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Lawless Extravagance: The Primacy Claim of Politics and the State of Exception in Times of COVID-19

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I. The Plague of Lawlessness

The idea that the law and times of crisis are mutually exclusive is anything but new.¹ It therefore seems that Cicero's aphorism that *silent enim leges inter arma* ('in times of war, the law falls silent')² can be as easily applied to other, non-bellucose crises, such as the outbreak of a pandemic, and that *silent enim leges etiam inter germina* ('also in times of plague, the law falls silent'). Classic literature abounds with horrifying tales of the collapse of morals and law in societies faced with the indiscriminate killing of its residents by an invisible foe. Thucydides describes the plague in Athens during the second year (430 BCE) of the Peloponnesian War as a form of 'lawless extravagance' (a colourful translation of the rather sober ἐπὶ πλεόν ἄνομίας, which lends itself perfectly as the title of this contribution). No fear of gods or law would restrain the fear-stricken Athenians, since nobody expected to live to be brought to trial for their offences.³ In his *De rerum natura*, Lucretius continues this story and tells us that for their fear of contagion, the Athenians neglected the necessary funerary rites for their deceased family members, and simply tossed the bodies on funeral pyres.⁴ Given both the then customary-religious and positive-legal significance of these rites,⁵ the lawlessness of these acts must be considered extraordinary in a dual sense for the ancient Greeks.

¹ See PC Bobbitt, 'Inter Arma Enim Non Silent Leges' (2012) 45 *Suffolk University Law Review* 253, 253.

² MT Cicero, 'Pro Milone' in NH Watts (ed and trans), *Cicero: Orations* (Harvard University Press, 1989) IV.11.

³ Thucydides, *History of the Peloponnesian War*, trans by R Crawley (JM Dent, 1910) 2.53.

⁴ Lucretius, *On the Nature of Things* (Harvard University Press, 1989) VI.1247.

⁵ See eg, R Garland, 'The Well-Ordered Corpse: An Investigation into the Motives behind Greek Funerary Legislation' (1989) 36 *Bulletin of the Institute of Classical Studies* 1–15; and above all, the tragedy of Antigone, wishing to bury her fallen brother in accordance with divine law, but in violation of Creon's decrees: Sophocles, *Antigone* (Bloomsbury, 2006).

Social distancing, if possible, proved effective, if we are to believe Boccaccio's *Decameron*, and his stories of seven young women and three young men, sheltering in a secluded villa to outlive the horrors of the bubonic plague rampaging through Florence in 1348, entertaining each other in splendid isolation with bawdy tales.⁶ However, it should not go unmentioned that before a society, such as ancient Athens or medieval Florence, descends into utter lawlessness in the face of an epidemic, those in power will usually first try to mitigate the looming catastrophe. This is typically done through legal means and by enacting acts that aim at containing the spread of the disease at hand, for instance by way of quarantine measures, which the Venetian senate fixed at 40 (*quaranta*) days in 1448, presenting us with the now famous and wonderful etymology of this word.⁷ Speaking of legal means and measures, it then seems to be only natural that in such a situation, we should not ask, as Albert Camus has his Dr Rieux declare in *The Plague*, 'whether the measures provided for under the law are serious, but if they are necessary to prevent half the town being killed'.⁸

II. The Primacy Claim of Politics

What Camus' Dr Rieux appears to allude to here is the ancient Latin maxim that *necessitas non habet legem*, or that necessity has no law,⁹ from which follow two successive consequences: the first is, what I call, the *primacy claim of politics*, from which, in turn, follows the concept of the state of necessity, exception, or emergency (used synonymously and interchangeably here and discussed below in section IV). Let me start, in this section, to explain and analyse the first implication.

The current COVID-19 crisis has of course not assumed such horrifying proportions as depicted in the historical scenarios above. The hypothesis under this first implication is nonetheless that such a crisis could and should allow those in power – that is, in brief, abstract, and perhaps simplified fashion: politics – to do what is *necessary* in order to avoid an apocalyptic scenario as in ancient Athens. What is necessary in such a situation is to protect the *good* of human life and health, along the lines of what Markus Gabriel calls the 'virological imperative': act during a confirmed pandemic as if the prognoses of the best virological models alone were guiding your actions in terms of your social contacts.¹⁰ Human life and health thus become the supreme good that requires protection from a

⁶ G Boccaccio, *The Decameron* (OUP, 2008) 6 et seq.

⁷ See GF Gensini et al, 'The Concept of Quarantine in History: From Plague to SARS' (2004) 49 *Journal of Infection* 257, 259; PS Sehdev, 'The Origin of Quarantine' (2002) 35 *Clinical Infectious Diseases* 1071, 1072.

⁸ A Camus, *The Plague* (Penguin Books, 2001) 40.

⁹ See Corpus Iuris Civilis, Dig. 1, 10, 1 § 1; M Koller, *Not kennt kein Gebot: Entstehung – Verbreitung – Bedeutung eines Rechtssprichwortes* (LIT Verlag, 2009); Seneca the Elder, *Controversiae*, IV.4.

¹⁰ M Gabriel, *Moralischer Fortschritt in dunklen Zeiten* (Ullstein, 2020) 287.

particular threat, which also demonstrates that this good is not something perennially fixed, but chosen with a view toward what is necessary in an empirically contingent situation.

This argument results in the assumption that it is generally acknowledged that individuals and societies disagree on how this good may be best achieved and problems on the path thereto be best resolved. Should we always act in line with given normative principles, moral or legal, or is it also permissible to transgress these norms for the sake of attaining this supreme moral good? If we choose this latter option, one way to reach a certain moral good is to subordinate anything else (other conceptions of the good, values, principles, etc) to it in line with the famous adage that 'the end justifies the means'.¹¹ This approach is usually denoted as a teleological view, in which the good is defined independently of the right, and the right is defined as that which maximises the good.¹² In other words, the good and the right are distinct from and yet only instrumentally interrelated with each other, and I can attain a moral good without acting right.¹³ Under such teleological thinking, a given society or political system can place any good on the pedestal of the highest good, thus considering any other good or right a mere means to achieving the supreme good and foregoing them in its favour.

It stands to reason that such a teleological view has a deeply intuitive appeal.¹⁴ It is natural to think that it is only moral to maximise the good, perhaps even by ignoring what is right or by simply instrumentalising it for the sake of the good. What is good can not only be ascertained by common sense, but since right is subservient to the good by maximising it, the goodness of things can also be more easily judged without referring to what is right. Social cooperation can thus be achieved by determining the circumstances which allow for achieving the supreme good of a society, and that good is, at the end of the day, ascertained by politics, depending on what the respective circumstances require.

Since politics can (among other definitions) also usefully be conceived as the quest for the good, which – again – is not a fixed and universal conception and thus historically contingent, let us now assume under this teleological hypothesis that politics represents an efficient as well as more or less direct path to achieving the supreme good it has chosen. This is only reasonable, as politics is equivalent to power and can, if we disregard any constitutional restraints for the time being, wield this power to resolve problems and attain any desired ends. Teleology requires that any political actions conform to 'goodness' and are measured in terms of their effects.

¹¹ Although this saying is widely attributed to N Machiavelli, *The Prince*, trans by P Bondanella (OUP, 2008) chapter XVIII, he never uses these exact words therein. See instead N Machiavelli, *Discourses on Livy*, trans by JC Bondanella and P Bondanella (OUP, 1997) I.9: 'For although the act condemns the doer, the end may justify him.'

¹² J Rawls, *A Theory of Justice*, rev edn (Harvard University Press, 1999) 21–22; WK Frankena, *Ethics* (Prentice Hall, 1963) 13.

