



Comparative Law Review

2019

ISSN: 2983 - 8993

COMPARATIVE LAW REVIEW

The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.

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THE PANDEMIC OF AUTHORITARIANISM

Günter Frankenberg

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I. UNCERTAINTY AND EXPERTISE

Law does not tolerate doubt. Rulings have to convince so as to be accepted as authoritative. Interpretations are meant to provide determinate, at least plausible, results. Legal education and practice are geared toward certainty. And later, the opinions of legal experts – merchants of certitude – often cloak the interests of the client behind a screen of definite assumptions and conclusions. Uncertainty, so much seems certain, is not a matter for the legal profession.

The Corona crisis teaches lawyers neither to comfortably issue coercive decrees nor to make gutsy judgments, but to learn what the pandemic is all about. Legal consultants need to find their place in the dispute of the faculties – virology, epidemiology, medicine, etc. They have yet to define their role as advisors while all the time operating in a “floating” terrain that offers little factual positiveness, leaves open many questions, requires from experts to constantly check and revise their tentative prognoses, to process new data and changing criteria. Throughout all societies, the pandemic is spreading and with it the uncertainty of how and with which legal means and legal measures to contain and control it. So far, lawyers have been assiduously following the diverse and unstable assessments delivered from the intellectual laboratories of virology, epidemiology and medicine. They find comfort in their lagging legal contributions to “flattening the curve”, reducing the “rate of the reproduction of infections”, limiting hot spots, and more. And, generally, they are satisfied with contributing to prevent the intensive care capacities from being overburdened. But what exactly do they contribute?

There are some aspects of the pandemic that are or seem to be certain: Corona can only be compared with earlier influenza viruses at the price of great inaccuracy. The virus is highly infectious, that is why it is spreading rapidly as a droplet infection. COVID-19, the actual infection, selectively threatens especially the old and those who have an underlying health condition, notably of the respiratory tract. Many of the infected remain asymptomatic.

Then there are approximate estimates with low half-lives for COVID-19 diseases, mortality rates, reproduction rates, and infection chains. Little is known about the average duration of required

intensive care treatment, and even the benefit of protective masks is controversial. Like a mantra, politics and the media spread flat infection curves and infection rates < 1 . Like a monstrosity, the numbers of people already cured are exhibited on a daily basis, notwithstanding that the body count does not mean much as long testing is sporadic and the cohorts of those who are and have been infected can only be estimated.

In the dispute of the faculties one witnesses, during these definitely post-Kantian weeks and months, how the voices from the natural sciences are heard first, followed by economists forecasting damages, insolvencies and unemployment. Even psychologists who warn about the effects of shutdowns, social distancing and isolation, and or social workers who report an increase in domestic violence and suicides receive more attention in the concert of experts. In contrast, law comes as also-ran. Legal experts who should “rule by argument and assertion”¹ do not seem to have much purchase in this concert of crisis. Politicians are not bent on lending an ear to jurists when it comes to strategies of how to confront the pandemic. As a matter of fact, legal expertise is traded in very small coins, rarely in large bills. Lawyers talk about what is or might be unconstitutional or illegal, which means should be deemed at least not proportionate.

Caution suggests that the legal expert should not “bend over the relevant legal norms” and ask whether the relevant norms “even give away what has been imposed on us”.² Instead, legal scholars and judges may start to wonder why their authority and expertise rank so low in these times of pandemic. They might realize that the old recipes don’t work, the customary doctrines and methods do not “fly” when law has to cope with extraordinary uncertainty. When almost everything is or could be different, then law must tune in to difference and, more importantly, must start to learn under conditions of uncertainty as quickly as possible, especially since the profession missed the chance to prepare for the pandemic in the early months of 2020 or long before when warnings of a pandemic had already been out³, and Corona will have to be reckoned with for quite a while because a “magic bullet”⁴, i.e. a vaccine, is not likely to solve the problems in the near future⁵ if one considers the complicated and extended search for a vaccine against Dengue, HIV and other viruses as well as the probability that Sars-CoV-2 might have mutations in store⁶.

