

Epimeter: Pandemic, Law, and State: The constant mutation of the raised issues – Reflections and points to note

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Abstract: Pandemics are a very complex social phenomenon. The coronavirus disease 2019 pandemic tested fundamental rights almost all over the world and brought to light important issues. It is obvious that law, rights, and justice are the big losers in this pandemic. The fact that the anticipated return to normal will be a disaster is undisputable but not obvious. We can avoid this disaster if we change our priorities and many of our beliefs. Pandemics should not be considered suspensions but accelerators of the historical evolution.

Keywords: pandemic, law, state, new normal.

A “matching” of mutations

Coronavirus disease 2019 (COVID-19) mutations seem to be followed – in a way that seems to be a perfect matching – by constant mutations on public debate, legal thinking, and state.

The outbreak of the virus was considered a “local” crisis. However, its spread resulted in a pandemic that caused health, social, and global financial crisis and left a “footprint” of pessimism on the world’s population psychism. In addition, new alarming evidence emerged about its countless impacts.

At the same time, it is worth to highlight that over the centuries (since Black Death), pandemics are a very complex social phenomenon, far beyond infection and treatment ¹.

COVID-19 pandemic and the “quarantine” measures that were imposed in order to prevent the spread of the virus tested Constitutions, Democratic Institutions, and fundamental rights almost all over the

¹Snowden, F.M. (2021), “Epidemics and society: From the Black Death to the Present”, Patakis, p. 200 ff.

world. The pandemic is now considered a collective wound, a challenge for our resilience.

The issues that the pandemic brought to light could be described by the following key observations:

1. A severe financial – social crisis
2. A “deterioration” of Democracies
3. A new truth aligned with medical rules (instead of laws)
4. A modern type of states where experts, in the role of oligarchs, are able to change the procedures of democracy and reduce the importance of equality and social justice
5. A “new normal” where fear of the infection and fear of the death have a prevailing position.

There is no doubt that the art of governing has changed – a biopolitical approach toward a new massive threat about what “dangerous other” means².

An “emergency period” or a “new state of exception”? – Biopolitics

For many decades, the state of emergency remained rather “invisible”³ to constitutional theory as well as to public debate. Its declaration was always a last resort.

The state of exception (Weimar Republic – Carl Schmitt) results in an invocation of emergency where legal restrictions do not exist (the one who decides the exception is the one who dominates).

This is exactly why the necessity of this act is always greeted with skepticism.

Since the Second World War, European Institutions and European citizens have tried to set the “state of emergency” within the limits of Law including always the term of “temporality”. However, the

²Tsoukalas, K. (2021), “The ‘political’ under the shadow of the pandemic”, Kastanioti.

³Akrivopoulou, C.M., “Emergency and the boundaries of Democracy and rights”, *Journal of Administrative Law* 5/2020, p. 623 ff.

implementation, even of temporal measures, results in restrictions of freedom.

The prophetic title of the monography of Giorgio Agamben “State of exception: when emergency converts exception into rule” is worthy of special mention. Agamben analyses a state of exception that is not based on Law (Guantanamo) and mentions the Patriot Act that was enacted in direct response to the attacks of 11.9.2001 as a typical example.

“Pandemic created a Brave New World and a new biopolitical paradigm that is made of materials that already existed”, mentions Prof. Xenofon Kontiadis in his book⁴.

At the same time, Foucault’s approach to biopower and biopolitics is a timely tool of analysis.

The concept of biopolitics was introduced by M. Foucault in the late ‘70s, during his lectures at the College of Fance (1978–1979). Biopolitics refers to the tactics that the power uses to administrate and regulate the life and the death of humans. On this basis, power to be has the ability to shape human life to a desirable form, to a form that is necessary for its establishment and better serves its increase despite the fact that its aim should be the regulation of the safety and the prosperity of humans⁵.

Safety is linked to prosperity. Since ideological guidelines do not exist, the only regulation that remains is the regulation of life. Given that the nonpoliticized population is interested only in its own interests, the only way for power to be to deal with it is via fear. In this way, power to be is established and imposes its politics by satisfying its own interests. This is biopolitics, a new chapter in politics of which we were not aware.

It has become obvious that law and rights, democracy, and justice are the big losers in the pandemic. A number of constitutional matters emerged from the “theocracy” of technocrats and the algorithms. The institutional consequences are unpredictable. At the same time, “Constitutional mithridatism” is likely.