¹³ See, however, also the interesting discussion by D Parfit, *On What Matters: Volume One* (OUP, 2011) 244–49.

¹⁴ See Rawls (n 12) 22.

Accordingly, the criterion for judging a given political measure either good or bad is whether it contributes to the realisation of a certain good.¹⁵ If we now also deliberately ignore the problem of unjust or immoral law and regard the law, from a liberal-democratic viewpoint, as the normative system that protects individual freedom as well as equality and hence represents that what is right, then the law must serve politics in attaining the supreme moral good for which that society strives, for right and good are distinct from one another, and the latter is prior to the former. Individual freedom and equality may certainly be protected, secured, and fostered under this view, but they are also only secondary and must take a step back if the need arises to maximise the good.

Having said that, it is then also plausible to envisage politics as an instrument in achieving this good which is unduly shackled by the cumbersome and complex procedures of the law. According to this interpretation, the law is a fetter,¹⁶ a mere convention, that impedes the efficient mechanisms of politics, and hence, it should be as free as possible from any legal constraints. For after all, if it is the aim of politics to make the supreme good a reality, then it would be immoral to hinder it in any way by, say, considering the freedom or equality of one single individual. Politics must, in this conception, be above the law to be efficient in attaining what it deems to be good. We may summarise this position in the following argument, namely that it is *for the law to follow politics, and not for politics to follow the law*,¹⁷ which I denote as the ‘primacy claim of politics’ throughout this contribution.

Given the plethora of problems a society might face, and the significance of a given good for the thriving of a commonwealth, the reader might be inclined to agree with this statement. Carl Schmitt similarly defended the primacy of the political in official decisions over all abstract norms – may they be moral or legal in nature.¹⁸ Especially in times of emergency and political exigency, the Head of State should enjoy wide-ranging constitutional and quasi-dictatorial powers to resolve such situations, even if this entails the suspension of fundamental rights.¹⁹

¹⁵ See A Huang, ‘On the Teleological Interpretation of the Right to a Happy Life’ (2020) 19 *The Journal of Human Rights* 24, 29. Note, however, that this author regards this approach as China’s key contribution to human rights.

¹⁶ See I Berlin, *Liberty*, ed by H Hardy (OUP, 2002) 170, fn 3.

¹⁷ This particular turn of phrase was used by the then-Austrian Minister of the Interior Herbert Kickl of the right-wing Freedom Party in a TV interview on 22 January 2019 after he had been asked whether curfews for asylum-seekers and speedy deportations of such individuals could be in violation of the rule of law and human rights. He alleged that the greatest danger to the rule of law would be its being abused and accordingly used against itself, politically incapacitating the State and the proper administration of the law. In reference to the European Convention on Human Rights (ECHR), he complained that there were in place ‘strange legal structures, sometimes many years old and created under totally different circumstances that prevent us from doing what is necessary. I would like to take on those rules and challenge them, for I still believe it is for the law to follow politics, and not for politics to follow the law’.

¹⁸ See eg C Schmitt, *The Concept of the Political* trans by G Schwab; expanded edn (University of Chicago Press, 2007) 19; C Schmitt, *Verfassungslehre*, 11th edn (Duncker & Humblot, 2017) §§ 3, 8, 11, and 16.

¹⁹ See C Schmitt, *Political Theology* (University of Chicago Press, 2006) 11–12; C Schmitt, *Der Hüter der Verfassung*, 5th edn (Duncker & Humblot, 2016). The relevant provision is Article 48 of the Weimar Constitution.

Times of crisis – regardless whether real, imagined, or faked – always generate a certain tolerance for the ‘necessary’ to prevail over the law and to cast the ‘normative power of the factual’²⁰ as a cure for any problems.²¹

In conformity with the virological imperative, governments across the world resorted to massive restrictions on the freedom of movement and other fundamental rights of individuals to combat the COVID-19 pandemic. When confronted with the potential illegality or unconstitutionality of the respective legal provisions put in place to do so, the Austrian chancellor Sebastian Kurz replied that when facing looming disaster, one cannot afford to discuss legal sophistries.²² It would be better, he continued, not to over-interpret legal questions on this matter and to let the relevant courts deal with them in due time.²³ In other words, the time for critical reflection and discussion may come, but not until the emergency is over. We may interpret these words to the effect that, under the primacy claim of politics which places the good before the right, any use of constitutional provisions that constrain the powers of politics can be regarded as an abuse directed against this good itself. Politics, in its quest for this good, would consequently trip over one’s own laws and be rendered hamstrung and incapacitated by them. Legal guarantees of freedom, equality, and human rights in general thus prevent politics from doing what is necessary and need to be taken on and challenged.²⁴

III. The Dangerous Abnegation of the Law and a Kantian Response

The crucial question that follows from the primacy claim of politics is that if the appeal to the good at the expense of the right is so intuitive and concurrently efficient, why exactly should we even discuss this issue here,²⁵ or why should we let the law get in the way of politics, if the latter is trying to save us from the COVID-19 pandemic? The answer to these questions is intricately related to the problem of how we can and should interpret the primacy claim of politics, to what connection the good and the right should have toward one another, and in what specific priority we should rank them, from which directly follows the question of what relationship of priority the law and politics should have vis-à-vis each other. Does, according to the teleological approach and the primacy claim of politics the

²⁰ See G Jellinek, *Allgemeine Staatslehre* (Athenäum, 1900) 338 et seq.

²¹ See AJ Noll, ‘Corona-Krise: Der Verordnungsstaat’ *Der Standard*, 25 March 2020.

²² Sebastian Kurz, Zeit im Bild 2, TV interview of 6 April 2020, discussing the legal implications of the 2019-2020 COVID-19 pandemic in Austria. See also A Somek, ‘Is the Constitution Law for the Court Only?’, (*Verfassungsblog*, 16 April 2020) verfassungsblog.de/is-the-constitution-law-for-the-court-only/.

²³ Kritik an Covid-19-Gesetzen: Kurz plant keine Änderung (News ORF, 14 April 2020) orf.at/stories/3161820/.

²⁴ Kickl, ORF-Report (n 17).

²⁵ See also C Bezemek, ‘Vom Primat des Politischen: Versprengtes’ (2019) 27 *Journal für Rechtspolitik* 194, 194.

right (law) follow from the good (politics)? Or does, in line with the deontological approach, the exact opposite hold true, namely that the good (politics) follows the right (law)?

A. Intricate Interweaving

To begin with, it is true, at least at first glance, that law and politics *appear* antithetical to one another. If one defines law in the Aristotelian sense, namely that it 'is passionless' and thus 'reason unaffected by desire',²⁶ then the law is certainly distinct from politics, as the latter provides an institutional process for the fulfilment or channelling of desire, whilst the law under this definition remains isolated from desire.

In this vein, one might be even tempted to describe law and politics in Nietzschean terms, the law being Apollonian rational and logical thinking, and politics being Dionysian emotional and instinct-driven acting. But if we regard law and politics through this very particular lens, we should also be aware that they are not necessarily rivals, but intertwined with each other.²⁷ Law and politics are tightly and dialectically interwoven,²⁸ particularly in the context of law-creation (ie, legislating), where politicians create new law within the institutional setting of a legislative assembly. Thus, it should equally be emphasised that the impact of politics on the law is certainly not always detrimental, since politics constantly changes the law in order to adapt it to an ever-changing world. Politics can have an extremely positive influence on the law, especially when we think about the constructive and reformative influence of progressive politics on areas such as anti-discrimination law, equality rights, societal inclusion of previously marginalised individuals and groups, etc. during the last couple of decades.²⁹

Politics only becomes a problematic factor for the law, however, once it starts to claim for itself absolute primacy over the law, and interferes by abnegating it; begins to reverse these reformative and constructive developments mentioned above, becomes regressive, and suspends or abolishes such fundamental rights without due justification or disproportionately. And in terms of judicial law-application, ie within the realm of an independent and impartial judiciary, it goes without saying that any political interference is undesirable and therefore negative from the perspective of the general public, as it results in arbitrariness, nepotism, corruption, and eventually despotism.