¹ D. Kennedy, (2016), *A World of Struggle. How Power, Law, and Expertise Shape Global Political Economy*, Princeton: Princeton University Press, 135.

² G. Lübke-Wolff, (2020), “Geschlossene Gesellschaft“, in: *Frankfurter Allgemeine Zeitung*, 24 March.

³ R. Marantz Henig, in: *The National Geographic*, 6 April 2020 - <https://www.nationalgeographic.com/science/2020/04/experts-warned-pandemic-decades-ago-why-not-ready-for-coronavirus/> (accessed 12 June 2020) with further references.

⁴ For the metaphor and its history see A. M. Brandt, (1985), *No Magic Bullet. A Social History of Venereal Disease in the United States since 1980*, New York: Oxford University Press, esp. 161 ff.

⁵ On the grim, albeit more realistic immunization aspects see *The Guardian* - <https://www.theguardian.com/world/2020/may/22/why-we-might-not-get-a-coronavirus-vaccine/> and *The Conversation*, 13 May 2020 - <https://theconversation.com/south-africas-covid-19-strategy-needs-updating-heres-why-and-how-138368/> (both sources accessed: 12 June 2020).

⁶ W.R. Fleischmann, jr. (1994), “Viral Genetics”, in: S. Baron, (ed.), *Medical Microbiology*, 4th ed., Galveston TX: University of Texas Press, Ch. 46; N.J. Cox, T. L. Brammer, H. L. Regnery, (1994), “Influenza: global surveillance for epidemic and pandemic variants”, in: *10 European Journal of Epidemiology*, 467 ff.

II. SECURITY LAW AND CONVENTIONAL LEGAL LEARNING

For selective, case by case learning, the security laws of many countries traditionally worked with and processed information according to the danger-to-safety scheme in order to defuse threatening situations. To cushion the consequences of hazardous technologies, Ulrich Beck's study on the "risk society"⁷, that reads like a commentary on Chernobyl (1986), generalized the police law concept of danger and offered "risk" instead as a more abstract, statistical category to comprehend and contain disaster. Under the banner of the "fight against terrorism" or organized crime, the rule-of-law matrix – threats to security trigger proportionate measures – morphed into a pattern for averting risks. While the dynamic and attractive (because more abstract) category of risk took the lead, danger receded into the background. In consequence, the threshold for police action became vague and was significantly lowered. In turn, police law took on the character of a flexible, hyper-preventive security law, which insatiably collected and hoarded data and brought them to bear in the face of imperceptible, information-dependent and cross-border threats. Above all, eavesdropping and surveillance measures, that is interventions that have a wide scope and reach far beyond any clear and present danger zone, signal the transition to a special police law in which "actual clues", "situation assessments" and "experiences" furnished by the police force guide their interventions.⁸ Would this security law qualify as a "learning law"? Rather a "danger invention law" that produces self-reflexively its own information and is hardly open to data from the outside which unsettles "settled knowledges". While conventional security laws at best learn from case to case, firmly entrenched in their law-rule categories, the new security law incorporates the emergency and therefore runs the risk of constantly seeing the world in a state of exception.

In many democracies, control and containment of epidemics either come under emergency law or follow the regulatory pattern of conventional police or security law, some including normalized emergency provisions as the following examples show. All of them limit learning processes according to their regulatory scheme prompted by concepts of order. Usually these laws have a friendly title, like the South African National Health Act or the [Australian Guidelines for the Prevention and Control of Infection in Healthcare \(2019\)](#), the Consolidated Health Laws in Italy⁹ or the (German and Argentine) Infection Protection Acts.¹⁰ As a rule they are tough on the matter, because they process the collective traumas produced by past epidemics, like the plague, cholera, typhoid fever, the Spanish Influenza – and leave little room for adapting the law to the new challenge.¹¹ Moreover,

⁷ U. Beck, (1987), "The Anthropological Shock: Chernobyl and the Contours of the Risk Society", in: 32 *Berkeley Journal of Sociology*, 153 ff.

