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The Chinese Advantage in Emergency Law

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Abstract: This Article has a twofold purpose. On the one hand, it offers comparative materials for an informed discussion of COVID-determined emergency law in China and Italy by assessing its normative implications and political genealogy. On the other hand, it explores the essential contiguity between the 'state of exception' triggered by the pandemic and the possible geopolitical shifts in global legal hegemony in the actual phase of surveillance capitalism which is witnessing a decline of law as a form of social organization and its replacement by the predictive models elaborated by technology. In this respect, the traditional Western iconography has long described the Chinese legal tradition as a "law without law", a despotic regime with intrusive population surveillance whose distance from the Western paradigm is deemed almost unbridgeable. And yet the legal response to coronavirus both in Europe and in the U.S. somewhat replicates the allegedly distant Chinese model in terms of restrictions and surveillance mechanisms which are being deployed to counter the crisis in the face of a formal commitment to the rule of law. This Article concludes that the emerging pre-eminence of the "rule of technology" over the "rule of law" in a critical event of historic proportions like a pandemic should and will set the future agenda of comparative studies in a double direction. On the one hand it calls for a truly critical reconsideration of role of law in society which in turn impels to rethink the hold of the liberal constitutional model and the obsolescence of traditional legal taxonomies. On the other hand, it

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might point to the emergence of an unexpected Chinese legal leadership, determined by the progressive undoing of the Western legal and political narratives whose backbone has been relentlessly eroded by decades of neoliberalism and populism.

Keywords: comparative law, coronavirus, state of exception, global hegemony, legal taxonomies.

1 The State of Exception and the New Legal Order

This paper has a double purpose. On the one hand, it offers comparative materials for an informed discussion of COVID-determined emergency law in China and Italy. On the other hand, it predicts a change of hegemony in global legal leadership, where China, unimpaired by the Western capitalist rhetoric of the rule of law whose democratic decay is manifest in the rise of authoritarian legalism and political populism, will set the standards of a global technological law, beyond traditional western narratives of freedom and dignity, with sociopolitical and legal implications that should be looked through a critical lens.

It thus seems a proper moment to apply some tools of critical comparison to the unfolding global saga determined by the spread of COVID-19 across the world.² The declaration of the "pandemic" nature of this epidemic by a UN scientific organism such as the World Health Organization (whose integrity and insulation from corporate influence has been questioned in the past)³ can be read as the proclamation of a global "state of exception", that has been followed by specific legal interventions by all but every country in the world.⁴ Thus, if the famous notion propounded by German Nazi jurist Carl Schmitt, according to which the sovereign is the one who can proclaim the "state of exception" is correct,⁵ we can now say that this crisis is for the first time showing at play a global sovereign whose authority, rather than political, is indeed "scientific".

Almost two decades ago, the senior Author of this Article, in a paper devoted to the HIV contaminated crisis due to blood transfusions, introduced the tools of

¹ See Burrhus F. Skinner, Beyond Freedom and Dignity (1971).

² *See* Ugo Mattei, *Comparative Law and Critical Legal Studies*, *in* The Oxford Handbook of Comparative Law 805 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed., 2019).

³ Leo W. J. C. Huberts, Integrity: What it is and Why it is Important, Public Integrity 1 (2018).

⁴ *See* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020.

⁵ *See* Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty [2nd rev. ed., 1934] (George Schwab transl., 2005). On the notion of "state of exception", see also Giorgio Agamben, State of Exception (Kevin Attell transl., 2005).

distress-based path dependency for the critical understanding of comparative legal change. 6 In 2007, globally acclaimed journalist and activist Naomi Klein, introduced the notion of "Shock doctrine" pointing at the capacity of capitalism to turn disasters in its own benefit.⁷ Later on, the concept of "emergency-based predatory capitalism"8 was deployed to discuss the use of "rule of law" narrative as denial of the political nature of humanitarian intervention. The dark side of human rights⁹ has been unveiled as the engine of ongoing Western efforts of "plunder".¹⁰ Today a new interesting tool of critical discussion, "surveillance capitalism", has been introduced, which points at the 2001 attack to the twin towers in New York City as an emergency-based turning point in current capitalist developments.¹¹

Deploying these tools, this paper explores the metamorphosis occurring in the comparative image and role of Chinese law that is taking place because of the global pandemic and entrance in the age of surveillance capitalism. The thirty-year long dismissal of China as "lacking the rule of law" might be finally over, not so much because China moved genuine steps in that direction, but because the West dismissed any attempt to be faithful to its own narrative. 12 The decline of credibility of Western legality after 9/11 is no marginal factor in the historical change of hegemony that the epidemic might have triggered. Of course, as every form of hegemony, ¹³ also the one of Western lawyers in China was possible only because (most of) the Chinese legal profession has internalized the idea of its own "lack" ¹⁴, facilitating the reproduction of "legal orientalism" in comparative law. 15 As

⁶ See Ugo Mattei, Legal Systems in Distress. HIV Contaminated Blood Path Dependency and Legal Change, Global Jurist 1 (2001).

⁷ See Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism (2007).

⁸ See Ugo Mattei, Emergency-Based Predatory Capitalism. The Rule of Law, Alternative Dispute Resolution and Development, in Contemporary States of Exception: The Politics of Military and Humanitarian Interventions 89ff. (Didier Fassin & Mariella Pandolfi eds., 2010).

⁹ See David Kennedy, The Dark Side of Virtue: Reassessing International Humanitarianism (2004); Id., The International Human Rights Movement: Still Part of the Problem?, in Examining Critical Perspective on Human Rights 19 (Rob Dickinson, Elena Katselli, Colin Murray & Ole W. Pedersen, eds., 2012).

¹⁰ Ugo Mattei & Laura Nader, Plunder: When the Rule of Law is Illegal (2008). See also Mauro Bussani, Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law, 67 Am. J. Comp. L. 701 (2019).

¹¹ Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power (2019). See infra Section 3.2.

¹² See e. g., Randall Peerenboom, China's Long March Toward the Rule of Law (2002).

¹³ See Ugo Mattei, A Theory of Imperial Law: A Study on U.S. Hegemony and Latin Resistance, 10 Ind. J. Glob. Legal Stud. 383 (2003).

¹⁴ See Jedediah J. Kroncke, The Futility of Law and Development. China and the Dangers of Exporting American Law (2016).

¹⁵ See Teemu Ruskola, Legal Orientalism. China, the United States, and Modern Law (2013).

scholars, we have no stake nor agency, of course, to reverse hegemony in law. We only have a duty to recover some less ideologically tainted approaches in comparing the *self-perceived* Western democracy with the *self-perceived* Chinese socialist model. Double standards are the foe of sound comparative work. ¹⁶

More than 20 years ago the senior of these authors recommended to deploy a comparative law taxonomy free from ethnocentrism and Western biases. *Three Patterns of Law* argued the necessity of respecting the options of every world legal system in the always contested and adjusting balance of power between *legal* professionalism, *political* decision-making and *traditional* production of law. ¹⁷ Today, in the global collapse of Western democracy under corporate takeover, the undeniable rise of prestige of the Chinese model (also in comparative studies) ¹⁸ suggests to approach the first genuinely global "state of exception" with that framework in mind. *Every legal system*, understood as formalized power, deploys professionalism, politics and tradition as controlling processes ¹⁹ to maintain status quo and social order. Technological changes might shift the balance of power among such processes or even entirely substitute any one of them. In conditions of distress, new tendencies emerge more openly, invariably defeating dominant self-narratives. ²⁰

In this dramatic phase of legal change, it is especially interesting to look comparatively to China and Italy. The latter is a traditionally semi-peripheral country, ²¹ with only nominal political sovereignty, being part of the NATO alliance and of the Euro area. It is, however, a country of long and prestigious legal tradition, with a style that has been studied by comparatists as "in between" French and German models – thus a good proxy of the European legal tradition. ²²

¹⁶ See Elisabetta Grande, *Hegemonic Human Rights and African Resistance: Female Circumcision in a Broader Comparative Perspective*, 4 Global Jurist Frontiers 1 (2004).

¹⁷ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal System*, 45 Am. J. Comp. L. 5 (1997).

¹⁸ *See* recently Taisu Zhang, *Development of Comparative Law in Modern China*, *in* The Oxford Handbook of Comparative Law 228 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed., 2019).

¹⁹ In the sense developed by Laura Nader in more than 50 years of digging in this direction. See, most relevant, Laura Nader, Naked Science: Anthropological Inquiry into Boundaries, Power, and Knowledge (1996).

²⁰ See infra Sections 2, and 3.2 and 3.3.

²¹ On the notion of semi-periphery, the classic reading is Immanuel Wallerstein, The Capitalist World-Economy (1979).

²² *See*, *e.* g., John Henry Merryman & Rogelio Pérez Perdomo, The Civil Law Tradition. An Introduction to the Legal System of Europe and Latin America (3rd ed., 2007).

During the long season of neoliberalism, which included the dismantling of the Soviet Union, Western mainstream, ²³ oblivious of the astonishing performances of the Communist Party of China, has developed a US-dominated paradigm of the "End of History". ²⁴ Italy joined the chorus and has ever since imported (quite uncritically) massive amounts of common-law style solutions in its legal system. ²⁵ As a civil law country early experimenting with common law imports, Italy has managed to maintain some of its traditional prestige especially in the Iberian Peninsula and in Latin America. Moreover, through its established school of Roman law scholars, it has maintained some degree of global scholarly relevance – in China as well.

At the peak of the pandemic in Italy, air carried supplies of medicines and other technologies arrived as courtesy of the Chinese Government in a phase in which Chinese economic interests are quite present in Italy, where a large and thriving Chinese community is growing in economic importance. A comparison between Italian and Chinese emergency solutions offers some interesting insights on the reasons of a possible change of global hegemony.²⁶

We strongly believe that changes that are reached in emergency conditions are there to stay. China over the centuries has shown exceptional resilience and capacity to smoothly digest foreign inputs, giving them a special Chinese traditional blend. What in its long history has happened in the reception from the West of law and political ideology, more recently has occurred in the realm of technology. The outcome of these receptions, that the Chinese tradition has made a seamless whole, might well be a global model of surveillance society for the XXI Century, where predictability is granted trough technology rather than law. Not only does this process manifest a decline of law as a form of social organization, but it points out significant legal and sociopolitical transformations. After the crisis, like semi peripheral Italy today, core Western countries will continue to converge in a direction of very little space for individual rights and idiosyncratic preferences, showing that the wind now blows from East to West.

In an age of uncritical fideism in technology and dehumanization of human activities, the technologization of society and legal culture ought to receive a close critical scrutiny.

²³ See Ugo Mattei, The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline, 65 Am. J. Comp. L. 567 (2017).

²⁴ See Francis Fukuyama, The End of History and the Last Man (1992).

²⁵ See e.g., Elisabetta Grande, Imitazione e Diritto: Ipotesi sulla Circolazione dei Modelli (2000).

²⁶ See Ugo Mattei, Why the Wind Changed: Intellectual Leadership in Western Law, 42 Am. J. Comp. L. 195 (1994).

2 Anatomy of an Emergency: The Chinese and Italian Normative Responses to COVID-19

2.1 China's Normative Response in Distress

China's normative response to the sudden COVID-19 outbreak revolves around the idea of a rule of law "with Chinese characteristics". This is the gist of the legal measures adopted to handle the pandemic, and must be read within the wider theoretical framework of socialism with Chinese characteristics.²⁷

Chinese society makes full use of the "Tai Chi/Ying Yang" dynamic thinking, according to which the political, legal and social dimensions are closely and inextricably intertwined. In other words, China cannot be grouped as a country belonging to the "rule of professional law", whereby law is conceived as disentangled and independent from tradition and from the political sphere. There is not a clear division of public powers in a sort of God v. Caesar dynamic like the one inspiring Western constitutionalism after the separation of Church and State. Nor is there any neat conceptual separation between the State and civil society, like the one famously masterminded by Hegel which is now part of the classic Western social and political thought. However, this does not mean that China *lacks the rule of law*, being this an mono-dimensional and ethnocentric way of looking at the Chinese legal experience (and at the very idea of the rule of law). Rather, the Chinese legal system has elaborated its own conception of the rule of law, which simply differs from its Western counterpart.

Specifically, the Chinese notion of the rule of law (fa-zhi), as mentioned in the Constitution of the People's Republic of China [hereinafter PRCC], ³¹ is based on the circular interdependence between China's socialist experience, its millenarian history, and the sagehood of its culture, which are all elements that cannot be deemed separate from – or hierarchically subordinated to – its legal tradition.

²⁷ "Communiqué of the Fourth Plenary Session of the 18th Central Committee of the CPC" (Adopted at the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China on October 23, 2014).

²⁸ Ku Hung-ming, The Spirit of the Chinese People 9-64 (1998).

²⁹ Mattei, supra note 17.

³⁰ Georg Wilhelm Friedrich Hegel, Elements of the Philosophy of Right [1821] (Allen W. Wood ed., 1991).

³¹ PRCC Const. Art 5(1) reads: "The People's Republic of China shall practice law-based governance and build a socialist state under the rule of law". An official English version of the Chinese Constitution can be found on the website of the National People's Congress of the People's Republic of China at https://www.npc.gov.cn/englishnpc/constitution2019/201911/165146fb6104dd3a2793875d19b5b29.shtml.

Contrariwise, they all participate in forming a unitary system. Therefore, a foreign observer trying to understand the functioning of Chinese legal order as it appears today would have to deal with many different layers which are not totally discernible from one another.

Brutally simplifying, we could say that a first layer is the never-lasting dialectic between a set of socially recognized values and moral examples providing guidance for good behavior in daily life (the so-called li) on the one hand, and the formal positive rules (the so-called fa) more akin – but not identical – to the Western idea of law on the other hand. The binding force of moral values that belong to the "rule of traditional law" cannot be underestimated. It is entrenched in the Confucian tradition and it inevitably conditions the actual idea of the rule of law. It originates from China's 5000-year-long human civilization and its core principles such as the primacy of the collective interest over the individual one, or the principle of good governance.³²

A second layer is the *political* element, since China's modernization is being pursued: a) under the leadership of the Communist Party of China [hereinafter CPC] which is the political body called upon to foster social, economic and cultural development, and realize the interest of the majority of Chinese People; and b) under the ideological guidance of socialism adapted by and for Chinese society. China is, indeed, a "socialist state governed by a people's democratic dictatorship", and it is "prohibited for any organization or individual to damage the socialist system"³³ – for only by following the road of socialism will it be possible to carry out reforms and to "promote coordinated material, political, cultural-ethical, social and ecological advancement, in order to build China into a great modern socialist country that is prosperous, strong, democratic, culturally advanced, harmonious and beautiful, and realize the great rejuvenation of the Chinese nation".34

A third layer is linked to China's opening up to the outside world through reforms and receptions of *professional* legal ideas and models.³⁵ As is well known, China started to deeply reform its legal system under the leadership of Deng Xiaoping in late 1970s, and has never stopped its legal reconstruction ever since. For instance, China became a member of the WTO in 2001, 36 and introduced

³² See Ugo Mattei, Teemu Ruskola & Antonio Gidi, Schlesinger's Comparative Law 282ff. (7th ed., 2009) [hereinafter Schlesinger's Comparative Law].

³³ See PRCC Const. Art. 1(1) and (2).

³⁴ These words are contained para. 7 of the Preamble to PRCC Const.

³⁵ The initial idea and practice of introducing Western rule of law to achieve national prosperity and strength can be traced back to China's defeat in the Opium War and the invasion of the eightpower allied forces in the 1840s.

³⁶ Schlesinger's Comparative Law, at 31 ff.

constitutional provisions protecting human rights (Art. 33(3) PRCC) and fostering the private (non-public) sector, which is now raised to an important component of the economy (Art. 11 PRCC). The previous planned economy was replaced by a more market-oriented system – the socialist market economy with Chinese characteristics – which is an economic model grounded in the socialist system under the oversight of the State but open to the global market. This new order, especially in the last few years under the impulse of 'Xi Jinping's thought on socialism with Chinese characteristics for the New Era', has turned China into one of the leading world economies.

For sure, Chinese modernization was influenced by international models, but it is by no means the result of a mere transplant. Rather, reforms combined the road of socialism with the adaptation of foreign ideas to Chinese characteristics. The dynamic relationship between, tradition, political leadership and professionalism has generated a mature rule of law with Chinese characteristics, under the leadership of the CPC.³⁷

In the light of the foregoing premises, we can summarize the experience and the lessons from China's legal response to COVID-19 as follows:

2.1.1 The Rule of Emergency Law: Institutional Advantages and Rule of Law with Chinese Characteristics

The downside of Chinese government organization may be seen in its bureaucratism which can lead to formalistic responses, intrusive agent control, inefficiencies, and even failure of local governance. When unfortunately fell into the eye of the storm, in the very early stages of the COVID-19 outbreak, the Chinese scientific and normative response to the soon-to-become epidemic was not as prompt and effective as expected. From November to December 2019, coronavirus was medically treated as a common flu or pneumonia just like everywhere else. However, after the Chinese medical science community realized that COVID-19 had similar coronavirus features to SARS with stronger "human-to-human" epidemiological contagion, the Chinese government rapidly made full use of its distinct institutional mechanisms and adopted policies and practices grounded in its "rule of emergency law". This is a body of rules and practices developed on the basis of necessity, whose application is temporary, tailored to the circumstances, and whose main content is

³⁷ From the perspective of law and anthropology, "rule of professional law" can only be translated as "rule of Fa" in Chinese context.

preventive. In the last decade, China's emergency law, enshrined for instance in the "Master State Plan for Rapid Response to Public Emergencies" (2006) and in the "Law of the People's Republic of China on Response to Emergencies"(2007), is gradually becoming an integrate part of the rule of law with Chinese characteristics as a reactive response to the different emergencies China had to manage including the flood in the Yangtze river basin, the SARS crisis, the political violence in Xinjiang region, and finally the present COVID-19 outbreak.38

As to our specific topic, dating from January 25, 2020, which is the first day of the Chinese lunar New Year of the Mouse, China's top leader, Secretary General and chairman of the Central Military Commission of the CPC, President Xi Jinping, personally presided over the Communist Party of China and the Central People's Government to coordinate and supervise an ad-hoc task force dedicated to COVID-19 prevention and control. This central working group is led by the Prime Minister Li Keqiang and other senior officials at central government whose expertise and duty is closely related to disease prevention and control. Through this centralized working group, China has implemented a systematic and scientific plan for the containment of the virus that has proved itself effective in stifling the pandemic throughout China. Despite some initial critiques, the Chinese solution has been considered an efficient exportable model to be adopted in other countries which are struggling to keep up with the spreading of COVID-19.³⁹

2.1.2 Delving into the Chinese Scientific Response to COVID-19: Central Coordination, Local Knowledge and Territorial Responsibility

The functioning of the Chinese solution to COVID-19 lies in the peculiar synchronic coordination between central government and local authorities which recalls a geometric game of chess whereby every move is studied in advance and arranged in the light of the following.

