. One could claim that declaring the state of exception is a better safeguard of legal standards and individual freedoms, but the existence of the generalised state of exception overwrites, at any rate, the formal legal devices that aim to contain it. As usual, the necessity forces special legislation which in itself has exceptional character, thereby exceeding the framework of the state of exception that has been declared. As argued by Angelo Golia et al.,

> the measures adopted were, to a greater or lesser extent, "exceptional" from at least two points of view: first, several governments resorted to new or rarely used legal instruments, often outside of established emergency powers or emergency regimes; secondly, these measures as a whole have (or have had) the potential to trigger or accelerate broader institutional shifts or reconfigurations. Although the duration and intensity of these shifts remain difficult to predict, there remains the potential for the pandemic and the measures taken to respond to it to induce substantial changes to constitutional structures. (Golia et al. 2020, 1)

The process of the generalised state of exception taking over the particular states of emergency is visible in numerous states. The US declared a State of National Emergency in March 2020, but it needed to be supplemented both by legislation – economic "deal packages" – whose impenetrability and convolution pave the way for concealed exceptions (Maxeiner 2020, 217–222). But the state of emergency was additionally supplemented with two classes of acts: binding executive orders of the President and non-binding guidelines, both ridden with inconsistencies and contradictions (Maxeiner 2020, 222–224). The chaos was only aggravated with competition between states and their contradictory regulations (Maxeiner 2020, 227–231).

Germany declared its state of health emergency, but not a constitutional state of exception; the proposal to replace the parliament with a standing committee was not carried out (Golia et al. 2020, 15–16). Nonetheless, more exceptional measures were needed than those offered by the *Infektionsschutzgesetz*. Heads of *Länder* governments and the Chancellor needed to convene in an extraconstitutional format in order to exchange information on the measures they adopted (Barczak 2020). The effective state of emergency was a statutory, not constitutional measure (Golia et al. 2020, 33). Still, as it is claimed, the constitutional culture of Germany was strong enough to open a debate on the legality of the adopted measures:

Besides these specific issues the first weeks of the pandemic also revealed much about German constitutional culture as a whole. This phase showed that German society has great respect for constitutional law, using it as a medium of reflection and a means of solving societal problems. The public debate regarding the COVID-19 measures was conducted in a highly legalistic manner and employed the categories of constitutional law. Significantly, for the most part these debates were carried out in the major daily newspapers as well as in online platforms such as the "Verfassungsblog". Nevertheless, this mode of reflection was not formalistic but extremely considered and responsive, impacting the choice of concrete measures. It allowed politicians to develop solutions that they would not have been able to reach without this reflection process. Consequently, the crisis has also revealed the degree to which constitutional law guides political processes in Germany. This close interaction with German constitutional law has probably contributed significantly to the successful management of the first weeks of the pandemic in Germany (Golia et al. 2020, 6).

France, by contrast, introduced state of emergency (*état d'urgence sanitaire*) quite quickly, with a clear swerve towards exceptional measures issued by the executive headed by the Prime Minister (Golia et al. 2020, 6, 24). This state was not constitutional, but based on statutory regulations and the doctrine of exceptional circumstances (Golia et al. 2020, 17). This choice proved controversial, as it required further statutory amendments to legalise the postponement of the second round of municipal elections, which would not need to happen if constitutional state of exception was declared (Golia et al. 2020, 17–18). Italy, which does not have a proper constitutional regime of the state of exception, needed to rely on particular constitutional devices, such as the possibility of issuing *decreti-legge* (Golia et al. 2020, 18) '*in casi straordinari di necessità e di urgenza*' (Art. 77 of the Italian Constitution), as well as on extraconstitutional administrative emergency instruments.

The distinction is, therefore, not necessarily between the countries that triggered constitutional states of exception and those that did not, but between the states that provided first a relatively coherent legal basis for future actions and those that acted patchily, without a coordinated legislative action, like Italy (Golia et al. 2020, 20–21). The same division cuts across 'illiberal' EU states. Hungary launched one of its constitutionally envisaged states of exception, namely the state of the danger of crisis, whereas the Polish ruling majority did not declare the state which the Constitution prescribed exactly for situations like pandemics, namely the state of national disaster (Drinóczi, Bień-Kacała 2020, 178). But the patterns of action after these initial choices did not run along the lines of constitutionality/unconstitutionality. In Hungary, the Authorisation Act was adopted in clear breach of the Fundamental Law insofar as it legalised the decrees that had been already issued and paved the way for adopting new ones outside of the scope of parliamentary control (Drinóczi, Bień-Kacała 2020,

180). Poland declared a statutory state of emergency ("the state of epidemic"), only to adopt further anti-COVID measures by sub-statutory ordinances. Most conspicuously, prohibitions of movement, to all intents and purposes similar to curfews, were adopted on the basis of ordinances, in clear breach not only of the Constitution (Art. 52) and international law (Art. 5 ECHR among others), but even the statutory law in which they were allegedly grounded. Additional violations of the Polish constitution concern the illegal prohibition of the freedom of assembly, preparations for holding the presidential election via mail and, finally, postponing the election *de facto* without a constitutional mandate (Serowaniec, Witkowski 2020, 167–168; Drinóczi, Bień-Kacała 2020, 189–191). These measures demonstrate

> how illiberal constitutionalism works: leaders are still pursuing their illiberal ideas and needs – which can more smoothly be achieved in the pretense of fighting against a human pandemic. Second, how emergency legislative drafting techniques can be 'illiberalized' – which, admittedly, follows from the logic of the regime. (Drinóczi and Bień-Kacała 2020, 191)

Consequently, if the COVID-related states of exception demonstrate any global trend, they seem to contribute to the age-old debate on the possibility of curbing the state of exception within boundaries of the law. First, constitutional devices of the state of exception proved inadequate in many countries, the necessity being of a radically new character. As a result, statutory regulations of medical emergency were often triggered. Secondly, even these measures proved inadequate and required partial adjustments, often adopted via ordinances or decrees issued by the executive. It is true that a good constitutional framework fares better in exceptional times (Drinóczi and Bień-Kacała 2020, 172), but it does not dismantle the generalised state of exception, which overwrites it with particular measures taken *praeter* or even *contra legem*.

4. COVID-19 CLUB OF SOVEREIGNS

The chain between the concepts of sovereignty, necessity and the executive – sealed by the generalised state of exception – is visible also on the international level. The national contraction made it problematic, with international institutions seeking legitimacy and influence by trying to help nation states in the pandemic. But international law has once again been revealed as an exclusive club of sovereigns. There are at least two dimensions of this process: international responsibility of states for spreading COVID and international human rights protection mechanisms that should intervene when human rights are endangered.

As far as the first issue is concerned, the rules on international responsibility of states (codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts), could allow to link the damages incurred by nations (financial

losses, costs of shutdowns and lockdowns, healthcare expenses) with an internationally wrongful actions undertaken by China. It might seem reasonable that the state in which the pandemic originated – and which adopted a secretive policy that prevented other states taking the necessary precautions – be found internationally responsible. According to Art. 3 DARS, "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law". It has been proposed that the legal act on which China's responsibility could be invoked are the International Health Regulations (IHR), a binding treaty approved by the WHO in 2005 and ratified by China (Mazzuoli 2020, 441). Article 7 IHR envisages that "If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information." This provision was clearly infringed by China in its non-dissemination policy (Mazzuoli 2020, 446–448). The trouble in demanding China's responsibility is expressed, however, in the following question: "how could it be possible to claim damage reparation from China if many states have not done their duty to take proper measures of restriction and social isolation?" (Mazzuoli 2020, 456). Collusion between sovereign states, which are not interested in displaying their own failures, is an effective obstacle to demanding actions from China on the basis of international law. Contrary to the claim frequently pronounced in the 90s, according to which we live in a post-Westphalian era, focused on the common interest of humankind rather than state interest, the pandemic clearly reveals the role of sovereigns in international law.

International law did not prove efficient at the level of international human rights protection mechanisms. If we take into account the European Convention on Human Rights – allegedly, the most developed instrument of human rights protection in the world – we will see that its reaction to the COVID is hampered by two crucial obstacles. First, Art. 15 allows of derogations of some ECHR articles in times of war or a threat to the life of the nation. This article functions as nothing less but a state of exception in its own right (Bachmann, Sanden 2020, 423). Ten countries invoked it in the period of the pandemic, usually derogating from the freedom of movement and assembly. More interestingly, these were the countries of Caucasus, South-Eastern Europe and two Baltic states; Western European countries did not resort to this measure, risking the future declarations of violations from the ECtHR if the measures they adopted were incompliant with limitation clauses of the Convention (Bachmann, Sanden 2020, 425–427). But even in case of the countries that did not use Art. 15, the scope of limitation clauses seems broad enough to encompass emergency measures (Dzehtsiarou 2020), turning them into 'micro-states of exception'. Second, by the delay in hearing cases by the Court – sometimes amounting up to 5 years – the states

are given an effective *carte blanche* for here and now. This adds to the rule of the executive, which finds itself ahead not only of the legislative, but even more importantly, of international judiciary.

As a consequence, sovereign states remain key players in the field also on the international level. If, according to Schmitt, the state of exception allows us to recognise the true sovereign, it is a defence against external threat – framed in the concept of security – that gives this sovereign its popularly recognised legitimacy. International institutions were relegated to the subsidiary position by the pandemic; COVID-19 revealed that the states believe themselves to be the crucial actors whenever necessity is invoked and act accordingly. It could be therefore claimed that the generalised state of exception, having a foothold always on the domestic level, is potent enough not only to suspend or disregard constitutional norms, but also mechanisms of international law.

5. CONCLUSIONS

Whenever COVID-19 is presented as a catastrophe, it needs to be seen in a correct perspective. The pandemic – apart from being a medical calamity in itself – only revealed the contours of the politico-legal framework that organises a response to the threat. This framework is contradictory: nourished by withered imagery of triumphant liberalism of the 90s, it is in fact based on the hollowing out of democratic institutions caused by decades of turbocapitalism. Authoritarianism is the song of today, both of autocratic technocrats in power and of populist movements that attempt to combat globalisation with strengthening of statal apparatuses. We wake up today with the same realisation that Schmitt made in the interwar period: parliamentary democracy is severely weakened, and the pandemic *coup de grâce* only reveals that its functioning has never been properly based on a coherent legal order guaranteeing universal rights and freedoms.

The problem of historical repetitiveness adds to our position vis-à-vis the catastrophe: we perceive it with an inkling of how the situation might deteriorate. As in Benjamin's quip mentioned in the introduction, our tradition allows us to hear, but not see. We are perfectly able to understand how states of exception are constructed, executed and abused, yet the immediate perception of the catastrophe is shrouded by the thick fog of ideologemes describing COVID-19 as a chance to reconstruct capitalism, restore the nature and rebuild inter-individual relations. Against this Age-of-Aquarius-type of obscurantism (Das Neves Gonçalves 2020, 8, 12) we need to reaffirm the existence of the generalised state of exception that sustains the chain of other concepts: sovereignty, necessity and citizenship. What the pandemic demonstrated was a clear return to the sovereign logic, both on domestic and international levels. COVID-19 opened new-old paths

of governing the living (Agamben 2020a) that will play a planetary role in the future fights for dominance and imposing a new face of capitalism. That is what our tradition allows us to hear; but seeing is another matter and it still seems that we are living in the margin that the catastrophe will soon cease to grant us.

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LEGAL FORM, COVID AND THE POLITICAL: NOTES TOWARDS A CRITIQUE OF THE *CORPUS IURIS PANDEMICI* [1]

Abstract. The scholarly analysis and critique of law always take place under circumstances of scarcity of academic resources. At any given moment, the number of academic jurists mastering a given legal system and being capable of analysing and critiquing it at a professional scientific level is limited. The pandemic of COVID-19 only exacerbated this phenomenon, exposing the importance of making methodological and paradigmatic choices. What critical legal theory teaches us is that the choice of method and approach to the analysis and critique of legal materials is not politically neutral. Asking about the political goals and choices behind solutions adopted by legislators, ministers, civil servants, law enforcement officers, and judges, and about the actual interests impacted by their decisions is much more important and topical in these difficult times. A sociologically oriented critical legal theory can provide the necessary tools for such an analysis of the *corpus iuris pandemici*.

Keywords: legal form, COVID-19, the political, critical legal theory.

FORMA PRAWNA, COVID I POLITYCZNOŚĆ: PRZYCZYNEK DO KRYTYKI *CORPUS IURIS PANDEMICI*

Streszczenie. Akademicka analiza i krytyka prawa zawsze odbywa się w warunkach niedostatku zasobów. W danym momencie liczba prawników-akademików, którzy znają dany system prawny i są w stanie go analizować i poddawać krytyce na profesjonalnym poziomie naukowym jest ograniczona. Pandemia COVID-19 jedynie pogłębiła to zjawisko, uwypuklając znaczenie dokonywanych wyborów dotyczących metody i paradygmatu badań. Krytyczna teoria prawa wskazuje, że wybór metody i podejścia do analizy i krytyki materiałów prawnych nie jest neutralny politycznie. Pytanie o polityczne cele i wybory stojące za rozwiązaniami przyjmowanymi przez ustawodawców, ministrów, urzędników państwowych, funkcjonariuszy organów ścigania i sędziów, a także o rzeczywiste interesy, na które wpływają ich decyzje, jest niezwykle aktualne w tych trudnych czasach. Socjologicznie zorientowana krytyczna teoria prawa może dostarczyć niezbędnych do tego narzędzi do prowadzenia tego rodzaju badań nad *corpus iuris pandemici*.

Słowa kluczowe: forma prawna, COVID-19, polityczność, krytyczna teoria prawa.

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1. INTRODUCTION

As I am writing these words in mid-April 2021, our species has entered its second year of coping with the COVID-19 pandemic, considered as "the greatest threat to global public health of the century [but also] … as an indicator of inequity and deficiency of social advancement" (Šimanskienė, Paužuolienė, Staškevičius 2020, 95). The law – understood here simply (but provisionally) as a set of general and abstract rules enacted and enforced by the state – has played a significant role in the response towards the threat posed by the virus. States of emergency, lockdowns, travel bans, social distancing measures, social bubbles, prohibitions of public gatherings, and more recently procurement contracts for vaccines and priority lists of social groups queuing for vaccination: all these forms of social engagement with the pandemic are, at least in our part of the world (the 'Global North'), deeply juridified. But the intensive use of law to tackle the pandemic has put the legal form as such under stress. Ministerial press conferences, official websites on COVID measures, or simply local policing practices have increasingly become sources – at least *iuris cognoscendi* if not downright *iuris oriundi* – of what can be dubbed as the emergent "*corpus iuris pandemici*."[2] Weeks or months later courts are striking back, annulling measures as illegal or unconstitutional, reducing penalties as disproportionate, releasing people from detention or, to the contrary, confirming administrative penalties and sentencing to deprivation of liberty for violation of measures. A distinct feature of these times is the sudden and strong re-emergence of national law: the *corpus iuris pandemici* is a distinctly national (or, in federal states, even regional) *corpus*, it exists in almost splendid isolation in each and every country (or federised state), mirroring the re-emergence of the strong nation-state as the main actor in tackling the pandemic and contributing to the fragmentation of our legal life. Borders have suddenly re-emerged where they were absent, and existing ones were insulated in an unprecedented manner (Lara Ortiz 2020).

As legal literature on the pandemic is emerging and the question is gaining more and more interest not only from doctrinal researchers in public law, but also from legal theorists and socio-legal scholars, my aim is to put forward a number of preliminary research questions which seem relevant from the standpoint of critical legal theory. I aim to indicate, in outline, what kind of aspects of the *corpus iuris pandemici* could inform a "critical jurisprudence of the pandemic," so to say. My aim is not to provide answers, but rather to provide an intellectual framework for a critical engagement with the *corpus iuris pandemici* by indicating what tools critical legal theory can provide to the pandemic and what aspects of that *corpus* can be elucidated fruitfully using those tools.

[2] The term is, of course, a neo-Latinism, created from the English adjective 'pandemic' (Latinicized to *pandemicus*). Given the importance of Latin for European culture, we cannot afford to leave it to the ancients.

The paper will first address (in section 2) the question of social agonism and the *corpus iuris pandemici* by pointing to five distinct socio-legal practices which can and should be interrogated from the perspective of an agonistic theory of law: constitutionalism; legislation; regulation; administrative action; adjudication. In a second part, the paper will address two horizontal issues: legal form and the pandemic (section 3), on one hand, and legal ideology and the pandemic (section 4), before concluding (section 5).

2. *CORPUS IURIS PANDEMICI* AND THE POLITICAL

One of the fundamental assumptions of critical legal theory is the presence of an agonism in every society, i.e. the conflictual nature of social life and the fact that this conflictual (agonistic) dimension is reflected in socio-legal practices (Mańko, Łakomy 2018, 475–477; cf. Mouffe 2013). Whereas the presence of conflicts is rather obvious in the case of adjudication (where the clash of interests of plaintiffs and defendants is plainly visible), conventional jurisprudence is prone to prioritising order and harmony when speaking about constitutionalism, legislation, or even regulation and administrative action (Mańko 2020d, 31–32). However, even in the case of adjudication critical legal theory goes beyond what the conventional legal theorist is prepared to accept, namely by extrapolating the individual conflicts of interests (plaintiff vs. defendant) towards collective conflicts which constitute the juridical reflection of economic and ideological conflicts nurturing any society (Kennedy 1997; Mańko 2021). The most obvious ones are class conflicts, reflected within the juridical in the guise of three typical antagonisms: worker v. employer; tenant v. landlord; consumer v. trader (Mańko 2020c; Mańko 2020d). Even if there can be rich tenants and consumers, and poor employers and landlords, the typicality of the legal relationship (in the sense of ideal type, but also statistical prevalence) is what counts from the perspective of an agonistic perspective on the law. These structural conflicts can be played out within the different strata of socio-legal practices: *constitutionalism* (the adoption, interpretation and application of the constitution, including through the use of constitutional states of emergency or the refusal to use them); *legislation* (the adoption of acts of parliament and decrees of a general nature); *regulation* (the adoption of detailed rules by government and executive agencies); *administrative action* (the adoption of individual decisions by public bodies, as well as the entire universe of coercive action, not necessarily taking strictly juridical forms, but expected to remain within the realm of law – think especially of policing in its various shapes and kinds); and finally *adjudication* (the business of courts, comprising the judicial interpretation and application of law and regulation, but also judicial review of legislation, regulation and administrative action, and the fact of judicial law-making which inevitably permeates the aforementioned practices).

The pandemic has opened entirely new fronts of analysis of the five socio-legal practices, outlined above, in the light of the agonistic paradigm. The task of the critical jurist is, therefore, to analyse such phenomena as the use of states of emergency, the adoption of COVID legislation and regulation, COVID policing and COVID case-law through the lens of the social agonism, i.e. asking each time the question: *cui prodest?* Who is the beneficiary, as a collective group, of the deployment of a state of emergency, or of the refusal to deploy it? Who benefits from certain new COVID rules adopted in the guise of legislation or regulation? Whose interests are being protected by courts, and whose by the administration? All these questions have to be answered through a proper sociological analysis of the occurring processes, both in a large scale (e.g. nation-wide) and on the basis of individualised case-studies. The key to evaluating legislation, regulation, adjudication etc. is the search for alternatives (Mańko 2021, [15]). If a state of exception were declared, one should immediately ask the question *what if it were not declared?* If it were not declared, the opposing question *what if it were declared* ought to be asked. In the case of legislation, one should evaluate the choices made against all constitutionally possible alternatives. *Idem* for regulation, administrative action, and adjudication. The search for alternatives and the focus on the interest of collective groups is the key to a thoroughly critical methodology. Comparative pandemic law can be a powerful tool, providing the necessary counter-examples concerning all possible aspects of the *corpus iuris pandemici* – how did other countries deal with the manner on a constitutional level (state of emergency, emergency decrees vs. standard procedures), within legislation, regulation, etc. (cf. Mercescu 2019).

Let me illustrate these discussions with some concrete examples. For instance, the Polish pandemic regulation in force at the time of writing (mid-April 2021) provides that non-food shops of a surface above 1000 sq.m. need to be closed, whereas such shops under 1000 sq.m. may remain open. Furthermore, shopping malls are in principle closed, save for food shops, pet shops, and press shops. In contrast, the Belgian regulation at the same time provides that all non-food shops, whatever their size, may be open, but may be visited only upon earlier reservation. In practice, smaller electronic and clothing shops in Poland, if located outside shopping malls, remain open and are freely accessible, which is in contrast to the situation in Belgium. A properly critical approach will enquire *cui prodest* both types of regulation. *Prima facie* it seems that the Polish regulation favours privately held, smaller shops, which will tend to be owned locally, but this would obviously need to be verified e.g., on the basis of economic data. On the other hand, the Belgian rules seem to hit all types of non-food shops equally, though in practice it would remain to be seen which types of shops better cope with the reservation requirement.

To take another example, the Central European countries, during the first wave of the pandemic decided to close their borders for all incoming persons

(save for own nationals and permanent residents) whereas the Western European countries initially kept their borders open. Today, during the third wave of the pandemic, the approach seems to be different, with the West of Europe closing its borders more stringently than the Centre of the continent. A properly critical approach should examine the actual beneficiaries and victims of both types of approaches, based at least on anecdotal evidence and case studies. An abstract, dogmatic approach to COVID legislation and regulation will not be capable of revealing anything in terms of the agonistic dimension of the *corpus iuris pandemici*.

A third example is the most topical one at the time of writing (mid-April 2021) as it is concerned with the rollout of vaccination programmes in various countries. The organisation of priority groups lends itself most clearly to an analysis in terms of the social antagonism. Whereas the prioritisation of medical personnel seems to be a common approach, other aspects remain rather different. For instance, in Poland prosecutors, psychologists, academic and school teachers have been included in one of the priority groups (1C) whereas in other countries such persons would be vaccinated only according to their age group. The Polish choice clearly reflects a preference towards safeguarding not only the medical service, but also the intellectual elite of the country (the inclusion of psychologists and academics – and not only medical staff – in the priority groups),[3] although the differentiation between prosecutors (priority group), on one hand, and judges and advocates (non-priority groups) is less obvious, unless analysed in the light of the on-going conflict between the judiciary, on one hand, and executive and legislature, on the other.[4]

Finally, one could cite the question of opening or closure of schools.[5] As it is well known, pupils in Western European countries have been, at least since the 2nd wave of the current pandemic, kept in school either full time (younger pupils) or at least part time in hybrid mode (older pupils). In contrast, pupils in Poland did not see their classrooms between March and mid-June 2020, returning only for the last two weeks, and likewise have been in school only during the first weeks of the school year 2020/2021. One could speculate, on one hand, on the policy reasons behind such a solution – for instance, the overriding need for social integration of

[3] Placing academics in a high priority group was the object of controversies. Some argued that persons working at cash registers in shops should be given greater priority. Professor Andrzej Rychard, a sociologist from the Polish Academy of Sciences, expressed the view that "it is a kind of reward for a socially held position, which, by the way, I think is socially acceptable and, in principle, there is nothing wrong with it" (Leszczyński, Rychard 2021). Later on, Professor Rychard retracted on his words (Rychard 2021).

[4] By the time I received this text back from peer review (mid-June 2021), vaccines have become widely available to all adult Polish citizens and residents of Poland, so the entire question of priority groups, so hotly debated at the beginning of the year, now lost any significance.

[5] For an analysis of education in times of pandemic see Indellicato 2020.

migrant communities (in the West) on one hand, and the generally poorer condition of healthcare (in Central Europe). Whereas the reasons for concrete decisions (total school closure in Poland vs. continued opening of schools in Western Europe) could be difficult to reconstruct (due to secrecy of deliberations), the actual impact upon social antagonisms can be ascertained with much greater probability. For instance, concerning the workers vs. capitalists antagonism, the continued opening of schools benefits the capitalist class, as it allows them to exploit the workforce more effectively (without the distraction generated by "teleschooling"). Secondly, concerning the women vs. men antagonism, the continued opening of schools allows women to pursue their professional careers, whereas teleschooling generally impacts women heavier. On the other hand, parents with health vulnerabilities are being exposed to greater risks due to the continued opening of schools, whereas they are offered better protection by total school closure.

To sum up, the critical approach to the *corpus iuris pandemici* is aimed at revealing, through the analysis of legal material and its social use in practice, whose collective interests are given priority in each and every instance, and how this can be explained in the broader context of the structural conflicts (antagonisms) nurturing society. The importance of comparative legal research as a crucial aid of critical legal theory cannot be underestimated.

3. COVID AND LEGAL FORM

Writing back in 2014, Costas Douzinas observed that

> As law is disseminated throughout society, its form becomes detailed and inconsistent, its sources multiple and diffused, its aims unclear, unknown or contradictory, its effects unpredictable, variable and uneven. […] Rule is replaced by regulation, normativity by normalisation, legislation by executive action, principle by discretion, legal personality by administratively assigned roles and competencies. Regulation and normalisation are ubiquitous and invisible, they come from everywhere and nowhere. […] The law expands inexorably at the price of assuming the characteristics of contemporary society, becoming decentred, fragmented, nebulous. (Douzinas 2014, 194)

In this insightful fragment which, in the second year of the pandemic sounds no less than simply prophetic, Professor Douzinas captured the very essence of the form-substance relationship within the juridical phenomenon. Juridification – the dissemination of legal form – cannot be without effect upon the nature of the legal form as such. In fact, the form vs. content dichotomy applied to law has a very long intellectual history which dates back at least to Aristotle who already contended that generality and vagueness belong to the very nature of law (Leyden 1967, 6). Legal form is, ultimately, that what makes the law what it is, i.e. what imprints upon it legality as such (*universal* legal form) and what makes it a particular branch or field of law (*particular* legal form) such as criminal

law, private law, administrative law, or English law, French law, or Polish law, or various combinations thereof (French administrative law of the 19th century, Polish private law of the socialist period, Italian criminal law of the Fascist era, etc.). Legal form is, as such, a cultural phenomenon and a social construct, hence its borders, both of the universal and particular type, are socially constructed and cannot be logically deduced from any philosophical *prima principia*. This does not imply that the concept of legal form relies on a logical vicious circle of the type 'law is what lawyers call the law' or 'law is what judges do', which was the weak point of American legal realism. To the contrary, the legal experience of concrete, historically existing and contemporary legal orders provides the parameters for defining legal form (cf. Cotterell 1998, 185–186). The concept is therefore per se rooted historically in, on one hand, the Roman legal experience (as the first appearance of mature legal form) *cum* the experience of Canon law and the Civilian Tradition that ensued, and the Common Law Tradition, on the other hand. Hence, universal legal form can be described as the formulation of normative precepts in a general and abstract way, combined with a tendency towards systemisation and generalisation (Cotterrell 1998, 186).

For Soviet legal theorists Olimpiad Ioffe and Mikhail Shargorodsky, the form of law was simply the state's rubber-stamping of the will of the ruling class (Joffe, Szargorodski 1963, 40). In this sense, anything that is adopted by the state *qua* law becomes *eo ipso* cloaked in legal form (cf. Wróblewski 1976, 815). Whereas this way of perceiving legal form has certain merit – it allows for a *formal* distinction between law and non-law – it does not provide a useful blueprint for the study of changes of legal form as such (as legal form is, under this conception, constant). Therefore, it becomes necessary to refer to the distinction made by late Soviet legal theorist, Lev Yavich, who differentiated between *internal legal form* and *external legal form* (Yavich 1976, 97–99). It could even be said that Yavich's concept provides the missing link between the classical use of legal form by Pashukanis (2003) and its contemporary use by Duncan Kennedy (1976). For Yavich, the external legal form is *the legal form in relation to the actual content* (substance), e.g., the economic one. This is the sense of legal form used by Pashukanis and, to an extent, by Ioffe and Shargorodsky. The internal legal form, in turn, is the *internal structuring* of the law. It is not law-as-form towards a substance which becomes juridified, but law's own form towards the substance of juridical normativity. In other words, the concept of internal legal form allows us to glimpse into law's inner life, whereas the concept of external legal form allows us to observe law's workings vis-à-vis its environment, be it political, economic, cultural, or ideological. Of course, both types of legal form are strictly interconnected, as it is impossible for law to be formless – a modicum of internal legal form is indispensable for the appearance of external legal form, i.e. for law to operate the juridification of certain non-legal relationships (Mańko 2020a, 28).

The critical study of the legal form of the *corpus iuris pandemici* can and should approach both dimensions of legal form: external and internal alike. The "covidisation" of law leads to the change of external legal form. Normally, it is characterised by *abstraction* (Pashukanis 2003, 43–44, 49, 57, 59, 64, 120–121), *interchangeability* in the guise of conceptual equality,[6] *selectiveness* (Collins 2003, 15–16; Mańko 2018, 42–43; Mańko 2020a, 29), *arbitrariness* (Pashukanis 2003, 60), and *programmatic reductionism* (Mańko 2020a, 29). To generalise what Hugh Collins wrote concerning contract law, one could say that not only contracts, but also legal form in general 'constructs an image of the human association that reduces its complexity to the elements and trajectories that have significance' for the legal form, and to this end it 'ignores most of the context' of law, and tends to 'displace other normative standards derived from the social context', with the result that it 'reduces the complexity of human association, rendering social relations susceptible to management and reconstruction' (Collins 2003, 15–16). The change brought about by the pandemic to *external legal form* is that facts which normally would be irrelevant suddenly become crucial. The law's attention is focused on a particular disease – SARS-Cov-2 – which suddenly becomes the legally relevant factor for various juridified relationships. In the most acute way this sudden relevance of COVID-19 for the external legal form can be observed in the concept of "immunity passports," in the requirement of COVID tests prior to boarding a plane or crossing a border, and the like.

But the pandemic affects not only the external, but also the internal legal form, which is even more interesting from the point of view of legal theory. Viewed in the perspective of the *longue durée* of legal form, the on-going pandemic and its impact upon the juridical can be seen as corroding modern Western legal form, both of its Civil and Common law imprints, as we have known it or, more specifically, as accelerating certain processes of decay that had been noted already earlier. Within the Central European periphery,[7] the cultural embeddedness of legal form is generally weaker, and the pandemic only exposes how thin this layer of formal, liberal legality has been. A specific feature of the *corpus iuris pandemici* is the rise of regulation, especially through governmental executive action, at the expense of the traditional form of properly debated parliamentary *lex* (Griglio 2020; Petrov 2020; Tacik 2021). It seems that this phenomenon has touched Western Europe and Central Europe to a comparable degree, with the

[6] In the sense that legal subjects (*personae*) and objects (*res*), as well as legal relationships, both *in personam* (such as contracts) and *in rem* (such as ownership), are treated as conceptually equal. Cf. Pashukanis 2003, 14, 113. This becomes especially visible in the very act of exchange: 'In fact, the juridical idea, or the *idea of the equivalent*, is first clearly delineated and objectively realised at that level of economic development where this form becomes common as equalisation in exchange' (Pashukanis 2003, 170, emphasis added).

