CARDIFF UNIVERSITY
PRIFYSGOL CAERDYDD

ORCA – Online Research @ Cardiff

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:https://orca.cardiff.ac.uk/id/eprint/135218/

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Dezalay, Sara 2020. Introduction: wars on law, wars through law? law and lawyers in times of crisis. Journal of Law and Society 47 (S1) , S1-S13. 10.1111/jols.12252

Publishers page: http://dx.doi.org/10.1111/jols.12252

Please note:
Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See http://orca.cf.ac.uk/policies.html for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.

WILEY

Author Query Form

Journal JOLS

Article jols12252

Dear Author,

During the copyediting of your manuscript the following queries arose.

Please refer to the query reference callout numbers in the page proofs and respond to each by marking the necessary comments using the PDF annotation tools.

Please remember illegible or unclear comments and corrections may delay publication.

Many thanks for your assistance.

Query No.	Description	Remarks
Q1	Please confirm that forenames/given names (blue) and surnames/family names (vermilion) have been identified correctly.	

UNCORRECTED PROOFS

jols12252 WILEY JOLS Trim: 152 X 229 mm September 29, 2020 21:23

APTARA | JOLS | jols12252 | Dispatch: September 29, 2020 | CE: XXX
Journal | MSP No. | No. of pages: 13 | PE: XXXX

JOURNAL OF LAW AND SOCIETY
VOLUME 0, NUMBER 0, SEPTEMBER 2020
ISSN: 0263-323X, pp. 1–13

Introduction: Wars on Law, Wars through Law? Law and Lawyers in Times of Crisis

Q1

SARA DEZALAY*

I. 'ANXIETY IS THE DIZZINESS OF FREEDOM'[1]: FROM THE WAR ON TERROR TO THE COVID-19 CRISIS

Nearly 20[1] years after the 9/11 terrorist attacks and the launch of the War on Terror by President Bush in the United States (US) and globally, emergency continues to remain a feature of liberal democracies. The War on Terror has had a profound impact on rule of law values and institutions in the US and around the world. In the past two decades, the two grand ideological narratives of the post-Cold War era themselves seem to have regressed: the universalization of liberal democracy and the consolidation of the international legal order. Politics trump law in explicit ways in a global context of acute commercial rivalry between the US and China. Wars against the rule of law are also deployed in more subtle, pernicious ways – under the garb, indeed, of the rule of law. Rule by exception has become a defining feature of government in liberal democracies, lending renewed credence to the oxymoron of 'illiberal democracy' as a label to characterize wide-ranging phenomena – from democratically elected governments using law as a weapon against the rule of law, such as the Fidesz party in Hungary, to the worldwide prominence of 'populism' as a 'new language' and ideological platform for political outsiders, from Donald Trump in the US to Jair Bolsonaro in Brazil.[2]

The coronavirus pandemic that has spread across the world as we wrap up this Special Supplement in June 2020 has added a new layer to these debates by challenging the notion of crisis itself: 'The metaphor of a war … has

* *School of Law and Politics, Cardiff University, Law Building, Museum Avenue, Cardiff, Wales, CF10 3AX*
DezalayS@cardiff.ac.uk

1 D. Kennedy, *Isabelle in the Afternoon* (2020) 6.

2 The term 'populism' has generated acute ideological and political debates in which (broadly speaking) its depiction as an all-encompassing label to characterize a common sense of disempowerment and disenfranchisement and a quest for a charismatic 'saviour' (see P. Rosanvallon, *Le Siècle du Populisme: Histoire, Théorie, Critique* (2020)) is opposed to the endorsement of populism as a political programme (see C. Mouffe, *For a Left Populism* (2018)).