As a first step, China's most important policymaker, the CPC central committee, sent work teams to the Wuhan city and other epicenters in Hubei province to push local authorities to comprehensively strengthen the front-line work of prevention and control. It is worth noting that the Chinese institutional architecture is organized in the form of a multi-level apparatus with a division of functions

³⁸ Meng Tao, Emergency Laws in China: Their Formation, Present Situation and Future, 124-40 and 222-23 Social Sciences in China (2011).

³⁹ China's Fight against COVID-19, http://www.chinanews.com/shipin/2020ggkf/2020/0330/ 131.shtml (last visited May 4, 2020).

between central and local state institutions at all levels (Art. 2 PRCC).⁴⁰ This institutional model follows the principle known as "democratic centralism", which entails that a) the government at the higher level is called up to supervise the one below; b) the elected deputies at all levels are made responsible to people through periodic election and are subject to their oversight; and c) all administrative, supervisory, judicial and procuratorial organs of the state are created by the people's congresses and are, consequently, supervised by them (Art. 3 PRCC). Hence, under the supervision of the central government, the foregoing institutional setting made possible to realize a prompt reorganization (appointment and removal) of the top local authorities in both Hubei province and Wuhan city, as well as to provide those areas with urgently needed medical forces and supplies in order to meet daily necessities of the huge local population (nearly 60 million in Hubei and 10 million in Wuhan). At the same time, however, Hubei province and the city of Wuhan were required to carry out their own responsibilities at every level; therefore, they were asked to speed up the construction of centralized hospitals, perform timely diagnoses and medical treatments, and strengthen the rotation and protection of medical staff. Moreover, in the name of mutual help and reciprocity, 29 out of China's 34 provincial governments, with the exception of Hubei, Tibet, Hong Kong, Macao and Taiwan, including Xinjiang Construction Corps and Military Units, sent more than 42,000 medical and nursing units to assist Wuhan and other areas of Hubei province. In other key epidemic areas in Hubei province outside Wuhan city, a "one-to-one contract method" was adopted to carry out medical assistance and treatment support.⁴¹

PRC Central Government also intervened with timely legislative decisions based on medical science evidence and in accordance with the rule of emergency law. For instance, following the researches carried out by the national and international medical science community which established the possible animal origin of the virus, special legislation was enacted. In particular, on February 24, 2020, the Standing Committee of National People's Congress (NPC), China's top legislature, voted to enact the Decision on Banning the Illegal Wildlife Trade, Abolishing the Bad Habit of Excessive Eating of Wild Animals, and Effectively Protecting People's Lives, Health and Safety to prevent the cross-infection between human and wild animals and the spread of the disease. This piece of legislation prohibits and

⁴⁰ PRCC Const. Art. 2 reads: "All power in the People's Republic of China belongs to the people. The organs through which the people exercise state power are the National People's Congress and the local people's congresses at all levels. The people shall, in accordance with the provisions of law, manage state affairs, economic and cultural undertakings, and social affairs through various channels and in various ways".

⁴¹ China's Fight against COVID-19, https://www.chinanews.com/shipin/2020ggkf/2020/0330/ 131.shtml (last visited May 4, 2020).

punishes – even resorting to criminal sanctions – hunting, trading, transportation and consumption of "land wildlife of important ecological, scientific and social value" and other land wildlife under state protection, including those that are artificially bred or reared in captivity. Furthermore, to contrast the spread of the pandemic, Chinese Government has also adopted policies and rules aimed at systematically standardizing law enforcement so as to urge all members of the society to behave strictly in accordance with the law and cooperate with the institutions in halting the virus.⁴² Just to name few key points, since the very beginning of the epidemic, the State Administration for Market Regulation of China has implemented a centralized government take-over and allocation system for the production, operation, and distribution of medical equipment and resources. As to the individual measures, China has often resorted to criminal law to enforce public health measures. To this end, China's Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice issued a joint document concerning criminal sanctions and provisions enforced to punish violations of emergency rules. Notably, Chinese citizens (but the provision was extended to foreigners and stateless people in later period) who have concealed travel information in epidemiologically risky areas, especially health information related to COVID-19 symptoms, and have thus contributed to the spread of the epidemic are subject to investigation and, if found guilty, are held liable of a punishable crime. Moreover, any attempt to conceal the infection in public places and any failure on the part of individuals with suspected or confirmed coronavirus disease to comply with mandatory quarantine and isolation rules will be deemed willful conduct directed to spread the virus and, therefore, severely punished according to criminal law. 43 Finally, the emergency-based legislation and rules have also witnessed the hardening of sanctions and punishments for other criminal conducts carried out to take unfair advantage of the epidemiological crisis (e. g., fraud, corruption, embezzlement, sabotage, counterfeit medicines trafficking, misinformation, etc.).

As far as the local level is concerned, all governments in China are required to set up strategic teams led by the local party and political leaders, in cooperation with the central government, whose main aim is to rapidly and efficiently respond

⁴² The Decision of the Standing Committee of the National People's Congress on Banning the Illegal Wildlife Trade, Abolishing the Bad Habit of Excessive Eating of Wild Animals, and Effectively Protecting People's Lives, Health and Safety(Adopted at the 16th meeting of the Standing Committee of the 13th National People's Congress on February 24, 2020) https://www.npc.gov.cn/ npc/c30834/202002/c56b129850aa42acb584cf01ebb68ea4.shtmlhttp://www.chinanews.com/ shipin/2020ggkf/2020/0330/131.shtml (last visited May 4, 2020).

⁴³ Opinions on Punishing Crimes of Breaching the Prevention and Control of COVID-19 According to Law (March 3, 2020).

to COVID-19 by implementing drastic emergency measures based on scientific evidence and designed to maximize patients' care and minimize mortality. 44 Accordingly, in the immediate aftermath of the epidemic outbreak, these teams were demanded to carry out epidemic surveillance, centralize medical treatment of patients found positive to the virus, and impose compulsory isolation with active surveillance on those who were suspected to have had contacts with infected people.

As to the specific measures adopted locally, dating from early morning of January 23, the Prevention and Control Headquarters in the city of Wuhan formally communicated to the citizens that: a) all bus, ferry, subway, airport, railways and long-distance transport services in general were suspended; b) citizens were prohibited to leave Wuhan without special reasons; c) all asymptomatic rural and urban residents were isolated from home in their communities. Subsequently, the other 12 municipalities in the Hubei province announced the closure of cities one after another. Concomitantly, almost everywhere outside Hubei province, some graduated form of emergency quarantine policies was implemented and commercial and outdoor activities in public places were strictly closed. Based on the ideals of individual responsibility and social mutuality, basic necessities for ordinary life were supplied for more than two months by the staffs of the corresponding local community through the highly developed digital commerce platforms of China, and with the assistance and support of volunteers.⁴⁵

In order to pursue its ambitious plan for the containment of the virus, Chinese government quickly mobilized a huge work force. It traced contacts of every coronavirus, identified patient through the use of technology and investigating teams, delivered test kits, supplied medical equipment and resources, and took immediate action to have new hospitals (namely mobile cabin hospitals) with thousands of hospital beds constructed. Just to give a quantitative idea of the effectiveness of Chinese systematic response to the pandemic, it is suffice to mention that the "Lei Shen Shan" and the "Huo Shen Shan" hospitals with 2,500 hospital beds, which are structures in line with high international standards, were built from scratch in the city of Wuhan in only 10 days. Furthermore, the action plan did not neglect rural areas, whereby mass prevention and control were conducted via the coordination between local organizations and village doctors. At the same time, since the initial outbreak of COVID-19 was confirmed, information

⁴⁴ It is worth mentioning that, for instance, National Health Commission of China issued seven different edition guidelines for COVID-19 diagnosis and treatment from the beginning of January to the beginning of March.

⁴⁵ China's Fight against COVID-19, https://www.chinanews.com/shipin/2020ggkf/2020/0330/131.shtml (last visited May 4, 2020).

upon the management of epidemic was released to both WHO and other countries, while China revised its infections count in the attempt not to leave undocumented cases. Moreover, on the domestic side, the whole population was encouraged to make use of modern social media and network platforms to spread official information about COVID-19 protection.

Thus, in the end, it can be concluded that China's national and local legal response strategy to COVID-19 epidemic was elaborated as a "coordinate management program" based on the virus peculiarities as resulting from the exchange of information between the central and the local levels and supported by and based on scientific evidence. 46 Its unitary institutional approach grounded in the "rule of emergency law" was capable to take rapid political choices in order to turn the law in the books into law in action to protect human lives and values. As specified by the head of the WHO emerging diseases and zoonosis unit - Maria van Kerkhove - in reporting China's classified control measures, Hubei, Wuhan and other parts of China implemented differentiated control measures based on the assessment of the outbreak. Different regions adopted different levels of prevention and control restrictions, and this strategy managed to avoid a complete national lockdown with all the downsides of such measure.47

2.2 Italy's Normative Response in Distress

Compared with the China's coordination grounded in its "rule of emergency law" above described, the analysis of the emergency measures adopted by the Italian Government to counter the coronavirus epidemic produces a sense of disorientation. The architecture of the legal system, twisted in emergency, the use of unintelligible dogmatic categories and specialist language, the legal force of specific provisions adopted, and a plethora of other factors are indeed puzzling not only to the foreign lawyer but also to the Italian one. For these reasons, it is appropriate to preface the critical analysis of the current global "state of exception" caused by the COVID-19 and its geopolitical implications 48 with a very succinct overview of the Italian system of the sources of law followed by a more detailed report of the

⁴⁶ See Liu Guanghua, Evidence-based Law: An Inter-disciplinary Approach between Law and Evidence-based Science, 3 Library & Information 11–17 (2018).

^{47 &}quot;WHO calls for more efforts in epidemic prevention and control", People's Daily, March 27, 2020, at 16.

⁴⁸ See infra Section 3.

specific national regulations enacted to address the pandemic. The former is intended to be a compass to focus our route on the intricate map of the latter.

2.2.1 Who Legislates in Italy? The Law-Making Authority under Conditions of Ordinary Law

The Italian Constitution vests the legislative power in the Houses of Parliament which represent the repository of popular sovereignty. ⁴⁹ This does not entail an exclusive monopoly of Parliament over the legislative power. Under particular circumstances, the Government is allocated the quasi-legislative authority to issue acts having the force of law, i.e., decrees originating from the Executive power which are nonetheless located at the same hierarchical level of ordinary statutory law. These acts are the Legislative Decree (decreto legislativo) and the Decree-Law (decreto legge). The former, widely adopted to discipline complex technical matters (e.g., finance sector, consumer law), is an example of delegated legislation in which the Parliament outlines the legal framework (basic criteria, time-period etc.) within which the Government is expected to draft its decree. 50 Contrariwise, the latter is not technically the result of a delegation of power. It represents, instead, an exceptional hypothesis in which, due to a "case of exceptional necessity and urgency", the Government is empowered to perform the legislative function on its own motion and under its political responsibility. Decree-laws are immediately effective, but they retroactively lose effect if not ratified and transposed into law by the Parliament within 60 days from their publication in the Official State Gazette (Gazzetta Ufficiale).51

The Italian Constitution, as for instance the Japanese Basic Law, does not contemplate specific emergency clauses nor does it recognize a state of emergency. It merely provides for a state of war which has not been invoked for the current

⁴⁹ It. Const. Art. 70 reads: "The law-making function shall be exercised collectively by both Houses".

An official English version of the Italian Constitution is available on the website of the Italian Senate at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁵⁰ It. Const. Art. 76 reads: "The law-making function may not be delegated to the Government unless principles and criteria have been established and then only for a limited time and for specific purposes".

⁵¹ It. Const. Art. 77 reads: "The Government may not, without a delegation from Parliament, issue a decree having force of law. When the Government, in case of necessity and urgency, adopts under its own responsibility a temporary measure, it shall submit such measure to Parliament for enactment. During dissolution, Parliament shall be convened within five days after any such measure has been submitted. Such a measure shall lose effect from the beginning unless it is transposed into law by Parliament within 60 days of its publication. Parliament may regulate by law the legal relations arisen from a rejected decree".

pandemic, be it designed for other classes of emergencies. 52 The latter is the only case in which the Government is granted a full-fledged constitutional power to legislate. But even under these exceptional circumstances the Executive is not vested of full unlimited powers but just of the "necessary powers" which, however, are the result of exceptional delegation from the Parliament.

At an inferior level in the hierarchy of sources of law, under the Constitution, the statutes and the acts having force of law, one finds the so-called secondary sources of law. Brutally simplifying for the purposes of this Article, secondary sources of law can be described as regulations issued by the Executive power in the form of decrees (Ministerial Decrees, Decrees of the President of the Council of Ministers, Governmental Decrees in the form of Decrees of the President of the Republic) whose ordinary function is to implement primary legislation.⁵³

2.2.2 The Italian "Measures on Containment and Management of the **Epidemiological Emergency": A Normative Account**

After a range of respiratory illnesses of unknown cause were detected in the Chinese province of Hubei in December 2019, and later reported to the WHO local office, and further to the onset of diseases allegedly related to the same etiology occurring outside of the Chinese territory, the coronavirus – later named COVID-19 - was declared "public health emergency of international concern" by the World Health Organization on 30 January 2020.⁵⁴ On the very same day of this declaration, the Italian Ministry of Health issued an ordinance precautionarily banning "air traffic from China", 55 immediately followed, as of 31 January 2020, by a Resolution of the Council of Ministers declaring a six-month state of emergency on the

⁵² It. Const. Art. 78 reads: "Parliament has the authority to declare a state of war and vest the necessary powers into the Government". See Giuseppe de Vergottini, Guerra e Costituzione. Nuovi Conflitti e Sfide alla Democrazia (2004).

⁵³ For an introduction to the sources of Italian law in English, see Mario Comba, Constitutional Law, in Introduction to Italian Law 47-51 (Jeffrey S. Lena & Ugo Mattei eds., 2002); The Italian Legal System: An Introduction (Michael A. Livingston, Pier Giuseppe Monateri & Francesco Parisi eds., 2nd ed., 2015); Introduction to Italian Public Law 195-218 (Giuseppe Franco Ferrari ed., 2nd ed., 2018).

⁵⁴ All the WHO declarations and outdates on coronavirus are available at https://www.who.int.

⁵⁵ See Ordinance of the Ministry of Health, 30 January 2020, art. 1. All the relevant measures adopted by the Italian Government are available online at https://www.governo.it/it/coronavirusnormativa.

national territory.⁵⁶ This resolution, invoking the application of a 2018 law related to civil protection, was followed by a multi-phase action plan, undertaken under the advice of a Scientific Technical Committee assessing the epidemiological risk at every phase, whose aim is to take all the urgent measures to manage and contain the epidemic.⁵⁷ Namely, the plan is made of a Phase 1 designed to manage the most critical stage of the pandemic; a Phase 2 contemplating a gradual relaxation of containment measures; and a Phase 3 when a return to ordinary life will be possible but only if new contagions progressively reach zero.

Phase 1: From Regional to National Lockdown

Following the implementation of some urgent measures by the Italian Department of Civil Protection, the establishment of ad-hoc Crisis Operative and Scientific Technical Committees, and given the increase in cases of contagion in the Lombardy and Veneto Regions, the Government decided to enact the Decree-Law 6/2020 [hereinafter DL 6/2020] on February 23 with the objective of proactively countering and containing the epidemiological emergency caused by COVID-19. The said Decree, later converted with amendments by Law no. 13 of 5 March 2020, empowered the competent local authorities of the enlisted places, whereby at least one case of contagion was reported, to implement all the necessary restrictive measures established to contain the contagion. Pursuant to Art. 1(2) of the DL 6/2020, those measures included – but were not limited to – 58 travel restrictions prohibiting any movement of natural persons entering or leaving the affected territories (so-called "red areas"), the imposition of compulsory quarantine with active surveillance upon those who had contacts with persons found to be positive to the virus, the duty on the part of travelers arriving from epidemiologically risky areas to disclose this circumstance to the local health authorities, bans on all public and private gatherings, limitations on public and private transportation,

⁵⁶ The "Resolution of the Council of Ministers relating to the health risk associated with the onset of diseases caused by transmissible viral agents" dated 31 January 2020 entrusted the Head of the Department Civil Protection with the coordination of the measures necessary to deal with the emergency on the national territory expressly referring to the so-called Code of Civil Protection (Legislative Decree, 2 January 2018 No. 1).

