

Project Proposal for the ERC Consolidator Grant Application¹

Rebellion against the Law

The Challenges of Legal Normativity in an Era of Polycrisis

This research is about the impact of the various crisis trends of recent years (the protracted crisis of liberal democracy in the North Atlantic political space, the challenges of populism, the global ecological and climate crisis, the COVID-19 pandemic and the war crises) on Western legal systems. The main hypothesis of the research is that the authoritarian tendencies resulting from the crises and from the use of extraordinary means of governance have significantly transformed the concept of rule of law and the resulting normativity of liberal democracies: the rule of law has been replaced by the use of law as a political instrument, rule by law, and even by the 'weaponisation' of law against different social groups. The research will reconstruct how this 'rebellion against law' emerged from an ideological-historical perspective and gained governmental and political relevance with the advent of the era of polycrisis. The research also aims to outline how a new rule of law and a new normativity approach can be reconstructed for the future.

Law without morals and “legal weaponization”

With the crisis of liberal democracy and the legal and political reactions to exceptional circumstances, the constitutional and political reinterpretation of constitutional democracies by authoritarian regimes has begun. The essence of this is to redefine the political sovereign inherent in the executive and to elevate it to a hegemonic position: this requires ignoring the basic assumptions of the previous constitutionalism that prevented the concentration of power and subordinating law as an instrument to politics. As the Weimarisation tendencies of the inter-war period showed, the excessive and persistent hegemony of politics can very easily turn into the totalisation of politics, since a politics freed from its legal and (related and consequent) moral constraints can essentially keep the political community in a state of permanent exception. In other words, even in the changed environment, in an era of objective crises and suspended normality (which will be an inescapable reality in the wake of the global ecological and climate crisis), it will be necessary to maintain the fundamental moral constraints of constitutionalism. The permanent state of exception applied by governments essentially damages the democratic immune system of society and individuals and nips in the bud any mechanism of social self-defence, and governments exploit this to the full: as we have seen in the analysis of the Covid19 pandemic, the promise of security has become a political watchword under which mechanisms to restrict freedom can be introduced, not for the security of society, but for the political security of government. In the context of 20th century and contemporary parallels, I have indicated that in many ways there is much to learn from where and how totalitarian politics has come in the 20th century, but there is also much to learn from the responses.

It is therefore worth recalling here the consequences of the constitutional and legal abuses of National Socialism described earlier, which followed the Second World War. I refer to Gustav Radbruch's formula, which he formulated in his 1946 work *Statutory Lawlessness and Supra-*

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Statutory Law.² According to Radbruch, unjust law must be regarded as “flawed law” when the conflict between law and justice becomes intolerable.³ Radbruch starts from a critique of German legal positivism: “Positivism, with its principle that 'a law is a law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal”⁴ Radbruch takes the conflict between justice and legal certainty as his starting point, nor does he formulate his famous (and, as we shall see, once again topical) formula to resolve it: “The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice.”⁵

Radbruch also refers to a qualified case in his formulation, for in his view, when there is not even an attempt to enforce the truth in the creation of a particular law, that is, when, in his view, equality is deliberately betrayed by the enactment of the act, it is not only flawed, but lacks legal quality.⁶ Radbruch puts it this way: “It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.”⁷

In my view, in the case of law constituted in a state of exception and constituted by the executive as a tool in the concentration of power, we see a shift from “defective law” in the Radbruchian sense to law that is increasingly morally and professionally questionable. I believe that in the 21st century, what we consider to be law needs to be thoroughly revised, since politics is increasingly producing (exceptional) situations in which political norms are given legal normativity uncritically, without controversy, without social and professional debate. This seriously damages the quality of legislation and, according to the Radbruch formula, its very existence. However, it is not only dangerous for the law, but also for politics, since a policy imposed by legal means loses its deliberative, negotiated character: in other words, its political quality. For all these reasons, Radbruch shows that the apparent national socialist legal order that emerged as a result of the dual state was far from being a national socialist legal order: “Measured by this yardstick, the coherent parts of national socialist law never acquired the dignity of valid law.”⁸

Exceptional law and order and extraordinary means of governance, rather than defending the normality of the legal and political system (for which it was historically established), have very often become a means of dismantling normality, and the use of law as a “weapon” is a key trend in this. In this context, it is worth quoting Kennedy, whose term *lawfare* refers to „law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war. They observe that law can often accomplish what might once have been done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a

² RADBRUCH, Gustav: “Statutory Lawlessness and Supra-Statutory.” *Law Oxford Journal of Legal Studies*, Vol. 26, No. 1 (2006), pp. 1-11. doi: 10.1093/ojls/gqi041.