[7] On the peripherality of Central Europe see e.g. Kukovec 2014; 2015; Mańko, Škop, Štěpáníková 2016; Mańko 2020e.

proliferation of emergency decrees here and there alike. Another formal aspect which is patently due to the pandemic is the law's growing instability: what was legal a week ago can become illegal today, and there is no way to predict what kind of measures will be decreed by the Minister of Health or the Government next week. We have not known such a degree of legal instability and unpredictability of law for decades, if not centuries. As Krzysztof Koźmiński and Jan Rudnicki have pointed out:

> Instances of the "creation and entry into force of laws in real time" have been observed whereby a high-ranking official during a press conference would orally expound on a previously unknown draft law along with a brief statement of its reasons, and then sign "live" (before journalists, television cameras, and thousands of viewers) such a regulation into law, which is then within hours promulgated in the official journal and enters into force on the same day. This practice – evidently partly justified on account of the COVID pandemic – defies the principles of good legislation […]. In contrast, the COVID reality has generated a situation where an unexpected decision of a politician becomes a source of universally applicable law, and as such, is immediately enforced. In fact, the familiar timetable of legislative works has become fiction as the consultation process has been replaced by unilateral statements from decision-makers, and media stories (TV programmes, Internet news, or radio broadcasts) have often become a more reliable source of information about binding law than the official *Journal of Laws*. (Koźmiński, Rudnicki 2020, 108–109)

What is even more perplexing (given the processes of harmonization and unification of law which seemed so ubiquitous!) is the variety of responses to essentially the same phenomena that can be observed in different countries. The contrast between Sweden and the rest of Europe was, perhaps, a first indicator of this kind of differentiation, but the differences in legal responses have only become pronounced since then.

The internal legal form of the *corpus iuris pandemici* has also been under challenge with regard to its systemic coherence. As Koźmiński and Rudnicki point out:

> A symbolic example of the peculiarity of the "COVID legislation" has been the "pandemic special laws", namely legal acts that aspired to the status of "comprehensive regulations" of the entirety of matters affected by the pandemic. Such laws […], previously unplanned, purported to regulate a wide range of issues of both a public and private character, which were yet to be the subject of the legislator's attention and entirely unregulated. […] The "COVID special laws" conflated provisions pertaining to the operations of confectioneries and gyms with laws laying down rules governing the organisation of funerals, and political rights […] with laws angled against speculators. Consequently […] the special laws were very complex, overly detailed, replete with *leges speciales*, purported to amend at once dozens or hundreds of acts, and difficult to understand without having recourse to the context of the entire legal system. Therefore, a meaningful perusal of these acts was a challenge both for laymen and experienced lawyers well versed in applying law. Their wording suggests that the drafting process involved persons without any legislative experience or basic awareness of legal terminology. (Koźmiński, Rudnicki 2020, 109–110)

Undoubtedly, the "COVID special laws", as described by Koźmiński and Rudnicki, can be treated as a symptom of the crisis of the modern legal form and a far-reaching departure from its ideals of systemicity, coherence and elegance, elaborated in the Enlightenment and implemented in the 19th century codifications.

4. CRITIQUE OF LEGAL IDEOLOGY IN TIMES OF PANDEMIC

A powerful tool wielded by critical legal theory is the critique of legal ideology (Stambulski 2016; Sabjàn 2019). This is because "[l]aw is first and foremost an ideological practice, a way of understanding the world" (Douzinas 2014, 188). In critical legal theory, ideology is understood as a "universalization project of an ideological intelligentsia that sees itself as acting 'for' a group with interests in conflict with those of other groups" (Kennedy 1997, 39), and at the same time also as "a system […] of representations (images, myths, ideas or concepts, depending on the case) endowed with a historical existence and role within a given society" (Althusser 2005, 231), and as "a fantasy construction which serves as a support for our 'reality' itself: an 'illusion' which structures our effective, real social relations and thereby masks some insupportable, real, impossible kernel" (Žižek 2008 [1989], 45). As such, ideology "is a structure essential to the historical life of societies" (Althusser 2005, 232), even if it is essentially contested (Kennedy 1997, 42). It plays an important role in upholding the status quo, as it masks and misrepresents 'the Real' of the social antagonism, proposing the fantasy of reality in its place (Marani 2013, 105; Garcia, Aguilar Sanchez 2008).

There can be no doubt that "law is central to ideology" (Douzinas, Gearey 2005, 221), nonetheless the exact relation between law and ideology is certainly a complex one. On one hand, law simply is subservient to the hegemonic ideology which determines the content of the law (Novkov 2008, 627). In this sense, one can speak about the overdetermination of law by ideology: law, in any of its phenomenological forms (constitution, legislation, regulation, administrative action, adjudication) is overdetermined, as far as its concrete substance is concerned, by a certain ideological vision of how society should be arranged. In this sense, the impact of the pandemic upon law can be analysed by reference to changing ideological inspirations of the COVID measures adopted by various governments. To what extent are they *liberal* or even *libertarian* (think of Sweden), or rather *conservatively* paternalistic and/or *social-democratically* interventionist (Koźmiński, Rudnicki 2020, 111–112), if not even downright *authoritarian* (think of excessive lockdowns, imposed in certain countries in an excessive manner, despite their doubtful effectiveness, especially in comparison to other countries in a similar situation).

But the ideological instrumentalisation of law is not the only dimension of the law-ideology nexus. The law itself – the form and content of legal institutions

– can shape the hegemonic ideology (Novkov 2008, 627), as when people believe that what is prescribed by legal norms is normal and appropriate (Dębska 2015, 251–253). For instance, human subjects interpellated by the law as consumers (*homines oeconomici passivi*) start feeling more like consumers (economic subjects) than citizens (political subjects) (Hesselink 2007, 323–348; Mańko 2014, 52). The impact of the pandemic upon the ideological outlook of the law has been immense and undoubtedly requires in-depth studies. The legal subject of the *corpus iuris pandemici* is no longer consumer or citizen, but it is increasingly the *patient*, interpellated on account of his or her health, presence of IgG or IgM antibodies in their blood, their prior vaccination or past history of COVID infection. This creates a pretty different ideological outlook of the law: no longer focused on consumption or political participation, but on the purely biopolitical notion of survival and preservation of bare life.

Thirdly, law can possess its own 'guild ideology' or 'professional ideology' of *legalism*, which aims at justifying the interests of lawyers in society (Halpin 2006, 159). As I have claimed elsewhere, this professional legal ideology – which I propose to call the "juridical ideology" – is no more homogeneous than the external political ideologies that impact upon the law (Mańko 2020a, 39–40). The impact of the pandemic upon the juridical ideology (lawyer's guild ideology) seems to have been, at least for the time being, negligible, although in the long run it cannot be excluded that a prolonged exposure of lawyers towards the extravagancies of pandemic legal form will have some kind of impact upon their own ideological consciousness *qua* lawyers.

5. CONCLUSIONS

The scholarly analysis and critique of law always takes place under circumstances of scarcity of academic resources. At any given moment, the number of academic jurists mastering a given legal system and being capable of analysing and critiquing it at a professional scientific level is limited. The pandemic of COVID-19 only exacerbated this phenomenon, exposing the importance of making methodological and paradigmatic choices. What critical legal theory teaches us is that the choice of method and approach to the analysis and critique of legal materials *is not politically neutral* (Mańko 2018). Opting for doctrinal legal analysis (so-called 'formal-dogmatic method'), which is the most readily available tool for lawyers, has been the choice of preference for many authors writing on the *corpus iuris pandemici*. Without negating the importance of maintaining a certain level of coherence of the *corpus iuris*, including its new pandemic extension – a coherence which cannot be attained without the constant scientific efforts of legal dogmaticians – I would like to make a pleading, in the conclusion of my paper, for more sociologically oriented and politically engaged scholarship in the

face of the new research topic of "Law & COVID." The political stakes, including those concerning the future of our polities and the future of law in general, are too high to limit the task of analysis and critique only to the application of traditional, formalist methods focusing on the linguistic and systemic side of the problem. Of course, it is quite important whether a state of emergency should have been introduced, whether a new piece of COVID legislation is compatible with the constitution, or whether a new limitation of human freedoms under COVID regulation can be reconciled with fundamental rights (see e.g., Drinóczi, Bień-Kacała 2020). Nonetheless, answering such questions one cannot but apply proportionality tests and balancing – operations which are, by their very nature, the playground of almost unbound judicial decisionmaking in the field of the political (Kennedy 2011; 2014) and arenas of the most intensive impact of ideology upon law (Mańko 2016). Analysing the choices made by the legislature, executive and judiciary only through the prism of traditional, formalist methods of linguistic and systemic analysis does not have much value. Asking about the *political goals and choices* behind the solutions adopted by legislators, ministers, civil servants, law enforcement officers, and judges, and about the *actual interests* impacted by their decisions is much more important and topical in these difficult times. A sociologically oriented critical legal theory can provide the necessary tools for that.

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THE COVID-19 CRISIS IN ROMANIA: A HYPOTHESIS AROUND PENAL POPULISM AND LEGAL CULTURE

Abstract. In this paper I seek 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. Specifically, I will organize this contribution as follows: in the first part, I will briefly describe 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; I shall qualify this reaction as containing some traces of penal populism. In the second part I shall offer a tentative mapping of the factors that can explain this problematic cultural reaction. Importantly, among these I include 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.

Keywords: COVID-19, Romania, penal populism, legal culture.

KRYZYS COVID-19 W RUMUNII: HIPOTEZA DOTYCZĄCA POPULIZMU PENALNEGO I KULTURY PRAWNEJ

Streszczenie. W niniejszym artykule staram się przedstawić hipotezę roboczą, która zostanie ostatecznie rozwinięta w przyszłym opracowaniu, a mianowicie, że kryzys COVID-19 ujawnił pewne problematyczne zachowania wskazujące na etos autorytarny zarówno po stronie władz publicznych, jak i obywateli, co sugeruje, że postawa populistyczna w dziedzinie prawa karnego może być obecnie częścią lub nawet elementem rumuńskiej kultury prawnej. W pierwszej części krótko opiszę reakcję Rumunii (przejawiającą się zarówno w podjętych oficjalnych środkach, jak i postawie obywateli) na pierwszą falę pandemii, skupiając się na roli środków karnych i wojskowych; zakwalifikuję tę reakcję jako zawierającą pewne ślady populizmu penalnego. W drugiej części zaproponuję wstępną mapę czynników, które mogą wyjaśnić tę problematyczną reakcję kulturową. Co ważne, zaliczam do nich udaną walkę z korupcją, której konsekwencją jest to, że to, co wydaje się bardzo umacniać rządy prawa w Rumunii po 1989 roku, może mieć też niezamierzony i paradoksalny skutek w postaci podważenia tegoż ideału.

Słowa kluczowe: COVID-19, Rumunia, populizm penalny, kultura prawna.

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1. INTRODUCTION

In the sea of uncertainty that we were navigating at the beginning of the COVID-19 crisis, at least one aspect seemed beyond doubt: countries responded for better or for worse with local answers to a universal threat. To recall that France decided to keep its wine shops open as they were considered indispensable to the life of the nation or that some states in the US did the same in relation to gun shops as they regarded them to be vital is merely to offer some anecdotical examples of how localism gained the upper hand in the handling of this crisis. As the pandemic unfolded it shed light on many well-known underlying social problems, common to almost all societies, some of which, like inequality, it definitively exacerbated. Nonetheless, if anything, the pandemic proved that culture – by which I understand received practices and beliefs – matters even in the face of a universal enemy. Specifically, in some instances, the crisis unearthed, like in the case of the country that I will examine here, Romania, some deep-seated manifestations of a culture that is not without critique and that have become more easily visible now, against the background of the pandemic and its corresponding legal and political consequences.

In this paper I seek 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. Specifically, I will organize this contribution as follows: in the first part, I will briefly describe 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; I shall qualify this reaction as containing some traces of penal populism. In the second part I shall offer a tentative mapping of the factors that can explain this problematic cultural reaction. Importantly, among these I include 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.

2. THE ROMANIAN RESPONSE TO THE FIRST WAVE OF THE PANDEMIC

At first glance, Romania did not do anything out of the extraordinary in its reaction to the first wave of the pandemic. Some of the measures that had been taken are typical and include the suspension of international flight, restrictions of internal travel, closure of entertainment places, banning of public gatherings, stay

at home requirements, curfews, obligation of mask wearing. However, from the outbreak of the pandemic in the country, one could observe a clear 'demand' on the part of the public opinion for the use of criminal legal tools and a corresponding 'supply' on the part of prosecutors in dealing with what started as a sanitary crisis but was soon to be transformed into a multifaceted phenomenon. Indeed, as soon as the crisis reached Romania it became clear that criminal law will be part of the arsenal put in place in order to contain the disease. People were placed under investigation or criminal files *in rem* were opened for such acts as negligent behaviour susceptible of transmitting the virus, lying about one's travelling history, corruption in relation to the buying of medical equipment, disclosing what was not yet public information about the shutdown of schools, a deed deemed susceptible of spreading the panic.[1] In fact, the media's initial coverage of the situation operated with two main indicators: the somewhat obvious number of cases/death toll and the number of criminal cases to be investigated in relation to the disease. In addition, the sometimes inexact rendition by the media of the criminal issue involved, coupled with the variety of behaviours which seemed to be punishable under criminal law, easily left the impression, in a typically Kafkaesque note, that one could be both prosecuted for doing X (for instance, going to work as a doctor who suspects that he/she might be infected) and for not doing X (for instance, refusing to go to work as a doctor).

Perhaps, nowhere was the penchant for resorting to penal means more troublesome than in its application to the medical system. To give just one example, when a hospital in the northern part of the country became a zone of high-rate infection with many members of the medical staff testing positive it was decided to dismiss the manager, open a criminal investigation and institute a military administration that was supposed to 'solve' the situation by bringing in the rigors of military rule. This generated an outrageous situation, indeed a borderline case of degrading treatment, which unfortunately did not seem to capture the public's attention. Allegedly, the regular doctors were made to shower collectively in special outdoor units of decontamination arranged by the provisional military manager and walk naked through the yard in the morning to their equipment rooms.[2] Needless to say, after the hospital's 'grand'

[1] As of 30 July 2020 more than 1000 criminal investigations had been opened out of which 400 have since been dismissed: https://www.digi24.ro/stiri/actualitate/justitie/de-ce-s-au-facut--degeaba-1–000-de-dosare-penale-pentru-raspandirea-covid-probatio-diabolica-1344800 [Accessed: 13 March 2020]. At the beginning of the pandemic, in April 2020, the General Prosecutor of Romania urged citizens to file complaints using the following language: "Give us information. We are watching everything!": https://www.dw.com/ro/procurorul-general-despre-anchetele-covid--veniti-cu-informatii-noi-stam-cu-ochii-pe-tot-ziarecom/a-53040174 [Accessed: 13 March 2020].

[2] https://www.libertatea.ro/stiri/medici-spital-suceava-general-ionel-oprea-2946349 [Accessed: 13 March 2020]; https://www.hotnews.ro/stiri-coronavirus-23772082-coronavirus-romania-avem-dreptul-judecam-medicii-care-dau-demisia-fata-pandemiei-covid-19.html [Accessed: 13 March 2020].

reopening under the 'exemplary' military management, other cases of COVID have been confirmed among the staff disproving the much-lauded disciplinary narrative.

Not only the voices condemning these oppressive measures went unnoticed but in the face of resignations by a number of doctors who were claiming to fear for their life or refused to go to work without having adequate PPE (personnel protection equipment), the authorities in charge of the crisis announced that they were taking into consideration to temporarily militarize all medical personnel so that doctors can be eventually accused of defection, placed under immediate prosecution and judged by Military Tribunals.[3]

Of course, the behaviour of a doctor who runs away when the people need them the most is morally condemnable. And, surely, it must be taken into account that the Romanian medical system fares the worst in the European Union and the system had to be defended from collapsing. However, while Italian and French doctors were being cheered for their wearing work, one can only wonder if, in Romania, efficiency was to be achieved by making doctors work under the pressure of being locked up in prison. Central and Eastern European countries are well-known for their citizens' lack of trust in institutions and among themselves (Kopecký 2003, 1–18). To encourage the public to expect criminal action as some sort of miraculous cure of all plagues (COVID included) is certainly not helpful for building social cohesion.

This lack of trust calling for repressive statal action was also manifest in the number of fines the authorities applied, one of the highest in Europe at the time.[4] The public was largely supportive of these administrative measures and it mattered little that the Constitutional Court intervened to declare unconstitutional the law on the basis of which these fines were imposed.[5] While the law from 1999 regulating in detail the state of emergency patently infringed on the principle of legality and proportionality, at least some part of the population felt infuriated by the decision whose immediate consequence consisted in the possibility of annulment before a common judge of the individual fines applied up to that point.[6]

Another relevant point for my diagnosis of the Romanian (legal) culture has to do with the manner in which the patients were treated in the first phase of the pandemic. As soon as the virus started to spread on the Romanian territory as well, legislation was adopted to the effect that all patients who tested positive

[3] https://evz.ro/decizie-de-ultima-ora-pentru-medici-se-vorbeste-despre-mobilizarea-acestora--in-armata.html [Accessed: 13 March 2020].

[4] https://www.bbc.com/news/world-europe-52370421 [Accessed: 13 March 2020].

[5] Decision n 152/06.05.2020 of the Constitutional Court of Romania, published in the *Official Gazette* n 387/13.05.2020 available at http://legislatie.just.ro/Public/DetaliiDocumentAfis/225555 [Accessed: 13 March 2020].

[6] APADOR-CH, a human right ONG, declared that "following the Court's decision" the regime of the state of emergency was "chaotic": https://apador.org/decizia-ccr-pe-intelesul-tuturor/ [Accessed: 13 March 2020].

were to be hospitalized.[7] Moreover, they were not to be released until they presented two consecutive negative tests. Concretely, this measure meant that a person could have been made to stay in the hospital despite their will for several weeks in a row even if they displayed mild or did not display any symptom at all. While such a legal obligation might have been instituted out of concern for the patients themselves, their relatives and ultimately the population at large, it amounted to a *de facto* deprivation of liberty (by virtue of an order of the Public Health Ministry). Here, again, the Constitutional Court, had to step in in order to emphasize that such a deprivation of liberty cannot occur without the necessary legal guarantees (such as judicial authorization) even if the security of the country is threatened by a public health situation.[8] The Court also took issue with the measures of institutionalized quarantine and isolation at home arguing that the legislation on which they are based fails to meet the require criteria of legality, most notably the principle of predictability. The media's coverage of the decision did not necessarily depict it under a favourable light rather suggesting that the Court was to be blamed for the chaos most likely to ensue. In the same vein, the Prime Minister of the time declared sarcastically: "the Court decided that a patient infected with COVID-19 can walk away freely" and urged citizens not to take into account the Court's decision.[9] In a press communication of the Ministry of Internal Affairs (the Department for Emergency Situations) it was mentioned that the beneficiaries of the Court's decision were to be warned that if they do have the virus and infect others a criminal action could be triggered against them.[10]

The state of emergency reignited discussions about the legitimacy of a Hobbesian state where the absolute, unfettered sovereign is to take whatever measure is necessary to protect society (Runciman 2020). Paradoxically, in wanting to be a Hobbesian sovereign that protects citizens from each other (the *Other* being here the bearer of the virus), the Romanian state ended up instituting a war of all against all (patients vs. doctors, doctors vs. the state, doctors vs. doctors, first-order Romanian citizens vs. second-order Romanian citizens). Fighting nature, it brought back 'the state of nature'.

Leaving aside the presence of the military on the streets which was in any case not unique to Romania,[11] I believe it is possible to read in all these

[7] Health Ministry Order n 753/07.05.2020.

[8] Decision n 458/25.06.2020 of the Constitutional Court of Romania, published in the *Official Gazette* n 581/02.07.2020.

[9] https://www.digi24.ro/stiri/actualitate/autoritatile-nu-ii-mai-pot-tine-pe-romani-in-izolare--si-carantina-pacientii-covid-au-inceput-sa-plece-din-spitale-incepand-de-vineri-1332925 [Accessed: 13 March 2020].

[10] https://www.digi24.ro/stiri/actualitate/autoritatile-nu-ii-mai-pot-tine-pe-romani-in-izolare--si-carantina-pacientii-covid-au-inceput-sa-plece-din-spitale-incepand-de-vineri-1332925 [Accessed: 13 March 2020].

[11] https://www.weforum.org/agenda/2020/04/coronavirus-european-armed-forces/ [Accessed: 13 March 2020].

problematic interventions a form of penal (or military) populism. Without exaggerating the need to squeeze the 'reality' into pre-established theoretical labels, there is indeed a sense in which what happened could be qualified as penal populism to the extent that penal populism is defined as "a way of ensuring that policy in this sphere is more reflective of the public will than values of criminal justice establishment" (Pratt 2007, 14). Even more problematically, for John Pratt and Michelle Miao, penal populism represents "an attack on the long-established link between reason and modern punishment" and view it as "only the prelude to the way in which a much more free flowing *political populism* now threatens to bring an end to Reason itself, the foundation stone of modernity" (2017, 3 – original emphasis).

Initially identified at the end of the 20th century as distinctive for the Anglo-American world given its high incarceration rates, penal populism has by now been discussed in relation to many countries (Pratt, Miao 2017). It has also been associated with phenomena as diverse as the war on drugs (Kenny, Holmes 2020), the cultivation of moral panic in connection to the arrival of immigrants (Minetti 2020) and terrorism or the rise of feminist rhetoric denouncing domestic violence (Grzyb 2019). Some of the measures attributed to a penal populist policy seem utterly absurd such as a "proposed law in Canada that would create a database specifically designed to embarrass judges who impose 'lenient' sentences. Every time a sentence was imposed a record would be made of the name of the judge, the sentence imposed, and the maximum sentence permitted according to the Criminal Code" (Roberts et al. 2003, 9). Others, like the imposition of legislation which severely undercuts judges' discretion in criminal law cases, seem less so and could be debated. In any case, what defines penal populism is not *per se* the objectionable character of the measure but the fact that its roots can be linked to popular opinion and this in disregard of the measure's actual consequences. Of course, it would be not only naïve but also counter-productive to expect politicians and experts to never respond to public opinion. There are however responses and responses and one has to bear in mind that the public can be simply mistaken (people systematically believe that the crime rates are escalating even when in fact they are decreasing) (Roberts et al. 2003, 21), confused (the answers they provide in a simplistic polls do not reflect the complex attitudes they harbour in reality) (Roberts et al. 2003, 25) or inauthentic (indeed, it is difficult to know exactly what the voice of the public is given that it is certainly distorted by various actors in the legal, political and journalistic field). Public opinion must indeed be recognized as a "nebulous concept" (Roberts et al. 2003, 25). From a more radical perspective, it can even be said not to exist (Bourdieu 1979).

Yet, for what it is worth, in the Romanian case it does indicate a tendency towards penal populism. Thus, according to a poll conducted by a newspaper on a lot of 1000 people more than 66% declared themselves in favour of the militarization of hospitals, which dovetails with the high levels of confidence the

public displays towards the army.[12] This statistical example, together with the other problematic measures which seemed to very much enjoy the support of the public, provide us with a picture in which penal populism occupies a certain space in Romanian (legal) culture.[13] Indeed, from the very start of the epidemic when hundreds of thousands of Romanians living and working abroad returned home (now the figure is estimated at more than 1 million), the Romanians 'inside' the country felt reassured in concocting a story of the *Other*, the foreigner, the no-longer-Romanian Romanian who brings the plague from across the pristine national borders. This legitimized once more the recourse to criminal means and highly constraining measures. Whether one can speak of an embedded attitude that could be hardly displaced is something that requires further scrutiny. Such an analysis will need to take into account the well-known distinction between *external* legal culture (the public's legal consciousness, that is its attitude towards law in general and the institutions of liberal democracy) and *internal* legal culture (the various perceptions of the legal community such as seen from the inside of the profession) (Friedman 1975). For the time being, the two seem to be converging towards a penal populism of sorts with prosecutors paying heed to the public's thirst for 'law and order' and the public demanding a harsh stance on unruly behaviour. I turn now to presenting some tentative explanation for why this penal populist ethos has pierced the veil of Romanian legal culture. As such, I will offer 'culture' as explanation, not as justification (culture does not excuse behaviour) (see, for instance, Honig 1999) nor as causation (the various factors identified below are to be understood as having *facilitated* not *caused* the relevant behaviours).

3. A CULTURAL MAPPING OF PENAL POPULISM

In comparative legal studies, Pierre Legrand has been advocating for reading foreign law (its texts and underlying culture) "*à la trace*," that is by bringing to the surface its many invisible traces that pertain to "infinitely complex networks of enmeshment" in history, ideology, language, economics, politics, etc. (2011, 626–627). An interpreter mindful of these myriads of traces shall not be content to read law from law, that is from law as it is posited as positive law but will supplement law with "deconstructive scrupulosity" and thus will accept it as the "hyperlaw that is" (Legrand 2011, 626–627). The fact the one finds herself before one's own national law does not dispense one with the task of tracing. Being aware that no account is total (indeed, law cannot be exhausted neither in practice nor as

[12] https://www.bursa.ro/sondajul-bursa-doua-treimi-in-favoarea-militarizarii-spitalelor-o--treime-contra-81713934 [Accessed: 13 March 2020].

[13] Additionally, the acceptance of violence towards Roma people for 'correcting' misbehaviour speaks of another feature of Romanian society, namely its ethnonationalism.

explanation) I can nonetheless begin to trace here what I have previously identified as a Romanian variant of penal populism such as it took shape in the specific context of the COVID-19 crisis:

– a long history of "connivance between law, politics and military" that goes back to the "devaluation of liberal regimes of legality during the interwar and at least in the early years of the postwar period" (cf. Cercel 2021);

– a self-deprecating ethos that has been haunting Romanian society since time immemorial: we are 'savages' who know of no discipline and who therefore have to be governed by pure force;

– a precarious state of the public health system which needed to be defended at all costs;

– a lack of trust in government among citizens specific to Eastern and Central European countries;

– a high rate of confidence on the part of the public towards the Army;

– the notion of 'moral panic';

– the recent protests whose zeal was often premised on the idea that all politicians are either incompetent or corrupt/ that politics is always dirty;

– the legacy of a successful fight against corruption.

While other 'traces' can and must certainly be added, I want to discuss here briefly the last point which could appear as the most surprising in the enumeration. For years, Romania strived to build for itself an image of a country that finally resolved to efficiently fight corruption. Indeed, under the patronage of the European Union which monitors the progress made by the country, in the last decade Romania assumed anti-corruption as one of its main goals and therefore implemented a series of measures to that effect. Consequently, the independence of the judiciary became much stronger than in the aftermath of the Revolution and prosecutors felt encouraged to go after high-profile politicians who were long suspected of crimes involving public money. The chief of the National Anti-Corruption Prosecuting Office (Laura-Codruta Kövesi, who was recently elected head of the newly formed EU Prosecutor's Office) and the prosecutors working under her direction were soon made into public heroes. Kövesi's abusive dismissal from office by the former ruling party in 2018 was a matter of high concern at the time not only among liberal elites but in society in general (see Mercescu 2021). With prosecutors perceived as the nations' saviours, a significant part of the public came to perceive penal justice as the solution to all evils.[14] There was and there still is a sense in which prosecuting and convicting represented more than

[14] While the contexts remain very different, the Romanian story of perceiving judges as saviors and criminal law as a solution to all evils is reminiscent of the "centrality and hyper-inflation of penal law in Italian life" associated with the so-called *Tangentopoli* period when "judges managed to translate their theoretical independence into effective action against seemingly impregnable politicians" (see Nelken 1996, 197). I am indebted to one of the anonymous reviewers for suggesting this analogy. On Italian penal populism, see: Anastasia, Anselmi 2018; 2020.

delivering justice; they were seen as setting the country straight, bringing order and efficiency where politicians were unable or unwilling to do so. Indeed, in penal populist rhetoric, the crimes one is supposed to combat are often represented as "'the most important problem' facing the country" (Roberts et al. 2003, 22). As far as corruption is concerned, such a claim is relatively easy to make. Indeed, in the case of Romania the "threats to national security [were] understood from 2005 onward to include high and medium-level corruption" (Iancu 2020). It is unsurprising then that many Romanians saw the fight against corruption as crucial, worthy of any sacrifices. Let it be reminded that former President Traian Băsescu was propelled into power on an anti-corruption agenda that proved immensely popular[15] and whose effectiveness was later on, in a bitter irony for him, to turn against his own protégés.

Notwithstanding the undisputable merits of the criminal justice system, a part of the population, including many legal professionals, were ready to admit, more or less serenely, that at least some of these achievements were probably obtained at the price of excessive if not dubious investigative methods, including perhaps illegal mass surveillance techniques (still a matter of controversy). For instance, constitutional law scholar Bogdan Iancu summarizes the various critiques in a contribution, which highlights that the rule of law recipe concocted at the higher European level, was bound to "go native and/or develop pathologies" in Central and Eastern Europe:

> In Romania, over the past 15 years, the EU-driven need to produce anticorruption conviction quotas demonstrating success, in synergy with more "strategic" domestic drives, has resulted in a version of "penal populism." Surveillance of all kinds spiked, with quasi-unanimous judicial approval of wiretap warrants. Perp-walks have moved high-stakes trials into the "court of public opinion", with many wiretap transcripts leaked by anticorruption prosecutors, Brazilian-style, in the friendly press. More worrisome still, protocols between apex judicial institutions with the Romanian Intelligence Service (SRI) have surfaced, including references of close collaboration on files, between the SRI and anticorruption prosecutors (Iancu 2020).

All in all, these problematic undertakings denote an authoritarian drive (even though in many respects different than the one perceptible in the early '90s which was a direct translation in practice of the Criminal Procedure Code itself and of a legacy according to which the prosecutor was playing an exacerbated, all-powerful role in the criminal trial). However, in line with the 'law and order' rhetoric, the public did not seem particularly bothered by these potential transgressions of the rule of law. Outcomes and institutional commitments mattered more than procedural justice. And so the public retained "a strong preference for security over either freedom or democracy" (Iancu 2020) which seems to have translated into a penal populist attitude on the occasion of the sanitary crisis.

[15] One of his campaign mottos read in a typically hilarious Romanian language that remains untranslatable as such "stick it to the corrupted."

In fact, some might argue that a mild form of penal populism can constitute an advantage in the fight against corruption. Thus, it can be that penal populism helps strengthen the rule of law at least in some post-authoritarian contexts by providing the actors of the judicial system with the necessary psychological support and by putting additional pressure on a massively corrupted political class who resists reforms. If this is so, one can nonetheless further claim that the 'positive' penal populism risks converting into 'negative' penal populism, affecting the rule of law in times of crisis when the country tends to be governed by exceptional powers, including military ones as in the case of the pandemic's management. It should be pointed out that a 'positive' penal populism is different from a 'benign' penal populism. The latter is defined as the situation when "politicians […] pursue the right policies (effective crime policies) but for the wrong reasons (to be popular)" (Roberts et al. 2003, 5). We can notice from this definition that the effectiveness of the policy does not depend on the popular will. By contrast, with 'positive' penal populism, the effectiveness becomes dependent on popular support. Both positive and benign populism can slide towards 'malign' populism, that is "the promotion of policies which are electorally attractive, but unfair, ineffective, or at odds with a true reading of public opinion" (Roberts et al. 2003, 5).

4. CONCLUSIONS

This brief paper cannot be the place to discuss whether the positive penal populism of the Romanian anti-corruption agenda outweighs in the end the negative penal populism associated with it/that sprang from it. Rather, I aimed at drawing attention to some problematic features of present day Romanian legal culture that have been exposed during the pandemic. I hypothesized that these characteristics might have something to do with the recent legacy of the anti-corruption fight. Now, the exact role of the politicians, of the media, of the legal community and of the public is certainly to be ascertained in more detailed contributions that will have to build on empirical data as well.

Until then I proposed this contribution as a working hypothesis that is not to be read as an indictment of local solutions. Politically speaking, the pandemic is after all a national, regional or even local affair and there is for sure no right answer in tackling the crisis (moreover, to be fair, the restrictions imposed in Romania were not even among the harshest). But hard times have the great merit of laying bare some of our deep-rooted assumptions, convictions, inertias. In the Romanian context, penal populism, together with nationalist discourses, emerged as particularly problematic aspects in addressing the coronavirus crisis bearing traces of old (authoritarian) and newer (anti-corruption) history that does not cease to mould the public's understanding of state power.

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LOCKDOWN: A COMMENTARY

Abstract. The Collins dictionary has elected lockdown as its word-of-the-yearn 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. This article 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.