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

overtaken the world. There is a feeling that governments need a freer hand because we are fighting a war of some kind.'[3] As Scheppele argues,

> constitutionalists have generally not been so concerned about the emergencies that are caused by nature … [b]ecause the cause of these emergencies is so evidently not political, the timing is out of the control of leaders who might benefit from them and the measures that are needed to address the problems are so visible and evident, these have been considered the emergencies least dangerous to constitutional government.[4]

Yet the pandemic has acted as an enabler to unleash already existing authoritarian tendencies – from the arrest of journalists and political opponents in India, to Bolivian authorities indicting political opponents on charges of 'crimes against public health',[5] to Hungary's Prime Minister Orbán securing the passage into law of the so-called 'Enabling Act', which, just like the infamous German Enabling Act of 1933, carries the potential of unlimited executive rule by decree.[6] By contrast, US President Trump or Brazil's Bolsonaro's fraught relationship with truth and their denial of the pandemic have been seen to echo their elective platform: a government by chaos to ostensibly subvert institutions and the establishment.[7]

Elsewhere, executive responses to the pandemic illustrate the continuous reliance on emergency as a *modus operandi* of government in liberal democracies. In France, a brand new 'state of health emergency' law was adopted on 23 March 2020, less than two years and five months after the end of the two-year state of emergency triggered in the wake of the 2015 terrorist attacks in Paris.[8] On the other hand, the executive flip-flopping between using scientific expertise and economic necessity to legitimate the governmental response to the pandemic is continuously complicating and compromising the view of the pandemic as an objective, apolitical crisis.

3 B. Paitnak, South Asia Director of Amnesty International, quoted in J. Slater et al., 'Under the Cover of Coronavirus, Governments Punish Adversaries and Reward Friends' *The Washington Post*, 30 April 2020, at <https://www.washingtonpost.com/world/under-the-cover-of-coronavirus-governments-punish-enemies-and-reward-friends/2020/04/29/a232cfc0-83ee-11ea-81a3-9690c9881111_story.html>.

4 K. L. Scheppele, 'Underreaction in a Time of Emergency: America as a Nearly Failed State' *Verfassungsblog*, 9 April 2020, at <https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/>.

5 Slater et al., op. cit., n. 3.

6 K. Kovacs, 'Hungary's Orbanistan: A Complete Arsenal of Emergency Powers' *Verfassungsblog*, 6 April 2020, at <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>.

7 E. Peluso Neder Meyer and T. Bustamante, 'Authoritarianism without Emergency Powers: Brazil under COVID-19' *Verfassungsblog*, 8 April 2020, at <https://verfassungsblog.de/authoritarianism-without-emergency-powers-brazil-under-covid-19/>.

8 S. Platon, 'From One State of Emergency to Another: Emergency Powers in France' *Verfassungsblog*, 9 April 2020, at <https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/>.

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

II. THE RULE OF LAW VERSUS EXCEPTION, OR THE CONUNDRUM OF LOOKING THROUGH A ONE-WAY GLASS

Emergencies kill constitutions. They damage them. They corrode their resilience. Emergencies enable regime tilts from liberalism to illiberalism. Debates involving constitutionalists and politics scholars have tended to focus on the *outcome* of emergencies and their triggering role in fostering democratic backsliding. However, they provide limited answers for making sense of the enduring centrality of exceptionalism for contemporary politics and the legacies of past emergency politics in the present. Foremost, what role does law play – and with it, lawyers – in the emergence of situations *qua* crises?

State reactions to the 9/11 attacks led to renewed interest in the question of the state of emergency in Politics and International Relations (IR) and in legal/philosophical debates, respectively. The War on Terror has overwhelmingly been framed as a binary in which the rule of law and exceptionalism are opposed, with a concern for the fragile balance between security and the public order on the one hand, and civil and political rights on the other. With discussions predominantly focused on whether a state of emergency is *inside* or *outside* the legal order, this binary has been correlated with a specific normative role attributed to law. It is either a *deus ex machina*, an external variable to curb exception and foster the resilience of the rule of law, or it is a tool at the service of the powerful, instrumentalized to subvert the rule of law. The question of what law does to power is thereby subsumed under a tension between law and exception – as an alternative between what law *ought* to do to respond to extreme and political violence, and *lawfare* through rule *by* exception.