⁵⁷ Pursuant to art. 43 of the 'International Health Regulations 2005', State Parties can implement: "health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern" with the purported objective of achieving the same or greater level of health protection than WHO recommendations. See International Health Regulations 2005 available online at https://www.who.int/ihr/9789241596664/en/index.html.

⁵⁸ Art. 2 of Decree-Law 23 February 2020 No. 6 overtly empowers the competent authorities to implement further measures to prevent the diffusion of the epidemic pending the enactment of the DPCM.

suspension of educational services and activities in schools of all levels including Universities and Institutions of higher education, suspension of in-person public and private examination procedures, the closure of cultural institutes and all commercial activities except those supplying basic necessities.

Given the explicit powers originally vested in the Prime Minister by art. 3(1) of the DL 6/2020 to implement all the urgent measures with his own decrees, the Decree-Law has been rapidly followed by an escalating sequence of Decrees of the President of the Council of Minister [hereinafter DPCM]⁵⁹ and, only at a later stage, by other Decree-Laws.

More specifically, art. 1(1) of the DPCM of 8 March⁶⁰ imposed severe restrictions on personal and economic freedoms and namely: a) extended the aforementioned emergency measures to the whole Lombardy Region and to other 14 provinces located in Northern and Central Italy whereby any movement of natural persons entering and leaving as well as crossing those territories was prohibited being exceptions only admitted in cases of "well-grounded workrelated reasons or situations of need or movements for health reasons"; b) commanded a complete ban on the movement from their residence of persons subject to quarantine or found to be positive to the virus; c) suspended all sort of public or private events including sport competitions and activities except for the training sessions of professional athletes participating in Olympic Games or other national or international events provided that they take place in facilities closed to the general public; d) suspended all civil and religious ceremonies including funerals; e) imposed restrictions on opening and closing hours upon catering and bar activities with the obligation, under the manager's responsibility and under penalty of suspension of the activity in case of violation, to provide the conditions to guarantee the possibility of respecting the interpersonal safety distance which is legally estimated in at least one meter; ⁶¹ f) permitted other commercial activities to remain open as long as they could guarantee access in a restricted manner so to avoid gathering of persons and respect the interpersonal safety distance.

Meanwhile, the evolution of the epidemiological situation registered an asymmetrical normative response across Italian Regions and Municipalities, whereby local authorities adopted a set of heterogeneous measures to stem the

⁵⁹ As of May 23, the several DPCM are dated 23 February, 25 February, 1 March, 4 March, 8 March, 9 March, 11 March, 22 March, 1 April, 10 April, 26 April, 12 May, 17 May and 18 May.

⁶⁰ An official English translation of the relevant DPCM is available on the website of the Italian Ministry of Foreign Affairs at https://www.esteri.it/mae/en/ministero/normativaonline/normati va-altre-amministrazioni.html.

⁶¹ See Annex 1, letter (d) DPCM 8 March 2020.

spread of coronavirus. 62 These episodes of localism, reproducing on a smaller scale the low degree of connection that can be observed at a supranational level amongst EU Member States, triggered a response from the central Government. Then, in the light of those episodes and especially in view of the increase in cases, the Prime Minister, with the DPCM of 9 March, ⁶³ extended to the entire national territory the restrictive measures that were previously prescribed just for the red areas, ⁶⁴ substantially nationalizing limitations to personal freedom by prohibiting any form of gathering in public places or places open to the public.

Starting from March 11, in conjunction with the statement by the WHO classifying coronavirus as 'pandemic' and calling on the different national governments to adopt aggressive action, a series of DPCM⁶⁵ and the Decree-Law 19/2020 - later converted with amendments by Law no. 35 of 22 May 2020 which repealed the previous DL 6/2020⁶⁶ – strongly tightened national containment measures. In particular, the said acts provided for: the prohibition of any movement of natural persons from the municipalities in which they were located (even outlawing return to their permanent place of residence) being exceptions only admitted in cases of proven occupational needs or situations of need or for health reasons; the total ban, under pain of criminal sanctions, for persons subject to quarantine or fund positive to the virus to move from their home or residence; the prohibition of any form of assembly in public and private spaces; the closure of parks and gardens and the prohibition of recreational activities (it was only permitted to carry out motor activity individually and in the immediate vicinity of one's residence); the suspension of catering services and retail business activities with the sole exception of those selling foods and vital products (this however included alcohols and cigarettes!) and those strictly functional to the management of the emergency provided that interpersonal safety distance be guaranteed. ⁶⁷ The disproportionate nature of these measures especially in areas of the country in which there were virtually no cases, the feeble ground of their formal legitimacy and some episodes

⁶² Pursuant to Art. 3(2), Decree-Law 6/2020 pending the issuance of DPCM and only in cases of "extreme necessity and urgency" Regions were allowed to implement the measures of the DL

⁶³ See Art. 1, DPCM 9 March 2020.

⁶⁴ Some of the restrictive measures had been already extended to the national territory by Art. 2 DPCM 8 March 2020.

⁶⁵ See specifically Art. 1, DPCM 11 March, Art. 1, DPCM 22 March and DPCM 10 April.

⁶⁶ Art. 5 of Decree-Law 25 March 2020 No 19 explicitly repeals the DL 6/2020 with the exception of Article 3(6-bis) and Article 4.

⁶⁷ See Art. 1 DPCM 10 April 2020.

of arbitrary enforcement by local police, have triggered substantial critique by a number of lawyers, legal scholars and magistrates.⁶⁸

Phase 2: The Gradual Relaxation of the Lockdown Measures

A first partial loosening of the aforesaid measures, previous to the official beginning of the so-called "Phase 2", occurred with the DPCM of 26 April. 69 The said decree, albeit introducing further measures like the explicit obligation to stay home preemptively and limit social contacts for those who present respiratory symptoms and a temperature above 37.5 °C (Art. 1(1) b), ⁷⁰ contemplated, starting from May 4, the possibility to ease some of the restrictions on individual freedom (e.g., people were allowed to meet relatives within the same region) and on business (notably factories and construction sites) so to gradually reopen the country provided that safety interpersonal distance is respected, gatherings prevented, and personal protective equipment (PPE) used (PPE like face masks is made compulsory in closed public places accessible to the public, including means of transport, and in any case when it is not possible to guarantee the safety distance).⁷¹

"Phase 2" officially started on May 18 with a scheduled gradual resumption of the productive, industrial and social activities staggered over a two-month period. ⁷² Besides approving a stimulus package to counter the economic and social impact of coronavirus for business and families with an ad hoc Decree-Law, 73 the Italian Government designed the containment and prevention measures for Phase 2 mainly via the Decree-Law 16 May 2020, No. 33 [DL 33/2020] immediately followed by the DPCM of May 17. The said acts, in addition to further reaffirming the mandatory nature of the rules on quarantine and social distancing⁷⁴ and providing for local authorities to monitor on a daily basis the epidemiological trends in their territories and provide for guidelines accordingly, remove as of May 18 the restrictions on the freedom of movement within the same region in which people are

⁶⁸ Ultimately, an independent Observatory for Constitutional Legality has been established: www.generazionifuture.org.

⁶⁹ DPCM 26 April 2020 partially replaced DPCM 10 April 2020 and was effective from 4 May 2020 to 17 May 2020, with the exception of some specific provisions (Article 2 paras 7, 9 and 11, which were in effect from 27 April 2020 cumulatively to the provisions of the Decree 10 April 2020).

⁷⁰ Under art. 1(1) b DPCM 10 April 2020 it was only a recommendation. The same provision is now contained in DPCM 17 May 2020, Art. 1(a).

⁷¹ See Art. 3(2) DPCM 26 April 2020.

⁷² A concise outline of Phase 2 measures in English can be found online on the website of the Ministry of Health at https://www.salute.gov.it/portale/nuovocoronavirus/dettaglioFaqNuovo Coronavirus.jsp?lingua=english&id=230.

⁷³ See Decree-Law 19 May 2020, No. 34.

⁷⁴ See Art. 1(6)–(10), Decree-Law 16 May 2020, No. 33; Art. 1 DPCM 17 May.

located and, dating from June 3, allow travels to and from abroad as well as interregional travels which thus may be limited only by measures taken in accordance with the principles of adequacy and proportionality to the actual epidemiological risk present in those areas and in the view of EU and international obligations. Accordingly, regions and local authorities are empowered to adopt guidelines and protocols or set a different timing for the relaxation of restrictions in view of the particular epidemiological conditions and trends of their territories.

2.2.3 In the Labyrinth of Minos: The Italian Emergency-Based Legislation and Constitutional Disorder

Even at a superficial scrutiny, the incremental body of 'urgent measures on containment and management of the epidemiological emergency from COVID-19' foreground a common denominator: in the majority of cases such measures have been implemented in the form of decrees of the President of the Council of Ministers.

In particular, by prohibiting the movement of persons across the national territory and banning any form of human aggregation, the sequence of DPCM – especially in Phase 1 – patently curbed some basic freedoms which are the cornerstones of the Italian Bill of Rights and namely: personal liberty (art. 13), the right to travel freely in any part of the country (art. 16), the freedom of assembly (art. 17), the freedom of religious beliefs (art. 18); freedom of speech and expression (art. 21).⁷⁵ Furthermore, the wide powers granted to Regional Governors to master the pandemic created possible conflicts between central and local governments as to the interpretation and implementation of emergency provisions. These specific aspects have raised doubts amongst some commentators as to the legitimacy and opportunity of such decrees to such an extent that they impel a radical questioning of the boundaries of the Executive power in times of emergency.⁷⁶

To begin with, the massive use of sub-primary legislation to enact severe limitations upon constitutionally recognized civil liberties and personal freedoms represents an almost unprecedented anomaly in the history of Republican Italy. Indeed, in the aftermath of World War II, the Italian Constitution framers showed the clear intention to prevent the recurrence of the despicable rights violations experienced during Fascism. In formal respect to the Constitution (the Albertine Statute),

⁷⁵ See Vittoria Barsotti, Paolo G. Carrozza, Marta Cartabia & Andrea Simoncini, Italian Constitutional Justice in Global Context 95 ff. (2016).

⁷⁶ See Sabino Cassese, *La Pandemia non è una guerra. I pieni poteri al Governo non sono legittimi*, Il Dubbio (April 24, 2020).

⁷⁷ For a general introduction, see Giuliano Amato, *The Constitution*, *in* The Oxford Handbook of Italian Politics 71–81 (Erik Jones & Gianfranco Pasquino eds., 2015).

Fascism deployed the rhetorical guise of constitutional reforms to put individual freedom at the mercy of the Executive. 78 In view of these considerations, the Italian Constituent Fathers decided to shield civil liberties with a statutory reserve. In particular, according to this rule of law shield, the Italian Constitution allows exceptional restrictions on liberties for health and safety or security reasons in more than one provision (e. g., in art. 14 and 16 Const.) but it specifies the authority empowered to do so, the kind of limits that can be attached to liberties, and it requires those restrictions be established in the forms and manners provided by the law.

Judged on this standard, the current wide use of DPCM has inaugurated a "new constitutional era" whose penumbras obfuscate its lights. 79 DPCM are neither law nor do they belong to the acts having the force of law (Legislative Decrees and Decree-Laws). They are just secondary sources and, as such, given their lower hierarchical level, they are not supposed to repeal, conflict with, nor derogate from the Constitution and primary legislation. The doubts as to the opportunity to massively resort to such sources grow deeper if we consider that DPCM are not subject to the preemptive constitutional control of the President of the Republic. Indeed, DPCM need not to be signed by the President of the Republic who, instead, in its capacity of guarantor of the Italian Constitution, is called upon to sign laws (and acts having the force of law) for their promulgation, and can refuse to sign a bill into law if she deems that it violates the Constitution.

It is true that all DPCM are presented – even in titles – as mere technical means to implement the Decree-Laws which are pieces of primary legislation. This formalistic answer, however, neglects the fact that, at the operational level, DPCM are the sources of law to which the adoption of the containment measures is delegated.80

From a different perspective, one could critically notice that the vague description of the powers to adopt containment measures via DPCM originally

⁷⁸ See Antonio Padoa Schioppa, A History of Law in Europe. From the Early Middle Ages to the Twentieth Century 626 ff. (2017). It is worth noting that in the preliminary works of the Italian Constitution, a proposal was made to introduce a provision overtly banning the possibility to declare a state of siege and adopt measures aimed at suspending constitutional guarantees, but the proposal was later abandoned and not included in the final version. See on the point, Sergio Bova, L'elaborazione della Carta Costituzionale nel Comitato di Redazione, in La Fondazione della Repubblica. Dalla Costituzione Provvisoria all'Assemblea Costituente 305, at 329 ff. (Enzo Cheli ed., 1979).

⁷⁹ Chiara Tripodina, La costituzione al tempo del coronavirus, Costituzionalismo.it 78 (2020). See also Ilaria Massa Pinto, La Tremendissima Lezione Del Covid-19 (Anche) Ai Giuristi. Fiat Iustitia et Pereat Mundus Oppure Fiat Iustitia ne Pereat Mundus?, Questione Giustizia (March 18, 2020); Umberto Ronga, Il Governo nell'Emergenza (Permanente). Sistema Delle Fonti e Modello Legislativo a Partire dal Caso COVID-19, Nomos 1 (2020).

⁸⁰ See supra.

bestowed upon the Prime Minister by art. 3(1) Decree-Law 6/2020 and art. 2(1) Decree Law 19/2020⁸¹ somewhat recalls what an English common lawyer would call an "Henry VIII clause", that is to say a clause enabling ministers to directly act avoiding close parliamentary scrutiny. This aspect entails a clear marginalization of Parliament and of the Judiciary. 82 Notably, Law no. 35 of 22 May 2020, in converting the DL 19/2020, inserted an amendment which explicitly provides that the Prime Minister has to introduce the contents of its emergency decrees taken under DL 19/2020 to the Parliament in advance to their adoption in order to hear their recommendations or, if it is not possible, to report to the Parliament on the said measures every fortnight. This clause, besides introducing a new form in the communications between the Branches of Government whose legal implications should be deepened, voices the need of the Parliament to be more involved in the emergency. 83 Moreover, it is worth noticing that the Decree-law powers to adopt containment measures are not vested in the whole Executive Branch as a political body, but in the person of the Prime Minister. It is an anomaly given that Italy has a parliamentary system and not a presidential one. It follows that the Prime Minister, in such form of government, is a primus inter pares in the Council of Ministers, where the Executive power (accountable to the Parliament) rests.

Nor can it be argued that the provisions contained in the emergency DPCM are merely technical recommendations or organizational measures lacking a direct binding and coercive force. Not only did the exceptional extension of the restrictive measures to the national territory originally occur via the DPCM: additionally, failure to comply with the containment measures set out in the Decree Law 6/2020, before being decriminalized by the subsequent Decree Law 19/2020, ⁸⁴ was punished under art. 650 of the Italian Criminal Code entailing both a reclusive and an administrative sanction. ⁸⁵ And even the more recent Decree Law 33/2020 provides that the violation of quarantine measures by a person who has tested positive to COVID-19 shall entail criminal sanctions for

⁸¹ For major details, *see supra* the description of the measures adopted in Phase 1.

⁸² Notably, waiting for the implementation of technological tools allowing a broader use of e-trials, Art. 82 Decree-Law 17 March 2020, No. 18 and art. 36 Decree-Law 8 April 2020, n. 23 temporarily suspended court activities until May 11.

⁸³ See Art. 2(1) Law 22 May 2020, no. 35.

⁸⁴ Art. 4(1) Decree-Law 25 March 2020, No. 19 replaces criminal sanctions with administrative sanction (a fine ranging from 400 up to 4,000 Euros and closure orders for up to 30 days in case of businesses and firms found in breach of the said measures) which are applied retroactively to the minimum extent to the misconducts committed before the Decree came into force (Art. 4(8)).

⁸⁵ See Art. 4(2) DPCM 8 March 2020.

the offender. 86 Because of the importance of constitutional guarantees in criminal matters, some commentators raised doubts over the formal legitimacy of the legal ban on the movement from their residence of persons tested positive to the virus as it is contained and formulated in the Decree Laws.⁸⁷ This is for such obligation does not just limit freedom of movement but curtails personal liberty which is safeguarded under art. 13(2) of the Italian Constitution by a twofold constitutional guarantee prescribing that any restriction thereof must be determined in detail by the law (statutory reserve) and be ordered by a reasoned judicial order (judiciary reserve).⁸⁸

Finally, it is worth reminding that Government representatives at the local level (so-called *Prefetti*) are under legal duty to monitor the implementation of the measures established by the DPCM with the possible use of police forces. In strict compliance with such obligations, law enforcement authorities established checkpoints at airports, train stations and highways to eventually collect self-declaration forms. In such forms, persons moving across the national territory, before the relaxation of those restrictions, were obliged to specify, under pain of legal sanctions in case of false declaration, the purpose of their travel, their destination, the fact that they have knowledge of the measures to manage and contain the epidemiological emergency and that they neither are under quarantine nor were they found positive to the virus.

To make a long story short, the legal handling of the matter by the Italian Government would be deemed a legal fiasco if judged according to the standards of liberal constitutionalism. A long time ago, one of the Italian Constituent Fathers claimed that the Constitution "is not a machine that once started can go on by itself [...] To make it move you need to put in fuel every single day, you need to put in your commitment, your spirit, your will to keep these promises, your sense of responsibility". 89 This moment definitely calls for commitment and responsibility, because what emerges from the labyrinth of provisions enacted to counter the coronavirus is a constitutional disorder. As already occurred in the past, 90 the Executive is governing by decree with an increasing frequency thus causing a centralization of power that, while formally retaining the framework of the institutions and the constitutional narrative, visibly twists the constitutional

⁸⁶ See Art. 2(3), Decree-Law 16 May 2020, No. 33 (providing for a prison sentence of 3-to-18-month period and a fine of between 500 and 5,000 euros for transgressors).