Keywords: lockdown, COVID-19, pandemic, state of exception, security.

LOCKDOWN: KOMENTARZ

Streszczenie. Słownik Collinsa wybrał *lockdown* jako swoje słowo roku 2020. Zdefiniowane jako „nałożenie surowych ograniczeń na podróże, interakcje społeczne i dostęp do przestrzeni publicznej", o których zadecydowały rządy „w celu złagodzenia rozprzestrzeniania się COVID-19"; dla leksykografów Collinsa *lockdown* zajął pierwsze miejsce, ponieważ jest to jednoczące doświadczenie dla miliardów ludzi na całym świecie, którzy musieli wspólnie odegrać swoją rolę w walce z rozprzestrzenianiem się wirusa. W obliczu nieznanego, zupełnie nowego wirusa, rządy na całym świecie zareagowały w dość znany sposób, zawieszając normalny tok życia społecznego poprzez wdrożenie środków, które zwykle zalicza się do stanu wyjątkowego. Niniejszy artykuł jest komentarzem, który ma na celu umieszczenie praktyki lockdownu (jako rządowego środka administracyjnego) w kontekście teorii państwa i rządu. W zakresie, w jakim sytuacje nadzwyczajne są zawsze odkrywcze, artykuł ten będzie argumentował, że stan wyjątkowy – którego podkategorią jest zamknięcie – w eksponowaniu suwerennej władzy państwa obnaża radykalną niemoc, w której jest ugruntowany i z której bierze swoje ostateczne znaczenie i funkcję.

Słowa kluczowe: lockdown, COVID-19, pandemia, stan wyjątkowy, bezpieczeństwo.

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1. INTRODUCTION

At first, the virus invaded our bodies, then it attacked our already sick polities making the megamachine of capital slow down dramatically; and finally, it has colonised the psycho-sphere (Berardi 2020), populating our imaginary with terrifying images (the invisible enemy; the death of loved ones; engulfed intensive care units; the unknown economic shock, which we are told 'this time will be different"). As an epochal event the pandemic marks an irreversible cognitive threshold in the twenty-first century, which is pushing us to look to the past and the future with different eyes. Perpetually exposed to the infodemic spectacle of the contagion, our everyday parlance has been invaded by words whose use was certainly not common, and until recently limited to the specialisms of specific scientific sectors. Coronavirus, pandemic, herd immunity, contact tracing, quarantine, self-quarantine, self-isolation, social distancing, super-spreader: these are some of the words that entered abruptly our lexicon; hopefully not permanently.

Among this plethora of terms, the Collins dictionary has elected *lockdown* as its word-of-the-year 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.[1] 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.

Locked down in the quasi-monastic (Coccia 2020) singularity of our own existence, we are witnessing the strange revival of the state's authority. In an ironic twist, the vituperate entity that we-the-moderns call state – whose death has been celebrated tragicomically on countless occasions – is back at the centre of the stage, as the only certain shelter remained in a world devastated by economic, ecologic, and sanitary tragedies. Blessed are the governments caring for the health of the population, and holy are the exceptions made in the name of our safety. There are not rights immune to be sacrificed for the sake of the security of the population – if anything, this the lesson we learnt with two decades of war on terror.

Forgetful of the fact that the state in its connivance with the capital played a central role in producing the tragedy we are living, we remain jammed in the magic of the spectacle of the pandemic (whose reality, of course, should not be doubted). And in such re-enchantment of state's institution, contesting the exception, and the ethical conundrums of the contagion appear as the ultimate

[1] https://www.collinsdictionary.com/it/woty [Accessed: 15 February 2020].

blasphemy: that of the negationists (Agamben 2020b). So it goes. Even when faced with the blatant irrationality of some emergency measures enacted by governments, we are stuck on the binary option of being either with the reason of the good state and the good science or with the ethos of conspiracy; either with the (Malthusian) human natural selection or with the herd of good citizens practising social distancing for "protecting themselves and the others." The pandemic produced a strange paradox: it has enlarged our everyday vocabulary while reducing at the same time the space for critical thinking.

But even in impending catastrophes, we should never refrain from questioning our forms of life and the strategies governmental powers implement to shape them. Hopefully, a state of exception will save us. But the post-pandemic world that is emerging inevitably raises the question of the risks entailed in prolonged crises and the instruments that are usually deployed to solve them. Indeed, as Agamben poignantly asked: what do human relationships become in a country that habituates itself to live in this way for who knows how long? And what is a society that has no value other than survival (Agamben 2020, 26)? The risk is that the fetish of security on which the very idea of the modern state's power and authority have been built assumes inexorably the form of an iron cage, in which the preservation of life coincides with the renunciation of what makes life bearable, and the very possibility of thinking change and a happier life becomes overshadowed by the concerns for never-ending security.

2. IMPOTENCE

Exceptional circumstances have always a revealing potential.[2] The lockdown, with its suspension of rights and the alteration of our daily gestures, reveals in a way the nature and essence of the state's power. It is not surprising, though, that in the enormous body of literature on the pandemic the name of Hobbes is a recurring one (Santi 2020; Iacob 2020; Hunt Bottin 2020; Lamola 2020). Perhaps, there is no other product of the human mind that has captured the essence of the state's authority more effectively than the *Leviathan*. Hobbes famously placed at the core of modern politics a fundamental bargain between security and absolute liberty: a kind of pact with which humans fearing for the preservation of their own life decide to give away part of their unbounded freedom for the sake of their security, which is conversely placed in the hands of the sovereign. "The office of the sovereign" we read in chapter XXX of the *Leviathan*,

[2] As Schmitt – paraphrasing Kierkegaard (1983) – wrote in a notorious passage of *Political Theology*: "The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition" (Schmitt 2005, 15).

> consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of the people; to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself. (Hobbes 1996, 222)

The *salus populi* is here symmetrical with the fundamental purpose of the construction of state power. "The final cause, end, or design of men […] in the introduction of that restraint upon themselves" Hobbes writes "is the foresight of their own preservation, and of a more contented life thereby" (Hobbes 1996, 111). The monopoly of legal violence, inscribed in the very functioning of sovereign power, is thus a desirable side effect for the sake of our security; of our *salus*.

But what is security? What problem modern politics aims to address in putting security at the centre of its own legitimisation? Physical integrity and our right to life, living out of the misery and precarity of war; but also, the contentment that makes life worth to be lived, the protection and security of human labour: these are the problems security usually addresses. Security is the certainty that our form of life is grounded on rational structures or truths that allow us to foresee what will come next; it is the belief that faced with the contingency of natural and human events, scarcity will be governed, and damages (economic, physical but also moral) will be compensated by specific institutions. The modern political principle of security responds to a general social-political demand to limit uncertainty, the aleatory; it is in a sense the translation into the political vocabulary of the idea of a human dominion/management of contingency (and the world) so dear to the canon of modernity.

As Foucault has argued, the problem of security and the emergence of its political/institutional apparatus appears on the "the philosophical horizon" of the category of misfortune, which encompasses all those factors – like bad weather, drought, ice, and ultimately war – that are out of "one's control" (Foucault 2009, 31). Bad fortune is both a recognition of impotence and a "political, moral and cosmological concept" (ibid). Due to their defective nature, humans are left in a state of constant insecurity; and the misfortunes that gnaw people and threaten the stability of polities are signs delivered by (divine) providence that something is inherently wrong with how affairs are conducted and need to be changed. From natural catastrophes to human's malice, the security that state's potency must grant is grounded on the substantial impotence of the contingent. And the art of government, as Machiavelli famously argued, consists of the application of rules and strategies that statesmen should adopt to limit, control, and turn in favour their impotence and fortune (Machiavelli 1988). And it is against this background that the modern government (as an art) and state's institutions emerged and developed into a form of administration of security; helped by the constant improvement of technology and sciences such as statistics, demography, economy, and medicine.

In its polysemy, the concept of security refers to the strategies through which state's power aims at making life and the world at large predictable and manageable, through the creation of specific apparatuses, laws, procedures, and competencies (Ventura 2020, 97). "The mechanism of security", Foucault claims, "making use of some instruments of prescription and prohibition" responds "to a reality in such a way that […] nullifies it, or limits, checks or regulates it" (Foucault 2009, 47). Faced with the incommensurability of the contingent (of providence) the apparatus of security does not aim at transforming the nature of "events"; but tries to nullify, regulate and limits their effects. Indeed, the logic underpinning security is not much the creation/imposition of order through the elimination of contingency, rather – as Agamben points out – it consists of guiding "disorder" (Agamben 2001, 23), that is letting things "happen" and assessing/managing risks and collateral effect.

The creation of the State-*Leviathan*, thus, inaugurated a process of world ordering, intertwined with capitalism modernisation, materialised in the political form of the nation-state, governmentality, and juridification (bureaucratisation) of the whole of reality. The actual/ideal function of these apparatuses necessitated on the one hand the production of a class of functionaries able to administer a growing number of things, events, and subjects (the so-called elites) (Ventura 2020, 97–98); and on the other hand, the substantial depoliticization of many of the sphere of human individual and social life whose administration is isolated from majoritarian political intervention and delegated to the governmental bodies, with the consequent creation of docile depoliticised subjectivities.

As Foucault maintains, one of the greatest innovations of the modern form of political power is the "emergence of population as an economic and political problem: population as wealth, population as manpower or labor capacity, population balanced between its own growth and the resources it commanded" (Foucault 1998, 25). For the Modern state, the target of the government's apparatus was not the individual not even the "people", but the population "with its specific phenomena and its peculiar variables: birth and death rates, life expectancy, fertility, state of health, frequency of illnesses, patterns of diet and habitation" (Foucault 1998, 25). The population, Foucault maintains, is an assemblage of bodies trapped in a system of government and disciplinary regulation; it is a passive subject/object whose existence depends on a specific way of observing the multitude of individuals composing the body of the state. "The population is not a primary datum" but is an entity "dependent on a series of variables", subject to manipulation and management (Foucault 2009, 71). The object population, thus, is not something given, rather is the product of a calculating analytic strategy. The population, Foucault claims, appears as a "kind of thick natural phenomenon" composed of a "set of elements in which we can note constants and regularities" (Foucault 2009, 71) which goes to produce a sort of harmonic framework in which it is possible to identify tendencies that could be made the target of intervention for the supposed benefit of all.

The production of security that is at stake in the constitution of modern states determines a substantial form of depoliticization of the body politic. The subject-object of governmental practices that goes under the name of population is not capable of self-determination but is a passive subject. Foucault expresses this by distinguishing between "people" and "population." With the development of political economy and the modern theory of government, "the population covers the old notion of people" (Foucault 2009, 43). The people become regarded as

> those who conduct themselves in relation to the management of the population, at the level of the population, as if they were not part of the population as a collective subject-object, as if they put themselves outside of it, and consequently the people are those who, refusing to be the population, disrupt the system. […] the people are generally speaking, those who resist the regulation of the population, who try to elude the apparatus by which the population exists, is preserved, subsists at an optimal level. (Foucault 2009, 43–44)

Differently from the people, the population is not a collective subject established by a (social) contract or a decision towards unity. The population as "subject" – that orients itself and is oriented through the action of government – is not an entity capable of any form of activity: "if one says to a population do this", Foucault points out, "there is not only no guarantee that it will do it, but also there is quite simply no guarantee that it can do it" (Foucault 2009, 71). Despite being composed of the same substance – the collective lives of the members of a given community – people and population are the product of different forms of subjectivation: the latter is established through the implementation of security mechanisms (what Foucault termed police), the former instead pretend to be an active force exercising a certain power over itself, declaring for itself the faculty of self-determination, opposing to the constituted order, the will to escape the tangles of governmental practices.

Ingrained in the principle of security, the modern state finds its legitimacy in the biocontainment and safeguard of its living substance – in the immunisation of the body politic from the contingency of human and natural events. The well-functioning of the state's apparatuses of security, with its disciplines and regulations, bureaucracy, commissars, and special counsels, is indirectly proportional to the possibility of resisting and contesting the leviathan. This is, in other words, what Foucault intended by distinguishing people and population. Implicit in the paradigm of security is the idea that the *salus* can only be achieved through a calculated limitation of the contingent; that is the delusional technical-bureaucratic transformation of fortune in risk.[3] And what the pandemic has exposed once more is that the administrative governance of the modern state

[3] In the last few decades, the concept of risk has become a "sociological" category in its own right. The literature on the field has grown significantly and it is right now more than vast. Perhaps, the more notorious efforts are Beck (1992) and Luhmann (1993). For an overview on the sociology of risk see: Roser et al. (2012).

is indeed oriented and governed by what is ultimately ungovernable (Di Cesare 2020, 29). But what happens when contingency starts cracking into the gears of the machines of state's power? What happens when the *machina machinarum* falters and is not capable anymore to grant the security of the state?

3. EXCEPTION

In its canonical definition lockdown pertains to all those kind of emergency measures that countries usually implement to face and manage the contingent, which scholars often classify as a "state of exception." The state of exception is what the law provides to adapt social and political systems to unpredictable threats. It is worth noting that the modern doctrine of the state of exception is substantially rooted in the context of war and the experience of being besieged. Legally speaking, the state of exception is a crisis reaction mechanism which alters the division/balance of powers and suspends certain liberties to restore as quickly as possible a condition of normality. The war metaphors that have been seldom used to depict the pandemic are in a sense the logical discursive companion to the application of specific measures thought for wartime: they tend to create the semiotic atmosphere to make the exception legitimate (Fusco 2020, 16).

The language with which the law is guiding legitimate authorities towards their own self-alteration (or suspension) is perhaps one of the most controversial aspects of emergency powers. Constitutional texts often use terms like alarm,[4] case of necessity and urgency,[5] tension;[6] the language with which the law tries to grasp the exceptional case is varied, flexible and open to diverse interpretations. Indeed, the very definition of emergency is not immune to controversies and alternative/opposed interpretation. The indeterminacy of the legal language[7] inherent to the doctrine of the state of exception allows potentially to implement the same measures to challenge very different emergencies.[8] But this is somehow

[4] Spanish Constitution, art. 116.

[5] Italian Constitution, art. 77.

[6] Basic Law for the Federal Republic of Germany, art. 80a.

[7] Of course the indeterminacy of legal language is not limited to the state of exception. The "indeterminacy thesis" is part of the golden age of Critical Legal Theory: see Tushnet (1996).

[8] It is worth nothing here that in this paper the terms emergency and exception are used as synonyms. I am aware that this might appear to some as controversial. Last year the famous Italian jurist and former president of the Italian Constitutional court Gustavo Zagrebelski, in the volume *Il Mondo dopo la Fine del Mondo* (2020), distinguished between "emergency" as something limited in time and regulated by law, from the "exception" as a form of dictatorial government that suspends and eventually transforms without guarantees the law. As Agamben as suggested this is nothing other than a re-framing of Schmitt's distinction between commissar and sovereign dictatorship and therefore emergency is somehow still exception (Agamben 2020a). If we look to the history of the emergence of the state of exception, as a legal doctrine, we could see that it refers in

a consequence of the very nature of the function of the exception as a legal object. As Alexander Hamilton has argued, the law in providing for itself the means to deal with emergencies should take into account that

> the circumstances that may endanger national safety are infinite and unpredictable; and for this reason, no constitutional mechanism is able to frame and provide for it, since it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense. (Hamilton 2008, 114)

This peculiar elasticity of the language of emergency powers is in a way the reflex of the very impossibility of grasping contingency at a denotative level. One could also argue that the state of exception formulates in legal language such substantial impotence in foreseeing the infinite threats for the safety of nations, providing in this way state's power with very flexible instruments, which permits in the end to alter the law – to suspends rights and the normal balance of state's powers – in very different situations irrespective of the severity of the type of threats (Fusco 2020, 17).

Looking to the lockdown through the lenses of the state of exception should not lead us to reach the extreme conclusion that democracies all over the world are in a way slipping into dictatorships. Rather it is an indicator that once more, faced with an emergency – fictitious or real – the standard governmental reaction consists in the intensification of disciplinary functions and governmental practices, usually obtained through a suspension of specific rights, and the alteration of the normal balance of state powers and the delegation of a broader authority to the executive. Implicit in the very idea of the state of exception is the assumption that a legal system works properly only in normal times and that the solution of an urgent threat cannot be hindered by standard legal procedures. But, if anything, the contemporary forms of states of exception that have been implemented in the last two decades, especially in the context of the "war on terror", show us that the sovereign exception, in its absolute essence, becomes gradually less visible (and legible): it has become embedded in the administrative practices of offices and bureaucratic apparatuses. To the extent that the exception in its modern form has become gradually normalised and regulated, the operative agents are right now the functionaries, the bureaucrats, the gendarme. The sovereign exception has been subsumed in the interstices of the rule of law, and its re-emergence in the moment of the pandemic exception, with its plethora of laws

its modern version to all those provisions, part of constitutional law or legislations, regulation the administration of emergency powers. State of emergency and state of exception, thus, should be considered as to signifiers for the same signified.

and regulation altering the normal flow of law, is revealing of its change in form but not in substance.

Carl Schmitt expressed the revelatory essence of the exception via an analogy with the miracle. "The exception in jurisprudence" he writes "is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries" (Schmitt 2005, 36). As the miracle – according to its canonical theological understanding – is an infringement of the natural eternal laws, product of god's almighty power, the exception becomes the moment in which sovereignty reveals its true nature. Such an analogy serves indeed quite effectively Schmitt's theorisation of a political (but also juridical) theology. However, it also brings about the *vexata quaestio* of the accommodation of sovereign absolute power within the framework of the constituted order.

As the centuries-long theological debate over the *potentia dei* shows, the recognition of the legitimate existence of miracles produces a series of paradoxes and questions of difficult solution. In Christian theology, the omnipotent "god of the *Nicene creed* is free to choose which world to create", among the many possible worlds; he can intervene in the created world, upsetting its rule, to which he is not bond (Randi 1987, 3). However, the immutable, perfect god cannot but act eternally towards some good. A god that does not realise the best of the possible world, in this perspective, would contradict its perfection, it would be a god without the perfection of a god (Randi 1987, 3–4). But again, a god (or a sovereign) whose omnipotence remains ultimately limited by its own creation would be a perfect but impotent god. Much like the exception, the miracle is a manifestation of the absolute power of god who can legislate in what way it prefers, even against the *ordo naturae* he has created, but by doing so he renders manifest the substantial imperfection of its creational potency.[9]

4. STAY HOME

As Foucault argued in his research on the emergence of biopower, for the modern treatment of epidemics the relation inside-outside, typical of the disciplinary management of otherness, is inverted. Established as a form of containment of the plague in the 15th century,[10] the quarantine aims at mitigating and controlling the spread of a disease, by immunising the population, not

[9] Eventually, this paradox found a systematisation in the elaboration of the distinction between *potentia absoluta* and *potentia ordinata Dei*. But the plethora of contrasting interpretations that such a crucial theological and political distinction has been subjected to is a further symptom that the conundrums of God's (and sovereign) power are still intact. On this issue see: Randi 1987; Ojakangas 2012; Traversino 2018.

[10] See: D'Abramo et al. (2021).

through a grand act of margination (and separation) of those infected, but through their inclusion, control and tracing (Foucault 2003, 43–46). For this form of administration of epidemics, the threat is not coming from the outside but is nestled among us all (and indeed Foucault pointed out how the quarantine has been usually imposed in towns in which the plague had already broken out); we must isolate from the other because both us and the other are a threat to the survival (*salus*) of the population. The imposition by decree of social distancing, the walling of our singularity, produces nothing less than the abolition of the other (De Cesare 2020, 59), in exchange for individual security and immunity for all.

But the imposition of distance, our locked-down existence, supported by repetitive slogans – like "stay home" – is rather insidious. It produces a false sense of solidarity, reciprocal accountability, and empowerment, which covers the same forms of exclusion and cancellation of the other as a plague spreader; but with the illusion of heroically renouncing to our liberties for the common good, all adorned by the hideous greetings to the ill-fated who remain exposed to the virus to work for the sake our health. Implicit in the "stay home" is the substantial impotence of state power in facing the pandemic. As the slogan adopted by the UK government flaunted at every press conference says "stay home, protect the NHS, save lives", what we are safeguarding by locking up ourselves at home is not immediately our life or health, but the state's capacity of taking care of it (protect the NHS). And perhaps this is the essential meaning of the Brocard *salus populi suprema lex*. As Kant suggested in his *Anthropology from a Pragmatic Point of View*, such a dictum

> does not mean that the physical well-being of the community (the happiness of the citizens) should serve as the supreme principle of the state constitution […] The dictum says only that the rational well-being, the preservation of the state constitution once it exists, is the highest law of a civil society as such; for society endures only as a result of that constitution. (Kant 2006, 236)

In his sparse and admittedly controversial considerations on the pandemic and the consequences of the global state of exception, Agamben highlighted a crucial ethical problem. It is right now evident that the protection of our bare life at all costs, is transforming our lived existence into something that has departed from what we have usually valued as human. It is obvious, Agamben writes, that we "are disposed to sacrifice practically everything – the normal conditions of life, social relationships, work, even friendships, affections, and religious and political convictions – to the danger of getting sick. Bare life – and the danger of losing it – is not something that unites people, but blinds and separates them" (Agamben 2020, 26). Hopefully, social distancing implemented in its harsher form will save us from the current pandemic; but of course, this could lead to the gravest of the perils: the renunciation to what makes human life bearable and the emergence of mere biological life as a permanent living condition. But, as

Agamben asks: what is a society that has no value other than survival? (Agamben 2020, 26). Perhaps as never before, in the current pandemic, our bare life appears as the proper subject of security and state power. The task before us is to keep the memory of this alive, especially at the moment in which the catastrophe seems to drift slowly into the past.

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THE NECESSITY OF LEGAL TYPOLOGIES IN CRISIS AND EMERGENCY[1]

Abstract. Legal analysis necessarily uses concepts, distinctions and typologies. These tools suffer challenges when the object of analysis or application is a crisis or emergency. The article looks into two examples of legal typologies of emergencies in the works of Gross and Ní Aiolaín and Agamben respectively. Based on this four levels of analysis for legal responses to emergencies is proposed: 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. The article 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.

Keywords: exception, emergency, crisis, legal concepts, typology.

KONIECZNOŚĆ TYPOLOGII PRAWNICZYCH W KRYZYSIE I SYTUACJI NADZWYCZAJNEJ

Streszczenie. Analiza prawnicza z konieczności posługuje się pojęciami, rozróżnieniami i typologiami. Narzędzia te napotykają na trudności, gdy przedmiotem analizy lub zastosowania jest kryzys lub sytuacja nadzwyczajna. Artykuł analizuje dwa przykłady typologii prawniczych sytuacji kryzysowych w pracach Grossa i Ní Aiolaín oraz Agambena w ujęciu respektywnym. Na tej podstawie proponuje się cztery poziomy prawniczej analizy odpowiedzi na sytuacje kryzysowe: 1) wyraźne opisy działań samych aktorów, 2) pozytywistyczne kategorie prawne dostępne w danym kontekście, 3) kategorie meta/porównawcze oraz 4) filozoficzne/ontologiczne koncepcje i kategorie, które kwestionują lub badają wszystkie poprzednie kategorie. Artykuł kończy się dyskusją na temat tego, w jaki sposób te poziomy analizy nakładają się na siebie, przenikają i muszą być połączone, aby uchwycić złożone zjawiska prawa w kryzysie.

Słowa kluczowe: wyjątek, sytuacja nadzwyczajna, kryzys, pojęcia prawnicze, typologia.

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1. INTRODUCTION

Jurists approach the world armed with the ability to distinguish, define and conceptualise every phenomenon. But what do we do when faced with events that shake the very foundations of our normal mode of proceeding? Extreme weather events and pandemics, social unrest and political breakdown, hybrid warfare and terrorism – our time is inundated with threats and crises that stretch the ability of ordinary legal structures to cope. When coordinates of normality are disturbed, we might be heading in a wrong direction when using a map made for calmer times.

We need to either use concepts already at hand or reach for new distinctions by producing new categories and typologies. Concepts such as emergency powers, state of exception, sovereign prerogative, martial law, etc. can be used. Still, a concerning worry might creep up on us – even the legal concepts made for exceptional times might be unsuitable or lacking in explanatory and legitimising force. It has even been argued that we live in a time of the *permanent state of exception*, where the *exception has merged with the rule* – what use can we have of concepts and typologies of legal responses at all in such a time?

Are they helpful or do we risk acting as naïve Linneans when we distinguish between this and that emergency, or this and that response? Neither actual crises nor legal responses exist out there like flowers and plants. Perhaps the construction of more or less elaborate typologies risks acting as a veil, making it harder to distinguish the reality of emergencies and responses to them. This text will make a tentative inquiry into the usefulness and risks of typologies of legal emergency and crisis responses. A four-level hierarchy of analysis will be presented and related to the epistemological approach, role and loyalty of the jurist. As a conclusion I will argue that we might not and should not escape typologies as jurists, but we would do well to reconsider our approach toward them. We must distinguish different levels of conceptual analysis, and be aware how we use them. I will base my suggestion on a reading of two books on law and crisis (Agamben 2005; Gross, Ní Aoláin 2006).

2. CONCEPTUAL APPROACH

Approaching a legal subject, problem or in general a phenomenon always requires a certain conceptual frame. For trained jurists this can take the form of a system, a set of distinctions between objects, concepts and their interrelations. This is both logically necessary and empirically certain. There is no "pure" or unstructured way to approach legal problem or phenomena. This is also the approach that legal analysis and legal procedure takes. The discipline and practice

of law itself works through making distinctions and thereby categorising and systematising the world and the objects of legal inquiry.[2]

At the edge of what the legal discipline can fathom out we find situations and actions that fittingly go under the general heading of "exceptions." While the exception to the legal rule is an integrated part of legal reasoning in everyday life (a certain rule has a few exceptions, and these exceptions in turn might have further exceptions), the notion of the state of exception refers to a suspension of the legal order as such. The suspension of the normal legal activities and legally regulated procedures of public actors creates problems beyond just finding out (or arguing for) what rule applies to a given situation.[3]

The diverse phenomena and practices that go under headings like state of exception (or siege, catastrophe, etc), dictatorship, martial law, emergency legislation, sovereign prerogative, and martial law, all stretches the juridical ability to gather and grasp real life inside a juridical system of concepts and distinctions.

Let us therefore investigate two examples of theoretical typological reflection used in the legal literature on emergencies, crises and legal responses.[4] While in many ways quite different, the almost contemporaneous[5] publications of Agamben's *State of exception* in 2005 (Italian edition *Lo stato di eccezione* in 2003) and Oren Gross and Fionnuala Ní Aoláin's *Law in Times of Crisis: Emergency powers in theory and practice* in 2006 both explicitly respond to developments after 9/11 and the build-up of the war on terror. Both studies also

[2] I challenge anyone to find a proper counter-example. There might be lawyers of a certain aggressive disposition that use broad and vague exclamations as their method of arguing in court. And of course, we have all read court rulings without much distinctions or clear use of concepts. But when distinctions as such and arguments based concepts are left totally to the wayside, we hardly identify such utterances or practices as law. A couple examples from the anthropological literature: "stupefying multiplication of distinctions" (Latour 2010, 16) that "legalistic thought classifies and organizes" (Pirie 2013, 14) and "Law does far more than provide rules for conduct: it establishes a whole set of categories and relationships that define interactions between people, property, and other social entities" (Pirie 2013, 52).

[3] This also relates to other issues of distinctions, such as vagueness. See Endicott's (2000) *Vagueness in law*. Consider also: "Where it seems that the law cannot draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which it leaves undetermined, as rightly as they can." Aristotle, *Politics* III.16

[4] There of course exist others, e.g., Ferejohn and Pasquino 2004; Dyzenhaus 2006; Lazar 2009. An empirical study was the basis for the Venice Commission report (1995). Seminal works are Rossiter 1948 and Schmitt [1932] 2004. An interesting Swedish study is Tingsten (1930, French translation 1934).

[5] It can be noted that Gross and Ní Aioláin refers to Agamben's book in three places (page 50 citing a formulation about necessity being the first and original source of law, page 170 at the final sentence in chapter 3 in relation to Schmitt, and at page 240 when discussing the Roman *senatus consultum ultimum*). Their study must have been almost finished when Agamben's book appeared (and quickly gained notoriety) in English in 2005. While they implicitly acknowledge the relevance of Agamben they do not engage in any discussion of his theoretical and historical inquiry or claims.

put these contemporary developments in their medium and long-term historical perspective (both reaching back through modernity and all the way to antiquity).

While Agamben's book approaches the issue from the discipline of philosophy and Gross and Ní Aiolaín from the legal field, they meet in a field where legal, historical, philosophical and political reflection must come to bear on the problem. This also means that they engage with a similar set of legal theoretical concepts.

3. TYPOLOGICAL ATTEMPTS WITH GROSS AND NÍ AIOLAÍN

One of the main arguments in Gross and Ní Aiolaín's book is that there is a shared fundamental assumption of all models of emergency regimes. They call this the "assumption of separation" which is "the belief in our ability to separate emergencies and crises from normalcy, counter-terrorism measures from ordinary legal rules and norms" (Gross, Ní Aoláin 2006, 171). Their argument is more or less that this assumption must be abandoned:[6]

> However, as we demonstrate below, bright-line distinctions between normalcy and emergency are frequently untenable. In various meaningful ways, the exception has merged with the rule, and ''[e]mergency government has become the norm.'' (Gross, Ní Aoláin 2006, 171)

Despite this the authors produce a typology that systematically distinguishes between different legal regimes and crisis responses. The untenability of "bright-line distinctions" does not stop them from taking responsibility for making such distinctions for the purposes of their study.

Gross and Ní Aoláin present us with a systematic typology of different models of emergency regimes. These are different responses to the conflict between democracy and democratic ideals (individual rights, legitimacy, accountability and rule of law) on the one hand and the call for "exercise of unfettered discretion and practically unlimited powers" on the other (Gross, Ní Aoláin 2006, 9). The authors' models are both theoretical and based on empirical examples (actual actions by different actors historically and rationalizations of these actions). The aim is ambitious: "Indeed we argue that these theoretical frameworks are applicable across legal systems and provide an equally relevant conceptual framework to assess international legal responses to crisis" (Gross, Ní Aoláin 2006, 9).

Three main types of models are presented, with respective subtypes. The first – *Models of accommodation* – is based on a discourse of democratic societies that accommodates the pressures an emergency puts on the state through relaxation by loosening or suspending legal or constitutional structures, but still attempting to maintain "normal legal principles and rules as much as possible" (Gross, Ní Aioláin 2006, 17). This loosening or suspension of the normal structures can

[6] A similar critique (with reference to Gross and Ní Aoláin) is made by Loevy (2016, 5).

be done in different ways, either in a predetermined fashion or on an ad hoc basis. The amount of suspension or relaxation differs, as well as the way in which it is structured, e.g., whether new competencies are defined inside legal or constitutional rules (as in emergency provision or special emergency legislation) or if the competency is broad and far-reaching, but limited in time (Roman dictatorship) or geographical scope (martial law). The headings under which the authors discuss these types of models are (Gross, Ní Aioláin 2006, chapter 1):

– *Classical models of accommodation*
  – Roman dictatorship
  – French "state of siege"
  – Martial law in the United Kingdom
– *Constitutional accommodation*
  – Emergency provisions in constitutional documents
  – Constitutional necessity
  – Declaration of state of emergency (or similar)
– *Legislative accommodation*
  – Modifying ordinary laws
  – Special emergency legislation
– *Interpretative accommodation*
– *''Each crisis brings its word and deed''* (combinations of the above).