³ BIX, Brian: Radbruch’s Formula and Conceptual Analysis. *American Journal of Jurisprudence*, 56. (2011) 1., 45–57., <https://doi.org/10.1093/ajj/56.1.45>.

⁴ RADBRUCH: “Statutory Lawlessness and Supra-Statutory Law” 6.

⁵ RADBRUCH: “Statutory Lawlessness and Supra-Statutory Law” 7.

⁶ BIX: Radbruch’s Formula and Conceptual Analysis. 46.

⁷ RADBRUCH: “Statutory Lawlessness and Supra-Statutory Law” 7.

⁸ RADBRUCH: “Statutory Lawlessness and Supra-Statutory Law” 7.

political opponent.”⁹ Such a fusion of warfare and law has a very dramatic effect, but the examples examined in this volume show that normality and exceptionalism, war and peace, are now mixed. Kennedy also refers to the observation made in the US military that law can very often be a more effective instrument of war than actual combat (I will give a number of examples in this research, from economic exceptionalism to Guantanamo, of the intertwining of the legal structure of government by extraordinary means in the history of American ideas and politics). Kennedy says: “When the military buys up commercial satellite capacity to deny it to an adversary – contract is their weapon. They could presumably have denied their adversary access to those pictures in many ways. When the United States uses the Security Council to certify lists of terrorists and force seizure of their assets abroad, they have weaponized the law. Those assets might also have been immobilized in other ways. It is not only the use of force that can do these things. Threats can sometimes work. And law often marks the line between what counts as the routine exercise of one’s prerogative and a threat to cross that line and exact a penalty.”¹⁰

All this shows that the weaponisation of law is very much connected with the disappearance of the moral content of law (criticised by Radbruch), and the practically institutionalised form of this is the dual state or autocratic legalism. In other words, the political management of a state of exception, of a state of emergency (historical and modern examples of which we have seen in this volume), which is constantly maintained, necessarily damages law, because as a political instrument it shakes the moral and normative content of law, and as we have seen: law without normative embeddedness can only be considered law in a formal sense, but not in a substantive sense.

Can normativity be a guarantee of normality?

The research aimed to provide a comprehensive picture of the impacts and challenges facing the system of law and democracy in the first decades of the 21st century. Three clusters of challenges to liberal democracy and the legal system can be identified: (1) on the one hand, the acute crises of liberal democracy that have been dragging on for decades, in particular the rise of authoritarian populism; (2) on the other hand, with the era of crises comes the era of governance by extraordinary means, here the emphasis is on authoritarian tendencies of extraordinary governance; (3) finally, due to the authoritarian tendencies indicated, the nature of legal normativity itself, hitherto thought to be fundamental, has begun to change. All these phenomena point to the disintegration of the normativity that we have hitherto associated with law and democracy in the historical-geographical system of liberal democracies.

In the course of exploring the crisis points, I will outline the crisis of the relationship between law and democracy that has been unfolding since the second half of the 20th century, which has seen legal normativity (and in this context, primarily the rule of law) as the guarantee of democracy. This system is none other than liberal democracy. However, as we have seen, liberal democracy is confronted with so many crisis phenomena that there is no doubt that it will have to change radically if it is to survive. We have also heard from one of its leading theorists, Francis Fukuyama, that the founding principles of liberalism have been undermined.¹¹

Liberal democracies in Western and Eastern Europe, as well as in North America, have thus suffered a series of shocks: liberal hegemony has been seriously shaken, culminating in the emergence of the populist *Zeitgeist* in the 2000s. However, this is by no means the end of the rod of liberal democracy and its constitutional paradigm, since from 2008-2009, and even more

⁹ KENNEDY, David: *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*. Princeton – Oxford, 2016. 258.

¹⁰ KENNEDY: *A World of Struggle*... 258.