²⁶ Aristotle, *Politics*, (ed and trans J Barnes), *The Complete Works of Aristotle*, Vol. 2 (OUP, 1984) 1286a17-18 and 1287a33-34.

²⁷ See F Nietzsche, *The Birth of Tragedy*, trans Douglas Smith (OUP, 2008).

²⁸ See also M Cerar, 'The Relationship between Law and Politics' (2009) 15 *Annual Survey of International & Comparative Law* 19-41; M Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Springer, 2008).

²⁹ See eg D Kairys, *The Politics of Law: A Progressive Critique*, 3rd edn (Basic Books, 1998).

B. The Contingency of Good, the Apriority of Right

Politics may also declare something to be the supreme good and pursue it; that certainly is the prerogative of politics lest it become ineffective and useless. Politics, in itself, is neither morally good nor morally bad – although it certainly *should* be both lawful and morally legitimate. This good pursued by politics is historically contingent and will usually also change in accordance to what is required in a specific situation:³⁰ in the case of a pandemic such as COVID-19, the preservation of life and public health will most likely take the position of the supreme good; in the event of a security crisis, the defence of the State itself will be considered paramount; and during a global recession and financial crisis, the protection of the economy and the banking system will have absolute priority. The good is thus always in flux and cannot be pinned down perennially. As I wrote before, politics may of course pursue the realisation of these diverse goods, but what it cannot and should not be allowed to do is to pursue any good at the expense of right. Right, in my hypothesis, represents the yardstick for all political measures and should, ideally, be realised in the shape of the positive law.

Yet the reader might wonder at this point what right actually is. If good is contingent and dependent on empirical circumstances, is the same not true for right? Aristotle, for example, infamously claimed that some humans were ‘by nature slaves’ and that it was therefore *right* to keep them in servitude;³¹ an assertion, which, I hope, is met with universal disapproval by contemporary readers. Yet, despite our current condemnation of the institution of slavery, the moral relativist could easily use this argument to confirm that right is, as good, equally in flux, since what was right for the Stagirite more than 2,000 years ago is not right anymore; and similarly, something we consider to be right today (say, the equality of women and men) was an idea frowned upon and scorned by the Ancients and throughout human history.

However, this argument is amiss, as slavery now not being right and the equality of women and men now being right have one thing in common, and that is the central concept of freedom. Aristotle can effortlessly establish something as unsettling as natural slavery, because he denies such natural slaves the faculty of reason.³² In contrast thereto, Immanuel Kant argues that all human beings possess reason as autonomous beings,³³ and from that reason and autonomy follows the

³⁰ I deliberately disregard at this point that crises usually do not appear in isolation from each other but simultaneously, and that the COVID-19 crisis is, in fact, a poly-crisis of public health, economy, social cohesion, etc. See eg SL Greer, A de Ruijter, and E Brooks, ‘The COVID-19 Pandemic: Failing Forward in Public Health’ in M Riddervold, J Trondal, and A Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave, 2021) 747–64.

³¹ Aristotle, *Politics* (n 26) 1254b19–22.

³² *Ibid.*, 1254b23–25.

³³ See I Kant, ‘Groundwork of the Metaphysics of Morals’ in MJ Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (CUP, 1996) AA 4:421 and 429 (hereinafter: *GMS*).

very idea of freedom. For him, freedom is the only innate right we have,³⁴ and as such, any human action is right as long as it can coexist with everybody else's freedom in accordance with a universal law.³⁵ The Kantian conception of freedom not only provides everyone with 'independence from someone else's necessitating choice',³⁶ but also gives us a rule to live by, ie the categorical imperative of right, calling upon everyone to 'so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law'.³⁷

This is therefore what is meant by right, particularly here; and since this right amounts to freedom derived from the a priori principles of reason, right cannot be empirically contingent, but is necessarily fixed – at least as long as one follows and applies reason. This also explains why slavery and the discrimination of women are and always have been wrong, namely because they violate this very reason-based freedom. Again, Kant concedes that there are other important conceptions of what is good, such as happiness, but morality – including right – remains the sole unconditional good for human beings.³⁸ Right, accordingly, is universal, a priori, and thus independent from any empirically contingent circumstances, and – perhaps most importantly – prior to good. And if we assume, following a liberal democratic understanding, that right is reflected in the positive law, and politics can be equated to the quest for good, then what also follows from the priority of right over good is that law is also prior to politics. This principle must of course also apply in handling the COVID-19 pandemic, and cannot simply be brushed aside, because certain measures are deemed to be necessary above anything else.

I must emphasise, nonetheless, that I do not wish to deny that there are forms of good other than right *qua* freedom; these other forms are of course also extremely significant, if we wish to lead a happy, fulfilled, and prosperous life. Having said that, the crucial point remains that allowing these other forms of good to supersede right is in contravention of reason. The concept of freedom *qua* right and reason is, nonetheless, the basis of any successful socialisation of individuals, since it tells us – and politics – to coordinate our actions in a way so that we can attain that what we desire to attain, ie any contingent good, without harming someone else who might desire to attain a different good. Only then, if right is respected, can all individuals partake in what they deem to be good. A good, which is defined by politics to exclude any individuals or groups as such, is no good, but a mere pseudo-good.

I would also like to clarify that I do not doubt that some or most of the legal measures implemented during the COVID-19 crisis were necessary to overcome this medical emergency. Again, what I doubt is that politics can 'dictate'

³⁴I Kant, 'Metaphysics of Morals' in Mary J Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (CUP, 1996) AA 6:237 (hereinafter: *MS*).

³⁵*ibid*, AA 6:230.

³⁶*ibid*, AA 6:237.

³⁷*ibid*, AA 6:231.

³⁸Kant, *GMS* (n 33) AA 4:415.

the question of necessity to the effect that the law can be amended or suspended in such a situation, or the task of legislation delegated to the executive branch *in toto*. If such measures are taken, they cannot simply defy or flout the existing law, first and foremost constitutional principles. I do not think that a pandemic must necessarily result in a state of ἀνομία (anomia), or ‘lawlessness’, or that politics always pursues a supreme good *without* taking into consideration the concept of right or by even (unintentionally or deliberately) violating it. In Hungary, in contrast, the government, in March 2020, usurped parliament’s power for an indefinite period on the basis of an emergency law, granting it the authority to rule by decree in order to be able to deal with the COVID-19 crisis as swiftly as possible.³⁹ Such a teleological view might certainly yield some desired and positive results in the short-run in combatting the pandemic (although even this argument is highly doubtful), but its long-term effect is all the more disastrous, myopic and irrational, as it undermines right, curtails fundamental rights, and ignores the separation of powers.

For such an approach results in extreme consequences and requires a society to pay a considerable moral price for this. It can even become monstrous – a utility monster, as Robert Nozick put it quite vividly – that receives enormously greater sums of utility (or good) from any sacrifice of others than these others lose.⁴⁰ What I do not mean here is the ‘sacrifice’ that young, healthy people offer to protect those more susceptible to the dangers posed by COVID-19, eg by staying home. What I mean here is the sacrifice by a society and legal system based on reason and freedom offered in the name of the supreme good. This means that if the positive law is a mirror-image of right and should give full effect to it, then politics, in its pursuit of a given good in contravention of the law, should certainly not claim primacy nor prevail over the law. In other words: if the positive law already provides for measures to address a crisis, the relevant rules need to be used; and if it does not yet provide for such measures, they ought to be created first in accordance with the relevant constitutional provisions in place, even if time is of the essence. The pursuit of the supreme good, whatever it is, should therefore only be legitimate and lawful within the framework of right. Right and good are not necessarily contradictory, and whatever politics does to achieve this good must not be done in a normative vacuum. Again: the problem is not *that* politics acts against the COVID-19 pandemic, it simply is *how* it sometimes acts.