The second type of models – *Law for all seasons* – begins with the premise that there is no special legal regime for emergencies or other threats (Gross, Ní Aioláin 2006, chapter 2). This is also called the "Business as Usual" model as it rejects accommodation and argues that "any particular emergency cannot excuse or justify a suspension, in whole or in part, of any existing piece of the ordinary legal system" (Gross, Ní Aioláin 2006, 86).

The third type of models – *Models of extra-legality* – assumes that emergencies challenge both of the previous models, and that the response must go beyond the legal altogether. The officials that have to act need to rely on the moral legitimation of their actions when they break or go beyond clear rules or competencies. They can argue that their actions are based on a sovereign prerogative that trumps the normal or written constitution, or they can hope for ex-post ratification of their necessary actions by a sympathetic legislator (Gross, Ní Aioláin 2006, chapter 3).

The above categories are not all necessarily mutually exclusive or distinct from each other. Not all historical examples fit nicely into one of the categories, and at times different interpretations (or rationalizations) would put them in different categories than the ones Gross and Ní Aoláin have done. They also discuss arguments and critiques than can be levied against all models and theories that they present. These form the bulk of the rest of the book. They also discuss theories that are seen by others as distinct but that they categorise in one of the

existing categories (e.g. the section on Carl Schmitt, whose theory they see as an example of constitutional necessity).

The conclusions of Gross and Ní Aoláin's study in relation to the question of typology is not clear. But in their introduction, they summarize their position in a warning against "blind adherence" to the different emergency regimes models that "may result in long-term destabilization" of the rule of law and rights protection (Gross, Ní Aioláin 2006, 12). They apparently see a danger in strict adherence to distinctions and concepts. Nonetheless, they seem not to have lost all hope, at least as long as jurists can continue their work. In an understated formulation they conclude: "Innovative legal concepts to deal with the problem of emergencies may be needed" (Gross, Ní Aoláin 2006, 12).

4. TYPOLOGICAL PROBLEMS WITH AGAMBEN

In a different philosophical and critical vein Giorgio Agamben's *State of Exception* starts out with lamenting that even though Carl Schmitt established the "essential contiguity between the state of exception and sovereignty" already in 1922, the public law jurists (for whom the concept of sovereignty is central) have not yet produced a theory of the state of exception in public law.[7] While some "regard the problem more as a *quaestio facti* than as a genuine juridical problem", others want to place the state of exception on the limit between politics and law, or even outside of law or the juridical altogether (Agamben 2005, 1). In other words, while the state of exception must be a problem and object of inquiry for public law, public law seems to either disavow it or not being able to actually grasp it.

Agamben has a primary purpose with his study. It is to investigate this "no-man's land between public law and political fact, and between the juridical order and life" (Agamben 2005, 1). By uncovering the ambiguous zone between "the difference – or the supposed difference – between the political and the juridical, and between law and the living being" he wishes to answer the question of "what does it mean to act politically?" (Agamben 2005, 2). This final question, situated on a politico-ontological level, is to be approached through the study of the public law problem of the state of exception, as a special case of the general relation between law and life.[8] Agamben argues that the path leading to this general

[7] Here Agamben cannot be read as saying that no attempts have been made. Several such theories are presented in the book, and he explicitly writes that the "most rigorous attempt to construct a theory of the state of exception" was made by Carl Schmitt in the 1920s. I interpret Agamben as arguing that no attempt so far has proved satisfactory, rather than that public law has ignored the issue.

[8] This central aspect of his theory is discussed several times throughout the book (and also in the broader project of his *Homo Sacer* series), e.g., as "[b]eing-outside, and yet belonging" (Agamben 2005, 35).

problem requires as a "preliminary condition" a theory of the state of exception (Agamben 2005, 1).

So, a legal theory of the state of exception not only can and should be supplied for the discipline of public law as such, but has a wider relevance. It might even contain a key to politico-ontological questions of the highest order. In what way does Agamben proceed then? While he does not produce a typology as such, he extensively discusses several different types of legal theories, legal arguments concerning the categorisation of and response to crises or perceived emergencies.[9] We can tentatively outline the concepts or terms he discusses, even though the discussion is not strictly ordered as such in the book: the concepts state of exception (*Ausnahmezustand*), state of necessity/emergency (*Notstand*), state of siege (*état de siège*, political state of siege [*état de siège politique*] and fictitious [*état de siège fictif*]), emergency powers, martial law, full powers (*pleins pouvoirs*, *plenitudo potestatis*); dictums such as *necessitas legem non habet*/*Not kennt kein Gebot;* the doctrine of constitutional dictatorship; legal forms of norm-making activity such as emergency decrees; as well as the phenomena of civil war (*iustitium*).

The above concepts cannot easily be ordered (as in a systematic typology), since they are used to describe both perceived situations and responses to them. For some authors they are also synonyms, while others make clear distinctions between them. Agamben himself uses "the syntagma *state of exception* as the technical term for the consistent set of legal phenomena that [the present study] seeks to define" (Agamben 2005, 4); in other words, he encompasses all the above under the phrase and subsequent theory of the state of exception. All the different concepts and terms point towards a "consistent set of legal phenomena", and the ultimate goal of the discussion is to show not only the underlying similarity, but rather the more foundational nature of law as always containing a threshold and a limit which shows itself in concrete cases of states of exceptions.

Agamben's central theoretical point is that the state of exception today has reached a new level of "maximum worldwide deployment" (Agamben 2005, 87). This means that although laws are often applied as we would expect, the "normative aspect of law can […] be obliterated and contradicted with impunity by a governmental violence" that produces a "permanent state of exception" while still claiming to apply the law (Agamben 2005, 87).

The end point of Agamben's theory in *State of exception* is therefore that all the previous categories and distinctions essentially break down. To contain the state of exception "within its spatially and temporally defined boundaries in order to then reaffirm the primacy of a norm and of rights" is not possible, because the state of exception as such is the basis for all application of law. This means that

[9] One of his main points is that there is uncertainty both conceptually and terminologically: "The uncertainty of the concept is exactly matched by terminological uncertainty. The present study will use the syntagma state of exception as the technical term for the consistent set of legal phenomena that it seeks to define" (Agamben 2005, 4).

we cannot return to a "state of law" (Agamben 2005, 87) because the dialectic of "anomie and *nomos,* […] life and law, […] *auctoritas* and *potestas*" (Agamben 2005, 86) has broken down. They are no longer "conceptually, temporally, and subjectively distinct" as they once were.

Since the state of exception "becomes the rule" (Agamben 2005, 86), in other words it has become the new normality, the question arises what use we have of the typologies? In a sense Agamben's study is a typological inquiry that deconstructs and argues for, if not the uselessness, then at least the ultimate futility of typologies.

I read Agamben's argument as saying two things at the same time: 1) there are no ultimate distinctions to be made between the different categories of emergency regimes, definitions of crises and their responses, since the era we now live in no longer respects such distinctions; 2) but at the same time, we must (like Agamben does) still engage with these categories, concepts and typologies, at least for the purposes of removing the veil that cover the violence and exercise of power without normative restrictions that actually takes place.

I am not sure if we should read Agamben as saying (or at least not sure I want to follow him if he does say) that we cannot sustain any hope for legal regulation, or that engaging in the juridical distinctions amounts to sophistry or naïveté. In specific situations and contexts, arguing for the norm-boundedness of state action, insisting on the distinction between emergency and normality, or taking flawed or dishonest legal arguments to task, is still an important task for the jurist. She might not harbour high hopes for (re)construction of legal regimes properly distinguishing between normality and emergency. While she should be wary of *assuming* such a separation (Gross, Ní Aioláin), she can still *insist* on the need for legal distinctions and continue the task of critiquing and developing legal arguments concerning emergency regimes and crisis responses.[10]

5. LEVELS OF ANALYSIS

It becomes in the end a question of on what level the analysis should be done. Several levels of description and distinctions of emergencies and legal categorisation of responses can be identified:

1. explicit descriptions of actions by actors themselves (what words or concepts are referred to by the actors),

2. positivist legal categories available in the context (what concepts and distinctions are used in the legal order where the actions take place),

[10] This is also what we have seen Agamben himself doing, not only as a philosopher in this and other books, but also as a public intellectual criticising specific exceptional regimes that are being normalized. One example is his refusal to travel to the US due to its biopolitical techniques of border control (Agamben 2004).

3. meta/comparative categories (concepts and distinctions available in literature, theoretical and comparative, e.g., as in Gross and Ní Aoláin),

4. philosophical/ontological concepts and categories that question or inquire into all the previous categories (e.g., Agamben's thesis of the "permanent state of exception").

What is the interrelation between these different levels of analysis? One way of reading them is that there is a continuous and rising convergence the higher one gets in the hierarchy of analysis. Level 1 (explicit descriptions by actors themselves) might vary and probably often lack a specificity and consistency – it might be unclear what such descriptions actually refer to, and actors without legal training might muddle the terminology and concepts used. Levels 2–4 are hierarchically ordered and reach towards a convergence, or ultimate distinctions. This might end up in a basic distinction between a normal situation and an exceptional situation[11] or in a monistic argument as in Agamben's thesis of a permanent state of exception, where all such distinctions ultimately meld together or vanish.

This is not to argue that one level should prevail on the expense of the others. Important practical and academic work can be done in relation to every level, and relating to several levels simultaneously. Related to this is Agamben's argument that two opposing forces interact in the legal history of the West:

The juridical system of the West appears as a double structure, formed by two heterogeneous yet coordinated elements: one that is normative and juridical in the strict sense (which we can for convenience inscribe under the rubric *potestas*) and one that is anomic and metajuridical (which we can call by the name *auctoritas*) (Agamben 2005, 85f).

Agamben argues that as long as these two aspects can "remain correlated yet conceptually, temporally, and subjectively distinct" the dialectic "though founded on a fiction – can nevertheless function in some way" (Agamben 2005, 86). When they "coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine" (Agamben 2005, 86), in other words: when a fascist state arises with a *Führer* or a *Duce*, or when democracies no longer respect, or rather uphold, the difference between normality and emergency, unbound violence beckons. This relates directly to the critique by Gross and Ní Aioláin's argument that we should not accept the "assumption of separation" and "bright-line distinctions between normalcy and emergency are frequently untenable" which means that "[i]n various meaningful ways, the exception has merged with the rule" (Gross, Ní Aiolaín 2006, 171). Where do these dire analyses and predictions lead us in regard to typologies? Can the typologies survive and retain usefulness when "the exception has merged with the rule" (Gross, Ní Aoláin) or "the state of exception has become the rule" (Agamben)?

[11] This dichotomy, used not least by Carl Schmitt, has a long tradition, cf. Gross 1999, 1834ff.

6. CONCLUSIONS

This might be the very moment when systematic inquiry and sophisticated distinctions are necessary more than ever. To develop typologies and attempt at all times to uphold the difference between emergency and normality – is that the task the responsible jurist must engage in when facing the breakdown of those very categories?[12]

The answer will probably differ depending on the specific circumstances and paths available. But my wager is that the jurist cannot escape distinctions, definitions and therefore explicit or implicit typologies. If we are to play any role, these are the tools we are given and the tools we can use. Leaving them behind means abandoning the discipline and practice of law. That might be advisable or necessary on an individual level.[13] But it means no longer acting as a jurist.

On the other hand, this, as I have already implied above, does not mean that all typological activity is the same. Depending on the aim of an intervention or a study, and the adherence or loyalty to a certain role (such as advocate, judge, legal scholar, philosopher) the use of typologies will differ. As a legally trained activist or politician, as a member of a legislative preparatory committee, as a judge or ombudsman, or as a law professor – all these roles, depending on the goal, can, to varying degrees, employ different levels of analysis. In making explicit descriptions as an activist or a politician on level 1, may also use legal terminology borrowed from the other levels. Or using positivist legal categories, as a judge, on level 2. Comparative categories can be used in the legislative preparatory process by a committee member on level 3. And finally philosophical/ontological concepts may be applied by a law professor acting on level 4.

But again – these are not neatly divided configurations. The legal scholar needs to engage regularly with all four levels (or otherwise risk becoming irrelevant for the legal discipline) and there is nothing stopping politicians or judges from doing the same. This even though in practice the perceived role and loyalty constrains such eclecticism – just as the positivist tradition often constrains legal scholars to stay firmly inside the doctrinal level 2 engagement with familiar legal concepts and logic.

An important benefit of being aware of and using these levels of analysis is that it lowers the risk of muddling concepts from different levels. A clear example of this is the widespread discussion of "states of exception" in the current debate on both the climate crisis and the COVID-19 pandemic. Whether different authors refer to positivist/legal categories or e.g. factual events is often not very clear. Here further analytic distinctions are of great value.

[12] Agamben explicitly rejects this possibility (Agamben 2005, 87).

[13] Or perhaps collectively in a future where law and legal activity as such is suspended or abolished.

In conclusion, we are bound to stay with distinctions, definitions and typologies. But we can go beyond the typologies of legal concepts, and use a meta-level typology, as has here been tentatively suggested, to grasp the issue on an epistemological level. In this way we can retain a critical and self-reflective distance towards a practice that we cannot leave, and even use it critically against itself.

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PANDEMIC, EXCEPTION AND THE LAW: NOTES ON THE SHATTERED NOMOS OF EUROPE

Abstract. In this article I propose a critical evaluation of the current European politico-legal landscape that unfolds under the conditions of the COVID-19 pandemic. My aim is to offer an analysis of the symbolic status of legality in this context and to reflect on its historical trajectory, by introducing it in a longer historical timescale than usually proposed as well as by insisting on the specific nexus between emergency legislation and authoritarian ideologies within Europe. In doing so I propose 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. The thesis that I defend here is a simple one: 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. To substantiate this thesis, I venture first to take stock of the existing theories, analyses and narratives on the relation between the pandemic and the politico-legal landscape of Europe. In doing so I shall focus first on traditional constitutional law accounts and on Italian philosopher Giorgio Agamben's criticism of the legal responses to the pandemic. Following this analysis, I move towards a situation of the pandemic within the sphere of the multiple crises befalling Europe that have become visible since 2015. At this stage I draw attention to the manifold layers of emergency legality and states of exception that have been sapping the liberal democratic nomos putatively defended within Europe. In a third move, I embark on a synoptical clarification of the relationship between law, ideology and the history of class struggle. In a fourth and last intervention I intend to assess the current nexus between the pandemic, exception and the law as a specific form of dissolution of the liberal nomos.

Keywords: COVID-19, pandemic, state of exception, nomos, liberalism.

PANDEMIA, WYJĄTEK I PRAWO: SZKIC O ZDRUZGOTANYM NOMOSIE EUROPY

Streszczenie. W niniejszym artykule proponuję krytyczną ocenę obecnego europejskiego krajobrazu polityczno-prawnego, który rozwija się w warunkach pandemii COVID-19. Moim celem jest zaproponowanie analizy symbolicznego statusu legalności w tym kontekście i zastanowienie się nad jej historyczną trajektorią, poprzez wprowadzenie jej w dłuższą niż zazwyczaj proponowana perspektywę historyczną, jak również poprzez podkreślenie specyficznego związku pomiędzy ustawodawstwem dotyczącym sytuacji nadzwyczajnych a ideologiami autorytarnymi w Europie.

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Tym samym proponuję nową genealogię stanu wyjątkowego, pozwalającą na wyartykułowanie relacji między siłą prawa, normatywnością prawną i ideologią w nowoczesnym kapitalizmie. Teza, której tu bronię, jest prosta: aktualna pandemia spowodowała historyczne przyspieszenie, którego prawo, rozumiane tu jako medium symbolicznie artykułujące władzę w sposób publiczny i pozorny, nie jest w stanie dogonić. Aby uzasadnić tę tezę, najpierw dokonam bilansu istniejących teorii, analiz i narracji na temat relacji między pandemią a polityczno-prawnym krajobrazem Europy. W tym celu skupię się najpierw na tradycyjnych ujęciach prawa konstytucyjnego oraz na krytyce reakcji prawnych na pandemię dokonanej przez włoskiego filozofa Giorgio Agambena. Po tej analizie przechodzę do umiejscowienia pandemii w sferze wielorakich kryzysów dotykających Europę, które stały się widoczne od 2015 roku. Na tym etapie zwracam uwagę na różnorodne warstwy prawa dotyczącego sytuacji nadzwyczajnych i stanów wyjątkowych, które podważają liberalno-demokratyczny nomos, który jakoby jest broniony w Europie. W trzecim posunięciu podejmuję się synoptycznego wyjaśnienia relacji między prawem, ideologią i historią walki klasowej. W czwartej i ostatniej części artykułu zamierzam ocenić obecny związek między pandemią, wyjątkiem i prawem jako szczególnym przejawem rozkładu liberalnego nomosu.

Słowa kluczowe: COVID-19, pandemia, stan wyjątkowy, nomos, liberalizm.

1. INTRODUCTION: THE IRRUPTION OF THE REAL

In this article I propose a critical evaluation of the current European politico-legal landscape that unfolds under the conditions of the COVID-19 pandemic. My aim is to offer an analysis of the symbolic status of legality in this context and to reflect on its historical trajectory, by introducing it in a longer historical timescale than usually proposed as well as by insisting on the specific nexus between emergency legislation and authoritarian ideologies within Europe. In doing so I propose 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. The thesis that I defend here is a simple one: 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. Rather than acting as a cure for the particular crisis, law is continuing the process of corrosion and self-erasure of liberal regimes of legality. To substantiate this thesis, I venture first to take stock of the existing theories, analyses and narratives on the relation between the pandemic and the politico-legal landscape of Europe. In doing so I shall focus first on traditional constitutional law accounts and on Italian philosopher Giorgio Agamben's criticism of the legal responses to the pandemic. This choice, as uneven at it might appear at a first glance is useful for offering a glance into the state of the art of both established and critical approaches to the pandemic. Following this analysis, that perhaps unsurprisingly emphasises the limits of our current politico-legal imaginary, I move towards a situation of the pandemic within the sphere of the multiple crises befalling Europe that have become visible since 2015. At this stage I draw attention to the manifold layers of emergency legality and

states of exception that have been sapping the liberal democratic nomos putatively defended within Europe. Such an evaluation opens the way to a historical and philosophical inquiry into the role of the state of exception within modern legal systems as an enabler of authoritarian regimes and ideologies. In a third move, I embark on a synoptical clarification of the relationship between law, ideology and the history of class struggle. In a fourth and last intervention I intend to assess the current nexus between the pandemic, exception and the law as a specific form of dissolution of the liberal nomos.

Before I proceed, a number of clarifications seem to be necessary. By limiting my analysis to the European context, and by discussing "European" law, I by no means intend to refer only to Union legislation, constitutional arrangements and so forth. I consider than Europe is much more than this, insofar as I also consider that law is much more than rules, commands or normative statements. What I am interested in exploring, is the shattered forms of liberal legality developed un der the promises of the rule of law and universalism of rights that have been for better or worse fostered by European states since 1945 in some places, or since the end of the last century in most of them. In a sense, Europe of this nomos, is the Europe of rights, of the European Court of Human Rights, inasmuch as is the Europe of democratic values, that have been built historically on the ruins of war, authoritarian regimes and totalitarian ideologies (Fraser 2005): it is a Europe with historical roots and a normative existence, that is formalised in constitutions, declarations of rights, Charters, Conventions, international treaties or a *sui generis* legal order. It is superfluous to add that I am not interested here with the positive enactments of this normative statements, as I am not interested with their place within the respective hierarchy of norms to which they belong, more than it is necessary for the purposes of this investigation. Furthermore, I am not interested in the Europe of markets and free trade and the way in which its material existence positively undermines the enactment of the democratic promises – this would be a daunting task.

What I am interested in, is the supra-national, trans-national and national clusters of legal normativity that embody a shared ideal of liberal legality that has emerged at the end of the Second World War and after the fall of authoritarian regimes. In other words, my interest lies with the nomos of our time, that is the "normative universe" that we inhabit by constantly creating "a world of right and wrong, of lawful and unlawful" (Cover 1983, 4). What I intend to follow is, the object of the ideology that has been prevalent within our polities on the continent in at least the last half of the century and which entertains both implicit and explicit lines of continuity with other historical projects since the age of Enlightenment (Skinner 2021). For the sake of clarity, I haste to name them here: separation of powers, liberal individualism, constitutionalism, procedural democracy. Yet, given that these normative statements are historically inscribed, they do entertain at least implicit connections with other spheres, be they economy or culture. In this

sense, this investigation is avowedly interdisciplinary insofar as it takes its object as a part of a wider symbolic framework that effectively constructs our politico-legal reality.

By taking the risk of an oversimplification, the main legal and theoretical responses to the pandemic can be lumped up under a rather easy periodisation: an initial attempt to respond, somewhat hastily to the urgency of the situation, from late February until late April 2020; the fabrication of a "new normal" and a first evaluation of the situation, that lasted from late May until late October 2020, depending on country and an ongoing stage of addressing a second and a third wave of the pandemic, to which one could add as a side-thread the emergence of the vaccine blunder. The core difficulty raised by the virus from the very beginning was one of finding the right symbolic frames for approaching and experiencing it, that is to be able to articulate its impact within the existing language. As such, it can be aptly described as a traumatic irruption of the Real (Shepherdson 2008, 27; Lacan 1975) to use Lacanian jargon, insofar as it is an intrusion that disturbs the existing frameworks of understanding, from scientific discourse to the most basic forms of social interaction. There is little surprise then that the first legal responses were unclear, uncertain, or marked by a specific clumsiness: declarations of states of emergency with little or no constitutional grounding (Venice Commission 2020a) poorly written secondary legislation, sweeping powers attributed to all sorts of executive bodies with no necessary connection to the pandemic. In short, it can be described as law-induced uncertainty.

During this time most commentators on the established spectrum were particularly worried about the proliferation of emergency regimes and the limited ways in which democratic or at least judicial control could have been exercised. This continued to remain one of the mantras of the constitutional and legal commentariat throughout the pandemic (Serna de la Garza 2020). Legitimate and accurate as it might have been at that time it was uttered, and it might still be at the formal level today, this position restated a rather known and limited suspicion of lawyers towards the concrete dimension of a factual arrangements determining legal situations. The usual concerns reported in the Verfassungsblog dossier and the first collections of commentaries (Verfassungsblog 2020), revolve around the impact on fundamental rights, constitutional process and constitutional guarantees. Almost unanimously and unsurprisingly, the universal palliative able to curb executives' enthusiasm in exercising undue power, is considered to be the control of proportionality of these measures exercised either by national Courts, be they ordinary or Constitutional, or by supernational bodies (Lebret 2020). Indeed, the standard seems to be that of proportionality constantly invoked by the ECHR when dealing with infringements of human rights, and by constitutional lawyers when dealing with emergency (Gross, Ní Aoláin 2006, 283–289; Greene 2018, 208–209).

With a number of notable exceptions, the legal orthodoxy would continue to stay silent on two fundamental issues: the sticking tendency of emergency

measures and the broader political implications of such powers asserted by state authorities. Within the minority opinion, there were indeed voices that have raised this issue in relation to the usual suspects, namely Hungary and Poland, yet they have circumvented the deeper pressure such measures would have on the broader status of legality from a transnational perspective. As the first wave of the pandemic was waning, and some of the initial responses – lockdowns, curfews – were being replaced by the "new normal", it was time for more legal clarity, and judicial reviews or constitutional ones started to flurry across the continent in order to limit the excesses of the initial responses (Venice Commission 2020b). This has given rise to a rather different re-assessment of the situation in which the governments were held in check by the judiciary. The mantra stayed unchanged, the need of finding a right balance between protecting lives and safeguarding freedoms. Yet, a slight shift could be observed surreptitiously in changing the focus towards the need for clarity and the importance of public freedoms even under the conditions of a pandemic, thus echoing to a larger extent economic considerations related to the impositions of lockdowns. After all, the new normal was about navigating within this middle-ground, between sanitary concerns, economic imperatives, and ideological creeds. The symbolic structure of the law was in place again, and the return constitutional and legal minutiae was there to reconstruct the seamless web of the law.

2. BEYOND BIO-SECURITY: THE MATERIALITY OF IDEOLOGY

At the antipodes, the critical legal field has been dominated by convenient re-evaluations and re-readings of biopolitics, bio-power, or bio-security: in the face of the catastrophe, Foucault of the Birth of Biopolitics (Foucault 2008) or Society Must Be Defended (Foucault 2003) was dusted and brought to new uses, while being re-read as a potential theoretical cure for the ongoing malaise (Sotiris 2020). Of a more apocalyptic tone, the hasty, unfortunate, and ultimately stubborn interventions of Giorgio Agamben (Agamben 2020, 17–20) took the front in addressing the issue of the pandemic, while both dividing the field of critical theory and putting his whole philosophical project in ambiguous light. In an astonishingly prolific series of interventions, since late February 2020, the Italian philosopher kept on reminding us the particular danger – no short of eschatological proportions – that has befallen the Western civilisation. The story was not new – indeed, the ongoing crisis came to reconstruct even as to detail the particular assemblages of power, life, law and violence that he postulated in his work (Agamben 1998). In a very specific sense, the politico-reality of the pandemic was agambenian.

But instead of moving beyond the already posited theses of the relationship between *law* and *bare life* as the instantiation – or indeed the *nomos* of modernity,

and the obvious point that we are indeed living a state of exception, the Italian philosopher kept on engaging with the phenomenology of the exception that was unfolding before our eyes. Hasty as these "live" forms of philosophising were, they were marked by an insistence of the "political", "fictional", "constructed" dimension of the state of exception and its relation to biosecurity. In the stead of a traumatic encounter with the Real, our societies are simply just falling pray to their own self-devised, solipsistic, phantasms. Worse even, they are living the apex of the "biosecurity", that is the union between a "religion of salvation" and "state power, with its state of exception", which "is probably the most effective that the West has known so far" (Agamben 2020, 13). What we are traversing in the flurry of lockdowns, curfews, or "social-distancing", is "a diffusion of sanitary terror", a "technique of government that it has been experimented in its most extreme form" (Agamben 2020, 13–14). We are all, and not as a matter of political ontology, *homines sacri*, but we all somewhat desire to be: "once in question it is a threat to health, men seem willing to accept limitations on their freedom they never dreamed of being able to tolerate, neither during the two world wars nor under totalitarian dictatorships" (Agamben 2020, 13).

Without insisting further on the philosophical ruminations produced under the strain of the pandemic, it is easy to see how once the state of exception moved from the ontological to phenomenological, the accuracy of the analysis has become blurred, bordering solipsism, as the ultimate division between state power and bare life took place and "our society no longer believes in anything but bare life" (Agamben 2020, 25). Under such circumstances, it is the time for the outmost tyranny to emerge, under the "blood-stained sword of the monstrous Leviathan" (Agamben 2020, 35), as it is the political power sustained only on the preservation of life. Such position has rightly been read as a hasty conclusion about the nature of the crisis and of the exception. As Romanian philosopher and translator of Agamben, Alex Cistelecan noted:

> […] it is clear that political power (states, governments, international organisations) cannot burden itself totally and exclusively with the preservation of the bare life of their citizens, and this because of a very simple reason: between power and the biological life of its subjects something has entered for a long time now, that we call capital. (Cistelecan 2020, 38)

While indeed it might have never been Agamben's point to reflect on the ways in which the capital enters into play,[1] and how material conditions shape the exception – once the exception moves away from being a conceptual and perhaps an ontological device towards becoming a phenomenological category that we experience – the question becomes important. In this sense, even if one

[1] A point can be made that Agamben does not disregard capitalism as a mode of production, insofar as he conflates it with religion, in a reading drawing on Debord's Society of Spectacle and the work of Walter Benjamin (Agamben 2016, 15–26). However, this reading eludes the historical development of capitalism.

could retain the critical thrust of the Agambenian injunctions in keeping under scrutiny the activities of state power as well as the operation of law under the unfolding exception, the need for grounding the exception further historically becomes urgent.

Despite its traumatic appearance, the current state of exception does not take place in an ideological and historical vacuum. While at its core, one can and probably should, isolate a purely medical or sanitary focus, this has become obscure through a constant obliteration that political, socio-legal and ultimately ideological concerns have produced. While it would be tempting to be able to interpret this current exception in the original Schmittian sense, of a state of suspension of the law that is determined by the very factual situation, when a decision in a supreme sense has to be taken (Schmitt [1921], 12), the question is at least dubious. First, not only that the factual situation is anything but clear, but the possibility of articulating it properly within a meaningful narrative has become a matter of continual uncertainty – facts indeed are the battleground on which distinctions of a political intensity have emerged. Agamben's recent insistence on the constructed dimension of the pandemic, as dangerously closely to the obscure ideologies of the new far-right it is, does show indeed the limits that an idealistic interpretation of the *factual* situation proves. Of course, any interpretation of facts is decidedly political, and any evaluation of the facts necessary for the declaration of emergency measures is political, but this does not deal away with the materiality of the factual situation.

What obscures at the core the factual situation is not its discursive inscription, nor its socially constructed features, but precisely its connection with an apparatus of exception that has very little to do with the specificities of the pandemic. First, the existing exception is not new. It would be difficult, if not impossible to situate it historically – is it the declaration of the state of emergency or emergency legislation in a specific jurisdiction at a specific moment in time its beginning? Such a position would at least presuppose that the distinction between normal situation and the exceptional one would be a neat one. However, weeks before the pandemic was declared, Romania, my native country, witnessed a busy day of governmental activity in which no less than 19 emergency ordinances – that is pieces of legislation passed under extraordinary legislative delegation – were issued (Emergency Ordinance No. 8–27 of 4 February 2020). France, has lived under a state of emergency between 2015 and 2017 (Fusco 2020, 15–16; Cercel 2020a, 34–35) and not long before the COVID-19 crisis the government was flirting with uses of the state of emergency again (Cercel 2020a, 35), not to mention the fact that in October 2020 both security and medical emergencies came together following terrorist activity. The United States under Trump was witnessing a flurry of presidential executive orders since 2017 (Driesen 2019, 516–518). Under the formal constitutional texture of these measures laid deeper political divisions and fault lines that threatened the very existence of the rule

of law. This might not have been part of a formalised and articulated state of emergency, siege or exception *per se*, but were indeed part of the generalised *state of exception* that has insinuated itself within European polities to the point of becoming a part of the normal functioning of the legal apparatus.

This regressive analysis could go back in time to the waves of disruption produced by the refugee crisis of 2015 and the security concerns befalling Europe at the wake of the terrorist attacks in Paris during the same year and in Brussels in 2016. Yet, perhaps unsurprisingly, these concerns, while obscuring the reality of European geopolitics, were soon to be doubled by ideological frameworks of cultural and racial superiority, as well as by ethnic retrenchments (Griffin 2017). The connivance between the legal operation of the exception and the nationalist tropes of blood and soil were out in the open in the discourses of the right: territory, population and states had to be defended if not with military might, at least with unfettered police powers and at worst with violations of European human rights law and international law. The rise of the so-called populist threat with its obvious rhetoric of blood and soil and its overt disdain for legal forms (Bugaric 2019, 395–396), took place in the very path opened by the normalisation of the exception. Indeed, Agamben was right in 2003 (Agamben 2005 [2003], 4) when naming the normality of the exception, as a recurrent trope in the gestures of European post-war polities. Yet the story goes deeper in time, before the London attacks and the New York ones, which have marked the end of the "end of history." Despite the lessons that should have been learned from the experience of the interwar, post-war Europe was constantly living under the shadow of the exception: and it is not only the case of Ceaușescu's Romania (Cercel 2011) or Jaruzelski's Poland (Mańko 2020). It was equally the Federal Republic of Germany dealing swiftly with the Rotte Armee Faktion (Blumenau 2014), the United Kingdom of the "troubles" (McEvoy 2011), France of the Algerian war (Thénault 2004), and of course, Agamben's Italy of the years of lead. Whether the lessons of the interwar, when all of Europe (except for the Czechoslovakia) lived under a form of exception, was learned all too well or not at all, is less important.

