RECONCEPTUALIZING STATE OF EXCEPTION

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RECONCEPTUALIZING STATE OF EXCEPTION: EUROPEAN LESSONS FROM THE PANDEMIC

Special Issue

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INTRODUCTION: RECONCEPTUALIZING STATE OF EXCEPTION: EUROPEAN LESSONS FROM THE PANDEMIC

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On 5 May 2023, the World Health Organization officially declared the end to the global health emergency related to the COVID-19 pandemic, a status that had officially been in place since 30 January 2020.[1] This historical period will certainly be remembered for a number of different reasons, from the very real threat that the new strand of the coronavirus posed to innumerable human lives, not forgetting the strain put on several health systems worldwide, and to the remarkable way in which the unprecedented accelerated development of new vaccines was ultimately able to curb down the pandemic.

Perhaps only now, at a time when the pandemic is behind us, we are beginning to make sense of what happened then. This period, and especially the years between 2020 and 2022, brought several changes to the way people lived and worked, especially during the several lockdowns that were put in place. And it was also a time ripe with reinvigorated intellectual debates and increased polarisation, with a surge in 'vaccine hesitancy' and a number of controversies aiming to cast distrust in science and democratic institutions.

It goes without saying that many of the phenomena of the pandemic bore significant political and legal importance, as governments, parliaments, and other institutions were forced to make decisions in a context of great uncertainty, and

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often temporarily suspending basic rights such as the right to free movement, with deep implications at national and international levels.

Surely such phenomena call for scholarly analyses and these cannot refrain from assuming an interdisciplinary perspective including some degree of methodological pluralism. From a standpoint of conceptual history, one concept, that of the 'state of exception', seemed to emerge as a backdrop to the several forms of emergency rule that were put into place in different geographies during the pandemic.

Against this background, *Reconceptualizing State of Exception: European Lessons from the Pandemic* is a special issue that puts forward a timely reflection on a major contemporary topic of debate at the intersection between law, political philosophy, and democratic theory. It draws on the cooperative endeavour undertaken by Working Group 3: Concepts, of COST Action CA 16211 *Reappraising Intellectual Debates on Civic Rights and Democracy in Europe*[2] in order to assess the various forms of state of exception/emergency rule brought about by the COVID-19 pandemic from 2020 to 2022, with a focus on European democracies.

Theorised by Carl Schmitt and further developed by Giorgio Agamben and other authors, the concept of state of exception poses a plethora of conceptual, normative, legal, moral, political, and social challenges, which are explored in the issue. Assembling chapters authored by an interdisciplinary team and working with some temporal distance, this issue fills a gap in the theoretical assessment of the current situation, as it aims both to reconceptualise the concepts of state of exception/emergency rule and unpack the implications that the several states of emergency have had to democracy and rights in the context of the COVID-19 pandemic in Europe and its aftermath.

Even though these concepts were already thoroughly examined in constitutional and political debates in the past, in particular during the interwar years in the 20th century, and had seen some significant scholarship develop on them, they acquired a newfound significance with the COVID-19 pandemic from 2020 onwards, to the extent that various forms of emergency rule were put in place, with recourse to varied legal provisions, in different countries. Therefore, reflecting on the significance of these precedents for the future now appears as an inescapable matter.

Furthermore, Europe proves to be a fertile ground for these analyses because it is the locus of a complex interaction between European and national law and decision-making processes, while it also bears witness to a tension between its liberal democratic tradition and the recent appearance of illiberal tendencies that might stand to profit from the challenges to democracy such as those put by emergency rule. As such, making sense of this constellation of concepts and problems by way of an inquiry that is both conceptual and empirically informed is a necessary task that we carry out in this special issue.

Against this backdrop, this collection of chapters is an effort to make sense of these phenomena by bringing together: first, theoretical, conceptual, and normative assessments of the contemporary resurgence of the state of exception/emergency rule amid the COVID-19 pandemic; and second, applied case studies of the plurality of forms such as resurgence assumed in different European countries.