⁸⁷ See Gian Luigi Gatta, Emergenza COVID-19 e "Fase 2": Misure Limitative e Sanzioni nel D.L. 16.5. 2020, n. 33 (Nuova Disciplina della Quarantena), Sistema Penale (May 18, 2020).

⁸⁸ On this twofold constitutinal guarantee, see amplius Barsotti, Cartabia, Carrozza & Simoncini, supra note 75, at 107-113.

⁸⁹ Piero Calamandrei, Discorso ai giovani sulla Costituzione [1955], in Lo Stato Siamo Noi 6 (2011).

⁹⁰ See Barsotti, Cartabia, Carrozza & Simoncini, supra note 75, at 168 ff.; Comba, supra note 53 at 49-51; Mary L. Volcansek, Constitutional Politics in Italy. The Constitutional Court 34-51 (1999).

equilibrium between the legislative and the executive bodies. ⁹¹ This contention draws considerable support from the very fact that the above scenario has triggered the reaction of more than 200 eminent legal scholars and professionals who wrote a public collective letter to their fellow jurist, the Prime Minister, in which, albeit acknowledging the seriousness of the pandemic and the necessity of effective actions, they overtly demand a restoration of constitutional guarantees and the respect of the safeguards provided for in the ECHR. ⁹²

A deeper understanding of the current legal landscape is then crucial especially in times of extra-ordinary political law, ⁹³ when political participation is suspended, emergency legislation rises to the "Supreme Law of the Land", and restrictions to fundamental freedoms and civil rights are carried out with a potential subversion of the ordinary legal and constitutional order.

3 The Legal Dimension of the Pandemic between Ordinariness and Extra-Ordinariness

The COVID-19 has rapidly escalated in a worldwide crisis with severe effects in almost every facet of society. Its virulence has been described alternatively as democratic, nonpartisan, or totalitarian in that it spares no effort to infiltrate each aspect of human life at every latitude. From North to South, from east to west of the globe, the coronavirus has literally shaken the world to such an extent that it could be seen as a turning point or, at least, as an opportunity to reflect. ⁹⁴ It has altered economic equilibria (and orientations) causing a recession of historic proportion in the Eurozone ⁹⁵ and in the U.S., and a visible drop in growth even in the seemingly unstoppable Chinese economy, whose GDP is experiencing a contraction for the

⁹¹ On the controversial relation between constitutionalism and political populism, see recently, Italian Populism and Constitutional Law. Strategies, Conflicts and Dilemmas (Giacomo delle Donne, Giuseppe Martinico, Matteo Monti & Fabio Pacini eds., 2020). See also Alessandro Simoni, *Limiting Freedom During the Covid-19 Emergency in Italy: Short Notes on the New "Populist Rule of Law"*, 20 Global Jurist 1 (2020).

⁹² The text of the letter is available online at https://generazionifuture.org/bacheca/lettera_aperta.php.

⁹³ See Schmitt, supra note 5, at 16 ff.

⁹⁴ See Slavoj Žižek, Pandemic! COVID-19 Shakes the World (2020).

⁹⁵ The Economic Forecast Spring 2020 issued by the European Commission projects a record overall contraction in the euro area economy estimated around 7.4 percent in 2020 with a probable rebound and an uncertain recovery in 2021. The document is available online at https://ec.europa.eu/info/sites/info/files/economy-finance/ip125_en.pdf.

first time since 1976.96 What appears to be the most striking aspect of this pandemic, however, is that it has *de facto* and *de jure* suspended ordinary politics, triggered the massive enactment of emergency-based legislation with visible restrictions to civil liberties, and even modified basic human relations by imposing isolation, celebrating technology and virtual space as the most readily available exit strategy to get back to normal, and transforming spaces of social aggregation (streets, squares, markets, courtrooms, Stock Exchanges etc.) into waste lands whereby a previously unheard-of deafening silence resounds. In this respect, from an anthropological point of view the homo pandemicus could be seen as the last stage in the evolution (rectius involution) of homo sapiens towards a far-reaching and worrying technologization of human activities.

This gargantuan subversion of ordinariness has conjured memories of dark times that were deemed to belong to a distant past and, at the same time, originated the need for new narratives capable of voicing and making sense of this tragic experience. 97 In particular, the logic of war and the allure of science have so much captured everyday language to become part of a new common sense which, as we know, is not just a vague sense of reality (right/wrong, necessary/ possible etc.), but rather "the sense that founds community" and reconnects that community to a shared set of meanings. In this cultural transformation, a dogmatic vision of science has become the novel "theory of everything", 99 and wartime metaphors have seized the political vocabulary so that almost ubiquitous is the idea that we are actually fighting a WWIII against an "invisible enemy". 100

⁹⁶ See https://www.reuters.com/article/us-china-economy-poll/china-on-slow-road-to-recovery -but-recession-risk-is-high-reuters-poll-idUSKCN22502B.

⁹⁷ See e. g., Together in a Sudden Strangeness. America's Poets Respond to the Pandemic (Alice Quinn ed., 2020); Fang Fang, Wuhan Diary. Dispatches from a Quarantined City (Michael Berry trans., 2020).

⁹⁸ Hans-Georg Gadamer, Truth and method 19 (Joel Weinsheimer & Donald G. Marshall trans., 2004) (1960).

⁹⁹ *See infra* Section 3.2.

¹⁰⁰ This type of metaphors abounds in several political statements. For instance, U.S. President Trump defined coronavirus as an "invisible enemy" (see Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing available online at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-presidentpence-members-coronavirus-task-force-press-briefing-3/); and so did the French President Emmanuel Macron when he declared: "Nous sommes en guerre, en guerre sanitaire, certes. Nous ne luttons ni contre une armée ni contre une autre nation, mais l'ennemi est là, invisible, insaisissable et qui progresse" (see Gaïdz Minassian, COVID-19, ce que cache la rhétorique guerrière, Le Monde, 8 April 2020). The Chinese President Xi Jinping in February promised to the Chinese population that he would have won the "people's war" against coronavirus.

The use of such metaphorical language should not be minimized for not only do metaphors influence the way we think and make sense of new experiences, but also the way we act. And in this scenario it cannot go unnoticed that the war on coronavirus is rapidly turning into a feud between U.S. and China over world hegemony that is increasingly assuming the likeness of a novel Cold War. On the battlefield of the pandemic, beside calling WHO "China-centric", President Trump sent a letter to the director of WHO in which he chastised China's handling of coronavirus as non-transparent, threatened to make the temporary suspension of United States contributions permanent, and accused the agency of failing to respond to the COVID-19 outbreak. Ohinese government, on the other hand, not only fired back on all American allegations, but through the intervention of President Xi Jinping at the 73rd UN's World Health Assembly pledged to make any coronavirus vaccine a "global public good".

Predictably, besides its obvious geopolitical implications, the echo of this war talk together with the image of COVID-19 as belonging to the domain of the 'exception-al' rather than to the domain of the 'norm-al', could not but deeply affect the physiology of the legal discourse.

Not only does crisis rhetoric justify, but it appears to nearly imply exercises of power that transcend conventional legal restraints. ¹⁰⁵ In fact the theory according to which "the complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions" so that its temporary suspension or alteration in times of crisis can be indispensable for maintaining the democratic order is not a new one. ¹⁰⁶ And, in this very delicate equilibrium between the rule and the exception lies the core of the problem.

¹⁰¹ *See* George Lakeoff & Mark Johnson, Metaphors We Live By (1980); Id., Philosophy in the Flesh. The Embodied Mind and Its Challenge to Western Thought (1999).

¹⁰² In explaining why he did not participate to the WHO virtual meeting convened on May 18, President Trump replied: "I chose not to give a statement. I think they've done a very sad job in the last period of time. And again, the United States pays them \$450 million a year; China pays them \$38 million a year, and they're a puppet of China. They're China-centric, to put it nicer. But they're a puppet of China". The transcripts are available on the White House website at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-roundtable-restaurant-executives-industry-leaders/.

¹⁰³ Donald Trump published the letter on twitter and the text is available at https://twitter.com/realDonaldTrump/status/1262577580718395393.

¹⁰⁴ See https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1777545.shtml.

¹⁰⁵ For a historical overview of the use of emergency powers, see Oren Gross & Fionnuala Ni Aolain, Law in Times of Crisis: Emergency Powers in Theory and Practice (2006).

¹⁰⁶ Clinton L. Rossiter, Constitutional Dictatorship. Crisis Government in the Modern Democracies 5 (1948).

Both modern capitalism and political authoritarianism have always seen opportunity in crises. Capitalist structures proliferate in times of crisis because they open up new frontiers of wealth accumulation and profiteering. ¹⁰⁷ Politicians, on the other hand, recurrently use emergencies as exculpatory avenues to be thrusted into the center of public life and gain political consensus. This is because framing rapid and even unconventional choices in times of emergency belongs to the duties of politics. The attempt to manipulate the momentum and seize extraordinary powers that have little to do with the crisis, however, sadly belongs to the longterm game of electoral politics. And this is even more evident in a global technocratic era whereby the risk that a momentaneous suspension of legal ordinariness produces long-term changes in the permanent structure of government necessarily assumes a supranational character. The easy manufacture of consent of citizens around the propriety of violating rights and the following tendency to reshape the law anew under the legitimizing rhetoric created by a state of exception represents the possible dark side of every emergency.

To exemplify this continuous historical tendency, it is enough to briefly recollect two major episodes, one from the past and one from the present. The former refers to how the Nazis capitalized on the fire of the German Parliament of 1933. Playing on the fears of communism, Hitler supported the rumor that the fire was set by the German Communist Party and that there was a serious threat to German institutions. Having convinced the then President von Hindenburg to use its constitutional emergency powers (art. 48 of the Weimar Constitution) to sign a decree which canceled basic civil liberties of citizens (the Reichstagsbrandverordnung, commonly known as the "Reichstag Fire Decree"), he then used the following state of exception as the legal ground to mute political opponents, and commence his seizure of power (the so-called Machtergreifung) and his road to the building of the Third Reich. 108 The latter relates to the post-9/11 legislation and to the military commissions of Guantanamo Bay that sadly became the symbol of the Bush administration approach to the War on Terror and, at the same time, represented a hideous legal blackhole that turned the U.S. (and other countries) from cribs of the rule of law to human rights outlaws. 109 Indeed, albeit

¹⁰⁷ See Anwar Shaikh, Capitalism. Competition, Conflict, Crises (2016). See also infra amplius Section 3.2.

¹⁰⁸ See Benjamin Carter Hett, Burning the Reichstag: An Investigation into the Third Reich's Enduring Mystery (2014); Michael Head, Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt 42ff. (2015).

¹⁰⁹ See Bruce Ackerman, The Decline and Fall of the American Republic (2013).

no official and real war was ever declared by U.S. Congress, ¹¹⁰ the rhetoric of the war on terror managed, in the name of national security, to dehumanize detainees, ¹¹¹ create double discriminatory legal standards for citizens and aliens, ¹¹² legitimize despicable unremedied violations of human rights, and inaugurate a new era of legal repression and democratic decline that has turned a temporary emergency into a permanent state of exception. ¹¹³

Since, after all, law and legal thought are always stretched between continuity and discontinuity, the legacy of the authoritarian experiences of the past and the alarming ghostly undercover traces of such attitudes in the present should inform and enlighten every analysis of our age. ¹¹⁴

In view of the above considerations, the step from a public health emergency to the possibility of a prolonged state of exception is not that long and remote. Thus, particular attention should be paid to what gets lost in the current transition from legal "ordinariness" to "extra-ordinariness". Emergency can indeed be quite a distortive magnifying glass through which to look at social phenomena. While shedding some light on a specific frame (the present condition), it may project a long shadow on the bigger picture (its future consequences).

3.1 "When Words Lose Their Meaning": The Legal Phenomenology of the Pandemic

In the attempt to convey the sense of bewilderment and disorder brought by the war upon Greek city-states, in his History of Peloponnesian War, Thucydides said that words themselves had lost their ordinary meaning to fit in the dramatic change of events. ¹¹⁵

This evocative expression perfectly captures the chaos provoked by the coronavirus and its implications for the democracy machine in Western capitalist countries. The epidemiological emergency has, indeed, imprinted itself upon the nations' psyche worldwide and the securitarian rhetoric surrounding it is having an unprecedented impact on the political, legal, and ethical vocabulary dominant in

¹¹⁰ See Bruce Ackerman, This is not a War, 113 Yale L. J. 1871 (2004).

¹¹¹ See Judith Butler, Precarious Life. The Powers of Mourning and Violence (2004).

¹¹² *See* David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (2003).

¹¹³ Agamben, supra note 5, at 3.

¹¹⁴ *See e. g.*, Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism Over Europe and its Legal Traditions (Christin Joerges & Navraj Singh Ghaleigh eds., 2003).

¹¹⁵ See James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community 3 et passim (1984).

Western democracies. Let us consider, for instance, social-distancing rules, the suspension of regular elections (as e.g., in Bolivia) and referendums, ¹¹⁶ the closure of the (Supreme) Courts' doors, and even the rescheduling of cases of major public interest (e.g.,: in the U.S. the Supreme Court postponed the case concerning the release of President Trump's financial records), 117 or the delegation of emergency powers to local authorities. These are just few examples of the extent to which the very notions of justice, liberty, separation of powers, together with the other predicaments forming the cornerstones of the Western legal tradition are visibly changing their acknowledged meaning to keep with precautions adopted in response to COVID-19. 118

This process, one could argue, is not new, but rather cyclical in the history of (legal) ideas. Whenever a set of events of huge scale disrupts the canonical state of things in the world – habits, customs, laws, economies – the language deployed up to that moment to make sense of it loses its descriptive power so that a narrative vacuum, and the need for a new vocabulary, surfaces. Legal modernity, for instance, has created its own mythology rooted in the language of reason, science, neutrality, calculability, individualism, and universal rights which charged the law with the symbolic meanings we are more familiar with today. 119 And this new legal consciousness inevitably entailed a clear-cut rupture with the past. The "epic" 120 of the medieval world was, indeed, subverted by the narrative strength of

¹¹⁶ See e.g., the U.K. Coronavirus Act 2020, secs. 59-64 (postponing local, mayoral and police elections due in May 2020 until May 2021).

¹¹⁷ In keeping with public health precautions in response to COVID-19, the U.S. Supreme Court announced, for the first time since the Spanish Influenza of 1918, the postponement of its March and April sittings of oral arguments. The press releases of the Supreme Court upon Coronavirus emergency are available online at https://www.supremecourt.gov/announcements/COVID-19. aspx.

¹¹⁸ On the basic common values of the West, the classic readings remain Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983); and Peter Stein & John Shand, Legal Values in Western Society (1974).

¹¹⁹ On the mythology of legal modernity and its theoretical conceptualization, see e multis Paolo Grossi, Mitologie giuridiche della modernità (2007); Jacques Lenoble & François Ost, Droit, Mythe et Raison: Essai sur la Dérive Mytho-logique de la Rationalité Juridique (1980) part of which is summarized in English in Id., Founding Myths in Legal Rationality, 49 Mod. L. Rev. 530 (1986); David Luban, Legal Modernism (1997). For a clear and concise account of this historical dynamic, see Fritjof Capra & Ugo Mattei, The Ecology of Law: Toward a legal System in Tune with Nature and Community 71ff. (2015).

¹²⁰ For this use of the term "epic", see Robert M. Cover, The Supreme Court, 1982 Term – Forward: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983), explaining that: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live".

Modernity which turned the law both into the emblem of a new legal order where justice was to be governed *sub lege* (rule of law) and not *sub homine* (rule of men), and in the working tool for the construction of a new social order – the capitalist society – whose economic spirit¹²¹ was soon to become the religion of the modern era. Generally speaking, the Western legal tradition – and *mutatis mutandis* the same can be said of other legal traditions informed by the circular dialectic between past and present so born of a revolution and over the centuries has been periodically interrupted and transformed by revolutions. ¹²⁴

So, what is so peculiar and destabilizing in the ongoing legal transformation triggered by the coronavirus pandemic? First and foremost, its own phenomenology in terms of *time* (its immediate chance-enhancing capability), *space* (its global magnitude) and *origin* (its authoritative foundation).

As to the *time* coordinate, what up to 30 January 2020 would have been generally deemed and talked of as illegitimate violations of civil liberties more consonant with totalitarian regimes than with civilized democracies – e. g., national lockdowns, the unrestricted use of drones for domestic surveillance, mass surveillance of mobile phones, or the issuance of government orders imposing severe restrictions on the same constitutional liberties forming the bulwark of almost every declaration of rights at both national and international level¹²⁵ – have been meanwhile legitimized and transformed into a set of "necessary urgent measures" almost over the course of a day.

As to the *space* coordinate, these measures are being enforced worldwide with a good degree of standardization by executive-dominated regimes even in non-executive-driven systems in spite of the normal interplay of political forces. ¹²⁶ And this harmonized response represents quite an anomaly from an historical perspective. The tension between the respect of legal ordinariness and the necessity to bend and suspend it in order to provide an effective response to a crisis is by no means an institutional novelty. Questions and debates around the status of constitutions in times of emergency have, indeed, loomed throughout the legal

¹²¹ See Max Weber, The Protestant Ethic and the Spirit of Capitalism [1905] (Talcott Parsons transl., 1930).

¹²² See Walter Benjamin, Capitalism as Religion [1921], in Walter Benjamin: Selected Writings (1913–1926) 288–91 (Marcus Bullock & Michael W. Jennings eds., 1996).

¹²³ See H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law (4th ed., 2010).

¹²⁴ See Berman, supra note 118, at 1.