⁸ For a detailed analysis see G. Frankenberg, (2013), *Political Technology and the Erosion of the Rule of Law. Normalizing the State of Exception*, Cheltenham UK: E. Elgar, Ch. I, V – VI.

⁹ See the report "Italy: Legal Responses to Health Emergencies", <https://www.loc.gov/law/help/health-emergencies/italy.php/> (accessed 30 May 2020).

¹⁰ In 2001 the Infection Protection Act (IfSG) updated rather than modernized the 1961 statute regulating contagious diseases.

¹¹ From the fascinating literature on the history of epidemics and pandemics see W. H. McNeill, (1976), *Plagues and Peoples*, New York: Anchor Press; J. Ruffié, J.-C. Sournia, (1984), *Les Épidémies dans l'histoire de l'homme*, Paris:

they normalize the state of exception by introducing extraordinary measures into the law in the guise of ordinary regulations.¹²

The Consolidated Health Laws establishes that the Minister of Health may issue a list of infectious and communicable diseases that are subject to special procedures and measures. The Italian statute sets up a system of reporting, provides for preventative measures, necessary assistance, mandatory medical treatment, and disinfection interventions. For epidemics or pandemics it complements the regulatory scheme by authorizing the Minister of Health to issue special orders for the inspection and disinfection of premises, the organization of special services and medical assistance, and the adoption of protective measures against the spread of such diseases.

The German Infection Protection Act¹³ corresponds to the danger prevention design of the Italian Consolidated Health Laws but complements and intensifies it by providing for emergency measures that are normalized – which is to say treated as the standard *modus operandi*, though: Always already leaning to public health with an eye to the state of exception, the recent revision during the COVID-19 crisis quite openly introduced extraordinary measures. Notably it empowered the Federal Minister of Health¹⁴ to sidestep laws and rule by decree once the Federal Diet had declared an “epidemic situation of national importance” (§ 5 IfSG). The regime of containing the further spread of an infection thus installed is reminiscent of the infamous emergency ordinances, which contributed to the decline of the Weimar Republic and the erosion of its constitution.¹⁵ Furthermore, the corona ordinances and general decrees of the *Länder* (member states of the Federal Republic) extensively exhaust the authorization framework offered by the IfSG. They authorize “the necessary protective measures” “to the extent and for as long as necessary to prevent the spread of communicable diseases”. In addition to reporting obligations, surveillance, bans on activities or the closure of communal facilities, the IfSG provides, among other regulations, for the obligation of sick or dangerous persons “not to leave the place where they are located or not to enter certain places”. If necessary a compulsory quarantine can also be imposed. Fines and prison sentences for offences are more draconian than those provided by standard infection protection acts:¹⁶ A fine of up to 5000 € or a maximum imprisonment of five years is not chicken feed. Federal and State governments have agreed on extremely strict measures that were gradually eased. Others, such as mobile phone tracking and surveillance by drones, are on the horizon.

Flammarion; M. Vasold, (2008), *Grippe, Pest und Cholera. Eine Geschichte der Seuchen in Europa*, Stuttgart: Franz Steiner Verlag; J. Attali, (1979), *L'ordre cannibale*, Paris: Glénat.

¹² See above Ch. IV and for a detailed discussion of “normalization”: Frankenberg, *Political Technology and the Erosion of the Rule of Law*, Ch. 1.

¹³ For a critique: <https://www.zm-online.de/news/politik/wissenschaftlicher-dienst-kritisiert-soeders-infektionsschutzgesetz/> (accessed: 12 June 2020)

¹⁴ § 5 para. 2 IfSG.

¹⁵ Se Art. 48 para. 2 Weimar Constitution (1919): “If public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124 and 153.”

¹⁶ See §§ 28 - 30 IfSG.