Accordingly, the first pair of chapters consists of two contributions to intellectual debates raised by the legal and political reactions to tackle the pandemic. The first one focusses on how a prolonged emergency affects the very sense of reality, and the second one on how it has transformed the sense of human sociability and its political ideal. Deepening that experience, the following three chapters illustrate with case studies the legal and political intricacies of a number of democratic regimes' responses to the pandemic's political and constitutional challenges. It can thus be argued that, in a way, this issue makes a movement from macro-level theoretical assessments to the concrete analyses of the changes taking place at a national level.

In his chapter, 'A Pandemic That Never Took Place: Discursivity, State of Exception, and Hyperreality', Iraklis Ioannidis reflects on the normalisation of the pandemic through which an exceptional event turns into a long-term condition. Relying on the ideas of Agamben, Baudrillard, and Heidegger, Ioannidis illustrates the biological uses of the term pandemic that denaturalise its own meaning. At stake in this chapter is therefore an analysis of the way in which the response to COVID-19 was itself unprecedented, including in its media coverage and in the implications that it had for citizens in multiple places. This piece thus assesses some of the controversies around COVID-19 and its consequences, and it also contributes to such critical debate on COVID-19 through its critical and even 'provocative' outlook, as the author himself assumes.

Iraklis Ioannidis thus forces us to take a deep look at the very definitions of epidemic and pandemic and, through his semantic analysis and critical look at the alleged 'hyperreality' in which, according to him, COVID-19 inscribed itself, denounces the influence of the 'biological code' in the interpretation of the pandemic and in the legitimation of the measures taken under the aegis of the state of exception. Looking very closely at the several definitions put forward by the World Health Organization, scrutinising the several levels of discursivity produced by the pandemic, and commenting on the way in which, through legal enforcement, the 'right to health' became an obligation with the set of restrictions imposed on citizens, this chapter – whether one agrees with its main claims or not – thus also raises relevant questions concerning the unstable tension between democratic legitimation and technocratic rule, as well as concerns on what the appearance of the 'state of exception' due to COVID-19 might imply for the future.

The second chapter of this issue remains at the level of an overall theoretical assessment of the implications of the COVID-19 pandemic, but this time around by shifting our attention to a more practical and normative level. Indeed, Marin Beroš addresses the moral and political significance of the COVID-19 pandemic by exploring its effects on the ideal of cosmopolitanism. In 'Sequestered Cosmopolitanism: Exception or New Paradigm?', the author ponders over the pandemic's impact on human sociability and commonality, and on the chances of solidarity across borders.

We should not forget that one of the most obvious consequences of the several lockdowns enforced in different countries was the restriction of free movement, including across borders, coupled with the enforcement of 'social distancing'. And it is self-evident how these restrictions run counter to the cosmopolitan ideal

of free movement. In this context, Marin Beroš's chapter puts forward a defense of cosmopolitanism, retracing its origins and history, from the Stoics to Seyla Benhabib, and with a strong emphasis on Kant's version of cosmopolitanism, unpacking its defining traits, and assessing the likelihood of its success in the future, in spite of the setbacks caused by the COVID-19 crisis.

Marin Beroš recalls that even before this crisis, cosmopolitanism came to be seen, in Martha Nussbaum's words, as 'a noble but flawed ideal', that is, a moral perspective without much practical impact, in spite of all the developments within the field of international relations and on cosmopolitan democracy of the last few decades. Beroš eventually concludes that we need not abandon cosmopolitan goals in spite of the pandemic, because the cosmopolitan ideal has in the past shown remarkable endurance.

However, these assessments would be mainly theoretical and the issue would be somehow incomplete without the empirically informed analyses of the following case studies in different European geographies. Without any pretention to be exhaustive, this issue aimed at gathering a representative sample of European Union countries, comprising Northern, Central, and Southern European countries. It goes without saying that these countries have constitutions and legal provisions that vary to a great extent but this makes it all the more interesting to bring them together in a comparative perspective. These three case studies depict different, if comparable, experiences of emergency rule in the European Union.