C. Anomia: Politics without Law

Let me explain this problem by reference to two dimensions of the role of politics as well as its problematic primacy claim in law-creation: first, the formal rank as

³⁹ See eg I Bar-Siman-Tov, ‘Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures’ (2020) 8 *The Theory and Practice of Legislation* 11, 26–27.

⁴⁰ See R Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 41.

well as the substance of the affected positive law in question, and secondly, the effect of this interference. From these two dimensions follows a scenario derived by way of interpretation from the abovementioned primacy claim of politics, or – to be more precise in Kantian terms⁴¹ – among the three pivots around which legislation turns, freedom (the law of reason) as well as law (positive law), and lastly force (politics).

It is conceivable that politics might affect the law negatively by completely suspending it, for instance, in a *state of exception*, which a pandemic such as COVID-19 could possibly cause. Hence, under the abovementioned maxim of *necessitas non habet legem*, political measures might be enacted that result in the disapplication or even abolishment of the basic constitutional rules of a State (most importantly, democratic elections, the rule of law as well as the separation of powers, and fundamental rights), because compliance with these rules is deemed impossible or a hindrance to resolving the cause of the emergency, such as a pandemic. Politics has gained full primacy here and any legal provisions left (if they have not been affected by the state of emergency) will have to follow politics.

To explain this in more depth, let us assume that politics affects sub-constitutional law (eg ordinary statutory law, decrees, ordinances, etc) quite regularly, as this is what politics *qua* the legislature usually does and exactly what it is supposed to do. I denote this rank of law as *lex* (in opposition to *jus*), which means that it represents ordinary law of non- or subconstitutional character that is not subject to any super-majorities or other constitutional safeguards to be changed. It can hence, in principle, be more easily amended than constitutional law.⁴² Let us also assume that this very constitutional law fully reflects and protects right, which is why I denote the former as *jus positivum* (because it is the positive-legal reflection of right or *jus*) and the latter as *jus rationale* (because non-positive right or *jus* is based on reason). If now, say, politics amends the sub-constitutional *lex* in a way so that is not in line with the respective Constitution and thus with right anymore, the consequence is *irrational law*, as it is in contravention of right and accordingly in contravention of reason – with the *caveat*, however, that such irrationality can only be determined *post hoc* by a court, deciding on whether the law in question was indeed constitutional or unconstitutional. However, the crucial point is that such irrational law may still be repaired from within the system of positive law in the light of constitutional law that reflects right, for instance by the legislature itself or a court with the powers of constitutional review (in the latter case assuming that access to such a court effectively exists). Here, the positive constitutional law and

⁴¹ I Kant, 'Anthropology from a Pragmatic Point of View' in in RB Louden and G Zöller (ed and trans), *Immanuel Kant: Anthropology, History, and Education* (CUP, 2007) AA 7:330 (hereinafter: *Anth*).

⁴² A statement which is, more or less, only true for legal systems with a written constitution. In the United Kingdom with its unwritten constitution, for instance, constitutional rules (with the exception of isolated entrenched Acts of Parliament that were adopted by a supermajority) can be easily and flexibly amended by a simple majority. For a critical view, see eg A Psygkas, 'The United Kingdom's Statutory Constitution' (2020) 40 *Oxford Journal of Legal Studies* 449–81.

the law of reason can work as allies and in symbiosis with one another to overcome the irrationality of the sub-constitutional positive law, and the primacy claim can here still be nipped in the bud, as politics *qua* law-creation has to follow the law. In principle, we do not require any legal-philosophical or metaphysical considerations here, as any problem afflicting the positive law can still be resolved from within itself, or from a system-immanent perspective of legal positivism.

However, in a state of emergency, wherein the positive law has been suspended and no *lex* or *jus positivum* is in force that could give effect to the *jus rationale*, and no access to any courts with the powers of constitutional review is possible, the positive law cannot be easily restored, from and within itself, to its former, pre-emergency and right-based state, if the political will to do so is lacking. Philosophical guidance from the law of reason will be required on the way thereto, although some restrictions apply: such guidance in itself can certainly not give effect to this legal restauration, but it will give individuals in quest of their right and freedom a goal according to which the legal and political system in question should be remodelled.

This scenario represents a drastic regressive step toward the state of nature – a Schmittian state of nature, along the lines of this thinker's ideas for a state of emergency⁴³ (fortunately, I must add, such a situation did not transpire in the COVID-19 pandemic, and thus remains merely a dystopian thought experiment). In this scenario, there still is a government in place that can somehow ensure the security and basic functioning of the State, but there are no noteworthy legal rules in place anymore that could guarantee the application of the categorical imperative of right, freedom, and the law of reason. I will refer to this situation as the *Anomia* scenario, wherein power is, due to the lack or suspension of legal order, exercised arbitrarily and perhaps in a tyrannical fashion:⁴⁴ an extravagance of lawlessness that Kant would probably call 'barbarism', wherein force (politics) reigns supreme without law (positive law) and freedom.⁴⁵

IV. The State of Emergency: From Paradoxical Voids to Full Powers

It is now time to turn to the second implication of the *necessitas* maxim mentioned above at the beginning of section II, and what it means for the concept of the state of emergency. In this section, I would like to discuss in particular the following three problems in relation to the state of emergency, or the *Anomia* scenario: the paradoxical nature of the state of emergency; necessity as the alleged source of law; and the shift of power from the legislative toward the executive branch.

⁴³ See Schmitt, *Political Theology* (n 19) 11–12.

⁴⁴ See K Raaflaub, *The Discovery of Freedom in Ancient Greece* (University of Chicago Press, 2004) 55.

⁴⁵ Kant, *Anth* (n 41) AA 7:331.

A. Paradoxical Nature

The first problem inherent to a state of emergency is that it constitutes a point of imbalance between law and political fact⁴⁶ which is situated – in the same way as civil war, insurrection, and revolution – in an ambiguous limbo at the intersection of the legal and political.⁴⁷ This means that if exceptional measures are the result of a crisis, such as a pandemic, and must accordingly be understood on political-factual rather than on legal-normative grounds,⁴⁸ then they are deeply paradoxical, as Giorgio Agamben asserts. On the one hand, as legal measures, they cannot be understood in legal terms, as the state of exception appears as the legal form of what cannot have legal form. On the other, if the law itself employs the exception (ie the suspension of itself), then it concurrently releases all legal subjects from its bonds *and* binds them in a no man's land between law and politics.⁴⁹

To resolve this paradox, as Agamben explains,⁵⁰ some seek to include the state of exception *within* the sphere of the law, either considering it to be an integral part of positive law (such as the famous Article 48 of the Weimar Constitution),⁵¹ assuming necessity to be an autonomous source of law,⁵² or as the State's subjective natural or constitutional right to its own preservation.⁵³ Others, conversely, regard it as something essentially political and hence external to the law; factual, but nonetheless having legal consequences.⁵⁴ Yet the problem with this neat dichotomy is that it appears to be insufficient to describe the phenomenon it claims to explain. If the characteristic property of the state of emergency is a total or partial suspension of the legal order, then it cannot be contained within it; and if the state of emergency is instead a merely factual situation and thus utterly unrelated to law, then it is rather difficult for a legal order to contain a lacuna precisely where the decisive situation is concerned.⁵⁵

Perhaps, the state of emergency simply is neither external nor internal to the law, but a zone where politics and law blur with each other.⁵⁶ And by this blurring, fact and law become undecidable; fact is converted into law, and law is suspended

⁴⁶ F Saint-Bonnet, *L'état d'exception* (Presses Universitaires de France, 2001) 28.