The prominence of the Schmittian-Agamben vision of the political in scholarly debates in the wake of state responses to the 9/11 attacks put the emphasis on the *rupture* induced by emergencies and the potential tilting of political regimes – from liberal democracy to its so-called nemesis, authoritarianism. The ongoing surge of populism around the world – including the tsunami of Bolsonaro's election as Brazil's President in January 2019 despite the uncritically acclaimed success story of the anti-corruption 'Lava Jato' ('Car Wash') operation in the country – has widely been conceived as the expression of a zero-sum relation between *progressive* globalization – as a vision of historical progress articulated by (Western) liberal democracy – and counter-globalization trends perceived as *regressive*: a pathway to illiberal democracy, 'competitive authoritarianism',[9] or outright dictatorship.[10]

9 S. Levitsky and L. A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (2010).

10 Y. Mounk, 'The End of History Revisited' (2020) 31 *J. of Democracy* 22; J. Welsh, *The Return of History: Conflict, Migration, and Geopolitics in the Twenty-First Century* (2016).

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

Yet the jargon of exception – as a political stance or an expression of (scholarly) dissent – masks more than it reveals. The wide success of Agamben's synthesis in IR scholarship[11] could arguably be related to the fact that it provided the grounds for political dissent against the policies deployed by US President Bush and continued by Obama. However, it does little to explain either the relationship between emergency and exception or the contradictions embodied by Trump – beyond the 'crackpot' representing a 'lunatic fringe'.[12] To boot: while the caravan of the political jargon of exceptionalism continuously moves, from terror to migrants to pandemic, so too does scholarship have its own thematic swarming effects around trends and buzzwords. Since the heyday of case studies on the global War on Terror during the early 2000s, it is as if the War on Terror had no past nor legacy in the present.

This framing not only appears problematic in the face of the *endurance* of exception in contemporary politics, it also questions the very relevance of the notion of exception itself, and its framing in opposition to the rule of law. What Bigo and Bonelli call the *doxa* of the dichotomy between the rule of law and the state of exception – due to its simplifying yet blinding clarity – fosters a problematic amnesia that ignores the repeated reliance on states of exception in the trajectory of contemporary liberal states in the Global North:

> States of emergency are akin to the flowers that the lotus-eaters offer to Ulysses' companions in *The Odyssey*. They tend to incapacitate us and make us forget their earlier deployments. They affect our memory and erase the past and its lessons. Each new state of emergency is presented as more severe than earlier ones, more important than others, thereby justifying not only the application of existing frameworks, but of something *more*, to combat a situation framed as radically novel … Therefore, there is nearly never a return to normal after the end of the crisis, no more than there is an inventory of what has been done. The regime does not go back to its *ex ante* situation. Emergency leaves a permanent imprint.[13]

Focusing on the routinization of emergency as a *modus operandi* of government in liberal democracies provides a welcome shift of attention towards the specificities of the logics of emergency themselves – beyond the binary that would locate the latter either in the rule of law or in the state of exception.[14] Attending to what Foucault terms 'dispositive' – that is, the complex assemblage of rules, bureaucratic apparatus, and executive

11 J. Huysmans, 'The Jargon of Exception: On Schmitt, Agamben and the Absence of PoliticalSociety' (2008) 2 *International Political Sociology* 165; D. Bigo and L. Bonelli, 'Ni État de Droit, ni État d'Exception : L'État d'Urgence comme Dispositif Spécifique?' (2019) 112 *Cultures & Conflits* 7.

12 Z. Williams, 'Totalitarianism in the Age of Trump: Lessons from Hannah Arendt' *Guardian*, 1 February 2017, at <https://www.theguardian.com/us-news/2017/feb/01/totalitarianism-in-age-donald-trump-lessons-from-hannah-arendt-protests>.

13 Bigo and Bonelli, op. cit., n. 11, p. 8, my translation, emphasis in original.

14 Id.

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

prerogatives that foster a street-level, daily administrative despotism – opens up interesting paths. It points to fracture lines that continuously (re)produce divides between 'us' and 'them', 'inside' and 'outside' as a modality of government – both in the synchrony of the intra- and inter-sectoral adjustments fostered by the framing of situations *qua* crises[15] and in the diachrony, by tracing the genealogy in the long term, of the 'dispositives of security' mobilized to respond to crises.