An eloquent case of the endurance of emergency rule is provided by João Cruz Ribeiro. His chapter, 'Checks and Balances in Times of Pandemics: The Portuguese Example', describes in detail the Portuguese constitutional framework concerning the state of emergency and the two periods during the COVID-19 pandemic in which it was implemented, arguing that due to the checks and balances of the Portuguese legal framework, this state of emergency cannot be described as a quintessential case of a 'state of exception'. However, the chapter documents how the Portuguese government kept adopting extraordinary measures even when emergency rule was no longer in force, that way blurring the separation of powers that characterise, temporarily, a state of emergency. As such, and paradoxically, the true 'state of exception' during the COVID-19 pandemic was, or so João Cruz Ribeiro argues, precisely when emergency rule was not formally taking place.

The piece goes on to analyse the several legal arguments put forward between 2020 and 2022 in cases addressed by the Portuguese Administrative Supreme Court and the Constitutional Court, and the apparent contradictions between the two, concluding that there was indeed decisionist behaviour by the government in times of 'apparent normality' and, therefore, that the judicial review somehow proved to be ineffective in these exceptional times in Portugal.

A revealing example of 'a restrained state of exception' is found in Finland's adoption of emergency rule, unlike other countries' 'radical' uses. In their chapter, 'Finland and the COVID-19 Pandemic – Risks Inherent in a Restrained State of Exception', Tatu Hyttinen and Saila Heinikoski show how some provisions from the Finnish Emergency Powers Act were, however, transferred to normal legislation.

Building on the distinction between the concepts of 'radical' and 'restrained state of exception', the chapter discusses the restrictions to fundamental rights put in place in Finland during the pandemic. Drawing upon theoretical insights, the chapter addresses the question of the extent a democratic *Rechtsstaat* can, in times of crisis, compromise its core principles. The analysis shows the resilience of the rule of law in a country, which is also characterised by the highest rule of law index and high trust in authorities and political institutions. Simultaneously, the authors argue that the restrained state of exception can result in restrictions of fundamental rights more easily with the framework of normal legislation and future states of exception, thus bearing risks and implications for the democratic *Rechtsstaat* that will unfold first in the aftermath of the COVID-19 pandemic.

This special issue ends with a comparative perspective between the cases of Germany and Spain, which are also examples of moderate cases of emergency rule. In his chapter, 'Constitutionalism and Emergency Rule: Comparing Germany's and Spain's Responses to the COVID-19 Pandemic', José María Rosales argues that, in spite of their many legal similarities, their respective governments' decisions between 2020 and 2022 disclose a very different understanding of emergency rule's constitutional gravity.

More specifically, Rosales argues that the decision-making strategies in this period leaned towards a greater centralisation in Germany and a stronger decentralisation in Spain, claiming that this partially reflects different constitutional cultures. Namely, the German parliamentary culture proved to be more resilient, with the *Bundestag* maintaining its normal course, while the Spanish Congress of Deputies remained almost idle for several months.

José Maria Rosales claims that emergency rule is a testing field for the resilience of the constitutional order, and that the success of a democratic regime is also measured by the vitality of its parliament. As such, and drawing parallels from the interwar period of the 20th century, the chapter concludes that 'the longer the recourse to emergency rule, the more difficult it becomes to get back to the normal functioning of a constitutional democracy'.

This and other lessons from the pandemic and its experience with emergency rule prove that, also in legal and constitutional terms, these were exceptional times, likely with a lot of legal and political implications for the future. Drawing insights from different scholarly perspectives and combining the analysis of intellectual debates with empirical case studies, this collection aims to contribute to analysing these recent developments, their consequences, and the lessons that can be drawn from legal, political, and philosophical perspectives.

NOTES

1. https://www.who.int/news/item/05-05-2023-statement-on-the-fifteenth-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-coronavirus-disease-(COVID-19)-pandemic
2. See https://www.uma.es/costactionrecast.