The fact is that after the fall of Weimar and other liberal constitutions, after Hitler, the second World War and the Shoah, European states continued to positively undermine their own constitutional commitments – be they socialist, nationalist or liberal – and to allow the exercise of unfettered sovereign power as if nothing had happened. If indeed this is not enough to raise at all the interest of our contemporary global constitutional scholars all too occupied to study "populism", let us examine to which extent this trend and lines of continuity in constitutional theory and praxis go even further, back to the very origins to European constitutionalism. We should be perhaps more specific here and resist the Agambenian temptation of reading in (and therefore reading *out* the historical and ideological weight of the machinery of the exception) the unfolding of an a-historical relation between law/power and *zoe* (Agamben 1998, 4). Beyond this

ahistorical appearance or frontispiece (Agamben 2015, 48–49) of the exception lies a material constitutional history whose meaning is still to be uncovered. If indeed the regimes of emergency and exception across Europe looked so familiar and similar (with the notable exception of the always different common law tradition) it is less because they were inscribing the unarticulated life in the mechanisms of the state (and indeed isn't it what all modern states do?), but more because their legislation can be traced back to either the mechanisms of the state of siege put in place during the French revolution (and transported by the Napoleonic armies together with ideas of codification), or by the mechanisms of the liberal interregnum of 1848 (Carver 2004).

3. EXCEPTION: THE SHATTERED NOMOS OF EUROPE

Looked through these lenses, the exception has a very specific role and function. The similarity is indeed material, not only in the choice of language, words, or concepts, but in the practice and aims of this institution which played a crucial role in the symbolic construction of legality through the last century. At its core lie indeed the same tropes of protection of the country against a threat, which functions as an effective prohibition and exclusion of the civil war and in praxis against its social instantiation, class struggle. Marx's analysis of the convoluted history of the 1848 revolution and its aftermath in France (Marx 1978 [1850]; Marx 1979 [1852]) is edifying in this sense by capturing the socio-political core of what was to become the recurrent drama of what we could loosely term the bourgeois *nomos*: faced with the rise of the proletariat, the bourgeoisie opens the way to militarism through the mechanism of dictatorship and exception. Once these become a constant presence in the politico-legal landscape and indeed part of the constitutional framework, the gate is open to authoritarianism and authoritarian slips from the constitutional sphere. Napoleon the nephew, is called to power. As Marx wrote,

> The forefathers of the respectable republicans had sent their symbol, the tricolor, on a tour around Europe. They themselves in turn produced an invention that of itself made its way over the whole Continent, but returned to France with ever renewed love until it has now become naturalized in half her departments – the state of siege. A splendid invention, periodically employed in every ensuing crisis in the course of the French Revolution. But barrack and bivouac, which were thus periodically laid on French society's head to compress its brain and render it quiet; saber and musket, which were periodically allowed to act as judges and administrators, as guardians and censors, to play policeman and do night watchman's duty; mustache and uniform, which were periodically trumpeted forth as the highest wisdom of society and as its rector – were not barrack and bivouac, saber and musket, mustache and uniform finally bound to hit upon the idea of instead saving society once and for all by proclaiming their own regime as the highest and freeing civil society completely from the trouble of governing itself. (Marx 1979 [1852], 118)

We should note from this flowery description the process through which the state of siege – an invention of the French revolution – returned half a century later in the days of the proletarian July uprising and paved the way to the abuses of the constitution perpetrated by President Louis Napoléon Bonaparte, who stormed the National Assembly (and not the Capitol) and proclaimed himself Emperor. But beyond the literary ornaments and historical detail mustered here by Marx, it is at least serviceable to consider the choice of words: the state of siege is an invention, a technology of power, which in terms of content would travel until the margins of Europe. It is part of a development through which the state was further centralised both in form and material force, by doing away with "the motley patterns of conflicting medieval plenary powers into the regulated plan of a state authority whose work is divided and centralized as in a factory" (Marx 1979 [1852], 185). As such, it is an invention which goes hand in hand with the rationalisation processes specific to constitutionalism. Albeit lurking behind the promises of formal equality and progress, the threat of the barracks and the bivouac, is part of the same machinery and was to be deployed strategically in the control of illegalisms thus assuring the law and order within the newly born bourgeois societies. However, its deployment always bore the risk of a fall or an abuse.

The irony is that even in the processes of constituting and consolidating its political power, the bourgeoisie was understanding it and indeed relating to its own power as if to a commodity. Here bourgeoisie should not be understood in a simply economic, reductive manner, but precisely as a class to which we owe the construction of modernity, based indeed of exploitation, but also adorned with culture, institutional frameworks and humanist ideals. It is a class which built the now yearned *European civilisation*, in a constant hesitation between barracks, bivouac and the letter of the law and through a constant blurring between the two. And who just like the Faustian apprentice sorcerer, released each time with its terrible inventions, forces which were seemingly unbeknownst. After the revolutions of 1918 and the exceptions emerging in Europe from Germany (Stolleis 1998; Kivotidis 2020; Lavis 2020) to Italy (Skinner 2013) and to Romania (Cercel 2020b; Cercel 2013) emerge the black shirts, the green shirts, the *freikorps* and so on. After the article 48, follows the Enabling Act, just as after the state of siege follows overt dictatorship. If we look at the written texts of the constitutions through these lenses, as cultural products and artifacts situated at the interface between sovereign power and legality and guiding the strategic deployment of legality or the use of unfettered force, we are able to read them as what they are in the height of capitalism.

Walter Benjamin's analysis of the forms of art in the capital of the 19th century that Paris was, is extremely useful here: "With the upheaval of the market economy, we begin to recognize the monuments of the bourgeoisie as ruins even before they have crumbled" (Benjamin 1999 [1935], 13). There is a part of the

constitutional arrangements of our past and present society which continues to be monumental, in both its grandiose promises and its legal rational minutiae. Yet, in its very texture it is sapped and supported by the threat of the barracks and bivouac, by the bayonets turned against the people. The point to be made by this archaeological excursus is perhaps less sweeping that it might seem: the state of exception that we know in modern history is that of a constant threat of unlimited power materialised in military, para-military or police repression supported by an administrative and legal apparatus able to distinguish between legal subjects and threats to the constitutional order. It is a mechanism built on the protection of the territory and population, constantly distinguishing between what (and who) should be protected and what (or who) should not. In its history of instantiations, it has been more often than not an epitome of the blood-stained sword of the monstrous Leviathan rather than the protective sword of justice. And yet this is precisely the point of the confusion we live in. Beyond the historically built frameworks through which the law and legal communities read the current exception, which are constitutive of the *state of exception* and continue to be since its entry in legal dogmatics and state practices, there lies the material reality of a pandemic.

The confusion is twofold: on one hand it obfuscates the uncertain level of our historical regime of legality by creating retrospectively a 'normal' situation to which one would strive to return, while on the other hand it amalgamates the political level of the exception with what would otherwise be measures of medical concern. Of course, we all know the history of the connivence between the ideological and repressive apparatuses of the state and the sphere of medicine (Lifton 1986; Foucault [1976], 217–222; Agamben 1998, 144–153), social hygiene and eugenics (Turda 2015; Turda 2010). We know to which extent, the development of new technologies and the expansion of knowledge, the emergence of a new *épistémè*, were functioning hand in hand with and as devices of power. But I think that one should be more specific and insist on the distinction that one ought to be able to make between what any modern polity would do in order to protect its citizens, what our polities have been historically doing, and what they actually do. I do not negate that these normative, factual, and historical questions are indeed closely connected, but pseudo-concepts, ideological and narrative tropes such as "sanitary dictatorship", "sanitary terror" professed either in the shadow of Agamben or within the ranks of the right, the libertarian circles and alike, insistently keep on conflating these levels in one Orwellian eschatological vision of a totalitarian denouement in which attempts at protecting lives are taken for necropolitical enterprises.

But indeed, isn't this position fundamentally the other side of the same dialectical coin of the discourse of the rational centre with its unfathomable and unshakable belief in the rationality of the legal machinery (COVID or not COVID we are doing pretty well considering the circumstances)? On one side the purportedly radical, foundational adherence to the "authentic" natural law,

freedoms, and rights supported by either social Darwinist tropes or a *foreclosure* of the Real (Shepherdson 2008, 124), while on the other side the seemingly measured legal restrain, mimicking the seriousness and rationality of the legal discourse, while the very substance is disintegrating before our very eyes. To put it otherwise, on one side the longing for an unalienated, purportedly "real" legality and constitutionality that is yet to come or has to be brought back, while on the other the mire of the "business as usual." That both positions are false is not the main point that detains me here. What I think it is useful to recall in this mutual para-noia, is the shared conviction in the performative force of law, as if the pandemic can be tackled by decree or by democratic consensus. Displacing the problem within the frames of the law of which we are not actually aware of is of little help. On the contrary, it prevents us from seeing the social dynamics at stake. Faced with the radical alterity of the virus, we cling on reconstructing the threat within the frameworks of the exception, thus obfuscating the political choices that are within our reach as societies. State, territory, population, economy and markets all of a sudden become natural categories in the dream-like reality of the legal form. They have to be saved and protected and the choices are turned into rational ones between competing values.

4. CONCLUSIONS

Rather than increasing to the outmost the presumably overwhelming state-power, the virus has just displayed its impotence – the Leviathan is just an artificial empty machinery that is no longer able to produce its reproduction without demanding more sacrifice from those it pushes out of its borders. Let us recall here the trivial detail that on Hobbes' frontispiece of the *Leviathan* the Sovereign is floating, that is can always change and determine who is under its power/protection. And indeed, the "political" state of exception continues within the pandemic, it is not determined by it, but it is the device able to protect this very floating power of the sovereign. Under its operation, there are the formal constituents of the sovereign that are protected and not the "real" subjects of our constitutions, international conventions, and charters. For their part, they are left either to err in the "new normal" as actual *homines sacri* caught in between state borders, work regulations, immigration status and subjected as precisely *bare* life that no state power wants or can protect anymore. Consider the refugees in the Mediterranean, or in the Alps, the shipping crews stuck in never-ending quarantines, the East European seasonal workers, and the countless subjects that support the material infrastructure of our polities. Subjects to the prerogative states that our "respectable republicans" have built in the last century of national or transnational constitutionalism, their – and we should not forget that this is a malleable category – only legal protection is that of the necessity that

the pandemic has created. It is on and against them that the politico-legal machinery of the exception is working through the ideological apparatuses calling for a return of blood and soil.

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LAW IN TIMES OF THE PANDEMIC

Abstract. The essay tries to show that the legal response to a new threat, such as an unknown disease, is an outcome of many factors, including social attitudes and public sentiment. This is demonstrated by the example of regulations adopted in the 19th century during the cholera epidemic. Similarly, 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.

Keywords: pandemic, law, individual rights, legislation.

PRAWO W CZASACH PANDEMII

Streszczenie. Niniejszy esej pokazuje, że reakcja prawna na nowe zagrożenie, takie jak nieznana choroba, jest wypadkową wielu czynników, w tym postaw i nastrojów społecznych. Pokazuje to przykład regulacji przyjmowanych w XIX wieku w trakcie epidemii cholery. Podobnie obecnie ograniczenia są wprowadzane, modyfikowane czy łagodzone nie tylko pod wpływem samego zagrożenia (poznanego jedynie częściowo), ale także czynników gospodarczych oraz nastrojów społecznych. Wzmocnienie władzy wykonawczej i zwiększenie roli aktów prawnych wydawanych przez tę władzę jest zjawiskiem powszechnym w obecnej sytuacji. Samo w sobie nie zagraża jeszcze rządom prawa, a umożliwia szybką reakcję na zmieniającą się sytuację. Zagrożeniem takim mogą być jednak restrykcje nadmiernie opresyjne, odwracające w pewien sposób nowoczesny paradygmat myślenia o prawach jednostki.

Słowa kluczowe: pandemia, prawo, prawa jednostki, prawodawstwo.

1. INTRODUCTION

Legislation – as Hegel's "Minerva's owl"[1] – is always somewhat "late", it is secondary to social phenomena, that are to be regulated by it. Regulations created "in advance", before the occurrence of a particular phenomenon,

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[1] "The owl of Minerva spreads its wings only with the falling of the dusk" (Hegel 1976, 13).

most often turn out to be insufficient or even inappropriate. This aspect of legal regulation is apparent in case of norms intended to outdistance technical progress by defining the legal consequences of using technologies that are not yet in common use. The same feature is also visible in case of legal response to new, hitherto unknown safety threats, such as pandemics of previously unknown diseases.

This work is devoted to the changes in of law and legislation that took place during the current COVID-19 pandemic. In a short essay like this one it is impossible to cover all relevant legal problems related to such a complex phenomenon. Therefore I will limit myself to highlight some features of the emergency legislation implemented that I consider essential. The current pandemic, with its social and legal consequences, is not substantially different from those occurred in the past. Perhaps the only essential difference distinguishing it from previous similar events is the speed at which the threat spreads. In previous major epidemics, the law has also been used to try to gain control over the situation. Comparing the past regulations with the current ones is difficult, since the former were implemented in different social and economic conditions than ours. But while medical knowledge has changed, social responses to new threats remain similar to some extent. To shed light on this, I will look at one example of a pandemic that took place on the brink of modernity, when economic relations were already capitalist and mass society was emerging: cholera epidemic in Europe in the 1830s. I chose this example, rather than, for instance, the more frequently reported Spanish flu pandemic, because, much like in the current pandemic crisis, public administration of European states intervened to capture and govern a health crisis through strong and articulated legal provisions. In Prussia, for example, the state administration was particularly scrupulous in documenting the course of the epidemic, so that one can follow the changing situation, the activities of the administration, and the evolving legal regulations in response to this situation almost day after day.

2. THE LAW AND THE CHOLERA EPIDEMIC

Six cholera pandemics took place in the 19th century. The first one (1817–1824) passed through India, Southeast Asia, the Middle East, East Africa and reached the shores of the Mediterranean Sea. The second pandemic (1826–1837/1838) involved manly Europe in the hot time of the revolutionary movements and the November Uprising in the Kingdom of Poland. Then it reached North America. Only in France alone, it cost about 100,000 lives (out of a population of 33.5 million). Among the European victims were some prominent figures, just to mention Grand Duke Konstantin Pavlovich of Russia and his wife, Prussian military general Carl von Clausewitz, the

commander-in-chief of the Russian army Ivan Dybich, and the philosopher G.W.F. Hegel. Cholera appeared in Russia in 1829, then it was recorded in Moscow in September 1830. In February of the following year it reached St. Petersburg and the Polish lands[2] engulfed by the uprising, and from there it spread all over Europe. Almost everywhere, it was preceded by panic among the population, fueled by the press. Particularly interesting is the reaction of the Prussian authorities. The first cases of cholera in the territory of Prussia were recorded in May 1831. The administration issued daily bulletins on the spread of the disease. At that time, a number of order regulations were introduced for the period of the epidemic. Poznań (Posen) and Gdańsk (Danzig), the two cities where the disease was recorded for the first time, were cordoned off. The borders were closed and people coming from Russia were quarantined. Traveling was possible only for those who had special travel documents. Offices, schools and theaters were closed, only churches remained open. Freedom of speech was also restricted, since it was forbidden to proclaim that cholera was not contagious. The regulations, initially followed scrupulously, concerned specific hygienic issues (disinfection of various objects with calcium chloride) and the treatment of the sick people and the corpses of the deceased (houses where the disease had occurred were marked). The adopted measures were very expensive, and their economic burden was primarily on cities and communes (some even had to go into debt). Panic broke out rapidly among the population. Riots of the poor, fueled also by rumors that the disease was invented by the rich in collusion with doctors, the riots of the lower classes were the reaction to food price speculation. Moreover, the epidemic was progressing more slowly than originally thought. Therefore, it became clear that the adopted restrictions would not last long. When cholera appeared in Berlin in August 1831, they were already abolished.[3]

The state of medical knowledge at the time was another factor influencing the legislation. The etiology of cholera was not known until the discoveries of Robert Koch. Two opposing theories were developed among medical doctors. According to the first, cholera was contagious and transmitted by touch, while the second pointed out thar the disease was to be caused by "miasma", i.e. a harmful, but not contagious factor occurring in the environment that could be

[2] According to official data, widely regarded by contemporary historians as greatly underestimated, 22,718 inhabitants of the Kingdom of Poland of 3 million 900 thousand suffered from cholera. 13,105 people died. It is estimated that 40,000 could be infected, half of which died. Cf. Olkowski 1968, 533. About 10% of the population died in the towns of East Prussia, where the epidemic appeared. Cf. Olkowski 1968, 559.

[3] Initially, the residents of the house where cholera appeared were quarantined for 20 days. Over time, the number of quarantine days was reduced to 10 and then to 5. Cf. Becker 1832, 51. The change in regulation was driven by economic factors. It was difficult to keep the "working poor" in quarantine for a longer period of time, because they had to earn a living.

activated under favorable conditions. While the first theory was dominant in the first period of the epidemic, the second theory gained priority and it was used as a justification for departing from the restrictions, not only in Prussia, but also in Russia and Italy, even though the epidemic was still ongoing.[4]

3. "RISK STAGING" AND THE LAW

The example presented here shows a certain – and, in my view, inevitable – inadequacy of the adopted regulations to a phenomenon that is known only fragmentarily at a given moment. Moreover, it makes manifest how not only medical factors, but also social expectations and economic conditions determine when restrictions are introduced and when they are relaxed or even abandoned. Ulrich Beck in elaborating his theory of risk society (*Risikogesellschaft*)[5] introduced a term that is particularly relevant for a correct critical consideration of the way in which decision during emergencies are taken: *staging of risk*. By this notion, Beck understood the social processes determining to what extent a given event of which we do not possess an adequate knowledge, is and should be considered a threat and how to respond to it using different means, including legal provisions.[6] From his perspective all the legal and legislative decisions concerning a new and hitherto unknown threat are based on a kind of fiction framed during the "staging of risk" process.[7] At the same time, according to Beck, "staging

[4] For the details on fighting the cholera in Prussia, cf. Markiewicz 1994, 79–86; Olkowski 1968, 533–570; Ross 2015, 59–195; Stamm-Kuhlmann 1989, 176–189.

[5] The first version of this concept was presented after the Chernobyl disaster, but later the scholar added important new factors such as globalization and international terrorism.

[6] Cf. Beck 1992; Beck 2008. For the discussion about Beck's theory, cf. Stankiewicz 2008, 117–132.

[7] In his classic, albeit highly controversial theory of state of exception, Carl Schmitt argued that modern concept of the state of emergency is based on legal fiction, since the use of emergency measures prescribed by the law (all the legal machinery of the state of exception) is based on the declaration of state's authorities, rather than on the factual state. Schmitt traced the origins of French doctrine of 'fictitious state of siege' (*état de siège fictif*). As he pointed out, the institution of "state of siege" as developed during the French Revolution (1791) was of military character. The legal institution underwent, however, transformation during the Spring of Nations when the replacement of actual state of siege by a mere declaration (decision) of state powers took place. The fictitiousness of the institution of state of exception was even deepened by the French of 1878. Cf. Schmitt 2014, 127–161. The fictitious nature of the state of exception has been further emphasized by contemporary Italian philosopher Giorgio Agamben. As Gian Giacomo Fusco nicely summarized Agamben's point of view: "Given its dependence on the decision of a sovereign authority, the state of exception becomes an effective instrument to be turned on or off at will, even when a threat has not yet materialised or its being a menace is not explicitly evident": Fusco 2021, 23. Cf. Agamben 2005, 1–31. It is quite evident that during current pandemic several states implemented harsh measures of the state of emergency declared *de iure* or only *de facto*

of risk" is not a purposeful fraud, but an imperfect tool used by society to try to avoid future catastrophes (Egner 2011, 21). In this process not only scientists, but also politicians, business entities, and civil society institutions are involved. In my view, Beck's concept could be useful to understand current changes in crisis legislation, including subsequent lockdowns and relaxations. Beck's concept shows well that the legal regulation of threats is not only related to the nature of the threats themselves (which are often only partially known to us), but is the result of a wider social process in which not only experts, but also politicians and social expectations and moods play an important role. A good example is the short-term loosening of restrictions in Poland in the second half of February and at the beginning of March 2021, undoubtedly resulting from the mood in Polish society at that time.

In the current pandemic, the authorities' decisions are made under conditions of limited access to information. The full knowledge of the COVID-19 disease and the factors affecting its spread and course in specific segments of population will probably have to wait a few more years. Inevitably, these decisions may turn out to be suboptimal or even wrong afterwards, but it is difficult to afford not to take any action. Moreover, in this case there is a tendency to copy the anti-crisis policy model that is already being implemented in neighboring states. It may be regarded as the least risky one or at least allowing for the "division" of responsibility, in the eyes of society, between all governments implementing a given policy model. I also think that during an epidemic, even multiple changes to legal acts issued by the government is something inevitable. Legal regulations must follow the dynamics of the very phenomenon. Decisions considered to be justified today may soon turn out to be insufficient or excessively restrictive. The possibility of making quick changes in these regulations characterizes the appropriate crisis management mechanisms.

4. STRENGTHENING THE EXECUTIVE POWER

Almost everywhere (except only a few states, e.g. Sweden which, by the way, changed a bit its policy towards the epidemic during the so-called the second wave in autumn 2020), the COVID-19 pandemic has strengthened the executive branch. This is also visible in Poland: the Act of December 5, 2008 on the prevention and combating of infections and infectious diseases in humans, as amended in March 2020 (consolidated text: Journal of Laws of 2020, 1845 as

even before the threat actually occured. In my view, Beck's theory adds another dimension to the considerations on the factiousness of the institution of the state of emergency: since in case of new threats the actual risk cannot be determined with certainty (the risk itself is "staged"), the state authorities follow their own expectations and social moods while implementing certain legal measures and tool.

amended), authorized the Council of Ministers in Articles 46a–46b to define certain restrictions by a regulation, including "temporary limitation of certain range of activity of entrepreneurs", "temporary limitation of the use of premises or land" or "ordering a specific way of travelling" (Article 46b points 2, 8, 12). There is neither a maximum period for which these restrictions may be in place, nor the procedure for assessing the legitimacy or adequacy of these restrictions by the legislature.[8]

The government's legislative activity under statutory authorization is particularly visible in France.[9] Pursuant to the Constitution of the Fifth Republic of 1958, the Council of Ministers has the power to issue decrees and ordinances. On March 22, 2020,[10] the French Parliament passed a law giving the government extended powers to issue decrees for two months during the "state of health emergency" (*l'état d'urgence sanitaire*) concerning, inter alia, limiting the movement of people and ordering the requisition of goods and services. Legal

[8] Theorists writing on states of emergency in modern democracies pointed out that modern crisis government must be strong and at the same time limited. Such a position is strongly emphasized in the classic study by Clinton Rossiter (1917–1970); cf. Rossiter 1948, 5–7. Rossiter also noted that the government was reluctant to give up powers taken over during the state of exception, and that such a state could be extended indefinitely. The constitutionalization of states of emergency was to be an obvious remedy for this threat. However, in states that are considered to be stable democracies, another model, called legislative model, has developed as well. In this model, implemented inter alia in Germany, Italy, Spain, United Kingdom and the U.S., "emergency powers are provided in the ordinary legislative process": Farejohn, Pasquino 2004, 217. Post-communist states has usually chosen a model based on the constitutional regulation of the states of exception. The current epidemic has to some extent called into question the approach to emergencies so far. In Poland, the epidemic management has been carried out under two legal regimes that are not regulated in the constitution, namely the state of epidemic threat and state of epidemic. Both are regulated by the Act of December 5, 2008 on the prevention and combating of infections and infectious diseases in humans. If in Poland the management of a pandemic situation was conducted into the corset of a constitutional extraordinary measures, it would not be possible to limit some constitutional rights and freedoms. For instance, the freedom of conscience and religion (Article 53 of the Polish Constitution of April 2, 1997) could not be limited at all, because in the case of a state of emergency and martial law, this freedom was included in the catalog of those rights and freedoms that cannot be limited (Article 233 (1) of the Constitution). Moreover, this freedom was not listed among the rights that may be subject to restrictions during a state of natural disaster (Article 233 (3) of the Constitution).

[9] Italy could serve as another example. Since the turbulent era of 1970s and 1980s (*anni di piombo*), governmental law-decrees are widely used in situation of emergency. The normative basis of such a practice is Article 77 of the Constitution of the Italian Republic (1947), which has been interpreted in such a way to enable the government to temporary measures valid for 60 days "in case of necessity and urgency." Cf. Fusco 2021, 25–26 (footnote).

[10] Loi n° 2020–290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de COVID-19, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&categorieLien=id. Cf. C. Desfontaines, "COVID-19: Confinement – Measures taken by the Government and applicable penalties," https://www.soulier-avocats.com/en/covid-19-confinement-measures-taken-by-the-government-and-applicable-sanctions/ [Accessed: 19 February 2021].

acts issued on this basis enter various areas of law, including the sphere of civil law contracts, inter alia, by postponing payment terms for specific services (Grynbaum 2020). The Act of May 11 extended the "state of health emergency", and thus also the powers of the government, for another two months. The law of July 11, 2020[11] repealed these regulations, but at the same time introduced a "régime transitoire" under which the government continues to have the power to adopt emergency measures. The regime, initially expected to last until the end of October, was extended by the law from October 1 to April 1, 2021. Moreover, the decree of October 14, 2020,[12] i.e. an act of the executive power, reintroduced the state of health emergency, which was extended by the Act of November 14, 2020[13] until February 16, 2021. The introduced catalog of situations in which it is possible to leave the place of residence, and the restrictions on movement by residents can be changed by the executive authority. Government legislation in itself does not yet pose a threat to the rule of law, provided that it is maintained within the constitutional.

5. INDIVIDUAL RIGHTS

Greater or lesser restrictions on human or civil rights and freedoms accompany the current epidemic. They cover a wide range of norm, from wide restrictions on freedom of movement, through far-reaching limitation of freedom of assembly and freedom to manifest religion or belief, to interference in economic freedoms. Even in states with a high standard of human rights, it happens that unjustified restrictions go beyond what is necessary under the present conditions. I will give just one example my field of interest. In Germany, following the recommendations of the federal government, the majority of federal states (*Länder*) introduced a general ban on religious services in April 2020, granting no exceptions. A Muslim religious association from Lower Saxony appealed against the provision of § 1 (clause 5) of the federal state's regulation on protection against new coronavirus infections of April 17, 2020, prohibiting "meetings in churches, mosques, synagogues and meetings of other religious communities." The association wanted to organize prayers every Friday for the remainder of Ramadan, while maintaining a strict sanitary regime, i.e. 1.5 meters between prayers and a maximum number of 24 people during one prayer in a mosque that

[11] Loi n° 2020–856 du 9 juillet 2020 organisant la sortie de l'état d'urgence sanitaire, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042101318/ [Accessed: 19 February 2021].

[12] Décret n° 2020–1257 du 14 octobre 2020 déclarant l'état d'urgence sanitaire, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042424377 [Accessed: 19 February 2021].

[13] Loi n° 2020–1379 du 14 novembre 2020 autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042520662?r=xlhRIpB5A0 [Accessed: 19 February 2021].

could accommodate 300 worshipers. In the judgment of April 29, 2020, the Federal Constitutional Court in Karlsruhe declared the prohibition unconstitutional, ruling its suspension, because the challenged regulation did not provide for exceptions enabling collective worship in individual cases.[14] Such a decision is, on the one hand something that allows us to look at the judiciary with optimism, and on the other hand it is a clear signal of the excesses of certain emergency laws implemented during the pandemic.[15]

[14] Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 29. April 2020, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html [Accessed: 19 February 2021].

[15] In the second phase of the epidemic, in the fall of 2020, restrictions on the freedom of religion were also introduced. Against the background of the regulations introduced at that time a case of Belgium it is particularly interesting. The regulation of the Minister of the Interior of October 28 establishing emergency measures to limit the spread of the COVID-19 coronavirus introduced the principle of social distancing and a maximum number of 40 participants during the collective worship (28 Octobre 2020. – Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 78132, „Moniteur Belge" 2020, No. 304). These provision were quite moderate. However, just two days later the regulation was changed (1 Novembre 2020. – Arrêté ministériel modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19). After the amendment, fifteen persons were allowed to participate in funerals and cremations (children up to 12 were not included in this number), whole in case of weddings only spouses, their two witnesses and the registrar or minister of religion were legitimate to take part, regardless whether the wedding was religious or secular (Article 15 para. 3 and 4). The amended article 17 prohibited the exercise of collective worship and "the collective exercise of collective exercise of non-confessional moral assistance (*l'assistance morale non confessionnelle*) and activities in within the framework of the non-confessional association (*association philosophique-non-confessionnelle)*", with the exception of only worship or non-confessional moral assistance during weddings, funerals and cremations, as well as services or non-competitive moral aid recorded for dissemination through all possible channels, while the recording was to take place without the participation of the audience, and up to 10 people could participate in its realization, including technical staff. The above-mentioned regulations were appealed against on December 4, 2020 to the Council of State (Raad van State) by the Congregation of Yetev Lev Dsatmar Antwerp, being an organization of Judaic character, registered as a company under British law, and five private individuals. According to the applicants, the collective religious freedom of adherents of Judaism was almost completely suspended. It was also emphasized that Judaism requires the presence of ten men (minyan) for certain prayers and religious rites, including weddings. Thus, due to restrictions, no Jewish wedding could be properly performed. While the aim of the regulation was justified, disproportionate means were used. n its decision, the Council of State gave the government five days to replace the challenged provisions of Article 15 and Article 17 of the regulation with new regulations that will not disproportionately restrict the collective exercise of religious worship. Moreover, according to the Council, it was necessary for the new regulations to be drafted in consultation with representatives of religious communities and non-confessional philosophical associations (Raad van State, Afdeling Bestuursrechtspraak Xe Kamer, Arrest nr. 249.177 van 8 december 2020 in de ak A. 232.384 / X- 17.848, point 25). As a result of the judgment, on December 11, 2020, the regulation was amended. Article 17 was repealed, and in article 15 para 3 was amended in order to allow the group up to 15 persons to participate collective worship and the activities of worldview associations, as well as weddings, cremations and

But what is more, the restrictions introduced during the pandemic crisis all over Europe have been often far from precise, so that they lead to almost banal considerations that is not always clear where a given prohibition begins and ends. The danger of imprecise norms is that, in extreme cases, they may lead to a reversal of the legal principle emphasizing that what is not explicitly forbidden by law is permitted. This principle was introduced by Montesquieu in his considerations about liberty in a "moderate" system. It is meaningful here that the French jurist saw England as the most perfect existing example of such a system and the English system provided inspiration to develop the concept of separation of powers.[16] Paradigmatic in this regard is the ministerial ordinance adopted in England and Wales on March 26, 2020 (announced three days in advance)[17] stating (paragraph 6) that no one may leave the place of living without a "reasonable excuse", while very casuistic situations regarded as reasonable excuses were listed. For instance, a reasonable excuse was to go "to obtain basic necessities, including food and medical supplies for those in the same household (including any pets or animals in the household)." Only two-person assemblies were allowed, and only a few exceptions were introduced from this provision, e.g. funeral attendance. Similar regulations were introduced in other parts of the United Kingdom. The public was also told that one form of physical exercises, such as running or cycling, was acceptable per day. These regulations were, I would admit, the most far-reaching restrictions on the rights of the individual introduced on the Islands since the Glorious Revolution of 1688. Such restrictions reversed the Montesquieuean paradigm of understanding the role of statutory law in a constructional state. The Western modern state – in each of its classic models, developed in the nineteenth century, i.e. the German, French, British or American model – was not to be a monster like the mythological Argus Panoptes using his hundred eyes to discipline everyone. A shift of paradigm mentioned here means a complete change in the role of the state. During the current pandemic a dangerous precedent for the perception of the role of law in a democratic state has been introduced. This precedent may be used in the future to curtail the fundamental rights and freedoms of an individual in case of other threats, even much smaller than the SARS-COV-2 virus.