¹²⁵ See e multis Art. 2, Declaration of the Rights of Man and of the Citizens (1789); Arts. 18–21, Universal Declaration of Human Rights (1948); Arts. 6–19 Charter of Fundamental Rights of The European Union (2000).

¹²⁶ See e. g., supra, Section 2.

history of countries recurrently under different forms. 127 But different legal systems normally adopt emergency regimes that are deeply rooted in their national history and are in a path-dependency relation with their institutional peculiarities and with the ideal-typical self-perception of their legal tradition.

To illustrate with few examples, the U.S. constitution, besides implying a more active presidential role in addressing emergencies, ¹²⁸ contains a fairly rudimentary emergency regulatory scheme providing that habeas corpus can be suspended in cases of "Rebellion or Invasion". ¹²⁹ Correspondently, in its choice not to exclusively concentrate explicit extraordinary powers in a branch of government, at least at a federal level, the American constitution leaves crisis supervision to the system of checks and balances and, especially, to the "least dangerous branch", 130 that is to the judiciary. The court system is the institution that, since the dawn of the American constitutional tradition, has been called upon to protect citizens' rights and control over the legitimacy of executive actions in view of the fact that the "Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances". 131 The major role played by the courts in social processes is a hallmark of the common law tradition, and after World War II it has been the major trigger of US global legal hegemony¹³². On this reading, the very idea that a decentralized system of Courts, and not primarily some form of bureaucratic, centralized top – down choice – making arrangements (e. g., legislators, administrative agencies etc.) should be entrusted with the function of adapting the law to changing social needs, even under exceptional circumstances, is deeply connected to the texture (and self-perception)¹³³ of the U.S. system and to the common law tradition at

¹²⁷ For a general overview, see Oren Gross, Constitutions and Emergency Regimes, in Comparative Constitutional Law 334 (Tom Ginsburg & Rosalind Dixon eds., 2011); Christian Bjørnskov & Stefan Voigt, The Architecture of Emergency Constitutions, 16 Int.'l J. Const. L. 101 (2018). For an informed and informative comparative analysis of constitutional and statutory emergency provisions in the time of coronavirus, see recently Tom Ginsburg and Mila Versteeg, States of Emergencies (Part I & II), in Harv. L. Rev. Blog, 17–20 April 2020.

¹²⁸ See John Ferejohn & Pasquale Pasquino, The Law of the Exception: A Typology of Emergency Powers, 2 Int'l J. Const. L. 210, 213 ff. (2004).

¹²⁹ See the U.S. Const. Art. 1, sec. 9(2).

¹³⁰ The obvious reference is to Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2nd ed., 1986).

¹³¹ Ex parte Milligan, 71 U.S. 2, 120-21 (1866).

¹³² See Mattei, supra note 26.

¹³³ See e. g., the insightful analysis of Bruce Ackerman, We the People 3. The Civil Rights Revolution (2014) (arguing that the real difference in the civil rights revolution was made by the passage of laws and by the active participation and support of the American polity).

large. On the one hand, it shows the historical faith in the resilient and adaptive character of the common law which always «works itself pure and adapts itself to the needs of a new day». On the other hand, it elucidates the public trust in the common lawyers conceived of as the "oracles" and "official ministers" of its tradition whose work is essential to the furtherance of justice even in the case of errors, because the good in their actions «remains the foundation on which new structures will be built», whereas mistakes «will be rejected and cast off in the laboratory of the years». ¹³⁷

In France, instead, both a statutory law originally enacted during the Algerian crisis¹³⁸ and the constitution explicitly provide for exceptional powers to the President of the Republic in case of an *état d'urgence*, when there is a serious threat to the French nation and institutions. ¹³⁹ It is clear, then, that the French emergency regimes, although later amended to concede a major supervisory role to the *Conseil constitutionnei*¹⁴⁰ and to meet the new challenges posed by terrorist threats to national security, ¹⁴¹ reflect in their original form the historical conditions that were present at birth of the Fifth Republic, the preeminent role of the President who is granted a quasimonarchical leadership, ¹⁴² and the political charisma of General de Gaulle.

An English version of the constitution is available on the website of the French Constitutional Council at https://www.conseilconstitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais_oct2009.pdf.

140 In 2008 a constitutional law (Loi constitutionnelle no 2008-724 du 23 juillet 2008 de modernization des institutions de la Ve République) added a sixth paragraph to Fr. Const. Art. 16 which reads: "After 30 days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, 60 Members of the National Assembly or 60 Senators, so as to decide if the conditions laid down in paragraph one still apply. The Council shall make its decision publicly as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after 60 days of the exercise of emergency powers or at any moment thereafter."

141 See Karine Roudier, Albane Geslin & David-André Camous, L'État d'Urgence (2016); Olivier Duhamel, *Terrorism and Constitutional Amendment in France*, 12 Eur. Const. L. Rev. 1 (2016).

¹³⁴ Lon L. Fuller, The Law in Quest of Itself 140 (1940).

¹³⁵ See John P. Dawson, The Oracles of Law (1968).

¹³⁶ See John Fortescue, De Laudibus Legum Angliae 9 (Andrew Amos ed., 1825).

¹³⁷ Benjamin N. Cardozo, The Nature of Judicial Process 178 (1921).

¹³⁸ See Loi n 55-385 du 3 avril 1955 relative à l'état d'urgence.

¹³⁹ Fr. Const. Art. 16(1) reads: "When the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted he President of the Republic shall take the measures demanded by these circumstances after official consultation with the Prime Minister, the presidents of the Assemblies, and the Constitutional Council".

¹⁴² See Maurice Duverger, La Monarchie Républicaine (1974).

Similarly, in Germany the abuse of emergency powers occurred during the Weimar Republic and the lessons from the horrors of Nazism firstly led to the absence of open emergency clauses in the Bonn Constitution of 1949¹⁴³ and, later, to the incorporation of a detailed regulation of the emergency rule in the modern German Grundgesetz aimed at establishing legal constraints to a prolonged concentration of powers. While providing for an extension of powers allowing the federal government to handle emergencies effectively, the modern German Basic Law is indeed designed not to be too intrusive in the sphere of fundamental rights. 144 By the same token, Spain and other Latin American countries which historically experienced fascism and dictatorships have a detailed constitutional emergency regime contemplating the proclamation and extension of different levels of emergency (e.g., estado de alarma, estado de excepción, estado de sitio). 145

These few examples show that there is a path followed by the different legal systems in reacting to crises that is to a great extent determined by their own culture and history. 146 However, what is peculiar and makes the recent emergencies different from the previous ones is that they are open-ended: they have a beginning but there is no certain end to the exceptional conditions they create. The war on terror, the war on coronavirus etc. are potentially endless not to mention that, from being unusual occurrences, national and international emergencies are becoming quite recurrent in the last decades above all if they are functional to a specific political agenda. 147 This open-endedness together with the globalization process are likely to modify the space and time dimensions of the emergencies. Not only do they confer on the effects of emergencies a broader supranational dimension that necessarily cross geographical and geopolitical boundaries, but are the visible evidence that "the state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics". 148 As a consequence, it is not thoroughly unlikely that, especially in the total absence of oppositional discourses and active intellectual critiques, this new phenomenology of emergencies may divert

¹⁴³ See Carl C. Schweitzer, Emergency Powers in the Federal Republic of Germany, 22 W. Pol. Q. 112 (1969).

¹⁴⁴ See Christian Bumke & Andreas Voßkuhle, German Constitutional Law: Introduction, Cases, and Principles 14ff. (2019).

¹⁴⁵ See Gross, supra note 127, at 336 ff.

¹⁴⁶ See Mattei, supra note 6.

¹⁴⁷ See recently Robert L. Tsai, Manufactured Emergencies, 129 Yale L. J. F. 590 (2020).

¹⁴⁸ Agamben, *supra* note 5, at 3.

legal systems from their traditional path and have the exception replace the norm and the extra-ordinariness become the physiological condition of government.¹⁴⁹

Ultimately, as to the *origin* of the semantic revolution produced by COVID-19 and its ramifications in political and legal discourses, it is allegedly to be found in a declaration by the World Health Organization (WHO). Albeit a specialized agency of the United Nations, the WHO is a scientific body which, therefore, strictly speaking, cannot be held politically accountable. Still, it is acting as a *de facto* global sovereign – a real *dominus mundi* capable of altering the constitutive elements of our political imagination and suspending legal ordinariness. ¹⁵⁰ It is thus evident that we are currently living in a global state of exception that, were it not for its catastrophic effects in real life, would perfectly fit the dystopic literary worlds portrayed by Aldous Huxley, ¹⁵¹ George Orwell, ¹⁵², or Aleksandr Bogdanov ¹⁵³ in their masterpieces.

Notwithstanding the unconventional scenario outlined above, however, the origin of the actual state of exception has been, to some extent, 'normalized' in the public discourse. A self-assured chorus of media, politics, and even an influential part of the intelligentsia seems to have elected, with a unanimous voice, scientific committees as last instance courts having final jurisdiction over the legitimacy of the regulatory framework to be enacted to master the emergency.

This phenomenon is blatantly evident in the fideism shown towards the policies suggested by the different Expert Boards and Scientific Advisory Groups nominated by national governments to lead their responses to COVID-19. Just to

¹⁴⁹ Some legal changes are visible for instance in France whereby, beside activating the emergency clauses contained in the constitution, an ad-hoc statute (Law March 23, 2020, No. 2020-290) was enacted. It introduced a new emergency regime called 'state of health emergency' (*état d'urgence sanitaire*) according to which the Prime Minister can exceptionally limit some rights and liberties (*e. g.*, freedom of movement, requisition of goods) by decree to address the emergency. Commentators noticed that this new *état d'urgence sanitaire* presents anomalies if compared to the other emergency regimes. Notably, it entails a less incisive parliamentary involvement in the management of the emergency for only extensions of the state of health emergencies exceeding one month must be authorized by the Parliament as opposed to the Law No. 55-385 of 3 April 1955 which provides that state of emergency can only last for 12 days after which it is necessary for the Parliament to pass a law. *See* Sébastien Platon, *From One State of Emergency to Another – Emergency Powers in France*, Verfassungblog on Constitutional Matters (April 9, 2020), available online at https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/.

¹⁵⁰ See Pier Giuseppe Monateri, Dominus Mundi: Political Sublime and the World Order (2018).

¹⁵¹ Aldous Huxley, Brave New World (1932).

¹⁵² George Orwell, Nineteen Eighty-Four (1949).

¹⁵³ Aleksandr A. Bogdanov, Red Star: The First Bolshevik Utopia [1908] (Loren R. Graham & Richard Stites eds., 1984).

mention few examples, China and Italy have resorted to Special Commissioners; 154 in the U.S., Trump administration's response to COVID-19 has long relied on the advice of an ad-hoc task force lead by the infectious disease specialist Anthony Fauci; in the U.K., the SAGE (Scientific Advisory Groups for Emergencies) is the organism made "responsible for ensuring that timely and coordinated scientific advice is made available to decision makers". 155

Serious questioning of whether the exceptional measures adopted to deal with the crisis may entail a dangerous departure from ordinary legality has been eluded either by framing emergencies in Schmittean terms as exceptional events falling outside the constitutional order, ¹⁵⁶ or by simply treating the leading role of science in the political management of the epidemic as natural and unproblematic. As a result, the dominant scientific paradigm and its technological transmission to society is taking more and more the looming semblance of a pensée unique. Contrariwise, the very fact that a WHO statement can raise to the foundational event of a global state of emergency with major normative and political consequences strongly demands an "hermeneutic of suspicion" ¹⁵⁷ – i.e., the same culture of doubt which should characterize any intellectual analysis. Not only does the peculiar legal phenomenology of this crisis unsettle settled certainties about the praised tradition of the rule of law: it should also advocate a more general and far-reaching reconsideration of role of law in society together with a critical rethinking of the hold of the liberal constitutional model and the obsolescence of traditional legal taxonomies.

3.2 Law, Science, and Technology in the Prism of Emergency ... and Beyond

The intimate relationship between law and society and the major role of legal institutions in the maintenance and modeling of social order represent a file rouge in Western political and legal thought.

Law has long been conceived as a social institution regulating human actions and mechanisms. This vision pervades natural law theory's claims for universal rights whose validity was said to cross geographic boundaries and even transcend

¹⁵⁴ See supra Section 2.1 and 2.2.

¹⁵⁵ On the role of SAGE in U.K. response to COVID-19 see https://www.gov.uk/government/ groups/scientific-advisory-group-for-emergencies-sage-coronavirus-covid-19-response.

¹⁵⁶ On the idea that emergencies entail an extra-constitutional suspension of legality, see e. g., Mark Tushnet, Emergencies and the Idea of Constitutionalism, in The Constitution in Wartime Beyond Alarmism and Complacency 39-54 (Id. ed., 2005).

¹⁵⁷ See Paul Ricoeur, Freud and Philosophy: An essay on Interpretation (Denis Savage trans., 1970).

the very existence of God; 158 the origins of modern political thought whereby to the legal regulation of social antagonism was acknowledged the thaumaturgical virtue of saving mankind from the savage and chaotic state of nature; 159 legal positivism that, with a polyphony of different voices, exalted the ordering power of law and its commands¹⁶⁰ through its purity¹⁶¹ and disentanglement from the spheres of morals and politics; 162 sociological movements 163 and the most recent and sophisticated theories unveiling the interdependence between the legal and the socio-cultural dimensions. 164 Thus, it is almost commonplace to characterize the Western social context in terms of a law-dependent and even of a law-saturated society whereby: (i) law is relied upon as an instrument of social change and organization; 165 (ii) the conflict between individual rights and community has been traditionally mediated through the use of litigation; ¹⁶⁶ and, consequently, (iii) the legal dimension is conceived as superior to and independent from politics and traditional beliefs¹⁶⁷ with a correspondent progressive "juridification" of social spheres which were previously under the realm of other forms of social control.168

¹⁵⁸ Hugo Grotius, De Jure Belli ac Pacis [1649] (F. W. Kesley trans., 1925) (famously arguing, in the *Prolegomena*, for the universal validity of law "even if we were to suppose [...] that God does not exist or is not concerned with human affairs"). See *amplius* Patrick Riley, *The Philosophers' Philosophy of Law from the Seventeenth Century to Our Days, in* A Treatise of Legal Philosophy and General Jurisprudence, vol. 10, at 11–24 (Enrico Pattaro chief ed., 2009).

¹⁵⁹ *See* Thomas Hobbes, Leviathan [1651] (J.C.A. Gaskin ed., 1996). See also John Locke, Two Treatises of Government and A Letter Concerning Toleration 160 (Shapiro ed., 2003) ("men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature").

¹⁶⁰ John Austin, The Province of Jurisprudence Determined [1832] (Wilfrid E. Rumble ed., 1995).

¹⁶¹ See Hans Kelsen, Pure Theory of Law (Max Knight trans., 1967).

¹⁶² See Herbert L.A. Hart, The Concept of Law (1961).

¹⁶³ See generally Alan Hunt, The Sociological Movement in Law (1978).

¹⁶⁴ *See* Roger Cotterrell, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory (2006); Id., *Comparative Law and Legal Culture*, *in* The Oxford Handbook of Comparative Law 710 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed., 2019).

¹⁶⁵ See Max Weber on Law in Economy and Society (Max Rheinstein ed., 1954).

¹⁶⁶ *See* Jethro K. Lieberman, The Litigious Society (1981); Jerold S. Auerbach, Justice Without Law: Resolving Disputes without Lawyers (1984). *Contra*, on how the allegedly litigious character of Western societies – with specific reference to the American society and tort law claims – would be a fabricated myth, see recently, David M. Engel, The Myth of the Litigious Society: Why We Don't Sue (2016).

¹⁶⁷ See Mattei, supra note 17.

¹⁶⁸ See Juridification of Social Spheres (Gunther Teubner ed., 1987).

According to the foregoing dominant vision, then, at least in principle, emergencies should represent the perfect test to show commitment to the rule of law. During emergencies the external signs of sovereign power become more visible and tangible. The levers of political power shift in the hands of the executive, dissent is curtailed in the name of a superior good (e.g., national security, public health etc.) and so the hiatus between the democratic legitimacy of political solutions and their legality tends to get wider. Therefore, as much as law is generally conceived in a Lockean sense as the elected institutional mechanism to protect individual rights even at the expense of community, it should all the more work as the last shield for basic civil liberties against institutional violence in times of emergency.

And yet, the draconian measures adopted by Western governments in response to COVID-19 seem to be astoundingly distant from the formal ideals of liberal democracies. 169 In the name of science, those values and liberties which in the dominant western narrative about law made "liberal constitutionalism [...] synonymous with constitutionalism itself" have been suspended and replaced by liberticide rules and surveillance mechanisms which the same narrative traditionally attaches to China and to the illiberal despotic East at large. Thus, in the face of a new critical event of historical proportions like a pandemic, the same foundations of the rule of law seem to be shaking together with the categories we inherited from liberal legalism which is now increasingly appearing as a clay-foot giant. 171 Furthermore, from the geopolitical perspective, the same "East" that the "West", in its capitalist expansion, has often characterized as legally uncivilized and, therefore, open to – and in need for – legal colonialism¹⁷² is now the model (conscious or unconscious) in the management of the pandemic with an east-towest inversion of path in the battle for global hegemony whose long-term effects are still difficult to foresee.

If we manage to observe the pandemic outside of a self-congratulatory mood triumphally equating the history of the rule of law with the history of the West, ¹⁷³ what we see is not a mutually beneficial dialectic between science and

¹⁶⁹ See Duncan Kennedy, Authoritarian Constitutionalism in Liberal Democracies, in Authoritarian Constitutionalism 161 ff. (Helena Alviar García & Günter Frankenberg eds., 2019).