¹¹ FUKUYAMA, Francis: *The End of History?* *The National Interest*, 1989. nyár. <http://www.wesjones.com/eoh.htm>

so after 2010, the world, Europe and the Hungarian political system and society in it (this is called a polycrisis)¹² were shaken by major interconnected crises that overlapped in many respects: the economic and financial crisis from 2008, the refugee and immigration crisis from 2015, the pandemic from 2020, and the war in Ukraine from 2022 as a result of Russian aggression. The effects of the successive crises have been felt regardless of the natural regime type, and I have tried to draw together the lessons learned from this experience in chapters two and three. One of the most important lessons of governing by extraordinary means is that exceptionalism is not only the cause but also the consequence of the decline of democracy.¹³ At the same time, as the analysis of the exceptionalist regimes introduced during the pandemic has shown, both democratic and authoritarian regimes have used exceptionalist governance, and democracies have generally been able to operate various control mechanisms. That said, the other key conclusion of both Lührmann and Rooney¹⁴ and the studies on Covid19¹⁵ is precisely that it is not only the undemocratic effects of exceptional governance that are worth considering, but also the regime in which the strengthening of executive power is used: that is, the potential undemocratic turn of exceptional governance depends strongly on the regime in which the exceptional measures are introduced, and the democratic quality of the normal state is thus a strong determinant of the exceptional situation. Further studies have also shown that, despite the exceptional and pervasive nature of the pandemic, executive power in democratic regimes has not become unconstrained, and the various interactions between the branches of power and the constraints presented here are seen to reflect the operation of Madisonian, horizontal and vertical mechanisms of power-sharing.

This paints a picture that is ambivalent and contradictory in many respects, but the experience of the Covid19 pandemic may give cause for hope for the contemporary assertion of control over executive power. This picture is, however, nuanced by the third crisis, namely the changing nature of legal normativity. I stress that it is not law as such that is at stake, but the fundamental context of liberal democracies, the autonomy of politics constrained by law and the normativity of law. I believe that not only the German legal system after 1933, but also its contemporary relations, are well characterised by Fraenkel's concept of the dual state: and this is true not only of authoritarian political and legal systems, but also of liberal democracies (if we take the American example, we can see how historically the exercise of exceptional power has become part of the US governmental structure). What is particularly worrying is that such a change in legal normativism is not simply a matter of authoritarian leaders and regimes, but of liberal democracy itself. As Fraenkel puts it, the National Socialist tragedy is rooted in the Weimar system itself: "No doubt, the National- Socialist coup d'état of 1933 was, at least technically, facilitated by the executive and judicial practice of the Weimar Republic. Long before Hitler's dictatorship, the courts had held that questions as to the necessity and expediency of martial law were not subject to review by the courts."¹⁶

¹² HENIG, David – KNIGHT, Daniel M.: Polycrisis: Prompts for an emerging worldview. *Anthropology Today*, 39. (2023) 2., 3–6. o. DOI: <https://doi.org/10.1111/1467-8322.12793>

¹³ LÜHRMANN, Anna – ROONEY, Bryan: When Democracy Has a Fever: States of Emergency as a Symptom and Accelerator of Autocratization. *V-DEM Working Paper Series*, (2019) 85. DOI: <https://dx.doi.org/10.2139/ssrn.3345155>; ENGLER, Sarah – BRUNNER, Palmo – LOVIAT, Romane – ABOU-CHADI, Tarik – LEEMANN, Lucas – GLASER, Andreas – KÜBLER, Daniel: Democracy in times of the pandemic: explaining the variation of COVID-19 policies across European democracies. *West European Politics*, 44., (2021) 5–6., 1077–1102. o., DOI: <https://doi.org/10.1080/01402382.2021.1900669>; MASSART, Tom – VOS, Thijs – EGGER, Clara: The Resilience of Democracy in the Midst of the COVID-19 Pandemic. *Politics of the Low Countries*, 3. (2021) 2., 113–137. o., DOI: <https://doi.org/10.5553/PLC/000018>

¹⁴ LÜHRMANN–ROONEY: When Democracy Has a Fever...

¹⁵ GINSBURG, Tom – VERSTEEG, Mila: The Bound Executive: Emergency Powers During the Pandemic. *Virginia Public Law and Legal Theory Research Paper*, (2020) 52. DOI: <https://doi.org/10.2139/ssrn.3608974>.