III. LAW(YERS): THE IRONIC BLIND SPOT IN THE NEXUS BETWEEN EXCEPTION AND THE RULE OF LAW

Nevertheless, the law continues to be conceived as an external, and immutable, variable whose diverse effects are normatively weighed as positive gains or negative losses. The role of the law is therefore conceived as a functional dichotomy between rule *by* law and *lawfare* – as if the law remained a kind of background, a given, static in its forms and equal in its effects. The example of Judge Sérgio Moro, one of the lead prosecutors at the helm of the Lava Jato anti-corruption campaign in Brazil who subsequently joined the Bolsonaro government, presents a conundrum: is it a case of an individual conversion, or does it characterize a new generation of legal professionals in Brazil clustered in the spaces opened up by the fight against corruption yet *de facto* aligned to Bolsonaro's exceptionalist stance? This ahistoric, normative, and value-laden function attributed to law can also give rise to political dilemmas. United States Agency for International Development (USAID) lawyers involved in the first wave of law and development initiatives from the 1960s to foster rule of law reforms in the developing world were quickly confronted not only with the failure of these endeavours but also with the contradiction of their own position as exporters of liberal legalist principles in the face of authoritarian and militaristic backlash in Brazil and elsewhere.[16]

Part of the difficulty relates to the concept of the rule of law itself; as Scheppele notes, '[t]he rule of law is one of the few political desiderata that generate little opposition from any corner of the world. It compels so much agreement because it is a famously fuzzy concept.'[17] Law overwhelmingly remains a black box in the Politics and IR literature. It provides an immutable, ahistoric, and functional background to the dichotomy between the rule of law

15 See M. Dobry, *Sociologie des Crises Politiques: La Dynamique des Mobilisations Multisectorielles* (2009).

16 D. M. Trubek and M. Galanter, 'Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Rev.* 1062; D. M. Trubek 'Living in the Contradiction: Globalization and Its Discontents' in *Invisible Institutionalisms: Collective Reflections on the Shadows of Legal Globalization*, eds S. Ballakrishnen and S. Dezalay (2021) 241.

17 K. L. Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 559.

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

jols12252 WILEY JOLS Trim: 152 X 229 mm September 29, 2020 21:23

and exception. While a similar tendency characterizes legal scholarship, it is compounded by a conception of politics as *external* to the rule of law. For example, legal debates (in March 2020) about the adoption of new legislation in France laying out emergency measures to respond to the spread of the coronavirus pandemic focused foremost on the need for such legislation given the already existing legal framework for emergencies.[18] The entrenchment of static dichotomies between war and peace and between 'ordinary' times and exceptional conjunctures reflects a conception of the state of emergency as either *outside* (through a coup) or *inside* the ordinary legal order. The state of emergency is conceived as a set of temporary measures, generally codified by the constitution – that is, as a modality like any other of the rule of law. It is seen, therefore, in functional terms as a way in which to enable governments to react to specific threats through a temporary transfer of power – from the legislative to the executive – allowing for more efficient, rapid action. By implication, the state of emergency is reduced to a *temporary* expression of power in contemporary liberal democracies – with a priori no bearing on the operation of the rule of law once the situation returns to 'normal'.

Yet, while fostering the continuous appeal to the law as a response to crises, this functional conception of the rule of law risks abstracting the notion of crisis itself, as a problem external to the law. However, as demonstrated powerfully by Ermakoff, the collective abdication of representative democracy by the Parliament in 1940 in France could not be explained, simply, by the objective threat of German occupation or ideological pulls; it was, rather, the context of indeterminacy in which the vote granting full powers to Pétain was taken that fostered this collective alignment.[19]

Beyond the question of whether the state of emergency lies inside or outside the (ordinary) legal order, it is the invocation of the rule of law itself for illiberal purposes, including in so-called liberal democracies, that becomes problematic. Constitutionalists' debates on 'constitutional resilience' against the threat of populist authoritarian nationalism within the European Union have tended to focus on legal or institutional changes to decrease constitutional vulnerabilities and the need to identify potential political backlashes.[20] Yet apparently innocuous elements of the rule of law can themselves produce illiberal outcomes. As Scheppele argues, focusing solely on indicators – what rules are enshrined in the constitution, how many judges are trained, who appoints them, and so forth – diverts attention away from the monstrous outcome that can be produced by their interaction: a Frankenstate.[21]

18 A. Lecatellier, 'L'État d'Urgence Sanitaire: Une Innovation qui Pose Question' *The Conversation*, 19 March 2020, at <https://theconversation.com/letat-durgence-sanitaire-une-innovation-qui-pose-question-134078>.