¹⁷⁰ Li-Ann Thio, Constitutionalism in Illiberal Polities, in The Oxford Handbook of Comparative Constitutional Law 133, 134 (Michael Rosenfeld & András Sajò eds., 2012).

¹⁷¹ For a critique of liberal legalism, see Duncan Kennedy, A Critique of Adjudication (fin de siècle) (1998).

¹⁷² For a clever critical reconstruction see Kroncke, supra note 14; Id., Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism, 38 Brook. J. Int'l Law 1 (2012). 173 See e. g., Tom Bingham, The Rule of Law (2010). For a brilliant critical analysis see Bussani, supra note 10.

law whereby the latter has a role in presiding over social processes but, rather, a monologue of science. The law is muted. It plays no role other than to translate the exceptional measures into norms without an ex ante critical scrutiny. So, in addition to a change in power relations, this emergency brings in plain sight also a cultural transformation of legal knowledge which is progressively losing the remnants of its critical bite. *Legal* words are progressively losing their original meaning and fire, while the *scientific* discourse in its technological guise has regained such momentum to almost cannibalize other forms of knowledge.

If one looks through the recent history of legal thought, it is not unprecedented that the encounter between law and other intellectual enterprises turns into a oneway speech in which extra-legal disciplines adopt a nothing-to-learn attitude. For instance, it is what happened with Economic Analysis of Law (EAL). Albeit no other movement has ever enjoyed a comparable degree of success inside and outside legal academia, EAL has not resulted in a genuine back-and-forth dialog between the two fields aimed at crossing disciplinary boundaries. On the contrary, it represents a "top-down analysis of the legal world" whereby economics imposes its narrative upon the law and legality is often reduced to efficiency with little or no room for justice. ¹⁷⁵ On closer inspection, a likewise dynamic is being reproduced in the current emergency. Science is colonizing legal thinking and disregarding what law(yers) and politics can do or say about the democratic management of the pandemic. This is one of the poisonous fruits of the suspension of politics. When science replaces politics, it gives way to biopolitics which entails a totalitarian endeavor to subject the entire life of citizens to specific control producing technological solutions that, in the official narrative, are presented as the *only* solutions that can reduce the exception to the norm and therefore, with closer reference to the current pandemic, bring citizens back to their ordinary life. ¹⁷⁶

The state of exception following COVID-19 crisis has thus revived, in a more radical and visible fashion, an approach to knowledge which locates scientific truth at the center of political discourse in a way that closely resembles the methodological monism and the acritical belief in the neutrality and objectivity of

¹⁷⁴ Guido Calabresi, The Future of Law and Economics. Essays in Reform and Recollection 7 (2016) (arguing in favor of a methodological difference between the approach known as Economic Analysis of Law and Law and Economics. The latter – which he rightly claims to be his own approach – entails a genuine dialog between law and economics whereby each discipline is used to suggest change and developments in the other).

¹⁷⁵ For a critical approach, see Calabresi, *supra* note 174; Ugo Mattei, Comparative Law and Economics (1998).

¹⁷⁶ *See* Michael Foucault, The Birth of Biopolitics. Lectures at the *Collège De France* 1978–79 (Graham Burchell trans., 2008).

science which were typical of the modern thought. 177 In this perspective, it is of little importance that contemporary epistemology has extensively proved that scientific paradigms do not represent objective truths, 178 but rather scientists' agreement on hypotheses that, precisely because of their scientific character, are provisional and falsifiable. ¹⁷⁹ The only thing that matters is the conformity of legal measures with scientific canons. And since only science is vested with the right of audience and the authority to speak, those measures should be *followed* – exactly as medical instructions – rather than questioned or resisted. Accordingly, it is true that, for instance, air surveillance or tracking applications are violating the right to privacy and personal freedom of billions of people. Nevertheless, in the rhetoric of the emergency, rights violations are downgraded to negligible collateral damages. As a consequence, in this transformative process, law abdicates its sapiential role to become a mere bureaucratic tool of enforcement whose function is not to produce solutions to social problems, but to enact the technical knowledge developed in other intellectual fields.

What surfaces from the above scenario is, then, a clear decline of law as an instrument of social organization, and its replacement by other discursive practices (and professionals). Notably, the far-sightedness that Jhering used to locate in law for its ability to mediate conflicts and serve the social interest¹⁸⁰ is now allegedly referred to the predictive models elaborated by science and technology. Prediction has suffused and even replaced policing, automated decision-making processes promise to decrease the margins of error and biases associated with human judges, smart contracts to reduce transaction costs and enforce the performance of private negotiations without the costly assistance of lawyers, 181 algorithms to counter terrorism and crime in a more efficient and effective way. 182 Therefore, from this perspective, not only are artificial intelligence, algorithmic analysis, machine learning, said to offer technical efficient solutions to the social problems that were formerly under the domain law but, more generally, to all the

¹⁷⁷ See e. g., Jean-Francois Lyotard, The Postmodern Condition (1979); Charles Taylor, The Malaise of Modernity (1991); David Harvey, The Condition of Postmodernity (1990).

¹⁷⁸ See Thomas S. Kuhn, The Structure of Scientific Revolution (1962).

¹⁷⁹ See Karl Popper, The Logic of Scientific Discovery (1959).

¹⁸⁰ Rudolf von Jhering, Law as a Means to and End 283 (Isaac Husik trans., 1913) (arguing that "law is the intelligent policy of power; not the short-sighted policy of the moment, and momentary interest, but the far-sighted policy which looks into the future and weighs the end").

¹⁸¹ See Regulating Blockchain: Techno-Social and Legal Challenges (Ioannis Lianos, Philipp Hacker, Stefan Eich & Georgios Dimitropoulos, eds., 2019); The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms (Larry A. Di Matteo, Michel Cannarsa & Cristina Poncibò eds., 2019).

¹⁸² See Andrew G. Ferguson, The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement (2017).

problems of society.¹⁸³ So, *de facto*, this narrative turns technology into an allencompassing theory of reality as if it were the only prism through which to look at and understand human society in the digital age.¹⁸⁴

It goes without saying that this paradigm shift is not the product of the pandemic. COVID-19 has just brought it in plain sight and accelerated an already ongoing process of marginalization of the legal discourse which is to be read in the broader context of the recent technological transformations occurring on the frontiers of global capitalism.

The nexus between law and capitalism is so stringent that all legal modernity could be reinterpreted as a theoretical framework for capitalist reproduction. 185 This relation is perfectly visible in the liberal conception of property which is the dominant mode of thinking around property in modern Western societies and reflects their atomistic socio-legal structure: a long-lasting powerful narrative in which individuals do not matter as members of a larger community but as individuals and owners 186 and in which property and liberty are made synonyms (the more you own the more you are free and independent from society)¹⁸⁷ so that any limitation of property becomes a dangerous limitation of liberty. 188 In turn, this narrative has extensively contributed to shape the modern legal and political imagination in the West and beyond and to create a market society: a social context in which everything can be commodified, 189 where market values are free to infiltrate every aspect of life, where social relations are reduced to economic transactions, and where property becomes "the guardian of every other right" 190 that must be protected at any cost even disregarding social inequality. As such, the legal idea of property as the "sole and despotic dominion which one man claims and exercises over external things of the world in total exclusion of the right of any other individual in the universe" developed as an individualistic extractive

¹⁸³ Evgeny Morozov, To Save Everything, Click Here: Technology, Solutionism, and the Urge to Fix Problems that Don't Exist (2013).

¹⁸⁴ See Jaron Lanier, Who Owns the Future (2013); Id., Dawn of the New Everything (2017).

¹⁸⁵ *See* John. H. Commons, Legal Foundations of Capitalism (1934); Ellen Meikesins Wood, The Origin of Capitalism: A Longer View (2002).

¹⁸⁶ *See* Crawford B. Macpherson, The Political Theory of possessive individualism: Hobbes to Locke (1962).

 $[\]textbf{187} \ \textit{See} \ \textbf{Ellen} \ \textit{Meikesins} \ \textit{Wood}, \ \textit{Liberty} \ \textit{and} \ \textit{Property}. \ \textit{A} \ \textit{Social} \ \textit{History} \ \textit{of} \ \textit{Western} \ \textit{Political} \ \textit{Thought} \ \textit{from the Renaissance to} \ \textit{Enlightenment} \ (2012).$

¹⁸⁸ A clear example of this rhetoric can be found in Friedrich von Hayek, The Road to Serfdom (1944).

¹⁸⁹ See Margaret Radin, Contested Commodities (1996).

¹⁹⁰ James Ely, The Guardian of Every Other Right. A Constitutional History of Property Rights (2008).

¹⁹¹ William Blackstone, Commentaries on the Laws of England, vol. II, 1 (1765).

mechanism that could not but favor the accumulation of capital in private hands with a relentless commercial assault on public and common resources at the expense of nature, community and the have-nots. 192 One clear evidence of this dynamic, is the law supporting the creation of the "Anthropocene": 193 that is the current geological epoch witnessing an anthropocentric relationship with the natural world that, instead of fostering an ecological balance, places mankind in a positional superiority vis-à-vis the environment, justifies the devastating plunder of natural resources in the name of private profit at the point of causing the death of original nature¹⁹⁴ and its replacing with a fake "second nature" reshaped by human activity. 195 Overall, this process has produced a huge change in the balance of political power with a correspondent progressive shift of sovereignty from the public sphere (the Westphalian Nation States) to the private one and a transformation of the Smithian concept of the "invisible hand" into the visible fist of transnational corporations that exercise an almost unrivaled dominion over the economic and legal sectors. 196

The technological and technocratic turn emerging from the pandemic are nothing but the litmus test of this constantly evolving unbalanced relation between law and global capitalism.

As magisterially highlighted by Rosa Luxemburg, modern capitalism always necessitates to venture in new terrains in search for valuable assets and raw materials. 197 And the new Eldorado of this late phase of the capitalist system, which is correctly termed "surveillance capitalism" or "informational capitalism", ¹⁹⁹ is the domain of information and big data. On the one hand, this new economic order is continuous with the history of market capitalism because, as much as market capitalism, it extracts resources which are out of the market and commodify them. On the other hand, however, surveillance capitalism departs from traditional market capitalism, its claims

¹⁹² See Capra & Mattei, supra note 119; David Bollier, Silent Theft. The Private Plunder of Our Common Wealth (2003); Emanuele Ariano, Ius Includendi. Note su Natura e Beni Comuni in America Latina: Il caso dell'Ecuador, in Beni Comuni 2.0. Contro-Egemonia e Nuove Istituzioni 59-70 (Alessandra Quarta & Michele Spanò eds., 2016).

¹⁹³ See Paul J. Crutzen, Geology of Mankind, 415(3) Nature 23 (2002).

¹⁹⁴ See Carolyn Merchant, The Death of Nature. Women, Ecology and the Scientific Revolution (1980).

¹⁹⁵ See David Harvey, The Enigma of Capital and the Crises of Capitalism 184 ff. (2010).

¹⁹⁶ See recently Adam Winkler, We the Corporations. How American Businesses Won Their Civil Rights (2018).

¹⁹⁷ Rosa Luxemburg, The Accumulation of Capital [1913] 348 ff. (Agnes Schwarzschild trans., 2003).

¹⁹⁸ See Zuboff, supra note 11.

¹⁹⁹ See Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism (2019).

be more radical and its power more totalitarian. Surveillance capitalism claims all human experience (behavioral habits, political preferences, sexual orientations etc.) for the market dynamic, dehumanizes it, takes it as raw material from which to extract information and, with the help of computational data-processing technology, transforms this inexhaustible source of common resources into privatized predictive models of what the population will do or think to be sold and purchased on the market.

To say that this new world economic order is the mere product of the commercial imagination and economic greed of big-tech companies like Google, Apple or Facebook would be simplistic and misleading. It is more convincing to explain this process in terms of a complex interplay of economic and political forces. In particular, this new logic is made possible by the connivance between the private and the public interests occurring at the expense of the community. The former develops the surveillance technology to predict and influence consumers' choices and orientations in all fields of human experience for commercial purposes, as a new strategy for extraction and accumulation of capital. The latter, especially with the embrace by political liberalism of global *neo*liberal economy, endows this technology with a badge of legal validity and create political consent around it in the name of a superior good either by coaxing or scaring the polity (be it the war on terrorism, the war on coronavirus, or another rhetoric grounded in the securitarian ideology). 200 The revolving doors between the public and the private sphere is a recurrent pattern which ends up favoring the economic interests of strong market actors, and impoverishing the citizenship and the citizens themselves which (technological) consumerism is reducing more and more to one-dimensional men²⁰¹ as if they mattered only as consumers or *net*izens (citizens of the web).²⁰²

This pattern even surfaces in some of the behavioral changes induced by COVID-19. On the one hand both Microsoft and Apple introduced the "Exposure Notification API" in their software updates to support COVID-19 contact tracing apps developed by public authorities so that it is downloaded automatically in people's smartphones with the alleged goal of helping to "combat the virus and save lives". ²⁰³ On the other hand, governments invited and obliged citizens to "stay at home" and abide by social distancing rules to save their lives and the lives of their fellow citizens. This narrative calls upon an ethics of responsibility which justifies the curtailment of rights (notably

²⁰⁰ *See* the insightful analysis of Ugo Mattei & Alessandra Quarta, The Turning Point. Ecology, Technology and the Commons (2018).

²⁰¹ *See* Herbert Marcuse, One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society (1964).

²⁰² On the origin of the term, see Michael Hauben & Ronda Hauben, Netizens: On the History and Impact of Usenet and the Internet (1997).

²⁰³ *See* "Google and Apple partner on COVID-19 Exposure Notifications API" at https://www.google.com/covid19/exposurenotifications/.

the right to privacy) and civil liberties in the name of public health but, on the other hand, uncritically celebrates the thaumaturgical virtues of technology as a lifesaver that enables citizens to live their lives and keep on with business as usual (smart working, smart teaching etc.) with huge profits for technology holders. The less visible result of this public-private partnership in what is becoming a surveillance society is that big corporations benefit both from the unprecedented increase in the *private* use of technology (e.g., Microsoft reported a 200% increase in meeting minutes²⁰⁴ and so did Zoom) and from the *public* stimulus bills passed by national governments.²⁰⁵

The perverted effects of this process are manifest both in the political and in the legal sectors.

As to the political dimension, these technological transformations concentrate political power in the hands of big-tech companies which, in the "value polytheism"²⁰⁶ following the death of God and of modern State and the upgrade of humans into gods capable of a creating a totally artificial life, ²⁰⁷ are thus turned into new global Leviathans. In turn, this concentration of power in private hands undermines the "human condition" by diminishing human agency and the political freedom of citizens who get deprived of their free choice-making capacity and turned into will-taker commodities whose political and social preferences can be freely profiled, extracted, and even hetero-directed as it sadly emerged from the Cambridge Analytica scandal.²⁰⁹ As to the legal dimension, almost implicit in surveillance capitalism is the progressive outsourcing of the public regulatory and policy functions to non-political actors (e. g., digital platforms) who are thus bestowed with an almost global influence over law-making processes. Not only are these transformations irreversibly modifying the conception of sovereignty, but

²⁰⁴ See https://www.microsoft.com/en-us/microsoft-365/blog/2020/04/09/remote-work-trendreport-meetings/.

²⁰⁵ See the economic scenario depicted by Matt Stoller, The Coronavirus Relief Bill Could Turn into a Corporate Coup if We Aren't Careful, The Guardian (March 22, 2020); Christopher Mims, Not Even a Pandemic Can Slow Down the Biggest Tech Giants, The N.Y. Times (May 23, 2020).

²⁰⁶ For the concept of value polytheism, see Max Weber, The Vocation Lectures (David Owen & Tracy B. Strong eds., 2004).

²⁰⁷ See Nicolas Carr, The Shallows. How the Internet is Changing the Way We Think, Read and Remember (2010); Yuval Noah Harari, Homo Deus. A Brief History of Tomorrow (2016). Adam Greenfield, Radical Technologies: The Design of Everyday Life (2018).

²⁰⁸ The obvious reference is Hanna Arendt, The Human Condition (2nd ed., 1998).

²⁰⁹ See Brittany Kaiser, Targeted: The Cambridge Analytica Whistleblower's Inside Story of How Big Data, Trump, and Facebook Broke Democracy and How It Can Happen Again (2019).

they represent the last step in the construction of a disciplinary society founded on technological control as foreshadowed by Michal Foucault.²¹⁰

If legal science does not perform its critical function, it is destined to become a captive of technology which, instead of integrating the legal discourse, simply *dis*-integrates it by: a) molding legal institutions around the needs and the power structures of the information age; and b) downgrading legal reasoning to the normative application of an exogenous, mono-logical way of regulating society. ²¹¹ From this perspective, the legal process would cease to be a socially determined activity and would be reduced to one of the apparatuses deployed by biopolitics and biopower to discipline citizens, surveil them with an invisible eye ²¹² that recalls Bentham's Panopticon, ²¹³ and turn citizenry into a passive aggregate of docile obedient bodies whose free will is annihilated and whose rights can be violated. ²¹⁴

Signs of this social and intellectual serfdom together with the obliviousness of the underlying institutional processes are already at play. For instance, even though what is now conventional wisdom leads us to believe in the neutrality of algorithms for their asserted ability to cut out human bias, it has been demonstrated that search engines are in fact deeply influenced by race, wealth and gender so that they end up reproducing or even reinforcing the social and economic hierarchies based on racial discrimination and income inequality existing in our society.²¹⁵ Upon closer look, even the very structures of property and contract have been deconstructed by technology. As to the former, it is worth noticing that as users of software-enabled devises we do not actually own the smart technology we purchase, since it is in fact owned and controlled by software companies. ²¹⁶ As to the latter, the morphology of contract that has been long been based on the paradigm of consent, is now replaced by *de facto* relationships governing online communities and platforms whereby agreements assume the semblances of terms of use and internauts do not really express consent, since they cannot negotiate or modify the terms imposed by the Internet provider, with a clear imbalance of

²¹⁰ Michael Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans., 1977).