III. CORONA STATES OF EXCEPTION AND LEARNING

So far, national infection prevention schemes do not show any signs that they are irritated by the Corona uncertainties or that there is a significant willingness to address and learn more about its peculiar features. Declaring the state of exception, disaster or emergency seemed to be a standard response from France to Russia, Tunisia to South Africa, Japan to the Philippines, Venezuela to Argentina. It reveals the global desire to break away from law-rule to personal rule and a preference for decision rather than learning.¹⁷

In her first speeches to the nation, German Chancellor Merkel seemed to pursue a different strategy. Rather than clearly framing social distancing and staying at home as decrees, ordinances or administrative acts, with a touch of vagueness she referred to "guidelines", "instructions for action", "rules" and most recently "standards". By avoiding to name definite "directives" and stressing that the Corona rules are not mere "recommendations", she relies on the semantics of approximation. It may very well be that vagueness currently may be a virtue by appropriately communicating the uncertainty surrounding the pandemic. Admittedly, in the decrees and ordinances issued primarily by states' and local authorities, infection protection steps out of Angela Merkel's shadow of a gentle prerogative and shows its blades.

Or would the Chancellor, in conjunction with other decision-makers at state level, have had to declare a state of exception, if only for reasons of clarity? In fact, a state of emergency could have distracted from the question of whether the enabling norms of the IfSG or the ordinances they support, for example, such as a nationwide lockdown (for the whole or parts of the population) or shutting down plants, but above all the special powers of the Federal Minister of Health are compatible with the Basic Law.

But what state of exception could the Chancellor have possibly declared? An "epidemiological situation of national importance" (§ 5 para. 1 IfSG) had to be (and was) announced by parliament. Moreover it appears to be a kind of spurious state of emergency, which lets the Minister of Health off the hook, following the unfortunate example of the Weimar Constitution for threats to the public order. The "epidemiological situation of national importance" is a bogus state of exception, its wording carefully avoiding "exception" and "emergency". With less caution one might consider it unconstitutional as far as it can be assumed that this "situation" disrupts the typical states of exception enumerated in the Basic Law. Admittedly, the typical states of emergency the Basic Law offers do not fit in with a pandemic: The situation of a legislative emergency is certainly far off. The suppression of armed insurgents (who break out of house arrest or protest against the Corona measures?) is not to be feared, nor is it likely that cross-border battles (over protective clothing, test kits or respiratory equipment?) will measure up to a "case of tension" or "defense" of the Basic Law. Disasters and

¹⁷ J. M. Casal Hernández and M. Morales Antoniazzi, (2020), "States of Emergency without Rule of Law: The Case of Venezuela", *VerfBlog*, 2020/5/22.

catastrophes under Article 35 (3) of the Basic Law are tailored to the inter-state deployment and cooperation of police and armed forces. One may infer that all the Basic Law has learned is history today, and that it is rather strictly focused on the dangers associated with an executive branch cut loose from parliamentary and judicial control and on the dangers of military operations within the country.

By the same token, a decent democratic governor, like the German Chancellor, certainly would not want authoritarian leaders to prompt her to declare a state of exception. At any rate, most autocrats launched their anti-Corona measures after declaring a state of exception of calamity because they habitually operate in this mode, in order to prevent the possible emergency that they might lose power. To list a few examples: President Rodrigo Duterte of the Philippines ordered the shooting of quarantine violators. Indian Prime Minister Modi initially recommended Ayurveda and homeopathic treatment to manage the COVID-19 disease, later he commanded, with little advance warning, a national lockdown and condoned police brutality against people suspected of violating quarantine rules. While Jaroslaw Kaczynski would generally have no qualms declaring the state of emergency and has demonstrated repeatedly his willingness to normalize extraordinary powers, at present he and his government avoid declaring the state of exception in Poland in order not to endanger the presidential elections (his party's candidate is likely to win) scheduled for the beginning of May.

Some autocrats used the Corona crisis as a Machiavellian moment to gain power premiums by loosening parliamentary controls and striking down the opposition.¹⁸ Until mid-March of 2020 neither “comprehensive restrictive steps” nor additional powers were on the agenda of President Erdoğan's anti-Corona policy. The Turkish President did not need donate himself emergency powers, as he had already accomplished that after the coup in 2016. Journalists and members of the opposition continue to be targeted. In Hungary Viktor Orbán took a significant step to consolidate his autocracy by removing parliamentary control of his decrees and turning criminal law against the opposition with a statute that holds a prison sentence of up to five years for spreading “false information” about COVID-19.¹⁹ The Corona crises hit the regime in Algeria at a very unfortunate moment: With the oil prices falling and tourism suffering, it has no convincing argument to contain the still lively protest movement undaunted by COVID-19.²⁰ By proxy, Xi Jinping cracked down on the protest movement in Hong Kong.²¹ The government of Bhutan went down the Swedish path, at least held a middle ground between denial and state of exception. It ordered a quarantine and surveillance of the closely controlled borders, without declaring the state of emergency.