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CHAPTER 1

A PANDEMIC THAT NEVER TOOK PLACE: DISCURSIVITY, STATE OF EXCEPTION, AND HYPERREALITY

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ABSTRACT

We have come to a point where the common way to characterise what is taking place presently, or, better yet, for the past almost two years, is with the term 'pandemic'. The task of this chapter is to bring to awareness certain critical reflections with the hope of disturbing the normalised discourse which excepts the authentic meaning of pandemic, a meaning which affects the totality of the human existence. Following the thoughts of Agamben, Baudrillard, and Heidegger, the hypothesis that this chapter is advancing revolves around the idea that the term 'pandemic' has been appropriated by biological thinking excepting its authentic meaning, that is, the ultimate reality of the human existence which is death.

Keywords: COVID-19; state of exception; hyperreality; pandemic; death

INTRODUCTION

We have come to a point where the common way to characterise what is taking place presently, or, better yet, for the past almost two years, is with the term 'pandemic':[1] 'We are/were in a pandemic'. Such phrases, along with their

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variations, have been normalised in everyday discourse. Normalised here means becoming a rule like a kind of implicit regulation which everyone has to follow. Suggesting, like the title of this chapter, that a pandemic did not take place can range from ludicrous or scandalous, to dangerous or, even blasphemous – if one takes (medical) science as a religion. Yet, a critical consideration of what has been taking place could reveal that what has been, discursively and mass-mediately, constituted and propagated *as a pandemic is not (a) pandemic*. Unless one is religiously adhering to the medical sense forced onto the term 'pandemic', a force which excepts its authentic sense, then what has been taking place is not (a) pandemic. It is a pandemic which never took place. Instead, what took place is a simulation of a pandemic which excepts the ultimate reality of the human condition: the only authentic pandemic that takes place which is death.

This chapter offers a critical consideration of what took place. Before initiating this exploration, a clarification of what constitutes 'critical', in this chapter, is required. 'Critical' today is being conceptualised and practised either as judging, destroying, or deconstructing. 'Critical' is usually thought either in an Aristotelian–Hegelian way – identifying thesis, antithesis, and then providing a synthesis – or in Kantian way as a critique. Derrida (2008) for instance writes:

> All the same, and in spite of appearances, deconstruction is neither an analysis nor a critique, … No more is it a critique, in a general sense or in a Kantian sense. The instance of krinein or krisis (decision, choice, judgment, discernment) is itself, as is all the apparatus of transcendental critique, one of the essential 'themes' or 'objects' of deconstruction. (p. 4)

What matters in being critical is this *instance of krinein* or *krisis*/*crisis*. It seems as if deconstruction presupposes critique, but the reverse is not necessary. Derrida's (2008) deconstruction, flowing from Heidegger's *destruction*, which in turn flows from Nietzsche's hammer, equates critique with being critical; and all of that with decision: 'A critical question – the question of critique, in other words, of decision' (p. 217). Yet, as Derrida avows in a different paper, when an 'interpretation is more "critical"', then 'it *suspends* the naive ontology' (p. 260). Before any decision, there is suspension, a de-*cision*, which means to break, to crack in the way a bolt of lightning cracks the dark as Heraclitus used to say. The *instance of krinein* or *krisis*/*crisis* is, thus, this break of what is. The offering of this chapter, then, is critical in the sense of suspending the naïve ontology which holds that a pandemic took place.

Unfortunately, critical thinking is not thought in this way today due to its own crisis. But this time, the crisis is medical. That is, the medical thinking has absorbed and pushed aside the authentic possibility of our critical being or our being critical. In one of his interventions, Agamben (2021) writes:

> 'Krisis' was originally a medical concept which designated, in the Hippocratic corpus of texts, the moment when the doctor decided whether the patient would be able to survive the disease. (p. 38)

Astonishingly, Agamben accepts that *krisis* was originally a medical concept. Yet, a look at the so-called Pre-Socratics reveals effortlessly that the Hippocratic