⁴⁷ A Fontana, 'Du droit de résistance au devoir d'insurrection' in J Zancarini (ed), *Le droit de résistance* (ENS, 1999) 16.

⁴⁸ F De Martino, *Storia della costituzione romana* (Jovene, 1973) 320.

⁴⁹ G Agamben, *State of Exception* (University of Chicago Press, 2005) 1.

⁵⁰ *ibid.*, 22–23.

⁵¹ See C Schmitt, *Dictatorship* (Polity Press, 2014).

⁵² See eg S Romano, 'Sui decreti-legge e lo stato di assedio in occasione dei terremoti di Messina e Reggio Calabria' in S Romano (ed), *Scritti Minori: Diritto costituzionale, Vol. 1*, reprint (Giuffrè, 1990); M Hauriou, *Précis de droit constitutionnel*, 2nd edn (Sirey, 1929); C Mortati, *L'ordinamento del governo*, reprint (Giuffrè, 2000).

⁵³ See eg O Ranalletti, *La polizia di sicurezza* (Società Editrice Libreria, 1904); CL Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Harcourt Brace, 1948).

⁵⁴ See eg G Balladore-Pallieri, *Diritto costituzionale* (Giuffrè, 1970); RC de Malberg, *Contribution à la théorie générale de l'État*, Vol. 1 (Sirey, 1920).

⁵⁵ Agamben (n 49) 23.

⁵⁶ *ibid.*

and obliterated into fact.⁵⁷ This means that we are back where we started, namely at the paradox of anomic law, an emptiness and standstill of the law; a force of law without law,⁵⁸ or – in the vein of my overall hypothesis – the eventual primacy of politics over the law. The two positive conclusions we can draw from this is that, first, the state of exception, also during a pandemic, does not necessarily coincide with dictatorship of full powers (although the executive may certainly act in such a manner during a crisis situation and abuse the absence of the law); and that, secondly, the state of exception is not an anarchic state of nature,⁵⁹ wherein there is neither law nor politics,⁶⁰ because some order still exists, even if it is not a juridical order.⁶¹ The one principal negative conclusion, however, is that such an anomic state is entirely incapable of guaranteeing the aforementioned *jus rationale* and the concept following from it, ie individual freedom. This is therefore certainly not a situation or result with which we should content ourselves, given the detrimental implications for fundamental rights, democracy, and the rule of law.⁶²

B. Necessity as a Source of Law

The second problem in this context follows from the first one. If the juridification of a crisis – ie its ‘translation’ into a legal framework – is impossible, as normativity presupposes normality,⁶³ then, as Schmitt writes, ‘the exception is that which cannot be subsumed; it defies general codification [...]’.⁶⁴ Since the application of a legal norm requires a normal quotidian framework of life, such ‘situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos’.⁶⁵

The only norm applicable would be necessity itself, which thus becomes the foundation of the state of exception,⁶⁶ or virtually its *Grundnorm*, in Kelsenian terms. The *necessitas* formula is consequently not only interpreted as resulting in or allowing for an anomic state (ie, that necessity has no law), but also to the extent that ‘necessity creates its own law’.⁶⁷ The principal argument here is that if the law

⁵⁷ *ibid.*, 29; G Arangio-Ruiz, *Istituzioni di diritto costituzionale italiano*, reprint (Bocca, 1972) 528.

⁵⁸ Agamben (n 49) 39 and 48.

⁵⁹ *ibid.*, 6 and 50.

⁶⁰ In a slight variation to Kant, *Anth* (n 41) AA 7:330.

⁶¹ Schmitt, *Political Theology* (n 19) 12.

⁶² The question remains at this point which States actually experienced such a full-blown state of exception during the COVID-19 pandemic. In general, it seems, that most States simply temporarily suspended some fundamental rights (first and foremost, the right to free movement) in order to constrain the pandemic. And from a doctrinal perspective, the suspension of derogable fundamental rights does not automatically amount to a violation, especially if such a suspension is grounded on a legal basis, and proves to be adequate, necessary, and proportionate.

⁶³ A Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 25.

⁶⁴ Schmitt, *Political Theology* (n 19) 13.

⁶⁵ *ibid.*

⁶⁶ Agamben (n 49) 17 and 24.

⁶⁷ *ibid.*, 24.

is no longer able to perform its highest task, which is to guarantee public welfare, it must be abandoned in favour of expediency; instead of transgressing it, it is simply cleared away.⁶⁸ As Machiavelli suggests, it is the breaking of the existing legal order that saves it,⁶⁹ and thereby, it is this act of breaking that becomes the basis of the substituting new order. Again, politics, or political expediency through necessity, claims primacy over the law.

In this vein, the principle according to which necessity defines a unique crisis situation in which the law loses its *vis obligandi* is reversed, becoming the principle according to which necessity constitutes the ultimate ground and very source of the law.⁷⁰ Politics *qua* necessity cannot be regulated by previously established norms, and since it has no law, it makes law and can accordingly overrule the existing law.⁷¹ In the same way as a revolution, the introduction of necessity as the fountain of new law is certainly unlawful from the perspective of the previous legal order, but perfectly legal and constitutional from the view of the new 'revolutionary' order.⁷²

However, given that this new order simultaneously suspends the hitherto valid law, it also remains controversial how the end of law (that is, the common good), can be obtained without the law, and that whoever intends to achieve the end of law, must also proceed with law.⁷³ This brings us again to the notion mentioned above that politics might certainly pursue a particular good, such as the protection of public health during the COVID-19 pandemic, but never against or outside the framework of right; and suspending the law that gives effect to right is certainly not in line with this approach, because it amounts to the 'auto-immunisation' of a given society which, due to the traumata of a crisis, destroys the foundations of its own order.⁷⁴

C. The Hour of the Executive

If the state of exception represents a legal void, then this anomic situation must be remedied somehow. This lacuna is usually filled by the executive power whose hour of action dawns with the sunset of the law. The underlying hypothesis is that since constitutions are designed for a state of normative normality, times of emergency necessitate us to move away from the regular separation of powers and to

⁶⁸ A Nissen, *Das Iustitium. Eine Studie aus der römischen Rechtsgeschichte* (Gebhardt, 1877) 98.

⁶⁹ Machiavelli, *Discourses* (n 11) I.34.

⁷⁰ Agamben (n 49) 26.

⁷¹ Romano (n 52) 362 and 364.

⁷² Agamben (n 49) 28.

⁷³ D Alighieri, *De Monarchia* (CUP, 1995) 2.5.22.