¹⁸ “Would-be autocrats are using covid-19 as an excuse to grab more power”, in: *The Economist*, 23 April 2020.

¹⁹ “Hungary: Law to fight coronavirus creates ‘uncertainty’ for journalists”, In: *Deutsche Welle*, <https://www.dw.com/en/hungary-law-to-fight-coronavirus-creates-uncertainty-for-journalists/a-53027631/> (accessed 30 March 2020). G. Halmi, G. Mészáros, K. L. Scheppele, (2020), “From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law”, *VerfBlog*, 2020/5/30.

²⁰ *The Africa Report*, 6 April - <https://www.theafricareport.com/25365/coronavirus-in-algeria-a-countrys-last-warning/> (accessed 12 June 2020).

²¹ A. Ramzy, and E. Yu, (2020), “Under Cover of Coronavirus, Hong Kong Cracks Down on Protests Movement”, in: *The New York Times*, 21 April.

After trivializing the virus and the COVID-19 disease, Brazil's President Jair Bolsonaro appeared to follow the lead of municipal and state authorities and finally asked Congress to approve the government decree declaring public calamity so as to be able to spend beyond the limit of the Fiscal Responsibility Law and face the emergency situation.²² His erratic, male chauvinist course of action cannot be trusted though. The question remains whether he will be held responsible for the increasing death rates in Brazil. Not to forget “Europe’s last dictator” (his own words): Alexander Lukashenko remains one of the last outliers who remain in denial and shun any serious anti-Corona measures, still believing that being in a good mood and doing rural work (the “tractor therapy”) will do the job.²³ Under the sign of the pandemic, some democratically elected heads of state appear to be bent on joining the phalanx of their openly authoritarian colleagues. Their practices illustrate that states of emergency are not tailored to legal learning experiences, but swift action (South Africa, Tunisia, Argentina) and to reward authoritarian gestures and stabilize autocracies: One of them, Emmanuel Macron, narcissistically offended by having to fear not being re-elected, vainly and foolishly declared war on the virus: "Nous sommes en guerre."²⁴ The other, Donald Trump, fluctuates erratically between denial, idiotic statements that reveal ignorance and lack of concern, and dramatization.²⁵ Finally, after the situation had become really dramatic in the US, he arrived at war rhetoric and declared a state of emergency, while simultaneously suggesting that “things got better” and the economy would be “opened again” soon as well as holding China and the WHO responsible for the pandemic.²⁶

The Italian practice is different but also neither suitable for imitation nor learning. The state of emergency and the blockade imposed on the country showed signs of despair over a disaster the government and its administration were unable to control especially in Lombardy.²⁷ The cascade of measures released under its umbrella cut deeply into civil liberties.²⁸ Certainly, Article 77 of the Italian Constitution entitles the government to take extraordinary action on its own responsibility in cases of urgency and necessity. For a national curfew, however, this cloak of legality seemed both thin and short. But who asks about the law when death is on the doorstep?

²² B. Grillo, (2020), “Municipal, state-level authorities declare a state of emergency”, in: *The Brazilian Report*, 17 March.

²³ A. Simmons, (2020), “In Belarus, Everyday Life is much the Same as Coronavirus Spreads”, in: *The Wall Street Journal*, 27 April.

²⁴ French President Emmanuel Macron, addressing the Nation and calling for a “general mobilization”, in: *Le Monde*, 17 March 2020.

²⁵ H. Stevens and S. Tan, (2020), “From ‘It’s going to disappear’ to ‘We Will Win this War’”, in: *The Washington Post*, 31 March.