19 I. Ermakoff, *Ruling Oneself Out: A Theory of Collective Abdications* (2008).

20 See 'Constitutional Resilience Debates' *Verfassungsblog*, December 2018, at <https://verfassungsblog.de/category/debates/constitutional-resilience-debates/>.

21 See Scheppele, op. cit., n. 17.

UNCORRECTED PROOFS

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

This normative understanding of the role played by law to foster the resilience of the rule of law is correlated with specific normative projections of the function played by lawyers themselves, *qua* agents of the rule of law. Scholarship focused on the roles of lawyers in times of crises tends to overwhelmingly construe them as legal *heroes*, as missionaries of the rule of law[22] – thereby reducing their less palatable roles as mercenaries at the service of the powerful to anomalies.[23] Yet, to take again the example of Judge Moro, this leads to over-emphasizing the ratchet effects of the individual gains enabled by emergency politics – thereby obscuring longer-term structural patterns that could help to make sense of these as *more* than opportunistic side effects. The risk, indeed, is to overlook contradictions that existed from the outset and that are crystallized in the momentum of conjunctural crises.

Therefore, how can we go beyond the question of how law *responds* to exceptional power and look through the looking glass of exception by tracing what law *does* to power?

IV. BEYOND THE NEXUS: THE RULE OF LAW AS POLITICS

Those are precisely the questions triggered by Rick Abel's monumental volumes *Law's Wars*[24] and *Law's Trials*,[25] which offer the first comprehensive study of the legacy of the War on Terror on rule of law legal frameworks and institutions in the US. This is the reason why this Special Supplement opens with a contribution by Abel, built out of these two volumes, as a point of departure.

As Abel argues, the response by the US and the liberal camp to the 9/11 attacks was framed and legitimized through a reference to war, enshrined in exceptional politics both at home and abroad. As his analysis testifies, this has also placed exceptionalism at the core of contemporary US politics, not only by stressing the limits of rule of law institutions but also by durably testing their capacity for resilience. As an *inventory* of the impact of the War on Terror on rule of law legal frameworks and institutions, Abel's surveys constitute a unique departure, in Law and Society scholarship, from the consensual understanding of the relationship between the rule of law and the state of exception as either a transient or an irrevocable dichotomy. The US response to the War on Terror was institutionalized through rules escaping the rule of law, but it was also operationalized through rules by exception within the remit of the rule of law. Yet exception bears a cost on the present; if no inventory is

22 See T. Halliday et al. (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (2012).

23 See, as a counter-point, A. Manji, 'The Grabbed State: Lawyers, Politics and Public Land in Kenya' (2012) 50 *J. of Modern African Studies* 467.

24 R. Abel, *Law's Wars: The Fate of the Rule of Law in the US 'War on Terror'* (2018).

25 R. Abel, *Law's Trials: The Performance of Legal Institutions in the US 'War on Terror'* (2018).

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

made to redress past wrongs inflicted on future generations, exception could lead to durable attacks on the rule of law. Such is Abel's bleak conclusion.

Abel's narrative also gives pride of place to the role of legal professionals themselves as a locus for maintaining the *status quo*, fostering resilience of the rule of law as much as resistance. Yet his study is not simply about legal heroism. Documenting precisely the elements of the rule of law both individually and in combination so as to identify the factors that could lead to and/or deter from attacks on the rule of law, his conclusions are sobering yet optimistic. Just like his earlier volume on late-apartheid South Africa, *Politics by Other Means* (1995),[26] Abel demonstrates that law has consistently shown itself to be more effective as a *shield* than as a *sword*. The most important lesson, he argues, is therefore a paradox: the fate of the rule of law depends on politics. That conjunctural politics have a variable influence on law's response to exception – depending on the majority party in Congress, or the party of the president who nominates federal judges – underscores that defenders of the rule of law must engage in politics, including the electoral process.