⁷⁴ See J Derrida, 'Autoimmunisierung, wirkliche und symbolische Selbstmorde' in J Habermas and J Derrida (eds), *Philosophie in Zeiten des Terrors. Zwei Gespräche* (Philo, 2004) 117–18.

concede more competence to the executive.⁷⁵ The main argument for this shift in power from the legislative to the executive branch usually is a temporal one, and the claim that crisis situations require rapid and pragmatic action from the government.⁷⁶

The most rigorous and perhaps most famous attempt to construct a theory on executive powers during the state of exception was made by Carl Schmitt, who intended to inscribe these powers within a legal context.⁷⁷ In his 1921 book *Dictatorship*, he undertakes this task by distinguishing between commissarial and sovereign dictatorship. In case of the former, there is a difference between norms of law and norms of the realisation of law, and its ultimate function is to create a situation in which the law can be realised through the suspension of its application. Sovereign dictatorship, conversely, is characterised by creating a situation in which it becomes possible to impose a new constitution by applying law which is not (yet) valid.⁷⁸ In sum, commissarial dictatorship represents a state of emergency in which the law is not applied, but remains in force; and sovereign dictatorship represents a state of emergency in which law is applied, but not formally in force.⁷⁹

The significance of this distinction only becomes fully visible in Schmitt's 1922 book *Political Theology*, wherein he adds the difference between norm and decision, and thus transforms his theory of the state of exception into a theory of sovereignty.⁸⁰ Only the sovereign – in this case the executive or the Head of State – can decide on the state of exception,⁸¹ and they can only do so by concurrently standing outside of the legal order *and* belonging to it.⁸² However unsettling this theory is in terms of the possible abuse of full powers during a crisis situation, it becomes even more disconcerting when taking into account the consequence of the sovereign's protean internal-external status, namely the incorporation of the state of exception and *anomia* directly into the person of the sovereign who then begins to free themselves from all subordination to the law and asserts themselves as *legibus solutus*.⁸³ And as the sovereign, as part of the executive branch and in charge of all political action, accumulates more powers, the people lose these very powers, and remain without legal protection from them.⁸⁴

⁷⁵ Rossiter (n 53) 5.

⁷⁶ EA Posner and A Vermeule, *The Executive Unbound: After the Madisonian Republic* (OUP, 2010) 8.

⁷⁷ WE Scheuerman, 'States of Emergency' in J Meierhenrich and O Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP, 2016) 547; Agamben (n 49) 32.

⁷⁸ Schmitt, *Dictatorship* (n 51) 136–37.

⁷⁹ Agamben (n 9) 36.

⁸⁰ Schmitt, *Political Theology* (n 19) 13.

⁸¹ *ibid.*, 5.

⁸² *ibid.*, 7.

⁸³ Agamben (n 49) 69.

⁸⁴ Rossiter (n 53) 5.

V. A Kantian Approach to the State of Exception

Sections III and IV demonstrated that any application of the *necessitas* formula without consideration for right is highly dangerous and results in an abnegation of the law under the primacy claim of politics. In the section at hand, I would now like to present and examine solutions to this problem based on Kant's moral and legal philosophy. The principal problem, in this regard, remains, however, that Kant has never explicitly mentioned nor discussed the concept of the state of exception, which means that we therefore can only infer from other statements how we can assess this issue in the light of his philosophy. Such other statements include the requirement of right to be exact, which therefore – and in contrast to ethics – cannot allow 'some room for exceptions'.⁸⁵

An alleged right of necessity, which Kant regarded as a conflict between two moral duties (eg, whether to inform on my father who is about to commit high treason, or not, or whether to give in to the temptations of self-preservation in the famous scenario of Carneades' plank),⁸⁶ belongs to Epicurus' unknowable intra-atomic regions. It cannot be clearly decided and must consequently be separated from the doctrine of right.⁸⁷

A. Universalisable Principles, Not Exceptions

Kant's philosophy is shaped by principles, not exceptions, above all the categorical imperative in its formula of universal law, namely the moral obligation to 'act only according to that maxim by which you can at the same time will that it should become a universal law'.⁸⁸ And the question of what you can will is a question of what you can will without contradiction. The contradiction is that your maxim would be self-defeating if universalised, and your action would become ineffectual for the achievement of your purpose if everyone else tried to use it for that purpose. Since you propose to use that action for that purpose at the same time as you propose to universalise the maxim, you in effect will the thwarting of your own purpose.⁸⁹ Relying on an exception from a universal law therefore destroys the rule and the achievement of your goals.

The same universalising rule is true for the law, both for the law of reason and the positive law. In terms of the former, both the categorical imperative in its original manifestation and the categorical imperative of right share the same form and

⁸⁵ Kant, *MS* (n 34) AA 6:233.

⁸⁶ I Kant, 'On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice' in MJ Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (CUP, 1996) AA 8:300 and note* (hereinafter: *TP*).

⁸⁷ Kant, *MS* (n 34) AA 6:233.

⁸⁸ Kant, *GMS* (n 33) AA 4:421.

⁸⁹ C M Korsgaard, *Creating the Kingdom of Ends* (CUP, 1996) 77–78.

do not prescribe any material content; they merely command us to act in a way that we wish can be normatively universalised.⁹⁰ In other words, the categorical imperative of right is a specialised version of the categorical imperative and thus dependent on it.⁹¹ Selfish and intelligent devils may certainly succeed in creating a functional State, but definitely not in establishing a rightful condition, as they will never have security in their use of external freedom,⁹² if right is not based on the categorical imperative. In terms of the positive law, this means that the categorical imperative of right denotes the positive law as an idea of reason, since right pervades the legal system, gives it normative character, unifies it, and renders it systematic and comprehensive.⁹³ Right supplies 'the immutable principles for any giving of positive law'⁹⁴ and 'can be cognized a priori by everyone's reason.'⁹⁵ The positive law, derived from right, thus also functions as a categorical imperative that we should will to be a universal law without exceptions, and accordingly also without a state of exception.

Exceptions from the positive law can hence only be justified as part of the positive law itself, but not against it, as such exceptions, through a state of emergency, would contradict its programme of legal protection *qua* universalisation.⁹⁶ But how is politics then supposed to deal with crisis situations such as the COVID-19 pandemic, if, say, certain legal provisions hinder the implementation of relevant measures? Kant's brief piece *On a Supposed Right to Lie from Philanthropy* is quite instructive in this respect, because it raises the question whether there is, in deviance from the general duty not to lie, a right to lie in exceptional situations, for instance 'to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house.'⁹⁷ Such a lie does not necessarily harm the right of another person, but 'nevertheless humanity generally, inasmuch as it makes the source of right unusable.'⁹⁸ Any such right to lie must be rejected from the perspective of the categorical imperative, because it would, as a maxim elevated to the status of a formal universal law, turn out to be contradictory, as it presupposes truthfulness in order to be meaningful. Doing so would directly contradict itself.⁹⁹

Every single one of us might certainly consider it morally justifiable to lie in order to save our friend's life (which is a matter of practical judgement), but you

⁹⁰ See G Seel, 'How Does Kant Justify the Universal Objective Validity of the Law of Right?' (2009) 17 *International Journal of Philosophical Studies* 71, 75.

⁹¹ W Kersting, *Wohlgeordnete Freiheit*, 2nd edn (Suhrkamp, 2016) 128.

⁹² Seel (n 90) 88.

⁹³ EJ Weinrib, 'Law as Idea of Reason' in HL Williams (ed), *Essays on Kant's Political Philosophy* (University of Chicago Press, 1992) 15.

⁹⁴ Kant, *MS* (n 34) AA 6:229.

⁹⁵ *ibid*, AA 6:296–297.

⁹⁶ O Lembcke, 'Regel und Ausnahme. Zu einer Leitunterscheidung der Politischen Ethik' (2007) 36 *Österreichische Zeitschrift für Politikwissenschaft* 49, 51.

⁹⁷ I Kant, 'On a Supposed Right to Lie from Philanthropy' in MJ Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (CUP, 1996) AA 8:425 (hereinafter: *VRML*).

⁹⁸ *ibid*, AA 8:426.