²¹¹ See Cohen, supra note 199.

²¹² See David Lyon, Electronic Eye: The rise of Surveillance Society (1994).

²¹³ Jeremy Bentham, The Panopticon Writings (Miran Bozovic ed., 1995).

²¹⁴ *See* Michael Foucault, Society Must be Defended. Lectures at the Collège de France, 1975–76 (Mauro Bertani & Alessandro Fontana eds., 2003).

²¹⁵ See e. g., Safiya Umoja Noble, Algorithms of Oppression. How Search Engines Reinforce Racism (2018).

²¹⁶ See Joshua A.T. Fairfield, Owned. Property, Privacy and the New Digital Serfdom (2017).

powers between the parties and a contractual justice more and more based on the rule of the stronger.²¹⁷

In the light of the above, we cannot but conclude that the legal discourse is in desperate need for a critical, humanist, ecological, non-market-driven²¹⁸ and counterhegemonic reorientation: "a global (and local) war of position in which legal interpretation through praxis (i.e., resistance and disobedience) is systematically carried on by legally and ecologically literate people supported by legal scholars serving the function of 'democratic philosophers'". ²¹⁹ In other words, to keep law and democracy alive, ²²⁰ it is unpostponable a critical renaissance in legal studies aimed at opposing the extractive, imperialistic and profit-oriented mentality rooted in the neoliberal ideology which places selfish profit accumulation over people, ecology and community. ²²¹ It is no coincidence that even COVID-19 as well as the recent wave of diseases like Ebola, SARS are in a way or another connected with the human overexploitation of nature and impact on ecosystems. ²²² Nonetheless, it is possible to take good even out of tragedy. As occurred in the past, ²²³ a tragic event like a pandemic can be seen as a moment of rebirth to meditate on some mistakes, or rebel against social inequality. As to the legal discourse in particular, what is needed is a paradigm shift from competition to cooperation, from extraction to reproduction, from privatization to access, from plutocracy to legal and social equality, from exclusion to inclusion, that revisits the foundations of the legal order and makes it in tune with community and the environment. The alternative in the long run is to have the law totally downgraded to an ancillary technique of global capitalism²²⁴ or to violent police power, and lawyers reduced to "the parrots of other men's thinking" 225 acritically mimicking

²¹⁷ See recently Cohen, supra note 199; and Alessandra Quarta, Mercati Senza Scambi. Le Metamorfosi del Contratto nel Capitalismo della Sorveglianza (2020).

²¹⁸ See Martha C. Nussbaum, Not for Profit. Why Democracy Needs the Humanities (2010).

²¹⁹ Mattei & Quarta, supra note 200 at x.

²²⁰ See James Boyd White, Keep Law Alive (2019).

²²¹ See e. g., Raj Patel, The Value of Nothing. How to Reshape Market Society and Redefine Democracy (2009); Michael J. Sandel, What Money Can't Buy. The Moral Limits of Markets (2012).

²²² See the recent WWF reports titled, respectively, "The Loss of Nature and Rise of Pandemics" (https://d3bzkjkd62gi12.cloudfront.net/downloads/the_loss_of_nature_and_rise_of_pandemics_ protecting human and planetary health.pdf), and "COVID-19: Urgent Call to Protect People and Nature" (https://www.wwf.or.jp/activities/data/20200616covid1902.pdf).

²²³ See Walter Scheidel, The Great Leveler. Violence and the History of Inequality from the Stone Age to the Twenty-First Century (2017).

²²⁴ See Katharina Pistor, The Code of Capital. How the Law Creates Wealth and Inequality (2019).

²²⁵ Ralph Waldo Emerson, The American Scholar (1837), in Emerson's Prose and Poetry 57 (Joel Porte & Saundra Morris eds., 2001).

and reproducing technological functioning, eventually to be entirely replaced by algorithms of prediction.

3.3 Emergency as the New Grand Narrative: A Resistant Reading

From a purely descriptive perspective, the autocratic turn and the institutional changes emerging from the pandemic may well be read as further fatal steps in the lengthily painful process of decline and decay of Western democratic institutions. The painful process of decline and decay of Western democratic institutions. From a wider normative perspective, on the other hand, these are legal transformations. And, generally speaking, any change in a pre-existing legal framework is always the visible evidence of the compromise between the established and the new, the ordinary and the extraordinary. In other words, through its prescriptive power, the *nomos* translates and crystallizes in norms some of the changeovers occurring in society. The point is to unravel the political hierarchies and the ideological assumptions hidden in the folds of positively enacted rules by comparing the different narratives they endorse. Following the teachings of critical sociology²²⁸ as inscribed in some critical comparative studies, ²²⁹ this stand is the only safeguard against the risk of being trapped in the hegemonic discourses.

In the light of these premises, in the current times of emergency, one cannot but observe that the legal outcome of the aforementioned dialectic between "ordinariness" and "extra-ordinariness" is particularly anomalous. The recent wave of emergency-based legislation is, indeed, prescribing concrete actions, practices, and policies that seem to have abruptly diverted legal systems from their traditional paths, producing unexpected similarities as to the legal arrangements adopted to master the pandemic in distant legal traditions with a different political imagery like the Chinese and the Western ones.

Needless to say, it is true that in the current globalized and globalizing era, whereby no system lives in splendid isolation, culture – and law as a cultural product – cannot be exclusively deemed as something geographically localized.

²²⁶ For an insightful analysis of this process, see Tom Ginsburg & Aziz H. Huq, How to Save a Constitutional Democracy (2018); Steven Levitsky & Daniel Ziblatt, How Democracies Die: What History Reveals About Our Future (2018). But *see also* Michael J. Sandel, Democracy's Discontent. America in Search of a Public Philosophy (1998).

²²⁷ *See* Anthony G. Amsterdam & Jerome Bruner, Minding the Law 217–45 (2000); James Boyd White, The Edge of Meaning (2001).

²²⁸ *See* Barrington Moore Jr., Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World (1966).

²²⁹ See e. g., Mattei, supra note 13; Günter Frankenberg, Comparative Law as Critique (2016).

The conception of legal order as a "law without borders" 230 is the normative expression of the "liquid times" we are living in.²³¹ Nonetheless, despite the convergence stimulus of globalization and the recurrent waves of legal imperialism, countries do tend to maintain (part of) their legal identities under different guises. And primarily, they produce solutions to specific legal problems that betray a certain degree of path dependence with their history, language and attitudes about the role of law in society.²³²

This is particularly manifested in legal transplants and, in general, in the migration of legal ideas. In their transfer from the context of production to the context of reception, foreign legal solutions always undergo some degree of change ending up being modified in their original nature by the receiving system.²³³ For instance, notwithstanding the several procedural reforms affecting the overall structure of the Chinese judicial system that, since the 1980s, clearly opened the way to in-court more adversarial litigation, the social dimension and the bequest of Confucian harmony and conciliation culture is still rooted and overtly manifest in the tendency on the part of the judges to bend formal rules in order to promote out-of-court dispute settlements. ²³⁴ This is for legal systems are the institutional apparatuses which order societies according to a specific – albeit mutable - political Weltanschauung that is, in turn, linked to a common cultural tradition, be it one of its manifold expressions. In this sense, law performs a huge symbolic function²³⁵ in that it mirrors, and renders visible by way of its rules, rituals and ceremonies, 236 the values (e.g., justice, equality, efficiency, order, harmony, etc.) and the power relationships of the cultural settings originating it at

²³⁰ See Maria Rosaria Ferrarese, Diritto Sconfinato: Inventiva Giuridica e Spazi nel Mondo Globale (2006).

²³¹ See Zygmut Bauman, Liquid Times: Living in an Age of Uncertainty (2007).

²³² See e. g., Mattei supra note 6; John Bell, Path Dependence and Legal Development, 87 Tul. L. Rev. 87 (2013).

²³³ See Diego López Medina, Teoria Impura del Derecho: La Transformación de la Cultura Juridíca Latinoamericana (2004).

²³⁴ See Fu Hualing & Richard Cullen, From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China, in Chinese Justice: Civil Dispute Resolution in Contemporary China 25 (Margaret Y. K. Woo & Mary E. Gallagher eds., 2011); Peter C.H. Chan, Mediation in Contemporary Chinese Civil Justice: A Proceduralist Diachronic Perspective (2017); Xin He & Kwai Hang Ng, "It Must Be Rock Strong!" Guanxi's Impact on Judicial Decision Making in China, 65 Am. J. Comp. L. 841 (2017).

²³⁵ See Umberto Eco, The Limits of Interpretation 9 (1994) (explaining that: "Originally a symbol was a token, the present half of a broken table or coin or medal, that performed its social and semiotic function by recalling the absent half to which it potentially could be reconnected").

²³⁶ See Oscar G. Chase, Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context (2005).

a given historical moment.²³⁷ Thus, legal systems and traditions are constantly reinvented, but change requires time and sedimentation, and normally passes through resistance and resilience.²³⁸

On this reading, what is truly exceptional and noticeable about the current crisis is the generalized lack of resistance and the transformative and conforming power that a temporary natural calamity is exercising upon legal institutions and political equilibria on a global scale. Accordingly, only by deconstructing the dominant discursive practises surrounding the current emergency will it be possible to enhance our understanding of its geopolitical implications in the long run. And, since the spark of the aforementioned legal transformation, and its reading key, can be traced to the idea of an emergency-based statutory framework as devised *by* and *for* the claims of this late phase of global capitalism, attention should be paid to the narrative of emergency.

Emergency is not just a word. It owns the same lure of other grand narratives (e. g., rule of law, equality, democracy)²³⁹ – i.e., all those meta-discourses deployed to legitimize the imposition of some ideas and practises in the eyes of the choice-makers and depoliticize them in the eyes of the choice-takers. *Nihil sub sole novum*. For instance, the rule of law has been extensively used by global financial institutions to impose neoliberal policies in the global south to "open its veins"²⁴⁰ and take advance of its resources, and this neo-colonial effort was disguised under the legitimizing rhetoric of exporting development and democracy.²⁴¹ Similarly, the emergency linked to the "war on terror" launched by the Bush administration had the effect of perpetuating American imperialism outside national borders and justifying the gradual erosion of human rights and essential civil liberties endorsed by the Patriot Act both inside and outside the US.²⁴²

By the same token, the coronavirus emergency is no doubt a dreadful epidemic in need for an effective and systematic response. At the same time, though, history teaches that, at least in its legally and economically instrumentalized version,

²³⁷ *See generally* Roger Cotterrell, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory (2006). Mauro Bussani, El Derecho de Occidente. Geopolítica de Las Reglas Globales [2010] (Elena Sánchez Jordan transl., 2018); Pier Giuseppe Monateri, Geopolitica del Diritto: Genesi, Governo e Dissoluzione dei Corpi Politici (2013).

²³⁸ See The Invention of Tradition (Eric J. Hobsbawn & Terence Ranger eds., 1983).

²³⁹ On the idea of grand narratives, see Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge [1979] (Geoff Bennington & Brian Massumi transl., 1984).

²⁴⁰ On this metaphor, see Eduardo Galeano, Open Veins of Latin America: Five Centuries of the Pillage of a Continent [1971] (Cedric Belfrage transl., 2009).

²⁴¹ See Mattei & Nader supra note 10.

²⁴² *See* Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006).

emergency can well work as a technique to open, in the long run, a broad terrain for unbridled political and economic power. This is part of the spectacle of global law whereby words are never just words, but, rather the lifeblood of the imperial *nomos*. While in colonial times the battles to gain international hegemony were fought with the open use of military force, the global era has produced more subtle and sophisticated forms of hegemonic domination based on a progressive physical decolonization, by means of the withdrawal of armies from occupied territories, and on a corresponding *narrative re-colonization*: an ostensibly bloodless – and thus preferable – imperial expansion carried on through the use of law and economic policies.

The legal discourse perfectly lends itself to this use. Law, in fact, never acts upon the bare historical reality but, starting from it, selects events and translates them in accordance to its ordering schemes and language to impose a specific version of the story.²⁴³ In this sense, in Barthesian terms, legal language is "fascist", in that it constrains the speech by prescribing what can and cannot be said about something. It is based on the authority of the speaker and on the "gregariousness" of its repetition. ²⁴⁴ It is not by chance that the ancient Greek term for legislator is "nomothetes", that is the 'name-giver'. 245 A legislator is, indeed, the one who has the recognized authority to establish the meaning of a name by prescribing the rules for its use.

On a closer look, a similar dynamic is replicated in the global legal response to the COVID-19 pandemic in which the state of exception was declared by the scientific authority of the WHO – which is thus acting as a global "nomothetes" ²⁴⁶ - and the gregarious effect is the echo of this proclamation and its translation in the set of legal solutions adopted across the globe. It is as if the pandemic had flattened local legal peculiarities prompting a global legal transplant the long-lasting consequences of which cannot be underestimated.

In this scenario, the terrible coronavirus emergency is being rhetorically deployed by the political power and by global economic actors to seize on the momentum. Shielded by the scientific and thus purportedly objective character of this state of exception, those power structures are building consent around practises that in *ordinary* times would be labeled as intolerable rights violations.

The perverse effect of this rhetoric is that it creates an aesthetic of terror. It makes use of the sense of chaos and uprootedness provoked by the pandemic to fabricate a demand for certainty which makes the population – thus transformed

²⁴³ See James Boyd White, Heracle's Bow: Essays on the Rhetoric and Poetics of the Law (1985).

²⁴⁴ See Roland Barthes, Inaugural Lecture, College de France, in A Barthes Reader 461-68 (Susan Sontag ed., 1982).

²⁴⁵ See Plato, Cratylus 384-89.

²⁴⁶ See supra Section 3.1 and 3.2.

into a passive patient – desire and even admire the repressive legislation which is curtailing rights and liberties. This phenomenon is perfectly depicted by Carl Schmitt when he says that the exception is always presented as "more interesting than the rule". ²⁴⁷ In accordance with this idea, unsurprisingly the extraordinary restrictive measures adopted to fight against the pandemic are welcome by the population for they are presented as belonging to the domain of "necessary", i.e., what cannot be different from what it is.

The foregoing theoretical reconstruction clears up the reasons why emergency is so functional to discretionary political power. First of all, be it an exceptional condition, emergency cannot be made to conform to any pre-existing legal framework. In this sense, the state of exception immediately creates a web of identity and a web of responsibility. As to the former, identity is linked to the powerful aggregating and democratic feeling of being "all in the same condition" - an idea that, behind its sympathetic and democratic facade, endorses legal uniformity and so a globalization of thought. As to the latter, the mantra in times of crisis as to the actions to be undertaken revolves around the must to do "whatever it takes" to solve the problem no matter how much social damage in terms of temporary violation of rights it might cause - an ethics of responsibility that justifies almost every practise in the name of a superior good. It follows that all of a sudden, due to the emergency situation, the system of checks and balances that gained constitutional recognition through centuries-long revolutions and has worked as a barrier against the descent of democracy to totalitarianism is downgraded to a bureaucratic futile obstruction to get rid of. To say it with a famous Cicero's maxim "silent enim leges inter arma": in times of war (ordinary) laws are silent.

The political backlash of such rhetoric is as much obvious as it is perilous.

The war talk about the current pandemic is providing further political support to the already visible international rise of authoritarian populism. ²⁴⁸ In the name of coronavirus, President Trump has labeled himself as a "wartime President". And behind a façade of national security, after declaring national emergency with

²⁴⁷ See Schmitt supra note 5, at 15.

²⁴⁸ *See* Pippa Norris & Ronald Inglehart, Cultural Backlash. Trump, Brexit, and Authoritarian Populism (2019); Yascha Mounk, The People vs. Democracy: Why our Freedom is in Danger and How to Save It (2018). For an insightful analysis of the interrelations between authoritarianism and the pandemic, see Günter Frankenberg, *Notes on the Pandemic of Authoritarianism* (forthcoming; an abridged German version of the article can be found in Id., *COVID-19 und der juristische Umgang mit Ungewissheit*, Verfassungsblog on Constitutional Matters (April 25, 2020), available online at https://verfassungsblog.de/covid-19-und-der-juristische-umgang-mit-ungewissheit/).

Proclamation 9994 of March 13, he is instrumentally using emergency to continue his ruling by decree and his racially-biased anti-immigration policy²⁴⁹ upheld by the U.S. Supreme Court in Trump v. Hawaii²⁵⁰ by signing an executive order temporarily suspending immigration to the United States for 60 days (but with the possibility to extend it "as necessity"). 251 The Hungarian Prime Minister Viktor Orbán, whose plan to build a new authoritarian constitutional order devoid of any checks and balances is well known, 252 invoked his constitutional emergency powers (art. 53) and had the Hungarian Parliament pass a bill which suspends general elections and vests him with full and extensive powers to rule almost indefinitely by decree. ²⁵³ In Israel, the Prime Minister closed courts and authorized the national security to draw on data intended for use in counterterrorism activities to trace the movements of people. And in general, this pandemic is being sometimes used by local governments in open societies to get the Legislative power to write a blank check to the Executive, as the Italian constitutional disorder has illustrated. This spread of autocracy is perfectly visible in the impairment of the civil rights and liberties by the emergency legislation with a clear subversion of the same liberal constitutional values which have built the dominant image of the

²⁴⁹ See recently Charles R. Lawrence III, Implicit Bias in the Age of Trump, 133 Harv. L. Rev. 2304 (2020).