¹⁶ FRAENKEL, Ernst: *The Dual State: A Contribution to the Theory of Dictatorship*. Oxford, 2017. DOI: <https://doi.org/10.1093/acprof:oso/9780198716204.001.0001> 6.

The problem for research is therefore whether there is a return to normality, or more precisely, whether law can henceforth be a guarantee of normality, or whether, in an era of polycrisis, we must accept the primacy of politics and the fact that it (re)constructs normality itself on a daily basis.

The question of normality and the role of law in it is increasingly at the centre of social science research. A very interesting aspect of the dilemma highlighted here is highlighted by Mark Neocleous, who argues that normality and emergency are not really separable, as if they were two sides of the same coin.¹⁷ He argues that “In separating ‘normal’ from ‘emergency’, with the latter deemed ‘exceptional’, this approach parrots the conventional wisdom that posits normalcy and emergency as two discrete and separable phenomena. This essentially liberal paradigm assumes that there is such a thing as ‘normal’ order governed by rules, and that the emergency constitutes an ‘exception’ to this normality. ‘Normal’ here equates with the separation of powers, entrenched civil liberties, an ongoing debate about public policy and law, and the rule of law, while ‘emergencies’ are thought to require strong executive rule, little time for discussion, and are premised on the supposedly necessary suspension of the law and thus the discretion to suspend key liberties and rights. But this rests on two deeply ideological assumptions: first, the assumption that emergency rule is aberrational; and, second, an equation of the emergency/nonemergency dichotomy with a distinction between constitutional and nonconstitutional action. Thus liberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form while providing the executive with the power to act in an emergency.”¹⁸

Petr Agha examines the question of the state of the norm in the context of the EU's economic policy and legal paradigms in the context of the integration of Central and Eastern European states.¹⁹ He argues that “One primary manifestation of the pursuit of normalcy is the emphasis on the RoL as a foundational EU principle. The discourse on the RoL often revolves around 'good governance' and 'democratic values,' essential components of normalcy. This pursuit aims to restore stability in the face of disruptions, shifting towards legal constitutionalism post-1989. This transition led to counter-majoritarian institutions, juridification across policymaking, and the rise of 'legal constitutionalization.' Legal constitutionalism post-1989 recalibrated political dynamics, establishing a network of legal institutions known as the “juristocracy”. This system emphasizes normalization through harmonized laws across member states for consistency. The link between post-1989 politics and normalization is intricately woven into ‘legal constitutionalisation’, altering governance dynamics and elevating the role of legal norms in shaping the political landscape.”²⁰ All of this, Agha argues, leads to an overlooking of the structural factors that sustain social inequalities, to technocracy, to an over-emphasis on institutional aspects in crises and to an under-emphasis on social factors.²¹ Agha also notes in relation to exceptional situations that “[t]he normalization narrative frames emergencies as abnormalities, reinforcing established institutions' authority and perpetuating the sense of inevitability surrounding existing power dynamics.”²²

Whichever approach one adopts, there is no doubt that the three sets of nodal challenges to liberal democracy and the legal system examined in this volume have made it doubtful that legal normativity can continue to be a guarantee of normality in the system provided by liberal democracy. One can reflect on how liberal democracy (even at the EU level) can be radically

¹⁷ NEOCLEOUS, Mark: The Problem with Normality: Taking Exception to „Permanent Emergency”. *Alternatives*, 31. (2006) 2., 191–213. o., <https://doi.org/10.1177/030437540603100204>

¹⁸ NEOCLEOUS: The Problem with Normality... 207.

¹⁹ AGHA, Petr: Reinforcing Institutional Power: The Discourse of Normalcy in European Union Governance. *Hague Journal on the Rule of Law*, (2024). <https://doi.org/10.1007/s40803-024-00232-5>

²⁰ AGHA: Reinforcing Institutional Power... 15.

²¹ AGHA: Reinforcing Institutional Power... 15.

²² AGHA: Reinforcing Institutional Power... 15–16.

transformed, one can argue for the integration of exceptionalism into normality and for treating the two as a unity. However, one thing we cannot do, in my view, is give up the fundamental guarantee of legal normativity, because however we conceive of the relationship between exceptionalism and normality, the legal system that is autonomous and thus constrains politics must have a corollary role in both.