⁹⁹ *ibid*, AA 8:430.

could then be held legally responsible for all consequences arising from that lie, eg if the victim slips out of the house unaware and the murderer then encounters your friend just because of your lie. You could, however, never be held responsible before a court for telling the truth.¹⁰⁰ We could of course also argue that this situation presents us with a moral dilemma, namely to protect the life of our friend versus the prohibition to lie to a stranger, which we could defuse by making exceptions – for instance that it is permissible to lie in certain situations. Yet this manoeuvre destroys the entire moral system, because one could think for every major premise – even for norms such as ‘do not torture children’ – of an exception,¹⁰¹ or another moral dilemma as a minor premise, which would then result in the conclusion that the end always justifies the means.¹⁰²

Kant thereby demonstrates that even the least of exceptions, unless provided for by this system itself, makes a normative system (may it be morality or the positive law) ‘uncertain and useless’.¹⁰³ He argues that the law even covers situations like the already mentioned plank of Carneades wherein the question arises whether one person might push off another person from the last remaining plank after a shipwreck to save their own life.¹⁰⁴ Saving one’s own life by pushing another person toward certain death always constitutes an objective wrong, but it might result in subjective impunity for the perpetrator. Under these premises (and Kant even explicitly mentions the *necessitas* formula here), there can be ‘no necessity that would make what is wrong conform with law’.¹⁰⁵

Kant is nonetheless not that unrealistic that he would misjudge the need for two types of exceptions. The first type concerns the level of principles, or the case of a normative conflict as above.¹⁰⁶ Wide legal duties leaving a margin of discretion are not to be taken as permission to make exceptions,¹⁰⁷ but without a clear rule to resolve such conflicts, we must rely on that worldly ‘prudence’ which can ‘adapt the practical rule in accordance with it to the ends of life even tolerably, by making appropriate exceptions’.¹⁰⁸ The second type takes into consideration that there can be political factors which impede the realisation of the law and require exceptions, ‘without, however, losing sight of the end’.¹⁰⁹ This is Kant’s outmost concession

¹⁰⁰ *ibid.*, AA 8:427.

¹⁰¹ For example, whether it is morally justified to torture the child of a suspected terrorist to force him to reveal the location of the next attack.

¹⁰² Gabriel (n 10) 152.

¹⁰³ Kant, *VRML* (n 97) AA 8:427.

¹⁰⁴ See MT Cicero, ‘De officiis’ in W Miller (ed and trans), *Cicero on Duties* (Harvard University Press, 1989) 3.89; and also LL Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62 *Harvard Law Review* 616–45, for a similar scenario.

¹⁰⁵ Kant, *MS* (n 34) AA 6:236.

¹⁰⁶ Lembcke (n 96) 52.

¹⁰⁷ Kant, *MS* (n 34) AA 6:390.

¹⁰⁸ I Kant, ‘Critique of Practical Reason’ in MJ Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (CUP, 1996) AA 5:36 (hereinafter: *KpV*).

¹⁰⁹ I Kant, ‘Toward Perpetual Peace’ in MJ Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (CUP, 1996) AA 8:347 (hereinafter: *ZeF*).

toward an exception to legal principles, as everything else would undermine his objective of the juridification of politics, namely politics which tends toward making exceptions. This is the reason why he states that '[r]ight must never be accommodated to politics, but politics must always be accommodated to right',¹¹⁰ or, almost violently painted in the image of a gesture of physical submission to a monarch, that 'all politics must bend its knee before right'.¹¹¹ The differences between Kant and Schmitt could not be greater: the latter constructs the law from the viewpoint of the exception which, in contrast to the rule, 'proves everything',¹¹² for the former, there can be no exception without a rule in the first place. Even a partial suspension of the law would amount to a regression toward the state of nature, which means that only a temporary acceptance of institutionalised or codified exceptions can be permitted.¹¹³

Therefore, from a Kantian perspective, the state of exception is not necessarily paradoxical. Since the law of reason as a metaphysical construct continues to exist even during a state of exception, a suspension of the law can only be deemed permissible as long as it is in accordance with the *jus positivum* and allows for a return toward a normal state of affairs. The state of exception only becomes paradoxical or self-contradictory if it is a one-way street with no point of return which is, in any case, inadmissible from a reason-based perspective. The rule is prior to the exception, and the latter only possible if the former allows for it. For our situation in a world ravaged by the COVID-19 pandemic, this means that all legal measures adopted must not only be in accordance with the existing positive law, but should also always be scrutinised in the light of right, or the categorical imperative of right. It is, therefore, absolutely appropriate to constrain the freedom of individuals (ie, free movement rights) to protect the freedom of others (ie, their health). However, any measures in place should also always allow for a return to the *status quo ante* once the pandemic is over, as otherwise, the exception would indeed become the rule. And this situation, as I will argue in the following section, would be incompatible with Kant's law of reason.

B. The Law of Reason and the Moral Obligation to Enter a Juridical State

If we assume, with Kant, that the law of reason is the metaphysical foundation for all positive law, then two arguments follow from this: first, necessity can then not possibly constitute the source of law, as has been argued before,¹¹⁴ because this position is then taken up by the law of reason. And secondly, we would also have

¹¹⁰ Kant, *VRML* (n 97) AA 8:429.

¹¹¹ Kant, *ZeF* (n 109) AA 8:380.

¹¹² Schmitt, *Political Theology* (n 19) 15.

¹¹³ Lembcke (n 96) 52.

¹¹⁴ See section IV(B) above.

a moral obligation to leave the state of exception and return to the regular state of positive law. Let me now explain this second point in more detail.

Whilst most philosophers agree that humans should leave the (hypothetical) state of nature, the reasons to do so vary greatly. For Thomas Hobbes, this departure is paramount for self-preservation, survival, and security,¹¹⁵ and thus purely instrumental. For Kant, conversely, we must leave the state of nature for *moral* reasons, because therein, a legal status can only be provisional or presumptive, as the law of reason cannot be effectively enforced in the absence of a positive-legal system.¹¹⁶ Morally autonomous individuals can only be treated as such through a public lawful coercion and judges competent to render rightful and enforceable verdicts.¹¹⁷ However, the establishment of such a positive legal system is only possible in a juridical state, where all human beings are treated as ends, not as mere means, in line with the ‘humanity formula’ of the categorical imperative.¹¹⁸ The positive law of the juridical state therefore ensures the exercise of the external freedom of individuals *qua* the positive law.¹¹⁹

If we now apply Kant’s argument that the departure from the lawless state of nature and the entering into a juridical state (ie, a state of positive law) is a moral obligation, to the state of exception – which is also a lawless state under the primacy of politics – we see the same result: under the law of reason as the foundation of positive law, there is a moral obligation to leave the state of exception (perhaps with the addendum ‘as soon as possible after the end of a given crisis such as the COVID-19 pandemic’) through the avenues the positive law itself provides for this exit, because human beings cannot be treated as morally autonomous individuals in such a state of legal suspension. In other words, even if we follow the Schmittian argument of necessity being the basis of all positive law, then this reasoning can only be purchased at the high price of abandoning our moral autonomy and external freedom. Yet, as we have seen in the previous section, the exception – or necessity – cannot, for logical reasons, be the fountain of all law, as this would result in a self-contradiction. An alleged right of necessity, as a supposed right to do wrong, is an absurdity,¹²⁰ and politics should therefore also diligently adhere to this principle when enacting measures to combat the pandemic.

C. Resistance against Despotism in the State of Exception

In this last section, let me now address the problem I denoted before as the ‘hour of the executive’ and the potential deteriorating of the state of exception into authoritarian rule, or despotism. The problem that consequently needs to be addressed

¹¹⁵ T Hobbes, *Leviathan*, revised student edn by R Tuck (CUP, 1996) chapter XIII.

¹¹⁶ Kant, *MS* (n 34) AA 6:256 and 307–08.

¹¹⁷ *ibid.*, AA 6:312 and 314–15.

¹¹⁸ Kant, *GMS* (n 33) AA 4:439.