^{250 585} U.S. (2018). Justice Sandra Sotomayor wrote a very refined and insightful dissenting opinion (in which Justice Ruth Bader Ginsburg joined) unveiling the racist and anti-Muslim bias of the President's travel bans («The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns»; to then conclude that: «The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent»). See on the point Eric K. Yamamoto & Rachel Oyama, Masquerading Behind a Façade of National Security, 128 Yale L. J. F. 688 (2019).

²⁵¹ The text of the order dated 22 April is available online on the website of the White House at https://www.whitehouse.gov/presidential-actions/proclamation-suspending-entry-immigrantspresent-risk-u-s-labor-market-economic-recovery-following-covid-19-outbreak/.

²⁵² See Gábor Halmai, The Making of "Illiberal Constitutionalism" With or Without a New Constitution: The Case of Hungary and Poland, in Comparative Constitution Making 302, 304–311 (David Landau & Hanna Lerner eds., 2019); Maximilina Pichl, Constitution of False Prophecies: The Illiberal Transformation of Hungary, in Authoritarian Constitutionalism 240 ff. (Helena Alviar García & Günter Frankenberg eds., 2019).

²⁵³ See Kriszta Kovács, Hungary's Orbánistan: A Complete Arsenal of Emergency Powers, Verfassungblog on Constitutional Matters (April 6, 2020), available online at https://verfassungsblog. de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/.

West as the quintessential instance of the rule of law and, therefore, superior to, and incompatible with, the other competing legal cultures, especially the Chinese one. 254

It is no secret that the traditional Western iconography presents the Chinese legal experience as a "law without law", ²⁵⁵ a despotic regime with an intrusive population surveillance for political purposes, ²⁵⁶ and therefore a country with a set of (legal) institutions, values, and concepts whose distance from the Western paradigm is almost unbridgeable. And yet, the Western response to coronavirus both in Europe and in the U.S. resembles to some extent the allegedly far "Chinese model" in terms of restrictions and surveillance mechanisms including data mining, aerial surveillance, phone tracking, ²⁵⁷ facial recognition, and the alike technological paraphernalia which are being deployed with different levels of transparency. ²⁵⁸

This is not to uncritically praise China's handling of the pandemic, whose shortcomings are visible, for instance, in the intrusive use of digital surveillance technology which, in the name of public well-being, is raising growing concerns for privacy and rights protection.²⁵⁹ Nor is it a final requiem for constitutional democracies, for this would be too premature a conclusion.²⁶⁰ Rather, on the one hand this Article is intended to be an opportunity to critically reflect, through the eye of the global pandemic, on the progressive undoing of the Western legal and political narratives whose backbone has been relentlessly eroded by decades of neoliberalism and the rise of populism which are making justice a matter of distilling values down to profit and individual utility. On the other hand, it is an attempt to acknowledge, beyond value judgments, that from a systemological

²⁵⁴ *See e. g.*, René David & John E.C. Brierley, Major Systems in the World Today 518ff. (3rd ed., 1985); William J. F. Jenner, The Tyranny of History: The Roots of China's Crisis (1992). For an insightful critique of this ethnocentric narrative, see Günter Frankenberg, Comparative Constitutional Studies: Between Magic and Deceit (2018).

²⁵⁵ For a brilliant analysis, see Teemu Ruskola, *Law Without Law, or is "Chinese Law" an Oxymoron?* 11 Wm. & Mary Bill Rts. J. 655 (2003).

²⁵⁶ See e. g., Chris Buckley & Paul Mozur, How China Uses High-Tech Surveillance to Subdue Minorities, N.Y. Times (May 22, 2019).

²⁵⁷ In Italy, for instance, Art. 6 Decree-Law 30 April 2020, No. 28 provides for the implementation of a contact tracing application downloadable on smartphones on a voluntary basis, which alerts people who come into close contact with persons tested positive with the purported aim to the virus in order protect their health.

²⁵⁸ See Patrick Howell O'Neill, Tate Ryan-Mosley & Bobbie Johnson, A Flood of Coronavirus Apps are Tracking Us. Now it's time to Keep Track of Them, MIT Technology Review (May 7, 2020).

²⁵⁹ See Raymond Zongh, China's Virus Apps May Outlast the Outbreak, Stirring Privacy Fears, N.Y. Times (May 26, 2020).

²⁶⁰ For a brilliant analysis on the point, see Ginsburg & Huq, supra note 226.

point of view the Chinese model, after coping quite successfully with the global economic recession of 2008, is likely to gain more international prestige for its national and international handling of the emergency which is being carried out with the goal of positioning itself as a global leader in pandemic response.

The claimed advantage of China's solutions could be better explained in the light of its hierarchical institutional settlement and its self-serving capacity to mediate between tradition and evolution. In particular, the Chinese legal tradition could be evocatively compared to the Roman divinity Janus: God of doorways and transition who was usually depicted with two heads facing in opposite directions. Similarly, such 'bifrontism' between past and future could be found in the Chinese dialectic between li and fa, between the rule of politics carried out through the rule of men (ren-zhi) and the gradual establishment of a rule of law (fa-zhi) with Chinese characteristics which does not conform to the Western legal imagination²⁶¹ and is intended to challenge its visions of democracy.²⁶² The pendulum of Chinese law, then, always swings back and forth. Back to a traditional, Confucian, ethical collectivist ethos in which law as a form of social constraint cannot be deemed disentangled from, nor superior to, tradition and politics. This is visible, for instance, in the traditional principles of yang min (nurturing people), li min (benefiting people) and hou min (enriching people) according to which a good government is like a patriarch taking care of its children²⁶³ – a characteristic that. in its modern political epiphany, is reflected in the wide-ranging quasi-parental guidance role played by the CCP which, informed by its Marxist-Leninist matrix, is progressively centralizing the decision-making authority and, especially further to the constitutional amendments of 2018, has raised to the "defining feature of socialism with Chinese characteristics". ²⁶⁴ And *forth*, towards the season of legal reforms and strategic opening to the outside world (gaige kaifang) started with Deng Xiaoping at the end of 1970s' and still continuing, in a different form, under the leadership of Xi Jinping.²⁶⁵ In particular, as noted by authoritative

²⁶¹ See Werner Mensky, Comparative Law in a Global Context. The Legal Systems of Asia and Africa 493 ff. (2nd ed., 2006).

²⁶² See the provocative thesis propounded in Daniel A. Bell, The China Model: Political Meritocracy and the Limits of Democracy (2015).

²⁶³ See Luigi Moccia, The Idea of 'Law' in China, 6 Eur. J. Sin. 9 (2015); Baogang Guo, Sino-Western Cognitive Differences and Western Liberal Biases in Chinese Political Studies, in Governance Innovation and Policy Change: Recalibrations of Chinese Politics Under Xi Jinping 73, at 82 ff. (Nele Noesselt ed., 2018).

²⁶⁴ See PRC Const. Art. 1(2).

²⁶⁵ See e.g. Marina Timoteo, China Codifies. The First Book of the Civil Code between Western Models to Chinese Characteristics, 1 Opinio Juris in Comparatione 23 (2019); Gabriele Crespi Reghizzi, Evoluzioni del Nuovo Diritto Commerciale Cinese, 213 Il Politico 142 (2006).

commentators, in the last round of years there has been a growing social legitimacy attached to law and legal institutions within Chinese society. While this "turn toward law" is not heading in the direction of liberalism and has been used as a strategic source of political consensus and economic development, it is nevertheless strengthening the social and political sentiment towards legality whose role and future developments should be subject to special scrutiny by comparatists. 266 From a comparative perspective, this modernization of China paved the way to the reception of Western legal models which, however, has never coincided with the pure and simple incorporation of foreign solutions into the Chinese system, but rather worked as a "legal irritant" ²⁶⁷: a stimulus prompting changes to keep the Chinese legal and economic system updated and competitive but, at the same time, remodeling the imported foreign solutions to adapt them to the local characteristics and serve the prestige of the Chinese model. This is evident for instance in the "socialist market economy", 268 and especially in the so-called Belt and Road Initiative. This new version of the ancient silk road, with the declared purpose of strengthening infrastructure and investment networks by constructing economic corridors between China and almost a hundred of other countries, can be seen as a vehicle to export the Chinese economic and legal model worldwide and compete for global governance.²⁶⁹

Hence, the real quiddity of the matter, which also motivates the path and approach followed in this Article, is far beyond traditional legal taxonomies whose descriptive power has shown its mercurial character and should be critically revisited in the light of the dynamic competition between legal orders to gain global hegemony. Taxonomies and legal classifications are never a perfect fit to the real world. They are, instead, theoretical spectacles through which to look at legal reality that, though useful, inevitably replicate a certain vision of the legal (and economic) order and reflect the places and times of their origin. Even comparative law as a discipline, especially through the spread of mainstream

²⁶⁶ See Taisu Zhang & Tom Ginsburg, China's Turn Toward Law, 59 Va. J. Int,'l L. 279 (2019).

²⁶⁷ See Günther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Mod. L. Rev. 11 (1998).

²⁶⁸ *See* Ignazio Castellucci, Rule of Law and Legal Complexity in the People's Republic of China 119 ff. (2012).

²⁶⁹ *See* International Governance and the Rule of Law in China under the Belt and Road Initiative (Yun Zhao ed., 2018); The Belt and Road Initiative. Law, Economics, and Politics (Julien Chaisse & Jědrzej Górski eds., 2018); China's Belt and Road Initiative: Changing the Rules of Globalization (Wenxian Zhang, Ilan Alon & Christoph Lattemann eds., 2018).

²⁷⁰ *See e.g.*, Alessandro Somma, *Global Legal History, Legal Systemology, and the Genealogy of Law*, 66 Am. J. Comp. L. 751 (2018). For a general view on the different approaches to legal classifications, see Mathias Siems, Comparative Law 84-112 (2nd ed., 2018).

functionalism and the uncritical look for commonalities, has been deployed as a tool to delegitimize those legal experiences deviating from the Western canon and trying to resist its hegemonic domination.²⁷¹ To the contrary, comparative analysis should bring to the fore the ethnocentric structure and hidden assumptions of dominant legal classifications and acknowledge that "the end of history, allegedly marked by the post-Cold War triumph of both liberalism and global capitalism, will have to be postponed again".²⁷² Here it lies the deep and too often unpursued "subversive"²⁷³ potential of a truly critical comparative approach.²⁷⁴ Any sympathetic reading of social processes merely taking side with the winners thereof would lead to a formalistic *in vitro* legal analysis substantially reproducing existing hierarchies and power structures without adding much to the scholarly debate.

Neither could the "legal" sense of the current emergency be found in the "here and now" dimension. Rather, it lies in the political genealogy of the operating set of policies enacted to master this epidemiolocal crisis and their long-term effects on our existing practises, for the norm may well end up being "destroyed by the exception" if the exception is *norm*alized.²⁷⁵

The questions should thus be: what happens in the aftermath of the crisis? What about the dark side of this state of exception paving the way for an increasingly intrusive surveillance and technology-driven model of society? While, indeed, emergency justly commands immediate actions and immediacy may obliterate nuances, past experiences teach that the looming effect of its rhetoric is its magical capacity of turning short-term measures into long-lasting restrictions on rights and freedoms.

From the ashes of the norm a new order may emerge, and this transformative process is what has to be put under critical scrutiny. Accordingly, a purely sympathetic reading of the current emergency situation motivated solely by the presence of "exceptional conditions" would be pointless and harmful. An unreserved apology of the present would just make us replicant lawyers at the service of the dominant narrative. Contrariwise, what we think is essential to interpret this course of history is a *resistant reading*. At the heart of resistance lies critique, and

²⁷¹ See Mattei, supra note 23.

²⁷² Günter Frankenberg, *Preface*, *in* Authoritarian Constitutionalism x (Helena Alviar García & Günter Frankenberg eds., 2019).

²⁷³ See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 Am. J. Comp. L. 683 (1998); Horatia Muir Watt, *La Fonction Subversive du Droit Comparé*, 52 Revue Internationale de Droit Comparé 503 (2000).

²⁷⁴ *See* Mattei, *supra* note 12; Frankenberg, Comparative Law as Critique (2016).

²⁷⁵ See Schmitt supra note 5, at 12.

"critique is always restlessly self-clarifying in search of freedom, enlightenment, more agency, and certainly not their opposite". 276

4 Conclusive Remarks: New Hegemonies and the Rule of Technology

The previous materials seem to confirm the hypothesis of legal systems reacting in distress by deploying their most readily available solutions and the development of a new authoritarian pattern of law based on scientific and technological hegemony. China, a legal system mostly based on the bureaucratic structure of a Leninist Communist Party, has reacted through the ordinary process of vertical coherence, typical of socialist legality.²⁷⁷ Local actors have been smoothly substituted, and the Leader has taken direct charge of the process, structuring an ordered model of emergency rule of law. This idea is only a slight variation on the vision of the "rule of law with Chinese characteristics", what some Western observers have named rule by law through which China after 1978 initiated its highly successful phase of capital accumulation.²⁷⁸ In China, mighty technological companies such as Tencents and Baidu display a tremendous power of surveillance, which today works as a device of social control and prediction rivaling professional law in its effectiveness. Not only in China, but also in countries within its collectivistic cultural ethos, like Korea and Singapore, such techniques have been used without concern for individual privacy issues. Israel followed suit (and Italy is attempting to do so) showing how this approach is capable of global reach within core rule of professional law countries.

Italy in distress has also deployed some of the typical characters of its neoliberal transformations occurring after 1989. In particular semi peripheral countries, just like the global South before, have been encouraged to concentrate power in the executives, abandoning parliamentary systems and proportional representation to join in the winner takes all logic of Washington consensus. To be sure, such move has been promoted with efficiency narratives of "reform". Critics have been quick to observe how power concentration in executives much facilitates foreign invasions of internal economic policies, through conditionality

²⁷⁶ Edward Said, Humanism and Democratic Criticism 73 (2004).

²⁷⁷ See Mattei, supra note 23.

²⁷⁸ See Ignazio Castellucci, Rule of Law and Legal Complexity in the People's Republic of China (2012).

corruption, or blackmail, by such technocratic organisms as the so-called Troika (IMF, ECB, EC), or the NATO in defense policy.²⁷⁹

In Italy, such process of power concentration often contested by the people has been accomplished by political parties in power mostly through the abuse of existing Constitutional law. Indeed, the attempt to change the Constitution to concentrate power in the executive failed in 2016, defeated by popular referendum, but nevertheless Governments kept abusing emergency decrees (Art. 77 Constitution) and the confidence vote to blackmail Parliament of dissolution. In distress, such a trajectory has been further amplified with the Prime Minister abusing his own personal organizational power, invading functions reserved to the Cabinet as a collective body.

The personal activism of a Chief of the Executive without personal executive power, thus incomparably weaker than his French or Chinese counterpart, has produced a similar relaxed attitude by Regional Governors in the north (belonging to opposition parties) towards the limits of their own executive authority, thus conflicting with the central power in a pernicious de facto competition at the expenses of citizen's rights. The central Government simply cannot dare removing locally elected officials (as Xi successfully did in China) just like President Trump simply cannot dare removing rebellious Democrat Governors in New York or California. Consequently, distress in capitalist multi-party countries simply disrupted the chain of command showing the crisis of constitutional liberalism and of its multiparty conception of democracy and the failure of the rule of law in the hands of partisan or excessively weak systems of Constitutional adjudication.

This scenario shows in emergency an advantage of legitimate single-party political systems (Cuba indeed dealt with excellent professionalism and cosmopolitan attitude to the crisis) mostly because unimpaired by spectacular political conflicts aimed at attracting voters in the next electoral round. Sure, the West can point at single-party political systems as "dictatorships". However, not only is this not a serious critique in front of the complex model of leadership selection in a modern Communist party such as the CPC, but in emergency there is no moral stand anymore of constitutional liberalism engaging in comparably authoritarian, while unruly, secretive practices accompanied by hypocritical individual rights discourses such as privacy.

To be sure, if the state of exception has been declared by the WHO (and the struggle among superpowers, private and public, for its control is in the news almost every day), such "scientific" global sovereign as a matter of course seeks capital-

²⁷⁹ For how such strategy has worked in the Global South already in Cold-War era see, John Perkins, Confessions of an Economic Hit Man (2004).

intensive technological solutions as the outcome of the crisis. Correspondently, technology is increasingly gaining status as the novel "theory of everything" and every corner of human existence is likely to become monitored and ranked.²⁸⁰ Tremendous economic forces emerge to push humankind further on the Internet frontier where, for the first time in global distress, yet a new system of social control rules. A "take it or leave it" logic, experienced on the platform, that can now be seen as a fourth "pattern of law" that simply did not yet exist 30 years ago.²⁸¹

The development of such "fourth" technological pattern of law allows critical comparative theory to predict a change in global hegemony. Unimpaired by narratives of privacy and individualized freedom, China has received from California (the previous U.S. hegemon), expanded and much more smoothly incorporated in its legal system, the logic of surveillance capitalism. The Chinese legal system, through the CPC, proves to be actually in control of its giant technological companies, something that is far from true in the West with giants such as Facebook, Google or Amazon that do control the law rather than being controlled by law.

The United States reached global legal hegemony by the aftermath of WWII, first by overcoming economically and later digesting and exaggerating the European components of the legal system (role of the judges from England, charter of rights from France, powerful legal science from Germany). Similarly, we can predict that the Chinese advantage in emergency law and the development of a new global pattern of law, *the rule of technology*, might point to the emergence of an unexpected Chinese legal leadership, determined by the final collapse of liberal constitutionalism provoked by COVID-19.

²⁸⁰ See Daithí Mac Síthigh & Mathias Siems, *The Chinese Social Credit System: A Model for Other Countries*?, 82 Mod. L. Rev. 1034 (2019).

²⁸¹ See Mattei, supra note 17.

²⁸² See Mattei, supra note 13.