²⁶ [https://www.merkur.de/welt/coronavirus-usa-donald-trump-zahlen-infizierte-lockerung-china-tote-covid-19-twitter-zr-13775220.html/](https://www.merkur.de/welt/coronavirus-usa-donald-trump-zahlen-infizierte-lockerung-china-tote-covid-19-twitter-zr-13775220.html) (accessed 30 May 2020).

²⁷ See the detailed analysis in *Il Post*, <https://www.ilpost.it/2020/05/07/two-months-that-shook-lombardy-to-the-core-coronavirus/> (accessed 30 May 2020).

²⁸ “Italy announces fines of up to 3000 € for breaking quarantine rules”, in: *The Local*, 24 March 2020.

IV. THE MISERY OF BALANCING CORONA ENDS AND MEANS?

Lawyers will probably have to do that, even if the world were to end. However, they should be prepared for uncertainty on a global and previously unknown scale. It is quite inadequate to continue what ministers of public health (worse: heads of state) have been doing in the past and what may account for the irrelevance of law and lawyers in the corona dispute of faculties: namely to pick up the conventional legal cutlery for handling the law on epidemics, check whether its present use is proportionate and rush to balance Corona means and Corona ends. It is almost tragic to what extent the legal analyses circle around the proportionality of social distancing, lockdowns, shutdowns and other interventions that have far reaching consequences for society, the economy, politics, psychological dispositions, women's burden and children's hearts and minds. Lawyers seem not to realize that anti-Corona measures not only infringe freedoms but transform everyday lives and disrupt the social tissue.

First, the principle of proportionality had to leave feathers in the already mentioned conversion of police laws into a generalized security (risk) law. With the reduced density of judicial controls, the judicial examination of police interventions thinned out the principle of proportionality.

Second, in the wake of the COVID-19 pandemic, the currently prevailing social conditions have been completely disrupted. And an end of the disruption is not in sight. How and for which purposes can such desolate relations provide a measure? World-wide flat curves of new infections, national herd immunity or low reproduction rates of the infection ($R < 1$) and local upper limits for regional hotspots are likely candidates as legitimate epidemic-hygienic *ends*. Under conditions of uncertainty these candidates lose their glamor – and normative weight.

Third, the pandemic has meanwhile globalized the *goals* and *means* that are used to control and contain COVID 19-infections. Flat curves, herd immunity, declining number of new infections, transmission rate ($R < 1$), hot spots, etc. have to be assessed and weighed against the consequences of social distancing and isolation, lockdowns and shutdowns of factories and businesses, schools and day-care facilities. Lawyers and judges have dutifully complied with the ever-changing virological and epidemiological prognoses and shifting targets, and have fitted them into the simplified schema of proportionality, often taking them as raw material and not even translating them into legal categories and criteria of proportionality).

Fourth, balancing has always been open-ended and unpredictable, more a metaphor than a stringent method. In times of Corona, balancing has to identify and “factor in” a sheer endless number of items, such as bankruptcy, unemployment, domestic violence, depression, disrupted educational careers, social isolation, the cumulative negative impact on women working under precarious, dangerous conditions, children being deprived of their life chances, the Kawasaki syndrome, and more. Is it proportionate to lock up the elderly – against their will – in residential care facilities even if they would prefer to see their relatives and accept the risk of death? Is it proportionate to keep day

care institutions and schools closed even if children (who are not Corona's prime targets) develop serious symptoms of social isolation? Is it proportionate to order a nation-wide lockdown with barely any time for preparation (as happened in India)?

Balancing faces the obvious dilemma to identify all the aspects of an overly complex situation and to weigh them properly. To reduce complexity some authors opt for one or the other highest value – life, health, dignity (and here included death in dignity), rather than the protection of "mere" health or "naked life".²⁹ Thus they escape from the demands of an exigent balancing method and avoid the mechanics of proportionality that have ossified in routine and amount to little more, during a pandemic, than testing the evident rationality of infection protection.