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funerals (11 Decembre 2020. – Arrêté ministériel modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, art. 1). This case shows, similarly to the mentioned German judgment, the functioning of an effective mechanism of constitutional review of limitations, leading, in a very short period of time, to specific changes to legal provisions.

[16] Cf. Montesquieu 17811–8. Cf. Szymaniec 2013, 93. Montesquieuean doctrine of liberty was developed and broadened by liberal thinkers like Benjamin Constant (who used the term "liberty of the moderns"). Cf. Constant 1988, 308–328; Lumowa 2010, 389–414.

[17] "The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020", *Statutory Instruments* 2020, no. 350.

6. CONCLUSIONS

In this essay, I wanted to show that the legal response to a new threat, such as an unknown disease, is an outcome of many factors, including social attitudes and public sentiment. This is demonstrated by the example of regulations adopted in the 19th century during the cholera epidemic. Similarly, 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. Sometimes the hidden purpose of certain restrictions is to influence these sentiments. 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. Shifting from a descriptive to a normative perspective, I would emphasize that perhaps there is no better way to protect individual rights than to take the principle of proportionality seriously. This principle, derived from Aristotelian concept of the "golden mean" in the most general terms is common in Western legal culture and consists in resolving conflicts of different principles, reasons or values not by eliminating one of them, but by balancing them (Łętowska 2015, 15–22).[18] In the Polish legal system, this principle is in Article 31 sec. 3 of the Constitution of the Republic of Poland of April 2, 1997. Public health is mentioned in this provision as one of the values justifying the limitation on exercise of individual rights when it is necessary in a democratic state.

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[18] Cf. Barak 2012; Alexy 2017, 13–29.

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NOTES ON BIO-HISTORY: MICHEL FOUCAULT AND THE POLITICAL ECONOMY OF HEALTH

Abstract. In October 1974, Foucault gave three lectures in Rio de Janeiro on the archeology of the cure. This piece will comment on the first two, published a few years later in France with the original titles: *Crise de la médicine ou crise de l'antimédicine?* and *La naissance de la médicine sociale*. Bio-history is the term Michel Foucault initially uses – in the second lecture – to refer to the effect of the strong medical intervention at the biological level that started in the eighteenth century and has left a trace that is still visible in our society. It is on this occasion that Foucault introduces the concept, or rather the prefix "bio-" in his analysis, and it is here – as my reflections intend to demonstrate – that we may trace the original meaning of a term that today seems rather abused and find a valuable analytical framework for a cogent approach to the relationship between medicine and power dynamics.

Keywords: bio-history, social medicine, Michel Foucault, public health, institutions, COVID-19 pandemics.

UWAGI O BIOHISTORII: MICHEL FOUCAULT I EKONOMIA POLITYCZNA ZDROWIA

Streszczenie. W październiku 1974 roku Foucault wygłosił w Rio de Janeiro trzy wykłady na temat archeologii leczenia. W niniejszej pracy skomentowane zostaną dwa pierwsze, opublikowane kilka lat później we Francji pod oryginalnymi tytułami: *Crise de la médicine ou crise de l'antimédicine?* oraz *La naissance de la médicine sociale*. Biohistoria to termin, którego Michel Foucault używa początkowo – w drugim wykładzie – w odniesieniu do skutków silnej interwencji medycznej na poziomie biologicznym, która rozpoczęła się w XVIII wieku i pozostawiła ślad, który jest nadal widoczny w naszym społeczeństwie. To właśnie przy tej okazji Foucault wprowadza do swojej analizy pojęcie, a raczej przedrostek „bio-", i to właśnie tutaj – jak zostanie pokazane w niniejszej pracy – możemy prześledzić pierwotne znaczenie terminu, który dziś wydaje się raczej nadużywany, jak też znaleźć wartościowe ramy analityczne dla przemyślanego podejścia do badań nad relacją pomiędzy medycyną a dynamiką władzy.

Słowa kluczowe: biohistoria, medycyna społeczna, Michel Foucault, zdrowie publiczne, instytucje, pandemia COVID-19.

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1. INTRODUCTION

The history of medicine is social and political. It is not only a kind of knowledge that passes through the individual exchange between doctor and patient but a knowledge that "forms part of a historical system." As such, "it is not a pure science, but is part of an economic system and of a system of power" (Foucault 2004, 19). Michel Foucault clarifies this point in October 1974, when he gave three lectures in Rio de Janeiro on the archeology of the cure. The first two – upon which I will comment on in this piece – were published a few years later in France with the original title: *Crise de la médicine ou crise de l'antimédicine?* and *La naissance de la médicine sociale*. It is on this occasion that Foucault introduces the concept, or rather the prefix "bio" in his analysis, and it is here – as my reflections intend to demonstrate – that we may trace the original meaning of a term that today seems rather abused and find a valuable analytical framework for a cogent approach to the relationship between medicine and power dynamics.

As is well known, the issue of biopolitics or biopower was, beginning with a series of research endeavors by the French philosopher,[1] employed by many interpreters and in various disciplines, especially philosophy. The concept of biopolitics, defined as the taking charge of life by politics,[2] or perhaps more drastically, as the right of death and power over life,[3] continues to be called into question for different purposes by diverse parties, with greater or lesser reference to the overall reading of Foucault's *oeuvre*.

To avoid entering into a debate that would be difficult and too onerous to reconstruct here, I do not intend to address the age-old theme of biopolitics in its entirety, but to limit myself to sketching the phases of "bio-history." This purpose, however, is not based solely on a practical necessity. This piece argues that we shall look at the crossroads of medicine and society to recover the depth of what "bio" implies.

Bio-history is the term Michel Foucault initially uses – in the second lecture – to refer to what he defines as "the effect of medical intervention at the biological level, the imprint left of human history […] by the strong medical intervention that began in the eighteenth century" (Foucault 2001a, 134).

As we can see, this is a definition that is both more specific and more complex than what Foucault will elsewhere provide under the prefix "bio." Bio-history is a specifically political history in which we are still fully involved. Hence, it is worth retracing the steps of this history to understand where we are today and

[1] In *Society Must be Defended* Foucault defines biopower as a concentration of interest that, starting from the second half of the eighteenth century, emerges as a technology of power that is exercised not on the man-body, "but in the direction of man-species" (2003, 242).

[2] See Foucault (2003), in particular, the lecture of 17 March 1976.

[3] See Foucault (1978), in particular, part V.

how we can try to understand what is at stake, socially and politically in the current COVID-19 pandemics. I want the intent of these reflections to be clear: I do not desire to proclaim the last word on the current conditions of the pandemic or to be seduced by the temptation of prophecy (Weber 1949; Bourdieu, Chamboredon, Passeron 1991). I intend instead to show the ambiguities that have been circulating for some centuries around the matter of medicine, and its interconnection with legal and police matters, which can lead to various consequences – just as, in the past, they have led equally to the "glorious" years of the Welfare State and to authoritarian medicalization.

The proposal of this article is based on the fundamental premise that "[W]e are living a situation in which certain phenomena have led to a crisis. These phenomena have not fundamentally changed since the eighteenth century, a period that marked the appearance of a political economy of health with processes of generalized medicalization and mechanisms of bio-history" (Foucault 2004, 18).

2. A SOMATOCRACY?

As Foucault (2004, 7) writes, "[W]e live in a regime that sees the care of the body, corporal health, the relation between illness and health, etc. as appropriate areas of State intervention. It is precisely the birth of this somatocracy, in crisis since its origins, that I am proposing to analyze." We live in an era that considers the body, its health, and its disease to be crucial. It is not just the generic right to life that is at stake here, but the more specific and complex problematic that has taken the name of the right to health. Let us start by sketching the legal history of this protection.

With the well-known Beveridge plan, a system of reforms of the English social welfare (Hills et. al 1994) – from which Foucault's first intervention begins – we see the establishment of a model that will make history and will be the basis of various national constitutions, as well as of the *Universal Declaration of Human Rights* (United Nations, Paris 10 December 1948) and a ruling by the *World Health Organization* (1948). In particular, the report *Social Insurance and Allied Services* originally commissioned by Winston Churchill in 1939, was first publicized on 1 December 1942. It radically changed the social security system in the United Kingdom. The commission chaired by William Beveridge drew up a program based on the universality of public assistance. The establishment of the *National Health Service* (1948) aimed at guaranteeing the improvement of the physical and mental health of people through the prevention, diagnosis, and treatment of diseases, a program based on certain principles: the universality of access financed through general taxation.

Article 25 of the *Universal Declaration of Human Rights*, which was deeply influenced by the British NHS, states that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

According to Foucault, this is a crucial turning point through which an old logic, according to which a healthy individual was at the service of the state, inverts its polarity: "the concept of the healthy individual in the service of the State was replaced by that of the State in the service of the healthy individual." In addition, "It is not only a question of a reversal of rights, but also of what might be called a morality of the body" (Foucault 2004, 6). Healthcare now enters the field of macroeconomics and becomes a decisive factor for statistical studies. In other words, the human body becomes the object of a story, and not the human body alone, but the human as a species among living beings, including its very relationship with other living beings. Admittedly, Foucault writes (2004, 11), "the history of man and life are profoundly intertwined. The history of man does not simply continue life, nor is it simply content to reproduce it, but to a certain extent renews it, and can exercise a certain number of fundamental effects on its processes."

Once healthcare has become central, and the state begins to serve a healthy population, authoritarian intervention – as we might notice today – also becomes possible through procedures such as mass screening or vaccination campaigns. In other words, taking care also means exercising control over individuals and, above all, over the "population", a concept that has a special place in the history of systems of thought, starting from the possibility of its management in hygienic-sanitary terms. A population is the collective entity that allows the frequency with which disease spreads to become visible. The population facilitates knowledge of morbidity rates and becomes a statistical field divisible by age, the behavior of life, social position, and the coordinates of space and time. The population is the field in which dangers manifest and is the basis on which one understands how to act at the level of their government. In other words, it is through the population that criteria of normality (and therefore, obviously, normalization) can be elaborated.[4]

[4] Foucault dwells on the concept of population in several lessons in *Security, Territory, Population* and *The Birth of Biopolitics*. But above all, see *The Politics of Health in Eighteenth Century*, the version translated by Lynch, Richard A. (2014, 117), in which he states that "an element appeared at the center of this materiality, an element whose importance unceasingly asserted itself and grew in the seventeenth and eighteenth centuries: it was the *population*, understood in the already traditional sense of the number of inhabitants in proportion to the habitable area, but equally in the sense of an ensemble of individuals having between them relations of coexistence and constituting therefore a specific reality. The "population" has a growth rate; it has its mortality and morbidity; it has its conditions of existence, whether a question of the necessary elements for its survival or of those which permit its development and improvement. In appearance, it is a question of nothing but the sum of individual phenomena; nevertheless, one observes there constants and variables

According to Foucault, in the eighteenth century, four major processes characterize consolidation of medicine: the emergence of "a medical authority, which is not restricted to the authority of knowledge" but that "can make decisions concerning a town, a district, an institution, or a regulation"; medicine becomes a "field of intervention" not only for diseases but with regard to the consequences of such things as "air, water, construction, terrains, sewerage"; the birth of the hospital: "Before the eighteenth century, the hospital was not an institution of medicalization, but of aid to the poor awaiting death; and finally, the "introduction of mechanisms of medical administration: recording of data, collection and comparison of statistics, etc." (Foucault 2004, 13).

This set of factors produces what Foucault calls the political economy of health. This means that, in contrast to the order of things before the eighteenth century, it is not enough to just provide for the health of individuals as a workforce, whether for reproductive or economic purposes. There is in fact a further step, which changes the role of medicine. Its connection with the economy certainly remains but becomes, in a certain sense, more complex. It is necessary that medicine is not only functional to the reproduction of the workforce but that it positively produces well-being. Well-being thenceforward acquires market value; it becomes a capitalizable asset:

> Health becomes a consumer object, which can be produced by pharmaceutical laboratories, doctors, etc., and consumed by both potential and actual patients. As such, it has acquired economic and market value. Thus the human body has been brought twice over into the market: first by people selling their capacity to work, and second, through the intermediary of health. Consequently, the human body once again enters an economic market as soon as it is susceptible to diseases and health, to well being or to malaise, to joy or to pain, and to the extent that it is the object of sensations, desires, etc. (Foucault 2004, 16)

3. THE QUARANTINE PLAN

The centrality assumed by the body implies that the technologies of power do not act only on a "mental" level – a split between mind and body that now, as ever, holds little analytical value – nor do they function as a kind of propaganda:

> Society's control over individuals was accomplished not only through consciousness or ideology but also in the body and with the body. For capitalist society, it was biopolitics, the biological, the somatic, the corporeal, that mattered more than anything else. The body is a political reality; medicine is a biopolitical strategy. (Foucault 2001a, 137)

The model that has been installed since the eighteenth century is more specifically the model of the plague, one no longer based on exclusion – like that of

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which are proper to the population; and if one wishes to modify them, specific interventions are necessary." See also Pandolfi (2006).

leprosy (see also Foucault 1977) – but on permanent registration, detailed analysis, and constant inspection. In cases of plague or other types of epidemics, the ideal form of organization and control is the quarantine: one based on an "emergency plan" (Foucault 2001a, 144–145) and the loose concept of "measure" (see Napoli 2009).

In general, Foucault identifies three models in the history of social medicine: state medicine (Germany), urban medicine (France) and labor force medicine (England). Let us dwell on the French and the English models. Foucault defines the French model of social medicine in relation to urbanity. Urban medicine administered burial places and controlled and reduced the dangers that corpses posed, making air and hygienic conditions a fundamental stage of its "development." It is important to note, however, that these kinds of changes are not to be read exclusively with an eye toward the ethical. Foucault shows how cataloging, the control of circulation, and a new economy of the living and the non-living simultaneously took place alongside these processes. Consider this crucial example: in the eighteenth century we start dealing with death. It was not a matter of Christian respect for death and the corpse – this is precisely the ethical prejudice we need to avoid – but rather the emergence of a norm of public hygiene and a new political-health ideal that takes into account the living. Air quality and distance from the town were the basic factors calculated by an urban and political restructuring that led to the "first medical and urban policing sanctioned by the banishment of the cemeteries" (Foucault 2001a, 147).

Urban medicine focused more on things than on people; air, water, the general state of health. Healthiness is precisely not people's health; it rather refers to the concept of environment. The French constituent assemblies of 1870 and 1871 conceived public health on the basis of this latter concept. Poverty, writes Foucault, was not yet taken into consideration in terms of danger and fear. It is the English model that will produce this break in the second half of the nineteenth century, with the organization of a public health plan that, to guarantee the reproduction of the bourgeoisie, will result in mechanisms for the control and care of the poor: vaccination control, obligatory immunizations, the registering of epidemics (and possible indicators of contagious diseases to come), the location of unhealthy places, etc.

The controlling tendencies of this national Health Service "campaign" were so tangible that there was no shortage of forms of rebellion – which, paradoxically, those same public actions were aiming to avoid or radically eradicate. With the Poor Law Amendment Act, approved by the English Whig government in 1834, workhouses were established in which, as is well known, the poor were systematically exploited. These actions, then, were certainly not a matter of protecting human rights – a framework that did not yet exist – but a matter of defending a utilitarian cause: healthy environmental conditions would improve the health of the workforce and consequently increase the productivity of factories. The result: a happier, healthier, more productive, and ideally docile proletariat. According to Foucault, it is on the

basis of the developments of the British model that our contemporary model of medicine – comprising medical assistance, control of the workforce, management of dangers, data collection, population screening, and mass vaccination campaigns – was formed (see Engels 1973; Mooney, Szreter 1998).

4. THE POLITICS OF HEALTH

A few years later, in 1976, Foucault returned to the issue, in a certain sense recapitulating what he had said more widely in the Rio de Janeiro conferences. I refer now to *La politique de la santé au XVIII^e siècle*,[5] a short text that nevertheless clarifies important implications that his previous lectures had left unelaborated. Nosopolitics, literally a politics of the disease – writes Foucault (2001b, 92) – has not been a set of top-down strategies since the 18th century, which would have imposed themselves vertically on the population.

The general plan was not so much to take care of needy people through assistance – although this was certainly also the case. Rather, something more radically innovative arises. The political and sanitary problem of the time revolved around the following issue: "how to raise the level of health of the social body as a whole", with the solution that was proposed based on standards of "physical well-being, health, and optimal longevity" (Foucault 2001b, 94). The practice required to obtain these three key principles of the new health policy was carried out by the "police." As we know, modern policing does not so much name a unitary institution as a set of police activities: economic regulation, measures of public order, rules of hygiene, etc. (Foucault 2001b, 94).[6] In other words – at least in the French history – the police have embodied the administration of the social *body*: "The police, as an institutional ensemble and as a calculated modality of intervention, was responsible for the 'physical' element of the social body: the materiality, in some sense, of this civil society, about which in the same period, moreover, it was attempted to conceive the juridical status and forms" (Foucault 2014, 117).

How to defend the "newborn" society, this social body affected by diseases and susceptible to epidemic contagion? Medical care and police control were ultimately born together. Here, Foucault situates the birth of medicine at the intersection of an economy of assistance and a *police* of health. Once the diseases

[5] Here I refer to the English translation included in *Power: The Essential Works of Foucault, 1954–1984,* Vol. 3, translated into English by Colin Gordon. There are two similar versions under the same name of this text; the two texts appeared originally in volumes also bearing the same title, *Les Machines à guérir* [Curing Machines]. As in all other cases, I consulted the original text first and then consulted the English translation.

[6] For a study on the ambiguity of the "police" that historically develops this question and charts a Foucauldian approach, see Napoli (2003).

of the poor have been included in the more general problem of the health of the population, we move from the ethical and charitable hypothesis of medical aid to a form of "medical police."

It is crucial, at this point, to understand the enabling conditions of this fundamental transformation. According to the French philosopher, the answer lies in the "accumulation of men", in the "demographic upswing in Western Europe" which made it necessary to develop "finer and more adequate power mechanisms" for the management of a growing population. At the same time, this population takes on the appearance of an "object of surveillance, analysis, intervention, modifications" (Foucault 2001b, 95). In this new technology of power, the family takes on a central role and becomes the "target for a great enterprise of medical acculturation" (ibid, 97) which is located in the interstices between private and public, keeping alive the private ethics of health, healthy reproduction, moral responsibility towards the child. Part of medicine is clearly practiced in the hospital institution, but it is also convenient for the market to maintain a domestic form of hospitalization.

In other words, public health is more a general technology that takes charge of forms of life and existence (including sexuality, reproductive capacity, and the risk of epidemic contagion) than a "simple" ethics of care. Quoting Rose, an important interpreter of Foucault, especially in the field of medicine, we might say that "the vital politics of our own century" is, in fact, "neither delimited by the poles of illness and health, nor focused on eliminating pathology to protect the destiny of the nation" (2007, 3). The current phase of public health and social medicine can be rather described as a *politics of life itself*, that is based on "our growing capacities to control, manage, engineer, reshape, and modulate the very vital capacities of human beings as living creatures." But what we mean by *life*? We shall comprehend what life really means and, therefore, how a bio-history can be advanced.

5. LIVING IN AND WITH A NEW FORM OF LIFE?

Let us now go back a few years, to the lectures in Rio de Janeiro in 1974. I would like to pause on two passages, in particular, to draw some important conclusions that this notion of bio-history can offer us in the present. The first excerpt is at the beginning of the second conference and contains an invitation: "it would be interesting to study the evolution of relations between humanity, the bacillary or viral field, and the interventions of hygiene, medicine, and the different therapeutic techniques." (Foucault 2001a, 135). The second passage is taken from the first conference and recalls an event – that, Foucault emphasizes, should not be forgotten – which took place in the zoological field, among non-human animals: "One must not forget that the first major epidemic studied in

France in the eighteenth century and which led to a national data gathering was not really an epidemic but an epizootic" (Foucault 2004, 16).

Reading these two passages together, it seems clear that Foucault had grasped and intended to comprehend in the concept of bio-history a way of conducting archeology that should not remain within the confines of the events that bind human animals together. On the contrary, he intended to suggest the usefulness of an approach that would take into consideration all living beings. In the world of life, he seems to comprehend – certainly well in advance – also viral forms of life, "le champ viral." This aspect is extraordinarily original if we consider that, in the contemporary field of biology, there is an open debate about whether viruses are part of the tree of life or not. When the Coronavirus pandemic began, that debate was resumed and new contributions were published. This time an emergent consensus, which has the potential to enter the order of discourse, has begun to see the virus as a living form. Before, the virus was considered a parasite that only exploited the life of others.[7] This is just an example of the "social" nature of the sciences, of their status as both historical and political, which are coterminous with power and change according to the contingency of events. From this methodological approach, we might analyze what happens in this conflictual field of knowledge and see what kind of hygienic norm it might lead to, how preventive and therapeutic techniques might change, and where the ensuing global data gathering might bring us.

To say that medicine is a social, historical, political matter, always linked to power, is to confirm what Rudolf Virchow himself – one of the "fathers" of social medicine (and thus perhaps of biopolitics) – said: "Medicine is a social science, and politics is nothing more than medicine in larger scale" (quoted by Waitzkin 2006, 7).[8] As always, we need to understand what politics can be invented, what new institutions we can forge to give that "bio" one sense or another. "We move in a world of perpetual strategic relations. Every power relation is not bad in itself, but it is a fact that always involves danger" (Foucault 1990, 168).

The archeology of care is certainly useful for looking, with a gaze that is not too shrouded by ethics, at the events in which we inevitably participate. This awareness must also prevent idealizing a hypothetical past that never existed, an Eden that the world has never known (Haraway 1992), where people lived in harmony with so-called nature. A hypothetical "type of natural hygiene or paramedical bucolicism," writes Foucault, are "alternatives" that "do not make sense" (Foucault 2004, 18). As Foucault claims: "A series of phenomena, like the

[7] On this debate, see Moreira and López-García (2009), where the authors express ten reasons to exclude viruses from the tree of life; Claverie and Ogata (2009), on the contrary, propose ten reasons to include viruses in the evolutionary picture. This debate has recently restarted: see Harris and Hill (2021), who reconsider "a place for viruses on the tree of life."

[8] The reference is to Virchow (1958) and Virchow (1957).

radical and bucolic rejection of medicine in favour of a non-technical reconciliation with nature, themes of millenarianism and the fear of an apocalyptic end of the species, represent the vague echo in public awareness of this technical uneasiness that biologists and doctors are beginning to feel with regards to the effects of their own practice and their own knowledge" (Foucault 2004, 12).

The vision of science as a kind of exact knowledge is still widespread and seems to be founded on the teleology of progress. What should be dismissed instead is precisely this (exclusively human) epic based on development (Stengers 2015). Indeed, with Latour, it is worth mentioning that "after a hundred years of socialism limited just to the *redistribution* of the benefits of the economy, it might now be more a matter of inventing a socialism that contests *production itself*. Injustice is not just about the redistribution of the fruits of progress, but about the very manner in which the planet is *made fruitful*" (Latour 2020).[9]

We are also in global mourning, but at the same time we are in a system of thought that struggles to conceive the inevitable risk contained in life: illness and death.[10] "Life is what is capable of error"– this is what Foucault (1991, 22) writes in the introduction to the most important work by his master Georges Canguilhem, *The Normal and The Pathological.* Illness is not measured as a deviation from pre-established norms; it is a change in the quality of life. We need medicine because we are sick. Medicine cannot, therefore, arise from physiology, but necessarily from pathology. Pathology calls normality into question:

> the consciousness of biological normality includes the relation to disease, the recourse to disease as the only touchstone which this consciousness recognizes and thus demands. […] In order for the normal man to believe himself so, and call himself so, he needs not the foretaste of disease but its projected shadow. […] health is an equilibrium which he redeems on inceptive ruptures. The menace of disease is one of the components of health. (Canguilhem 1991, 285–287)

6. CONCLUSIONS

A life under protection is also a life that surrenders itself, which is dependent on a certain idea of security, possibly expecting the realization of this security from the national state, and therefore inevitably under the conditions set by the state itself. In this regard, Foucault pointed out – in *Un système fini face à une*

[9] He adds that "this does not mean de-growth, or living off love alone or fresh water. It means learning to select each segment of this so-called irreversible system, putting a question mark over each of its supposed indispensable connections, and then testing in more and more detail what is desirable and what has ceased to be so" (Latour 2020).

[10] "Behind the doctor's back, death remained the great dark threat in which his knowledge and skill were abolished" (1976, 146) – wrote in *The Birth of the Clinic*: "it is at death that disease and life speak their truth: a specific, irreducible truth, protected from all assimilations to the inorganic by the circle of death that designates them for what they are" (1976, 145).

demande infinie, 1983 – that we need to know "how people are going to accept being exposed to certain risks without being protected by the all-providing state" (Foucault 1990, 172). What Foucault did not have the opportunity to see completely – leaving this world prematurely, precisely because of a virus – is that healthcare has undergone an epochal turning point, in a neoliberal sense, in which centrality is given to the reason of market.[11]

However, the approach he proposed remains a fundamental one, inasmuch it provides us with a perspective for grasping the ambiguity of medicine: "what allows medicine to function with such force is that, unlike religion, it is inscribed in the scientific institution" (Foucault 2001c, 76),[12] or, in other words: "one of the great functions of medicine […] has been precisely to take the place of religion and reconvert sin into illness, to show that what was, what is sin, of course, may not be punished there, but will certainly be punished here" (Foucault 2001d, 1249).[13]

Foucault always intended to pause in the ambiguity, the complexity of the intertwining between knowledge and power, as in the following methodological warning: "We cannot simply designate the disciplinary effects of medicine. Medicine can work well as a mechanism of social control; it also has other functions, of technical and scientific types" (Foucault 2001c, 76).[14] It is on the basis

[11] Various scholars have focused on how the eclipse of the concept of the right to health runs parallel to the WHO's loss of a leading role in international health policy to the benefit of the World Bank. In fact, in 1987, the World Bank published the first document on health: *Financing Health Services in Developing Countries. An Agenda for Reforms*. Its recipe is well known, advocating for: introduction of user fees (direct payment of services) in order to promote insurance programs, the privatization of health services, and the decentralization of health care. In this era of health (and its complex legal concept), new problems arise, mainly linked to the fact that the market has become the protagonist of our history of medicine. Vaccination campaigns follow the course of choices, clearly aligned with the profit motive, that pharmaceutical corporations establish. See the works of Howard Waitzkin: *Medicine and Public Health at the End of Empire* (2011), and *Health Care Under the Knife: Moving Beyond Capitalism for Our Health* (2018). In the journal *Lancet*, Julian Tudor Hart, a visionary general practitioner who set up preventive health care in a Welsh mining community back in 1971, wrote an article entitled *Inverse Care Law*: "The availability of good medical care tends to vary inversely with the need for it in the population served. This inverse care law operates more completely where medical care is most exposed to market forces, and less so where such exposure is reduced. The market distribution of medical care is a primitive and historically outdated social form, and any return to it would further exaggerate the maldistribution of medical resources" (1971, 405).

[12] My translation of "ce qui permet à la médecine de fonctionner avec une telle force, c'est que, contrairement à la religion, elle est inscrite dans l'institution scientifique" (2001c, 76).

[13] My translation of "l'une des grandes fonctions de la médecine […] a été précisément de prendre le relais de la religion et de reconvertir le péché en maladie, de montrer que ce qui était, ce qui est péché bien sûr ne sera peut-être pas puni là-bas, mais sera certainement puni ici" (2001d, 1249). See the reflection of Agamben (2020).

[14] My translation of "On ne peut se contenter de désigner les effets disciplinaires de la médecine. La médecine peut bien fonctionner comme mécanisme de contrôle social, elle a aussi d'autres fonctionnements, techniques, scientifiques" (2001c, 76).

of this complexity that the possibility of inventing new institutions, of building new practices, is always open, and ensures the duplicity of advances in techniques and their parallel potential for control. Foucault's reflections constitute a valuable compass for our practice:

> We have to transform the field of social institutions into a vast experimental field, in such a way as to decide which taps need turning, which bolts need to be loosened here or there, to get the desired change; we certainly need to undertake a process of decentralization, for example, to bring the decision-making processes, thus avoiding the kind of grand totalizing integration that leaves people in complete ignorance of what is involved in this or that regulation. What we have to do then is to increase the experiments […] bearing in mind that a whole institutional complex, at present very fragile, will probably have to undergo a restructuring from top to bottom. (1990, 165–166)

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"IT IS A NOMOS VERY DIFFERENT FROM THE LAW": ON ANARCHY AND THE LAW

Abstract. The relationship between anarchy and the law is, to say the least, an uncomfortable one. 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, this '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. Taking into account the aforementioned challenges, in this article, I examine and develop 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, I aim to think anew the relationship between anarchy and the law and, ultimately, to point towards an ethico-political account, of what I shall call an an-archic nomos which escapes (or, at least, tries to) the dogmatism and "archist" mentality of the law.

Keywords: Anarchy, law, nomos, institutions, Deleuze.

„JEST TO *NOMOS* BARDZO RÓŻNY OD PRAWA": O ANARCHII I PRAWIE

Streszczenie. Relacja pomiędzy anarchią a prawem jest, delikatnie mówiąc, niewygodna. Tak zwane „klasyczne" stanowisko anarchistyczne – we wszystkich jego heterogenicznych tendencjach – charakteryzuje się zazwyczaj całkowitym sprzeciwem wobec prawa. Jednakże, pomimo swojego nieocenionego wkładu i nieustannie aktualnej krytyki stanu rzeczy, ta „klasyczna" pozycja anarchistyczna musi zostać ponownie zbadana i ponownie wyartykułowana, jeśli ma stanowić skuteczną przeszkodę dla obecnych (i bardzo złożonych) mechanizmów dominacji i opresji dogmatyzmu i dominacji prawa. Biorąc pod uwagę powyższe wyzwania, w niniejszym artykule analizuję i rozwijam dwa pojęcia myśli filozoficznej Gilles'a Deleuze'a, a mianowicie pojęcie instytucji oraz pojęcie nomosu nomadów. W ten sposób chcę na nowo przemyśleć relację między anarchią a prawem i ostatecznie wskazać na etyczno-polityczne ujęcie tego, co nazywam an-archicznym nomosem, który wymyka się (lub przynajmniej próbuje) dogmatyzmowi i „archistycznej" mentalności prawa.

Słowa kluczowe: anarchia, prawo, nomos, instytucje, Deleuze.

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On the breaking of this cycle
maintained by mythical forms of law,
on the suspension of law
with all the forces on which it depends as they depend on it,
finally therefore on the *abolition* of state power,
a new historical epoch is founded.

Walter Benjamin[1]

1. INTRODUCTION

If the law, but also, laws and rights more generally, are susceptible to what it could be seen as a systemic dogmatism in the sense that they can be understood as a transcendent authority that dictates and imposes hierarchising rules of and over living – in the sense of an *archē* [ἀρχή],[2] that is, as a monocular prism of rightness upon a multiplicity of modes of being, acting effectively as "a limitation of actions" (Deleuze 2007, 19) – of what is possible, then we have to remain able to ask within and beyond the auspices of legal theory: is it possible to even think in terms of an *an-archic* (without an *archē*) mode of being, that is an *ethos* which thinks and does politics *beyond* the dogmatism and the commands of the law, laws and rights? Furthermore, how are we to respond to the usual protestation of (legal) authority and, *especially*, the view that understands the law as a universal framework of fundamental legality, and especially so when it is often admitted that it 'may not be perfect', but the law is 'the only' or 'the most socially efficient' way to be and to act?