⁴Kontiadis, X. (2020), *Pandemic, Biopolitics and Rights. The world after COVID-19*, Kastanioti.

⁵Kokkinos, G. (2021), *Worthy life – Unworthy life. Eugenics, degeneration, biopolitics: the doctor as social therapist and national re-educator*, Taxideftis.

As professor Vlachopoulos mentions, “As we try to protect our rights, we accept a temporary limitation of our constitutional rights. However, this does not mean that getting addicted to their loss is acceptable”⁶.

Did new mutations “reveal” a new Leviathan?

The pandemic accelerated enforcing and dominance of already known practices, restrictions, and behaviors.

A short reference to the front cover of the original first edition of “Leviathan”, dated 1651, is perhaps timely. The thoughts of Tomas Hobbes about political community are depicted very successfully on this front cover.

The exact description of this engraving could be expressed as follows:

A giant human figure (man) (from Bible – Old Testament – Book of Job) stands huge above the countryside and the cities.

He wears a crown and holds symbolically a sword in one hand and a scepter in the other.

His body is made of thousands of human figures.

The following phrase is written just above this image: “There is no power on earth to be compared with him”. (Job. 41.24).

Suddenly, under this historical reference and under the new “visibility”, the state appears as a solution, not as a problem. A “new” theocracy is created, and the state returns to a dominant position.

There is no doubt that this evolution is dangerous for the democracies⁷. Nothing can be taken for granted anymore. On the contrary, we must have reservations and express our doubts about the usual “common sense” because the world we have to decode is increasingly complicated.

It is undoubtedly a total deconstruction of consent, social contract, and life.

⁶Vlachopoulos, Sp. (2020), Constitutional Mithridatism. Individual Freedoms in pandemic eras, Eurasia, p. 35 ff.

⁷The Economist: “The triumph of big government”, November 20th-26th, 2021.

Citizens are active but absents. Leviathan is already visible and expresses “the abolishment of the possibility to express doubts about law”. The moral foundation of democracy recedes. The nonpolitical – neutral – technical and predefined routine appears. It is a new reality where solid values do not exist and solutions are provided by technocrats’ algorithms.

Democracy and justice are the big losers in the pandemic. Moreover, end of the pandemic does not equal end of the crisis. This must be highlighted.

This is the reason why the protection of democratic inclusion (democracy includes rich and poor, workers, bourgeois, homeless, jobless, petty bourgeois, great bourgeois, immigrants) is more necessary than ever.

The means to protect the democratic inclusion are the total implementation of rights, a new demand for participation, new democratic consents, the possibility to control all powers through law and justice, and the existence of a state of justice that targets to social values, to justice, and to the battle against injustice and inequality.

Conclusion

Reflection is necessary. A new approach to justice that will aim to the convergence (rather than to the divergence) between the lawmaking process and the function of justice is also necessary.

As far as the “return to normality” is concerned, it is remarkable that societies tend to evolve through conflicts, contradictions, and even “explosions”. However, during periods of crisis, “we (completely irrationally) miss” the life as it was before – we probably whitewash the past.

In USA, in 1929, during the great depression, H. Hoover’s slogan (rivaling Fr. Roosevelt) was “Return to normalcy” – not to the established “normality”. This slogan prevails today, most likely uncritically. We do not think of the characteristics of the normality. Moreover, we do not think if a return to the prepandemic imprudent and destructive normality is desirable, tolerable, and achievable. We are looking forward to this return, but any such “return” is going to

be a disaster if we do not change our priorities⁸. Perhaps we should review many of our strong positions regarding the inherent limits of the political. Perhaps we should also believe that the concept of “normality” has become disputable and that “pandemics” should not be considered suspensions but accelerators⁹ of the historical evolution.

Suddenly, Karl Max’s 11th thesis on Feuerbach is again timely: “philosophers have only interpreted the world in various ways; the point, however, is to change it”¹⁰.

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⁸Boyer, R. (2021), “Capitalismes in the vortex of the pandemic”, *Polis*, p. 45 ff.

⁹McNeil, W.H. (2021), “Plagues and peoples”, *Papadopoulos*.

¹⁰Marx, K. (1974), “Manuscripts of 1844”, *International Library*, p.9.