V. LAW, SECURITY, EXPERIMENTS

The Corona virus and the COVID 19 infection call for a step towards a law with a more flexible, open texture that integrates new ideas and fresh perspectives, and that allows for experimenting and learning, rather than relying on more or less centralized command and control structures. In addition, co-determination and voluntariness need to be introduced as (new) principles without which even the prohibition-supported and compulsively enforced, imperative protection against the infection ultimately cannot work. Washing one's hands, staying at home and also social distancing at work places, in public spaces and educational institutions cannot be reliably supervised and enforced by an authoritarian regulatory model as maintained by standard police laws, exacerbated by the normalized state of exception or, in particular, its crude version.

In contrast to conventional and extraordinary schemes of infection protection, uncertainty demands that other sources of information be tapped. There is no good reason to assume that individuals who want to protect themselves, their families, workplaces and businesses have nothing to contribute to containing the pandemic, if properly supervised by public health authorities. On the contrary, groups have already proven capable of organizing public assemblies strictly obeying the rules of social distancing. Shop owners who want to do business in times of a pandemic can be required to work out practical concepts of how to protect their customers and staff. Supermarkets have demonstrated how to meet this expectation. Schools and universities organize learning processes, so they might as well organize ways and means of self- and other-protection. Societies do not need law's omnipresent, yet fairly powerless COVID-19 autocracy but can be trusted instead, like markets, doctor's offices, bakeries, repair shops and others, to participate in the social Corona laboratory where they learn how to work out rules and develop plans to prevent contagion.

According to practical reason, laws that are meant to protect from infection could and would have to change their modality: from coercion (which chafes with time) to incentives, from penalties (which

²⁹ U. Volkmann, (2020), in: *Frankfurter Allgemeine Zeitung*, 1 April; Agamben, G. (2020), *Neue Zürcher Zeitung*, regarding the anti-Corona measures - <https://www.nzz.ch/feuilleton/coronavirus-giorgio-agamben-zum-zusammenbruch-der-demokratie-ld.1551896/> (accessed: 12 June).

might lose their edge once people die by the thousands) to trial and error, and from infection paternalism to co-determination and a modicum of solidarity³⁰. With "rules" that instruct (how to work out security plans) rather than provisions that prohibit, with (legal) education and consultation instead of deterrence, experiments (not the easy exit!) could be dared to approach Corona with a supply-oriented law, not a law that condones violence, but one that is geared toward participation of those who are affected. The new law regulating how to cope with a pandemic as a societal experiment would advise, as in the past, everyone – especially the most vulnerable – to protect themselves. (This is where public funds could be used which no longer need to be called upon to support ailing businesses.) The law could focus on supporting those who need special assistance by offering social services. Volunteers can be reckoned with, as the willingness to help refugees in 2015 teaches, provided that civil society is no longer placed under house arrest and demobilized by ordinances and decrees, but is involved in the discussion about and the actual doing of what the pandemic requires. If this experiment founders because people do not "play along"? Then the state may have lost some time but would have gained valuable knowledge about people's behavior (other than abstract models can provide), and could have concentrated meanwhile on procuring protective clothing and respiratory equipment, supplying tests kits, promoting the search for vaccines and medication, and in particular actively supporting medical treatment and health care services.

Society would have learned painfully that a pandemic requires all of us to cooperate and participate in developing protection concepts, unless we do not mind the country to be run like a leprosy ward and its inhabitants being driven by virus-scare into a state of disorientation they acquiesce in and take to be "proportionate".

And the law? It is rarely any wiser than the society whose collective behavior it is supposed to regulate. As long as its application occurs in a situation of uncertainty, there is no choice: it simply must learn. One may hope that its staff has already learned: sovereign is she who does *not* declare a state of exception. And who does *not* normalize it under the flag of epidemics control.

³⁰ Which might be the components of Chancellor Merkel's program – or not and seems to be the guiding principle of Sweden's approach. See I. Tharoor, (2020), "Sweden's coronavirus strategy is not what it seems", in: The Washington Post, 12 May - <https://www.washingtonpost.com/world/2020/05/12/swedens-coronavirus-strategy-is-not-what-it-seems/> (accessed 30 May).