In this article, considering the aforementioned *aporias*, I aim to think in terms of and point towards an ethico-political account of, what I shall call, an *an-archic nomos* [νόμος], which is influenced by, but also tries to develop further, Gilles Deleuze's understanding of the term, *nomos* of the nomads. Such an account aims to think beyond the law and think anew our relation with laws and rights, more generally. I should stress, however, that my intention is not to provide a definite answer, as a sort of better 'solution' to the 'problem' of legalism a 'manifesto' or 'programme'. I argue that an examination of Deleuze's understanding of *nomos* (and his thought more broadly) has something interesting to offer to an *ethos* that tries to live immanently and do politics in an *an-anarchic* way, which *escapes*

[1] Benjamin 1986, 300.

[2] The term *archē* means 'to be the origin', or to be prior to something, thus it is used here to signify the foundational principle, the beginning of everything that succeeds it. It can also have the meaning of 'a command'. It could be seen that both meanings have a close connection to a notion of the law as a dogmatic, *archist* principle that commands our modes of being. See: Agamben 2019.

the dogmatism of the law, laws and rights at least in their transcendent modality.[3] I should also stress that my choice to employ and to continue to use a term which is broadly understood as a juridical one, *nomos* in order to schematically describe my account does not suggest any sort of reconciliation of anarchic thought with the law, or any other form of recognition of an emancipatory promise, in a more 'progressive' more 'inclusive' theorisation of the law. It is rather an examination of how we can create different potentialities of life, which refuse to get captured within the dogmatism of a transcendent, moralising mode of a juridicalised being. To that extent, the use of a juridical term to signify a non-juridical *ethos* (or, in better terms, a non-juridicalised life) manifests a paradox and an irony which remains open to ponder on.

In what follows then, we shall start our examination by a brief exploration of the so-called blackmail of the law and the 'classical anarchist' responses to it (**Section 1**). Consequently, I ponder on the aforementioned modalities of such an *an-archic nomos* as centrally formed by two Deleuzian notions: the institution (**Section 2**) and the *nomos* of the nomads (**Section 3**). By placing these two notions in direct opposition to the dogmatism of the law, laws and rights, I aim to think beyond and escape the capture of the dogmatism of the *archist* mentality of the law.

2. ON LAW'S BLACKMAIL AND 'CLASSICAL' ANARCHIST RESPONSES

Law's dogmatic mentality operates with the use of a powerful blackmail. According to this blackmail, any form of criticism that points towards the overreach of law's universal framework of human values runs the risk of embracing an always-already characterised liminal situation where the absence of the law, laws or rights will signify the beginning of a much more chaotic outcome; akin to that where "the violent anarchy of the state of nature" (Newman 2012, 308), a kind of Hobbesian state of *Warre*, will become unstoppable and, as a result, life will become "solitary, poor, nasty, brutish and short" (Hobbes 1986, 186). This is especially pertinent when law claims

[3] I do not aim to argue that Deleuze himself was an anarchist and I am not interested in such mundane discussions which are trying to present an image of an author in order to serve certain political and non-political (or mere 'gossiping') purposes. I, simply, want to argue that Deleuze's thought may have something interesting to offer to the efforts to (re)think anarchy in terms of an *ethos* and a related politics. This is, of course, not a radically novel view, with Deleuze's relation to anarchy and his huge, direct or indirect, influence on many theorists of anarchy, anarchist group and movements being well-known. In fact, only within the last year, an edited collection on Deleuze and anarchism also a lexicon of anarchic concepts, which places Deleuze within the broader anarchist tradition were published. See respectively, Gray van Heerden and Eloff (2019) and Colson (2019).

to operate as something akin to what Carl Schmitt saw as the formation of a Christian Empire (or what we can call a moral Empire of the West). In other words, as a *Katechon* [Κατέχον], a restraint of the coming of the Antichrist – and, we could add, the coming of *an-archy* (Schmitt 2006, 59–62). While this view is problematic for various reasons that are not the central subject of my interest here, it remains of relevance since this 'sense' appears to have managed to influence, to a significant extent whether explicitly or implicitly, a large proportion of theoretical scholarship on law and authority more broadly. For example, we, usually, read of an explicit or implicit established by now belief that the law and a wider notion of being governed by 'law and order', or what, the French collective of radical philosophers, Tiqqun, call 'Empire', are "the crowning achievement of a civilisation, the end-point of its ascendant arc" (Tiqqun 2010, 127) and so forth. Perhaps, it is this successful fearmongering-consensus-building in the name of defence against a, supposed, chaotic aftermath, if anyone was to doubt the universality, effectiveness or even the particular ways in which the values of law are procured and defended, that has led critics to be careful enough to avoid unleashing a, potentially, more powerful or, as it is tellingly termed, 'total' critique that questions, for good reasons, the very notion of a mode of thought that *thinks* that *thought itself* is now only possible within this legalistic or juridical framework.

In addition, it could be further speculated that, perhaps, the dominance of *archē* as a modality (grounding and thus, enabling law or right on the basis of some higher law etc.) and its morality-coding have rendered any *thinking otherwise* an extremely difficult, if not at times institutionally impossible and unwelcome task. Such a mode of *archist* thinking hierarchises among and above beings and ideas and has contributed to an understanding of *the law* as a framework-concept above human experience, or as a value of values that – despite any flaws – represents something which can be defined as 'the good' itself or the mark of 'the civilised', once more above the level of the immanent experience of values. Nonetheless, this is beside the point ultimately, since this 'overthinking' in itself about any *future* potential repercussions of a life beyond the law does not have anything to say about the *present* and thus it tends, in itself, to be an *uncreative* and *reactive* over-investment.

Moreover, we need to ponder on the (im)possibility of thinking and using terms that are infused by a strong historical juridical sense (such as *nomos*), in order to point towards a non-dogmatic, *an-archic ethos* and way of thinking. Such a potential becomes even more difficult if we additionally consider that the relationship between the law and anarchy tends to be characterised, to say the least, as an uncomfortable one. Taking a purely negative approach towards the law, anarchist thought – in all its heterogeneous tendencies – is, usually, characterised by a total opposition against the law, which tends to be understood as an irrational, immoral and oppressive 'tool' of the state apparatus that promotes the interests of

the government against, and not for, its subjects.[4] The law has the ability to justify the obligation of the people to adhere to the rules of the state and to that extent, it justifies the state's monopoly of violence – "state behaviour is an act of violence, and it calls its violence 'legal right'; that of the individual, 'crime,'" writes Max Stirner[5] (2017, 209). These views are, famously, echoed by Pierre-Joseph Proudhon when he states: "Laws! We know what they are and what they are worth. Gossamer for the mighty and the rich, fetters that no steel could smash for the little people and the poor, fishing nets in the hands of government" (2005, 90). But beyond being an "unworthy hoax" (Bakunin 1964, 136) that justifies and legalises the 'brutish' acts of the state, the law becomes also an insurmountable barrier that fetters any potentiality towards living a life characterised by spontaneity and revolt against hierarchy; and to that extent, it limits and at times terminates the ability of human beings to confront their immanent everyday problems and resolve them according to the particular and singular needs of a situation that they are faced with, without being attached to the commands of the laws of the state or 'enabled' in principle but, simultaneously, hindered in reality. According to Pyotr Kropotkin, people become

> perverted by an education which from infancy seeks to kill in [them] the spirit of revolt and to develop that of submission to authority; we are so perverted by this existence under the ferrule of a law, which regulates every event in life – our birth, our education, our development, our love, our friendship – that, if this state of things continues, we shall lose all initiative, all habit of thinking for ourselves. (Kropotkin 1975, 27)

To that extent, people are unable to respond, engage, *create* and *think otherwise* because they expect to receive all the answers to their problems from an *archist* authority of the law of the state, or adapt to the modality that one thing will be valid in the name of a higher abstract principle (in this case law) but another will be valid in everyday reality.[6]

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[4] Mikhail Bakunin even suggests that a main characteristic that defines someone as an 'anarchist' is the demand for the absolute abolition of juridical law. As he states in Bakunin 1964, 271: "The Negation of Juridical Law: In a word, we reject all legislation – privileged, licensed, official, and legal – and all authority, and influence, even though they may emanate from universal suffrage, for we are convinced that it can turn only to the advantage of a dominant minority of exploiters against the interests of the vast majority in subjection to them. It is in this sense that we are really Anarchists."

[5] Individualist or egoist, anarchist tendencies, anarcho-nihilists and insurrectionists' affinity to 'illegalism', in the pure sense of the term, is manifested by direct, insurrectional acts against the laws of the state. Such acts are considered by these tendencies to be the only answer to the oppression of the law. For examples of these tendencies and their relation or non-relation to the law, see: Anonymous 2011; Landstreicher 2009; Feral Faun 2010; Serafinski 2016; Bonanno 2009.

[6] The similarity between this view and the way that Deleuze criticises the law is striking. For Deleuze, the law signifies a return to transcendent or *archist* values, which are *uncreative*, leading to a fettering and blocking of other possibilities of thinking about and resisting oppression.

In the remainder of his "Law and Authority" essay, Kropotkin explains how we became so accustomed to obedience and the need for ever-expanding laws that we cannot do without them. Thus, we accept any restraint to our freedom in the name of security, in the name of avoiding what Hobbes understood as the 'threat' of the state of nature, leading to the ultimate pacification of our social and political instincts and the degradation of our spirit of revolt. This leads Kropotkin to suggest that the only viable solution is the total destruction of the juridical system and the law. As he characteristically writes: "No more laws! No more judges! Liberty, equality, and practical human sympathy are the only effectual barriers we can oppose to the anti-social instincts of certain amongst us"[7] (Kropotkin 1975, 43). Despite its invaluable contribution and the ever-pertinent critique of the state of affairs, this 'classical' – if it can be named so – anarchist dismissive approach to law needs to be re-examined and rearticulated if it is to pose an effective nuisance to the mechanisms of domination and the oppression of dogmatism and dominance under an *archist* mode of being. This is a because, a head-on confrontation with the law and the state – a potential for a general insurrection – does not appear like a pragmatic, or even an effective solution due to the blurry meanings of the law and the state and the overcomplicated relations that characterise our (post)modern societies, including the difficulty of defining and identifying the boundaries of the state and its law.[8] Perhaps, it is the recognition of this impasse that led, more recently, to the emergence of works that tries to think 'seriously' about the law and its relationship with anarchy in new and interesting ways, including analyses about how questions relating to a living of a life *beyond* law and the state can be placed in a different sense 'compatible' with an anarchic *ethos*.[9] In what follows, I aim to contribute to this discussion by (re)visiting the Deleuzian concepts of the 'institutions' and the *nomos* of the nomads.

[7] The similarity between Kropotkin's contempt for the judges and the judgmental mode of thinking of the law of the state and Deleuze's appeal not to leave the jurisprudential operation to judges Deleuze is striking (1995, 169).

[8] Giorgio Agamben (1993, 84) is right when he states in *The Coming Community* that "the novelty of the coming [here we can add anarchic] politics is that it will no longer be a struggle for the conquest or control of the State, but a struggle between the State and the non-State (humanity), an insurmountable disjunction between whatever singularity and the State organisation." Following this line of thought it could be argue that anarchic politics, if they are to be effective, need to focus more on how to form an *ethos* that escapes the dogmatic, moralising judgment of the state – of creating new ways of existing that slips away from state's capture. I will support, further, this view in the subsequent sections where I explain Deleuze's use of the term *nomos* to oppose the law of the state.

[9] See, for example, the works of Lozidiou (2011; 2018; 2019), Newman (2012) and Tamblyn (2019).

3. INSTITUTIONS AGAINST THE LAW

In his first major work, *Empiricism and Subjectivity: An Essay on Hume's Theory of Human Nature*, Deleuze makes a distinction between the law and institutions. Following, David Hume's critique of the idea of a society based on 'a social contract', Deleuze states that:

> The essence of society is not the law but rather the institution. The law, in fact, is a limitation of enterprise and action, and it focuses only on a negative aspect of society. The fault of contractual theories is that they present us with a society whose essence is the law, that is, with a society that has no other objective than to guarantee certain pre-existing natural rights and no other origin than the contract. Thus, anything positive is taken away from the social, and instead the social is saddled with negativity, limitation and alienation. The entire Humean critique of the state of nature, natural rights, and the social contract amounts to the suggestion that the problem must be reversed […] The institution, unlike the law, is not a limitation but rather a model of actions, a veritable enterprise, an invented system of positive means or a positive invention of indirect means. (Deleuze 1991, 46–47)

In this passage, we observe a distinction between an idea of the law and that of an institution with the first said to be operating as a mere limitation of actions, a restraint. This idea of the law suggests that the people that create 'a society' form – and are formed by – a social contract based on a fundamental sense of law that places restraints on the 'brutish' impulses and passions which would be harmful to the rest of the population in the absence of such a contractual bond, very much akin to Hobbes' views which were noted above. Deleuze, via Hume, argues that a notion of the institution is quite the opposite of the law, in the sense that the institution is something that operates as 'a model of actions' that is characterised by a positive invention and, in that sense, it does not limit action but expands the possibilities of a wider range of actions and responses to the multiplicity of encounters one is faced with each time – the institution is a sort of an enterprise, which is ever-changing, and hence it cannot bind and restrain. Institutions are created in order to "satisfy [their] tendencies and needs"[10] (Deleuze 2007, 19) and they are ultimately dissolved or changed if such needs are redundant. Hence, the importance of the distinction between the law and institutions is, for the purposes of this article, that thinking through or with institutions rather than the law, in the sense described above, enables a different perspective about thinking the social, an *an-archic* way as I shall explain below, which is "profoundly creative, inventive and positive" (Lefebvre 2008, 54).

[10] A parallel line could be drawn between the function of an institution and that of the philosophical concept (Deleuze, Guattari 1994) with the former functioning at a practical level (for example, how to organise in order to respond to a particular, political/social issue) whereas the latter responds to problems of thought. In both situations, however, institutions and concepts are ever-changing and thus, *an-archic* and non-dogmatic as they do not prioritise any of their parts over the others.

Despite not expanding further on this distinction, it seems that Deleuze held a fairly consistent approach to it. For instance, in his later book on Leopold von Sacher-Masoch, *Coldness and Cruelty*, Deleuze states that "laws bind actions; they immobilise and moralise them" (1991, 78). To that extent, the law operates through the imposition of certain transcendent or *archist* action-binding values; classically through the distinction of good and evil, right and wrong, judging actions by hierarchising beings in terms of these actions. In contrast, Deleuze remarks that "pure institutions without laws would by definition be models of free, *an-archic* action, in perpetual motion, in permanent revolution, in a constant state of immorality"[11] (Deleuze 1991, 78, [emphasis added]).

An institution can be said to be envisaged as an open-ended, nomadic space, as I explain below, where we can *find each other* (The Invisible Committee 2009, 97) and create with each other. It is a way of responding to a particular situation not because we are *a priori* commanded by *archist* norms (legal, or moral), but because a situation calls us to create something that is capable to respond to a singular need of the transformation of the social. Further to that, an institution should not operate just as a 'space' where we *find each other*, but as one where we have the capability of *losing each other*, of *losing or changing the institutions themselves and through our practices – which are never predetermined – losing our own selves and whatever we held as a dogmatic notion of truth and norms.* What is meant by that is that an institution is also "an indication of a need for distance, however elastic, temporary, revocable, that is, connected to those that turn out to be the transformations, the metamorphoses, of the social" (Fadini 2019, 528). Thus, we need to always be vigilant for the situation where an institution loses its purpose, or becomes ineffective in responding to the particularities of novel situations. We need to maintain, in other words, the *courage* to do away with it and to that extent to be able to create something new against convenience, habit or 'common sense' or because its laws and norms dictate that we need to hold on to it even when it stifles life.

In that sense, an institution can be said to hold a paradoxical level of consistency which is determined by a different understanding of how one can operate through *an-archic nomoi* [νόμοι] – if they can be called so – that are not reduced to a hierarchical permanent formation and set finality, since they are to sustain the potency to recreate their rules anew in the present; and as such to reorganise an institution according to the particular needs and *uses* before a specific and singular circumstance.[12]

We can observe an equation or, at least, a strong resonance between the way Deleuze opposes the law with this notion of the institution. We encounter

[11] Here, perhaps, Deleuze had in mind the work of the French jurist Maurice Hauriou, who thought that the institutions are more important than their laws and contract. This speculation is made by Dosse (2010, 113) and Tosel (2019, 145).

[12] For a similar view, see: Ford 2016, 94.

in both an opposition to the dogmatic thinking and moralisation that is promoted by a dominant understanding of the law as a sign of 'progress' of a 'superior civilisation' more generally, with institutions and *nomos* calling for a creative method of establishing and re-establishing laws and rights which are not reduced to any form of primary, permanent, causes or an *archē*. Deleuze, explicitly, points towards this relation between *an-archic* institutions and *nomos*, when he explains to Toni Negri in the the famous interview, "Control and Becoming" that there is "a whole order of movement in 'institutions' that's independent of both laws and contracts" (Deleuze 1995, 169). Institutions are a matter of a *nomos*, that has nothing to do with legalistic and dogmatic rules. This *nomos* becomes, as I explain below, a matter of *thinking otherwise* about law and our nomic relation to it.

4. THE *AN-ARCHIC NOMOS* OF THE NOMADS

In this part, I aim to think beyond the dogmatism of the law by examining a *thinking otherwise* of the law and the creation of laws and rights, in terms of what Deleuze names *nomos*. In *Difference and Repetition*, Deleuze refers to the practice of the distribution *in* land in its Homeric use as *nomos*.[13] While, *nomos* is widely known as the modern Greek translation of the English word 'law,' according to Deleuze, its Homeric use significantly differs from our understanding of what law is or could be nowadays – "it is a *nomos* very different from the 'law'"[14] says Deleuze and Guattari (1986, 16). Following the analysis on the meanings of the word by the French linguist Emmanuel Laroche, Deleuze explains that *nomos* for Homeric society has a pastoral sense. For Deleuze, this meaning of allocation or distribution was not a matter of land distribution, because as the philosopher states the understanding of *nomos* as land-distribution was "only belatedly implied" (Deleuze 1994, 309). Instead, Deleuze remarks:

> Homeric society had neither enclosures nor property in pastures: it was not a question of distributing the land among the beasts but, on the contrary, of distributing the beasts themselves and dividing them up here and there across an unlimited space, forest or mountainside. The nomos designated first of all an occupied space, but one without precise limits (for example, the expanse around a town) – whence, too, the theme of the 'nomad.'(Deleuze 1994, 309)

[13] For a brief discussion on that, see: Culp 2016, 56.

[14] I should note here that probably Deleuze's use of *nomos* relates to the term *nomós* [νομός], that "relates to the 'distribution-sharing' of land among else, rather than *nómos* [νόμος] as 'law.'" According to Zartaloudis 2019, 140 *nomós* [νομός] "relates to the family of *nemein/nemesthai* [νέμειν/νέμεσθαι] with regard to a sense of a certain 'ordering' or distribution/sharing." This use "relates to pasture and herding." Nonetheless, since Deleuze does not distinguish between the two words, for the purposes of this article, I consider just his explanation to see how this understanding of *nomos* [νόμος] as a difference sense of 'law' calls us to think otherwise about the law.

Here the figure of the nomad seems to counter the enclosed space – or, *striated* space in Deleuze and Guattari's terminology – as provided by the official laws of a society based on a so-called 'sophisticated' legal system and rights, for example, a distributor father-figure of a state apparatus or a sovereign.

On the contrary, the nomad, in this particular sense, moves within a *smooth space*. Deleuze and Guattari crucially explain that 'striated' or 'sedentary' space "is counted in order to be occupied" (1986, 18–19) whereas smooth space is "occupied without being counted" (1986, 18). This suggests that striated space, faithful to the calculable or metric mentality of the state apparatus and of the law in the sense described earlier, *calculates* which entities, ideas, rights and modes of life are 'fit' to be included within the enclosed space of its boundaries of *rightness* and *propertyness* – according to Deleuze and Guattari, the striated space "measures, puts barriers, borders and hierarchises between insiders and outsiders" (1986, 18–19). This 'calculation' is operated by state's laws and customs which have as a 'measure' the *archist* morality of the state apparatus and its interests – they act still in accordance with the model of the sovereign, superior and unparticipated 'judgment of God'.[15] On the other hand, smooth space is a place for creation and invention without a predestined or pre-empted distribution of shares, laws, rights and so forth. It is there to be occupied and moulded accordingly, in order to serve particular needs and respond to a particular situation – the institution, as explained above, corresponds to this understanding of smooth space.

The nomads, as stated above, disorient the authority of the state apparatus and striated space because "such a static or striated formation of identities is insignificant [for them] since their constant movement ensures the dissolution of any form of identity that could supposedly claim any sort of purity" (Deleuze, Guattari 1986, 18–19). Operating within a smooth, boundless space, the nomads are, thus, affiliated with a notion of an *an-archic* movement without a beginning or end. In that sense, the nomad proceeds in a mode of *becoming*, in the sense that one refuses to be limited by any form of transcendent, *arhcist*, moral, fixed or eternal rules, norms and identities – as such, the nomad comes to disorient the conformity of the obedient subject to the state.

According to Deleuze, the nomads follow a *nomos* which is based on an experience – and not an *archē* – of a 'nomadic distribution' (Deleuze 1994, 36), which is "a sort of crowned *an-archy*, that overturned hierarchy […]" (Deleuze 1994, 41). Similarly to the operation of institutions as opposed to the law, the nomadic distribution functions in an open space that is unlimited, without predetermined beginnings or limited ends. Perhaps, the most distinctive characteristic of the nomads is then that they always try to slip away from the law, the state apparatus, its laws and rights. While, the state always tries to appropriate

[15] See how Deleuze (1998, 126–135) uses Antonin Artaud's work to oppose a transcendent, judgmental mode of being.

nomadic creativity – presenting it even as 'entrepreneurship', 'innovation' and 'progress' the nomads must remain vigilant and find the *line of flight* to escape capture, and to continue to live in a creative *an-archic* space.[16] Thus, even though the *an-archic* distribution of the nomads may, often, appear to be 'captured' within the dogmatism of law and the state apparatus, this is not the case according to Deleuze and Guattari:

> even though the nomadic trajectory may follow trails or customary routes, it does not fulfil the function of the sedentary road, which is to *parcel out a closed space to people*, assigning each person a share and regulating the communication between shares. The nomadic trajectory does the opposite: it *distributes people* (*or animals*) *in an open space,* one that is indefinite and non-communicating. The *nomas* came to designate the law, but that was originally because it was distribution, a mode of distribution. It is a very special kind of distribution, one without division into shares, in a space without borders or enclosure. The *nomas* is the consistency of a fuzzy aggregate: it is in this sense that it stands in opposition to the law or the *polis,* as the backcountry, a mountainside, or the vague expanse around a city ("either *nomos* or *polis*"). (Deleuze, Guattari 1986, 50–51)

The *nomos* of the nomads, their distribution into space, paves the way for a necessarily non-juridical understanding of a non-law since it escapes the narrow pre-set boundaries of juridicalised hierarchy and juridical dogmatism. It is in that sense *an-archic* "akin to a dispersal [but] somewhat orderly" (Zartaloudis 2019, 142). Akin perhaps to the way a particular logic used in, say, mapping a geographical territory determines also what one sees (or not). Just like the unmapped *chaos* that accompanies *becoming* and *pure immanence,* the map of a nomadic distribution is possible as it is still 'consistent' in its *an-archy*, and that enables it to expose the *archist*-infused law's blackmail of the supposedly catastrophic results in the absence of an *archē*. The mapping of the laws-map is a 'sham' that permits the eternalisation of the pacifying domination in the form of rules disguising the *a priori* necessitated distinction between the 'masters' and the 'subordinates' and the ways in which they can each pragmatically 'exercise' their rights.

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[16] See: Deleuze, Guattari 1986, 22–30. Deleuze and Guattari explain how the state apparatus tries to appropriate nomadic science, incorporating into its royal (calculable) science. See also: Châtelet 2014, esp. chapter 6. Châtelet explains how the market promotes the image of a flexible 'nomad' which seeks innovation and movement, all, of course, in order to serve the politics of the market. The nomad of the market is, often, the precarious, or worse, employed or unemployed who in the name of 'innovation' and fluidity is always vulnerable to any sort of exploitation. As Châtelet (2014), 75 writes: "Young nomads we love you! Be yet more modern, more mobile, more fluid, if you don't want to end up like your ancestors in the muddy fields of Verdun. The Great Market is your draft board! Be light, anonymous, precarious like drops of water or soap bubbles: this is true equality, that of the Great Casino of life! If you're not fluid, you will very quickly become losers. You will not be admitted into the Great Global Super Boom of the Great Market… Be absolutely modern (like Rimbaud), be a nomad, be fluid – or check out, like a viscous loser!"

An *an-archic nomos* is, then, an ethico-political action that aims to break the boundaries of the dogmatic mode of thinking and existing that is promoted with the law, a supposedly *archist* morality re-establishing the primacy of a concrete notion of identity, as opposed to the constant movement of *becoming*.[17] It is a way to expose and to "disturb the state and the law from the outside" (Newman 2012, 327). In that sense, it is in a constant opposition and *strife* against the dogmas and hierarchies of any state apparatus, and it should be ready to respond adequately to any assault coming from them. It has to possess a *lethal* instinct ready to destroy any form of dogmatism and 'break the wheel' of the 'current state of affairs' (of what also leads one to say what they think but then also say 'yet, at the end of the day…'), refusing to compromise and to be 'pacified' by any call for pseudo-progress and *consensusualism*.[18]

Such a *nomos* is *an-archic* because it refuses to be subordinated by any form of pre-emptive hierarchising, and it refuses to prioritise a mode of being over another. Despite its anarchy, however, a *nomos* remains within its own consistency, in the sense that it functions by '(re)organising' itself through institutions, or through what we can call *nomoi*, that are ever-changing and *expressive* (as opposed to *representative*) of a certain situation in question. Its *ethos* is *an-archic*, because it operates through a mode of immanent being that does not rely on dogmatic, *archist* values, laws and rights. It is rather an immanent autonomous *ethos*, because since anyone who operates through this *an-archic ethos* is the cause and the consequence of the operation (or perhaps causes and consequences become so blurry that are no more). This is perhaps the heart of the creativity that can be found in the *an-archic* persona of the nomad who wants "to become worthy of what happens to [it], […] to become the offspring of one's own events, and thereby to be reborn, to have one more birth, and to break with one's carnal birth […]" (Deleuze 2015, 149). Similarly to what Deleuze and Guattari define as *becoming-democratic*,[19] we can talk in this manner of a *becoming-law* or a *becoming-right* in this life where its 'essence' and its praxis are indissociable and it is this threshold that forms its *ethos*. A *becoming-law* or a *becoming-right* does not have anything

[17] For a brief discussion on the becoming of the nomads see: Sellars 2007, 34–35.

[18] I am using here lethal and 'destruction' in similar terms to Benjamin 1986, esp. 297.

[19] Deleuze and Guattari (1994, 113): "A becoming-democratic that is not the same as what States of law are, or even a becoming-Greek that is not the same as what the Greeks were. The diagnosis of becomings in every passing present is what Nietzsche assigned to the philosopher as physician, 'physician of civilization,' or inventor of new immanent modes of existence. Eternal philosophy, but also the history of philosophy, gives way to a becoming-philosophical. What becomings pass through us today, which sink back into history but do not arise from it, or rather that arise from it only to leave it? The Aternal, the Untimely, the Actual are examples of concepts in philosophy; exemplary concepts." Here, Deleuze and Guattari clarify that a 'becoming-something' does not resemble the 'final' or 'identarian' form of this or that 'something' but, instead, its becomings hide a multiplicity of other potentialities that can be explored in perpetuity in order to form something new.

to do with imitating any kind of supposedly progressive or 'civilising' human behaviour, or equally with betraying a 'principle,' or, indeed, with assimilating into a certain set ordering by once more attempting to impose itself on others (like the many such attempts promoted also through or in the name of/or against the law, laws and rights in order to rebuild soon to be again 'civilised' state apparatuses).

This *becoming,* at a 'personal' level (though one that can no longer be labelled as such), is an ability to be attentive and open to what happens to us, to be able to appreciate and to be feasibly *curious* (and thus ready to let ourselves go and forget our certainties[20]) in order to live with the (un)known. Perhaps, one does so by embracing key characteristics, which define the radical ascetic virtue of all great philosophers, and which are, according to Deleuze, 'humility', 'chastity' and 'poverty' (Deleuze 2001, 3). It is through these fundamental but lived virtues that we are ready to accept and become worthy of the situations and cases that we are faced with – and this ability of becoming worthy of oneself is at the very heart of an *an-archic ethos*. In other words, not to be split between an ideal self (who believes in, say, the law) and a real self (who is unable to make ends meet or be equal to others).

To that extent, our failures are not to be any longer the source of renewed *ressentiment* and our success not a matter of the arrogance of accumulation and progress. Instead, failure and success are closely connected and are accepted as some of the many immanent possibilities of living. A life with this *an-archic nomos* then is able to accept and embrace its limits and 'the exhaustion of possibilities', that will make the *strife* begin anew, rather than fall back into the 'tiredness' that bolsters *ressentiment*, dogmatism and *archism*.[21] For this reason, everything is harder and yet more sustainable among ourselves.

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[20] Caroll (2015, 15): "'Curiouser and curiouser!' Cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English."

[21] For the difference between 'exhaustion' and 'tiredness' see: Deleuze 1998, 152–174.

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IN SEARCH OF ORIGINALITY IN CENTRAL AND EASTERN EUROPEAN LEGAL CULTURE CULTURE(S) 4TH ANNUAL CEENELS CONFERENCE: LEGAL INNOVATIVENESS IN CENTRAL AND EASTERN EUROPE MOSCOW, 14–15 JUNE 2019[1]

Abstract. The paper describes the debates which took place during the 4th Annual CEENELS Conference (Moscow, 14–15 June 2019). The aim of the conference was to analyse the issue of legal innovativeness in Central and Eastern Europe, the topic which was chosen as a continuation of previous CEENELS conferences. The organizers wanted to challenge the widespread belief that the legal culture of Central and Eastern Europe lacks original and innovative concepts and ideas. Even if the conference did not bring a definitive answer about the character of Central and Eastern European countries' legal culture, it showed that the region is not only a territory of legal transplants and reception of legal ideas, concepts and institutions, created in Western Europe or the US.

Keywords: legal culture, Central and Eastern Europe, Central and Eastern European Network of Legal Scholars.

W POSZUKIWANIU ORYGINALNOŚCI KULTURY PRAWNEJ (KULTUR PRAWNYCH) ŚRODKOWEJ I WSCHODNIEJ EUROPY IV KONFERENCJA NAUKOWA CEENELS „LEGAL INNOVATIVENESS IN CENTRAL AND EASTERN EUROPE" MOSKWA, 14–15 CZERWCA 2019

Streszczenie. Artykuł opisuje dyskusje, które miały miejsce podczas IV Konferencji CEENELS (Moskwa, 14–15 czerwca 2019). Celem konferencji była analiza zagadnienia innowacyjności w zakresie prawa w Europie Środkowo-Wschodniej. Temat ten został wybrany jako kontynuacja poprzednich konferencji CEENELS. Organizatorzy chcieli podważyć powszechne przekonanie, że w kulturze prawnej Europy Środkowo-Wschodniej brakuje oryginalnych oraz nowatorskich koncepcji i pomysłów. Nawet jeśli konferencja nie przyniosła definitywnej odpowiedzi na temat

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charakteru kultury prawnej krajów Europy Środkowo-Wschodniej, to pokazała, że region ten jest nie tylko terytorium przeszczepów prawnych i recepcji idei, koncepcji i instytucji prawnych, tworzonych w Europie Zachodniej lub USA.