¹¹⁹ GP Fletcher, ‘Law and Morality: A Kantian Perspective’ (1987) 87 *Columbia Law Review* 533, 535.

¹²⁰ Kant, *TP* (n 86) AA 8:300.

here is how Kant regarded the question of resistance or rebellion against such a regime and a state of exception, and whether a revolution against such a political system can be justified or not.

In this context, Kant is often accused of inconsistency:¹²¹ while he expressed evident sympathy for the French Revolution as a crucial step in terms of humanity's moral progress (especially through the establishing of a morally good juridical constitution),¹²² he also firmly rejected the idea of any right to revolution against the wrongful conduct of the 'legislating head of a State'. A revolution against the highest legislation – ie the current legal system – can never be lawful in Kant's eyes.¹²³ However, his position is, once correctly understood, fully plausible and consistent,¹²⁴ particularly in the context of this chapter. To begin with, to revolt against every individual legal act we deem wrongful or unjust would not only be highly impractical, as this could destroy the entire political-legal system, but also self-contradictory. It is self-contradictory for the simple formal reason that the existence of a highest law containing a provision that it is not the highest, thus allowing the people to revolt against it, would violate both the positive-legal rules of this legal system from internal aspect¹²⁵ and the law of reason, as only such a positive-legal system can guarantee it by securing everyone's freedom.¹²⁶ One could say, quite provocatively, that any legal system is still better than having none,¹²⁷ and within a lawful juridical state, we should therefore seek reform, not revolution, to overcome defective positive law.¹²⁸

The problem with this line of reasoning remains, nevertheless, that – as a purely formal argument – it can be applied to any system whatsoever, to the mafia with Don Corleone as the highest 'legislator', or to a dictatorial system with any despot at the top of the respective regime. Yet, this argument acquires a substantive content once applied to the juridical state.¹²⁹ If it is, as discussed above, a moral obligation to leave the state of nature by establishing a juridical state,¹³⁰ then it is prohibited to destroy such a state by way of revolution and to return to the state of nature.¹³¹ And since only the juridical state – and not a mob of gangsters or a dictatorial system – can ensure my freedom and other individual rights, it is irrational as well as morally wrong to revolt against it.

This is exactly the crucial point in terms of the state of exception: not every polity that calls itself a 'State' is indeed a juridical state. If a juridical State reverts

¹²¹ See K Flikschuh, 'Reason, Right, Revolution: Kant and Locke' (2008) 36 *Philosophy & Public Affairs* 375, 375.

¹²² I Kant, 'The Conflict of the Faculties' in AW Wood and G di Giovanni (eds and trans), *Immanuel Kant: Religion and Rational Theology* (CUP, 1996) AA 7:84–89 (hereinafter: SF).

¹²³ Kant, *MS* (n 34) AA 6:320.

¹²⁴ BS Byrd and J Hruschka, *Kant's Doctrine of Right: A Commentary* (CUP, 2010) 90.

¹²⁵ *ibid.*, 182; Kant, *MS* (n 34) AA 6:320.

¹²⁶ Kant, *TP* (n 86) AA 8:298.

¹²⁷ Kant, *ZeF* (n 109) AA 8:373.

¹²⁸ Kant, *MS* (n 34) AA 6:340.

¹²⁹ Byrd and Hruschka (n 124) 182.

¹³⁰ Kant, *MS* (n 34) AA 6:256 and 307–15.

¹³¹ *ibid.*, AA 6:340.

to a non-juridical State, for instance a den of thieves¹³² or a despotic State, then I find myself in a state of nature again,¹³³ wherein resistance is permitted. Against a 'State' which kills or enslaves people, I not only have a right to defend myself, but actually a duty to do so.¹³⁴ Resistance against despotism is consequently permitted, and we find despotism in a government that is 'simultaneously lawgiving',¹³⁵ ie when the despot as the executive is not bound by the laws that they, as the law-giver, can change anytime. Without any separate legislator to bind the executive, the latter can implement arbitrary and ad hoc decisions, and legal subjects have no legal basis on which they may challenge these decisions.¹³⁶

Applied to the state of exception, this means that any measures against, say, a pandemic within the bounds of right and external freedom are certainly lawful and do not allow for any resistance from a Kantian perspective. If, conversely, such a state of exception becomes, during the hour of the executive, despotic, and citizens are degraded to mere subjects,¹³⁷ this regression to a Schmittian state of nature would certainly permit resistance, may it be 'the freedom of the pen',¹³⁸ negative resistance by refusing to accede to the demands of the despot,¹³⁹ or even (albeit only implicitly mentioned) active resistance, thereby coercing others to (re-)enter a juridical condition.¹⁴⁰ But again, this is – in the current situation – definitely not the case, and the measures implemented against the COVID-19 pandemic do certainly not allow for a rebellion, especially if we take into account the positive-legal provisions for them, their objective justification, and their proportionality. In conclusion, we might say that the Schmittian sovereign may certainly declare the state of exception, but it does not thereby gain any legal title in the Kantian sense¹⁴¹ and can therefore be resisted.

VI. Concluding Remarks

I would like to finish this chapter with the following three conclusions: first, the law cannot be thought of or constructed from the exception, but only from the rule – and we can locate this rule in the concept of the categorical imperative of

¹³² See also Augustine, *De civitate Dei* (Penguin, 2003) IV.4.

¹³³ See G Cavallar, *Kant and the Theory and Practice of International Right* (University of Wales Press, 1999) 101.

¹³⁴ Byrd and Hruschka (n 124) 91 and 184; J Hruschka, 'Die Notwehr im Zusammenhang von Kants Rechtslehre' (2003) 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* 201, 201 et seq; Kant, *MS* (n 34) AA 6:461.

¹³⁵ Kant, *MS* (n 34) AA 6:316.

¹³⁶ Byrd and Hruschka (n 124) 184.

¹³⁷ Kant, *ZeF* (n 109) AA 8:351; Kant, *MS* (n 34) AA 6:306–307.

¹³⁸ Kant, *TP* (n 86) AA 8:304.

¹³⁹ Kant, *MS* (n 34) AA 6:322.

¹⁴⁰ *ibid*, AA 6:256. See also P Capps and J Rivers, 'Kant's Concept of Law' (2018) 63 *American Journal of Jurisprudence* 259, 288.

¹⁴¹ H Radermacher, 'Zum Problem des Erlaubnisgesetzes bei Kant' (1988) 74 *Archiv für Rechts- und Sozialphilosophie* 42, 49.

right (ie, external freedom) *qua* the law of reason. Otherwise, we will only find ourselves in theoretical dilemmas and practical problems under the primacy claim of politics which may elevate the pursuit of any good over the realisation of and compliance with right. If a certain good is to be pursued, then only within the bounds of right.

Secondly, even in the current crisis, the COVID-19 pandemic, we should not overestimate the power of the exception. A crisis situation may certainly reveal 'our true faces' or the shortcomings of a given political-legal system, but we should not estheticise it to the point that we forget the underlying rules.¹⁴² In fact, any deficit that manifests should represent a lesson to improve the system and make it more robust against any future crises (and it goes without saying that this should not happen at the expense of right).

And thirdly and last, speaking of improvement, a legal system can be made more robust and respectful of right, if it includes clear rules on how to handle crisis situations, especially under what circumstances and to which extent certain legal rules can be suspended, how and when they can and should be re-activated, and how individuals can challenge this suspension of their rights. A blurring of law and facts and situations where the exception becomes the rule can never be accepted, lest 'the juridico-political system', as Agamben quite violently states, 'transforms itself into a killing machine'.¹⁴³

¹⁴² See also Kaiser (n 63) 20–24.

¹⁴³ Agamben (n 49) 86.