Słowa kluczowe: kultura prawna, Europa Środkowo-Wschodnia, Central and Eastern European Network of Legal Scholars.

The 4th Annual CEENELS Conference took place in Moscow on June 14–15, 2019. It was organized by one of the foremost Russian universities, the National Research University "Higher School of Economics," in collaboration with the Faculty of Law of the University of Graz, and under the patronage of the best-known journal devoted entirely to legal issues in the region, the *Review of Central and Eastern European Law*. The conference was a major academic event, gathering about 80 legal scholars from fifteen European countries and the US. Its subject, "Legal Innovativeness in Central and Eastern Europe," was chosen as a continuation of the themes discussed during the CEENELS conferences in previous years (cf. Zomerski 2016, 2017; Szymaniec 2018; Mańko 2020a, 33–36).

CEENELS – the Central and Eastern European Network of Legal Scholars – was created in 2015 as an informal network of legal scholars, intended to counterweight the prevailing influence of Western European and Northern American scholarship in the intellectual life of the region (cf. Zomerski 2016). Among the strategic goals of CEENELS, strengthening the ties between legal scholars from different countries in the region has been emphasized. It is worth noting that, the term "Central and Eastern Europe" is interpreted by the creators of CEENELS much more broadly than it is usually understood, for instance as in basic OECD terminology (Glossary 2001). Thus, it is conceived as a cultural notion encompassing the shared experiences of all the countries controlled previously by the Soviet Union, as well as the Balkan region where various cultural influences have mingled. Another of CEENELS's goals is to promote joint research projects and create a unique methodology of legal research, which will contribute to build critical legal knowledge about the region (CEENELS 2016).[2] Determining whether it is possible to establish such a unique methodology is a matter of time. However, with some degree of confidence it is possible to say that each subsequent meeting within the network brought us closer to identifying the distinctive features of the legal culture, or the family of legal cultures, of the region. The first CEENELS conference took place in Brno in 2015 and it focused on determining the state of legal culture in the region twenty-five years after the beginning of the political and economic transition (Zomerski 2016). The aim of the second conference, organized in Kraków in 2017, was to identify the remnants of legal and political thinking from the period of "real socialism" (Zomerski 2017), while the third

[2] See also the informal manifesto of CEENELS written by the organisers of the 1st CEENELS conference: Mańko, Škop and Štěpáníková (2016).

annual conference, taking place on 11–13 January 2018 at the University of Latvia in Riga, was intended to identify legal identities and legal traditions or the region (Szymaniec 2018). It is worth adding that the topic of the 5th Annual CEENELS conference, held (online)[3] at the University of Debrecen on 25 June 2021, was devoted to "Re-thinking legal institutions in Central and Eastern Europe."

The intention of the organizers of the 4th Annual CEENELS Conference, which took place it the HSE Faculty of Law in Moscow,[4] was to challenge the widespread belief that the legal culture of Central and Eastern Europe lacks original, innovative concepts and ideas which are capable of contributing to the European legal heritage and that it should be characterized as a culture of borrowers. According to that view, the main difference between the legal evolutions of Western and East-Central Europe lay in the fact that in the former Roman law was the subject of ongoing discussion and reception, while in the latter it was hugely neglected or even rejected in the Early Modern period. This caused a "delay" that had to be made up for in the nineteenth century. Moreover, in the nineteenth and early twentieth centuries the region was under the influence of French and German-Austrian legal cultures which were immersed in Roman law, while later its legal development was harshly interrupted due to the establishment of Communist regimes (cf. Giaro 2011).[5] After the collapse of the Soviet bloc, the main task for the region was the adaptation of its legal culture to Western values, especially through establishing the proper rule of law standards and systems of protection of human rights. In the view of some comparative law scholars, legal reforms in Central and Eastern Europe have not been completed and there is still much to do to eradicate the remnants of "real socialist" legal mentality and to adjust both legal institutions and legal education in the region to Western-European level.[6] Needless to say, this view leads to the

[3] The 5th CEENELS conference was initially to be held on 26–27 June 2020 but was postponed due to the COVID-19 pandemic.

[4] The convenors of the 4th CEENELS conference were Professor Dmitri Poldnikov, Dr Vladislav Starzhenetsky, and Dr Bulat Nazmutdinov.

[5] Cf. Giaro 2011. Zdeněk Kühn emphasizes the importance of the Austro-Hungarian legal culture for the Central European legal tradition; however, the understanding of Central European legal culture that he employs is very narrow (Kühn 2011, 1–20).

[6] Professor Uwe Kischel, in his well-known synthesis of comparative law, points out that even the countries of the region which became the EU member states still have many problems with statutes which have been rashly drafted and passed. The process of application of law in the region is tainted by excessive formalism. Both courts and administrative bodies are reluctant to take sufficiently into account "the parties' interest, or legal common sense." Moreover, according to Kischel, old elites, dating back to the period of "real socialism," have still maintained the influence on both legal education and the system of application of law. Cf. Kischel 2019, 534–546. A similarly unfavorable picture of Central and Eastern European legal culture can be found in other scholarly publications.

opinion that the legal environment of Central and Eastern Europe is still in the position of a disciple of more developed Western legal cultures.

To determine whether Central and Eastern European legal culture (or the family of Central and Eastern European legal cultures, if we would admit that it is not a single culture but rather a group of cultures which are similar in various ways) has produced something which is interesting not only because of its distinctiveness, all the elements of legal cultures should be analyzed. Since a legal culture includes not only legal institutions, concepts, ideas, values, and mentalities, but also the patterns of social behaviours concerning law and attitudes towards certain legal institutions and the entire legal system (cf. Nelken 2004, 1–11), the topic must be studied from many perspectives. The Moscow conference offered such an approach. An abundance of papers devoted to various aspects of positive law, application of law ("law in action"), as well as legal theory and history, was presented in the course of four plenary sessions and twenty-two parallel sessions. The sessions' titles are meaningful, so it is worth quoting them: "Legal Theory," "Legal Language," "Legal History," "Byzantine Law," "Constitutionalism," "Courts," "Public Law," "'Immunity' and 'Resistance' within Administrative Praxis," "Criminal Law," "Private Law," "International Law," "International Courts," and "New Challenges." They show clearly that the organizers of the conference were eager to present the legal problems of the region in the broader context of international legal relations. It is impossible to describe here the content of every conference paper. Therefore, I will focus on those of these presentations which I consider important and/or interesting from the point of view of the conference topic.

The first plenary session started with a paper of associate professor Evgeny Salygin, the dean of HSE Faculty of Law, who portrayed his faculty as a leader in legal education in Russia. Then, Professor Adam Bosiacki (director of the Institute of Sciences on State and Law at the Faculty of Law and Administration, University of Warsaw) delivered his keynote lecture, entitled "Legal challenges of post-communism: the Polish experiences." Professor Bosiacki pointed out some socio-political factors negatively influencing legal reforms in Poland. In his view, the lack of broad, comprehensive political programmes and political instability should be listed among the most important of these factors. Furthermore, Professor Bosiacki supported the position of those who are of the opinion that legal reforms in Poland have not been completed. As an example, he mentioned the legal regulation of the healthcare system, undergoing several changes during the last twenty five years. The Polish experience certainly is not unique in the region, but, as Professor Bosiacki noted, should not be generalized to other countries of the region.

The next speaker, Professor Martin Škop (associate professor and dean of the Faculty of Law, Masaryk University, Brno) dealt with issues that were already the subject of his paper in Riga, namely the art of law drafting. As the Czech scholar pointed out, in Central Europe the law-making process is still depicted as formalized, objective and rational. According to Professor Škop, such a depiction

corresponds to the values of industrial society, but it is not necessarily relevant nowadays. Professor Škop presented the outcomes of the legal sociological research conducted by his team. The research was focused on officials drafting legal acts in the Czech Ministry of Justice and showed that they feel unappreciated. Thus, in the speaker's opinion, their role needs to be recognized.[7]

In his paper entitled "Digitalization and Legal Doctrines", Professor Anton Ivanov (HSE) spoke about the influence of artificial intelligence on legal education and on legal culture in general. According to Professor Ivanov, artificial intelligence can be more easily accommodated to common law legal culture, since using computer programs, it is a simpler task to analyze court decisions than the abstract ideas that are the basis of civil law legal culture. Moreover, certain AI tools, provided by American corporations, may contribute to the unification of legal cultures, transplanting patterns of thinking typical of common law culture to the ground of the civil law legal systems. In that regard, Professor Ivanov advised that civil law countries should focus on creating such AI tools which would be able to deal with abstract legal ideas.

Professor Anton Rudokvas (Saint Petersburg State University) shed light on the historical origins of certain provisions of the Civil Code of the Russian Federation. The scholar drew special attention to the institution of trust which was introduced to Russian law by the presidential decree of Boris Yeltsin of 1992. It was later regulated by the provisions of the part two of the Civil Code of the Russian Federation (chapter 53, articles 1012–1226).[8] However, being a type of contract, the Russian trust differs substantially from a common-law institution.[9]

[7] The same topic was addressed by Dr. Markéta Štěpáníková, a member of Professor Škop's research team, in her paper "Informal authorities in the process of legal drafting." She was of the opinion that due to the immense role of ministry legal officials during the lawmaking process, they should be named the "informal bearers of authority." This view view provoked lively discussion during which a different view was presented, namely that MPs' assistant, experts involved in parliamentary commissions and lobbyists should be considered as "informal bearers of authority", rather than ministry officials. Taking into account my own experience as a member of the Legislative Council for the Prime Minister of Poland, I would rather admit that (at least in Poland) in many cases ministry officials prepare drafts using excerpts from legal acts which are already in force or were in force before. Sometimes this attitude leads to the phenomenon of "copy – paste" legislation, which is a source of many legislative errors and sometimes even loopholes in legal texts. Thus, ministry staff are not always a creative force in the legislative proces. It is worth adding that the art of lawmaking was also a subject of the papers of Professor Yuri Arzamasov of HSE ("Correlation between normography, legisprudence, and legal linguistics"), who proposed the introduction of normography, i.e. a new branch of legal sciences, dealing with the drafting of legal texts.

[8] Cf. Federal Law No. 15-FZ of January 26, 1996.

[9] Not only this plenary presentation, but also a separate section, was devoted to private law. A wide range of topics was presented there, including the nature of Romanian private law (Professor Emőd Veress, Sapientia Hungarian University of Transylvania), testamentary gifts under legal provision valid on the Polish lands and in contemporary Poland (Dr. Jarosław Turłukowski, University of Warsaw), the institution of executory debenture in Croatia (associate professor Antun

Professor Alan Uzelac (University of Zagreb) presented another innovation which should not be followed. This doubtful Croatian legal institution is a writ of execution issued by a notary on the basis of a so-called "authentic document" (e.g. an invoice). It was introduced in order to facilitate the collection of debts, but thereafter it has become the cause of numerous abuses. It is worth mentioning that by 2019, due to such writs, bank accounts of 350 000 Croatian citizens were temporarily blocked. The Court of Justice of the European Union decided, in its judgment of 9 March, 2017,[10] that Croatian notaries who act within the framework of the proceedings based on an "authentic document" do not fall into the notion of a "court" under the EU law,[11] because during the proceedings the principle of *audi alteram partem* is not respected.

A professor at Charles University in Prague and judge of the Supreme Administrative Court of the Czech Republic in Brno, Zdeněk Kühn, devoted his conference paper to judge-made law in Central and Eastern Europe. According to the Czech scholar, during the transition period the role of court decisions in the region was gradually increasing. This process related to the changes in court proceedings (introduction of the elements of an adversarial system) and the growing popularity of a communicative approach to law. It should be emphasized, however, that the concept of precedent is hardly accepted in the countries of the region, even though reference to court decisions plays a huge role in legal argumentation (thus, some scholars refer to *de facto* precedents).[12]

Professor Mátyás Bencze (University of Debrecen) presented his own model of quality control of adjudication. In the author's intention, this model is the answer to the problem of the low quality of legal arguments employed by courts in Central and Eastern Europe. The lack of sufficient connection between legal argument and conclusion, ambiguity of wording and overloading with special terminology should be listed among the main deficiencies of courts' reasonings. To avoid these deficiencies, quality control of adjudication based on "minimum requirements" should be introduced. These requirements, which combine the assessment of the

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Bilić, University of Zagreb), business transaction invalidity under Russian law (Konstantin Totyev, HSE, Moscow; cf. Totyev 2016), shareholder agreements under Czech and Slovak law (Sandra Brožová, University of Economics in Prague), the institution of "obștea", a collective forest owners' association, as a form of common-pool resources management in Romania (Dr. Ionuț Tudor), and corporate social responsibility under Polish law (Ewa Matejkowska, Jagiellonian University).

[10] European Court of Justice judgment of 9 March 2017, Case C-551/15 *Pula Parking d.o.o. v Sven Klaus Tederahn*, ECLI:EU:C:2017:193.

[11] Cf. Article 1(1) of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, 1–32).

[12] In regard to the Polish legal system, cf. Stawecki 2010. It is worth mentioning that in Polish legal theory Professor Andrzej Stelmachowski (1925–2009) was the first who, in 1960s, wrote about the law-making role of courts (Stelmachowski 1967). His views were challenged by some of the most eminent Polish legal scholars, including Professor Jerzy Wróblewski (1926–1990).

legality of a decision and its persuasiveness, include the clarity of a decision and the arguments which have been employed, considering all the essential circumstances of the case, the assessment of all the parties' arguments, and the linguistic clarity of the decision. According to Professor Bencze, the assessment of courts' decisions should be multifaceted and include such elements as an analysis of the number of appealed decisions, survey research regarding the comprehensibility of decisions and citizens' satisfaction with the quality of judgements, and the development of an algorithm to analyze the consideration of the parties' arguments in court decisions.

The last lecture of the plenary sessions was delivered by Professor Kathryn Hendley (University of Wisconsin Law School), who spoke about her research project devoted to the career preferences of young Russian lawyers. The survey, conducted in 2016, covered more than two thousand undergraduates from 163 Russian law schools of both public and private universities (cf. Hendley 2018). According to the American scholar, all Russian graduates have acquired the same legal culture, which emphasizes democratic values and judicial independence. They differed, however, about the courts' independence. On the one hand, those who seek to work in state administration and the criminal justice system are more convinced of the independence of the judges. On the other hand, "most of those who hoped to work with private clients were openly suspicious of the courts, fearing that they would bend to the will of politicians" (Hendley 2018, 273) As described by professor Hendley, the system of legal education in Russia, with the distinction between full-time students and extramural students (*zaochniki*) and the phenomenon of "fly-by-night" legal education (Hendley 2018, 268–269, 271–272) resembles to some extent the Polish system during the late 1990s and the first decade of the present century. Thus, it is likely that the educational attitudes and career preferences of Russian students have some similarities with the attitudes and preferences of law students in Poland and other countries of Central and Eastern Europe. Professor Hedley's multidimensional project could serve as a model and an incentive to carry out similar research in other countries of the region.

Russian legal professions were also the subject of the analyses of Yulia Khalikova (Bremen International Graduate School of Social Sciences) and Dr. Anton Kazun (HSE, Moscow) who spoke about the symptoms of gender inequality among attorneys. A more general topic concerning legal practitioners was raised by Dr. Lucian Bojin (Western University of Timişoara), who pointed out the changes in lawyers' practice in post-1989 Romania. In his view, the gradual adoption of patterns of behaviours taken from American law firms and law schools by Romanian legal practitioners caused more significant changes, namely the "bottom up" reception of common law ways of thinking, instead of the "top down" reception of French legal culture, which was characteristic of Romania in the late nineteenth and early twentieth centuries.

Another Romanian scholar from the same university, Dr. Alexandra Mercescu, presented one of the most interesting, at least in my opinion, papers in panel sessions. Its title, "'Originality' in Law: Its Ontology, Its Politics", referred to the very core of the conference's subject. Dr. Mercescu pointed out that for Romanian legislators originality is not the most important value, since frequently their aim is simply to follow the Western ("Euro-American") model of regulation. Moreover, originality is not so much appreciated by Romanian legal scholars, since so-called legal dogmatics,[13] consisting of commenting on legal provisions in a seemingly objective way, is still a prevailing style of writing about the law in force in Romania. It appears that what presented by Dr. Mercescu applies not only to Romania, but also to other countries of the region, such as Poland, Czech Republic and Slovakia. Central and Eastern European lawyers with a practical orientation do not appreciate originality so much, since they are trying to convince society that they are revealing an objective sense of legal norms, even if the interpretation they are proposing and defending serves the specific interests of certain social groups or private companies.

Among other contributions on legal theory was a joint paper prepared by Professor Vladimir Isakov and Professor Dmitry Poldnikov (HSE, Moscow). The authors discussed the state of theoretical jurisprudence in Russia, pointing out that there is no journal dedicated exclusively to the general theory of law. Only five out of thirteen leading Russian legal journals accept papers concerning theoretical issues. In fact, the issues raised by the authors are connected with problems considered by Dr. Mercescu: since legal scholarship in Central and Eastern Europe is largely practically oriented, it is often hard to find a separate forum for more general reflection.

Four contributions were devoted to the most innovative achievements of Polish scholars. Professor Tomasz Bekrycht (University of Lodz) analyzed theories of legal interpretation developed in Polish legal theory. He emphasized that the abandonment of the simple positivist model of legal language and methods of juristic practice in Polish legal studies led to the emergence of a more complex picture of theories of legal interpretation. The author distinguished three groups of "theory-conceptions" related to legal interpretation. The first group mainly describes judicial decisions and legal practice, not only from the viewpoint of their outcomes, i.e. conclusions of judgements and their justification, but their axiological basis. Such an approach was represented by Lech Morawski (1949–2017). The "theory-conceptions" belonging to the second

[13] Practically oriented legal scholarship in Central and Eastern Europe still takes the form of dogmatics, dating back to the nineteenth century. Raul Narits wrote about this phenomenon: "Dogmatics has traditionally two levels: first the general level, where dogmatics is understood as scientific processing of all legal material. In a more specific sense dogmatics is understood as sentences that form a certain system, which enable to conceptually and systematically value the application of law" (Narits 2007, 19).

group criticize and dispute the ways and methods of the legal reasoning that underlies legal decisions and indicate methods and approaches which could be applied to a given legal decision in the future. Jerzy Wróblewski's theory falls into this group. The starting point for the theories of the third group is not a description of judicial practice, but an application of the achievements of various disciplines (such as linguistics, logic, cognitive science, philosophy of language) to legal reasoning in order to create an ideal model of interpretation. This model consists of a series of postulates, directives, and recommendations as to how to proceed to get the best result in interpretation. Maciej Zieliński (1940–2020) developed such an approach.

In my own contribution, I focused on the innovative achievements in Polish sociology of law in the 1960s and 1970s. Polish legal sociology was launched after 1956 and was marked by such names as Adam Podgórecki (1925–1998) and Maria Borucka-Arctowa (1921–2018), although it had some predecessors in the pre-war period among the representatives of the Wilno school of Bronisław Wróblewski (1888–1941). Podgórecki, who was undoubtedly the main figure of the current, combined in an original way the elements of the Petrażyckian tradition (cf. Podgórecki 1981) with the American concepts of social engineering. Emphasizing the importance of the category of intuitive law for sociological research, he was, just as Petrażycki before him, an adherent of legal pluralism (cf. Podgórecki 1991). Dr. habil. Rafał Mańko (University of Amsterdam) presented the theory of Artur Kozak (1960–2009), whose legacy is largely unknown outside Poland. Kozak was inspired by Berger's and Luckmann's idea of social construction of reality and Richard Rorty's ethnocentrism, which was transformed by him into the concept of "juriscentrism", the very core of his thought (cf. Mańko 2020b). In the same session, Wojciech Zomerski (University of Wrocław) discussed the changes in Polish legal theory which led to the emergence of post-analytic theory of law (cf. Stambulski 2019). It is worth noting that in the section on legal history, associate professor Evgeny Tikhonravov (Siberian Federal University, Krasnoyarsk) devoted his paper to Krystyna Marek (1914–1993), a Polish émigré activist who became a full professor of international law at the University of Geneva. In the paper, her role in shaping the concept of non-recognition of territorial annexation was specially emphasized (cf. Marek 1954).

The paper of associate professor Anita Soboleva (HSE, Moscow), who presented her own "topical approach" to legal interpretation, should be considered as one of the most original contributions in the session devoted to legal theory. Her basic sources of inspiration are Ronald Dworkin's theory of judicial decision-making and the work of Jerome Frank (1889–1957), who revealed the role of psychological factors in judges' decisions. According to Dr. Soboleva, everything applied in issuing a legal decision has a legal character. Thus, instead of sources of law, she distinguishes sources of judicial (legal) arguments, which serve as

topoi, and include norms, principles, values, ethical concepts, and religion. The "rhetorical situation", the key point of Dr. Soboleva's theory, is characterized by the constant interplay of the author, text and audience. Moreover, during the same session Professor Anton Didikin (HSE, Moscow) analyzed acts of speech and Dr. Alexander Petrov (Siberian Federal University, Krasnoyarsk) spoke about the formal priority of codes on the basis of the legal system of Russian Federation.[14]

The entire Russian-language session was devoted to Byzantine law and its heritage. In the scope of this session, such issues as the synthesis of religious and secular authority in Byzantium, the reception of Romano-Byzantine law among Balkan Slavs in the Middle Ages and the influence of Byzantine law on Russian law, were discussed.[15] The legal history session was, in turn, dominated by the subject of modernization and legal transformations in nineteenth- and early-twentieth century Russia,[16] but the situation of the Russian peasantry in the eighteenth century was also widely discussed.[17] Among these topics, the paper of Dr. Laura Gheorghiu (University of Graz) clearly stood out, because it was devoted to the theory of the "founding father" of functionalism in international relations, David Mitrany.

Since in many countries of the region religion is considered to be almost an element of national identity, it is quite surprising that only three contributions were devoted entirely to law and religion issues. Professor Alexander Safonov (HSE, Moscow) presented the issue of freedom of conscience in Russian jurisprudence

[14] It is worth adding that codes have never had a formal priority in the Polish legal system. Consequently, from the formal point of view, they are considered equal to other statutes. There are, however, specific rules concerning how codes should be drafted, passed and changed. Thus, if the basic guidelines on what codes should be are followed, there is no need to give codes a special place in the hierarchy of legal sources.

[15] The following speakers took part in this section: associate professor Dr. Aleksandar Đorđević (University of Niš), professor Alexey Ovchinnikov (Southern Federal University, Rostov-on-Don), Dr. Vadim Pavlov (Academy of the Ministry of the Interior, Minsk), associate professor Andrei Seregin (Southern Federal University, Rostov-on-Don).

[16] The following scholars took part in this section: Professor Konstantin Krakovskiy (Russian Presidential Academy of National Economy and Public Administration), Professor Kirill Solovyov (Institute of Russian History, Russian Academy of Sciences), Professor Alexander Safonov (HSE, Moscow), and Dr. Bulat Nazmutdinov (HSE, Moscow). Only one contribution concerned Soviet law: associate professor Aaron Retish (Wayne State University, Detroit) analyzed "Legal Innovations of the Local People's Courts, 1917–1922."

[17] This topic was raised by Dr. Elena Borodina (Institute of History and Archaeology, Ural branch of Russian Academy of Sciences) and Alice Plate (Ural Federal University named after the first President of Russia B.N. Yeltsin). Professor Elena Marasinova dealt with the interesting subject of the moratorium on the death penalty which was in force during the reign of Elizabeth Petrovna. Professor Marasinova posed a question of whether the moratorium was influenced by Orthodox Christian beliefs or by Enlightenment thought (cf. Marasinova 2019). Only Professor Adrian A. Selin (HSE, St. Petersburg) dedicated his paper to the early modern Russia, speaking about Novgorod's judicial system at the turn of the 16th and 17th centuries.

at the beginning of the 20th century and the relationships between Russian and Western-European concepts in that regard. Ksenia Eggert (KU Leuven/HSE, Moscow) focused on the "anti-blasphemy" law in contemporary Russia, while the paper by Dr. Wojciech Ciszewski (Jagiellonian University) dealt with conscientious exemptions.

Several contributions referred to different aspects of legal language. Associate professor Natallia Kovkel (Belarusian State Economic University) spoke about the contemporary semiotics of law, while professor Vladislav Turanin (Belgorod State University) devoted his paper to the phenomenon of legal terminology. Dr. Simeon Groysman (Sofia University "St. Kliment Ohridski") tried to convince his listeners that introduction of the language emphasized the supremacy of rights in Bulgaria and other Balkan countries was based on a "top-down" mechanism and was not the result of the cultural development of these countries. Dr. Anna Demenko and Dr. Michał Urbańczyk (Adam Mickiewicz University in Poznań) analyzed the phenomenon of hate speech in Poland, pointing to the ineffectiveness of Polish criminal responsibility in the cases related to this phenomenon.

The session on constitutionality was dominated by such issues as populism and the phenomenon of "illiberal democracy." Dr. Petr Agha (Czech Academy of Sciences) dealt with the former, while Professor Adam Sulikowski (University of Wrocław) focused in his contribution on the later.[18] Associate professor Alexandra Troitskaya (Moscow State University) devoted her paper to the more general topic of Eastern European constitutionalism which, in her view, should be analyzed taking into account the broader social context of each country. Associate professor Anna Alexandrova (Penza State University) spoke about the arrangements of social rights in Central and Eastern-European basic laws. Bartłomiej Ślemp (University of Warsaw) presented constitutional problems involved in local government finance in the CEE region. The homogeneity clause in the Russian constitution was, in turn, the subject of Dr. Alexander Gorskiy's paper (University of Tübingen), who found it to be halfway between Austrian and German constitutional provisions concerning the requirement of homogeneity (*Homogenitätsgebot*).

Three papers in the session dedicated to the courts focused on judicial law-making. The methodological approach was presented by Dr. Maria Filatova (HSE, Moscow), while Maxim Sorokin (National Institute for Entrepreneurship Research, Russia) focused on Russian issues. Associate Professor Marko Bratković (University of Zagreb) analyzed the binding force of the interpretational statements of the Supreme Court. Jan Zobec, a former Slovenian Constitutional Court justice who serves now as a judge of the Supreme Court, pointed out the failures during

[18] The same subject was raised by Dr. Przemysław Tacik (Jagiellonian University) in his contribution in the public law session. However, in my view the term "neo-authoritarianism" used by the author is not a felicitous one, because it puts the current problems in the wrong context which leads to their presentation in an exaggerated way.

the transition of Slovenian judiciary. Two reports concerned Polish issues: Kinga Drewnowska (University of Wrocław) spoke about the constitutional judiciary, while the principle of proportionality was discussed by Magdalena Michalska (Jagiellonian University).[19] Moreover, the conference lecture of associate professor Marianna Muravyeva (University of Helsinki) was also concerned with judicial practice. Its title speaks for itself: "'One Slap is Not the End of the World': Defining Family Violence in the Courtroom." During its preparation, Dr. Muravyeva analyzed some 800 decisions and protocols of administrative and criminal cases in the courts of Moscow and St. Petersburg encompassing the entire decade between 2008 and 2018.[20]

The entire session, under the rather enigmatic title "'Immunity' and 'Resistance' within Administrative Praxis", was concerned solely with administrative law in Poland. Its participants were scholars associated with Jagiellonian University in Cracow. The discussed topics covered the new institution of administrative mediation introduced into Polish law in 2017 (Professor Hanna Knysiak-Sudyka), means of challenge in administrative proceedings (Professor Marta Romańska), administrative appeals (Jakub Grzegorz Firlus) and the participation of the public prosecutor in administrative proceedings, which is an institution dating back to the time of "real socialism" (Dr. Agata Cebera). Moreover, issues concerning Polish administrative law were also included in the sessions devoted to public law and the courts. Piotr Eckhardt (Jagiellonian University) analyzed the institution of the construction planning permit, while Professor Agnieszka Skóra (University of Warmia and Mazury in Olsztyn) presented changes in attitudes towards electronic administration and electronic administrative courts and electronic administration in Poland.

Issues of criminal law were presented in a single session. Firstly, Monika Czechowska (University of Wrocław) described the Polish institution of crown witness as a merger of elements taken from Italian, American and German legal systems. Since a person as a crown witness might escape criminal liability, warnings have been presented regarding possible abuse of this institution. Then Dr. Imre Otto Nemeth (Eötvös Loránd University) drew attention to the phenomenon of overcriminalization.[21] The way restorative justice is used in

[19] Without doubt, the principle of proportionality is very useful tool (cf. Barak 2012; Szymaniec 2015), but it is hard to admit the originality of the Polish arrangement of this principle (Article 31 (3) of the Constitution of the Republic of Poland of the 2 April 1997). It is largely based on the Federal Law of the Federal Republic of Germany and the jurisprudence of the Federal Constitutional Court in Karlsruhe.

[20] Other reports presented in the public law session were devoted to state liability in Slovenia (Professor Damjan Možina, University of Ljubljana) and legal transition in Armenia (Dr. Aiste Mickonytė and Dr. Benedikt Harzl, University of Graz).

[21] This phenomenon is apparent not only in Hungary but also in Poland. Based on my experience in the Legislative Council for the Prime Minister of Poland, I am able to say that many drafts of statutes contain criminal provisions which are unnecessary from the social point of view. It

Germany was a theme of the report of Irina Chashchina (HSE, Moscow) and Christina Kulakova (Ludwig-Maximilians-Universität München). Finally, Maxim Karljuk (HSE, Moscow) in his contribution discussed the question of punishment. Using arguments taken from such different sources as the writings of Marxist lawyers from the early Soviet period, theories presented by modern sociologists and the achievements of neuroscience, the author questioned the existence of free will and thus challenged the concept of criminal punishment.

The international law sessions included papers that looked, in accordance with the traditional approach to that branch of law, at the relationships between states created by states themselves. Two of the papers focused on bilateral investment treaties. Associate professor Emilia Miščenić (University of Rijeka) presented the Croatian perspective on the issue, while Dr. Velimir Živković (KFG, International Rule of Law) focused on the Serbian approach which, in his view, lacks legal originality. Integration in the scope of the Eurasian Economic Union was the subject of the paper authored by Dr. Hugo Flavier of Bordeaux University. The last paper in this session, by Professor Daria Boklan (HSE, Moscow), was devoted to the Russian response to the threat of climate change in the scope of international law. The session on international courts presented, in turn, different ways of interaction between international and domestic courts. In the paper entitled "The tale of two courts," Yulia Khalikova (International Graduate School of Social Sciences, Bremen) presented the responses of the Constitutional Court of the Russian Federation to the case law of the European Court of Human Rights. Andrey Shcherbovich and Mikhail Zverev (HSE, Moscow) dealt with a similar subject, although they also took into account the jurisprudence of Russian ordinary courts. In the last paper, the possible impact of the latest European Court of Justice's judgments on the European Arrest Warrant System was analyzed by Professor Balazs Jozsef Geller (Eötvös Loránd University).[22]

Even if the CEENELS Moscow conference did not bring a definitive answer to the question of the original contributions of Central and Eastern Europe to the world legal heritage, it showed that the region is not only a territory of legal transplants and reception of legal ideas, concepts and institutions, created elsewhere. Many topics discussed at the conference should remain the subject of further, detailed studies.

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seems that the authors of drafts view the introduction of such provisions as a remedy for any phenomenon they deem negative. Therefore, due to such an approach, the principle of proportionality ceases to serve as a tool for assessing the admissibility of criminalization.

[22] It is worth noting that the short session on new challenges to legal systems included three contributions. Associate professor Maria Kapustina (St. Petersburg State University) presented the impact of Russian Information Security Doctrine on legal regulations. The phenomenon of whistleblowing as a legal issue was explored by Dr. István Ambrus (Eötvös Loránd University). Associate professor Daria Chernyaeva (HSE, Moscow) presented, in turn, the Russian approach to the regulation of genetic engineering.

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