Such an apparently unlikely comparison – between the unpromising environment of South Africa of the 1980s and the US' vibrant, mature democracy – prompted us to push the discussion further to ask: has the War on Terror paved the way for the ongoing attacks on the rule of law that we are witnessing today in the US and elsewhere in the world? Does the War on Terror even remain a relevant yardstick to account for, and contrast, ongoing attacks on the rule of law? Or should those be traced in longer-term structural patterns? Built around Abel's volumes, this Special Supplement stems from a workshop organized under the sponsorship of the *Journal of Law and Society* and the Cardiff Centre of Law and Society Annual Conference that took place at the Cardiff School of Law and Politics on 30 April and 1 May 2019. It brings together an array of scholars hailing from different disciplinary traditions across Law and Society and Politics/IR. As the Special Supplement is published by a Law and Society journal, its first ambition is to push and question disciplinary boundaries as a way in which to go beyond a focus restricted to the dichotomy between the rule of law and exception.

V. FROM EXCEPTIONALISM TO CRISES AS BOUNDARY MAKING

Looking through the looking glass at law itself – that is, at legal frameworks in their geo-political context and foremost at legal professionals themselves – this Special Supplement asks what variables, in the synchrony and the diachrony, help to explain the force of law in times of crises. Examining the nexus between legality and crisis beyond the normative values attributed to law demands breaking with scholarly convention in two ways.

26 R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994* (1995).

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

First, rather than looking at law's *response* to exceptional power, this collection posits the notion of crisis itself as a heuristic category. Crisis situations are characterized by idiosyncratic dynamics as 'fluid conjunctures'[27] that allow for intra- and cross-sectoral alignments and disalignments, which are fostered by the more or less brutal transformations of the social spaces in which individuals, institutions, and normative frameworks are embedded. Crises may also provide an entry point to trace conflicts and contradictions that existed before and that are reactivated in specific conjunctures. The political invocation of crisis – that is, of emergencies requiring a response – may align with or depart from these initial conflicts and contradictions. As Abel argues, law's force correlates more or less strongly with political majority. By the same token, the crystallization of legal responses around the War on Terror, the fight against corruption, or other emergencies can strengthen as much as it can mask sectoral adjustments within legal fields and in the structural relation between these social spaces and national fields of state power. Focusing on crisis as a heuristic category, therefore, provides a way in which to depart from conceptual yardsticks and typologies, such as that of the rule of law versus exception, but also terms like 'state capture', 'corruption', and 'illiberalism' that are as much ideologically laden as they both shape and are shaped by symbolic boundaries – whether those boundaries are political or scholarly. Such terms, therefore, tend to obfuscate their entanglement with policy pulls.

Second, this Special Supplement aims at unpacking the relationship between the rule of law and exception by conceiving it not as a *static* opposition – framed as an either/or – but as a *dynamic* one, by empirically tracing processes of boundary making and their effects on the force of law. Shifting the focus towards boundary-making dynamics is a way in which to question and assess the embeddedness of the nexus between the rule of law and political exception with historically bound *values* and their structural impacts in the trajectory of legal evolution, that of the state, and beyond, in relations of power between the Global North and the Global South.

This collection puts the emphasis on two processes of boundary making at play in the relationship between the rule of law and exception:

(1) what (and how) claims to value are made through (the rule of) law; and
(2) how the relationship between law and exception maps onto political liberalism/illiberalism.

Individually, the contributions adopt a micro or a more macro perspective, attentive to the roles played by agency, specifically that of lawyers, or focused more broadly on structural patterns. Collectively, this Special Supplement explores these questions both in the synchrony and the diachrony, across time and geographical scales: in judicial and bureaucratic responses to terrorism, but also in the trajectory of the state, imperialism, globalization, and the

27 Dobry, op. cit., n. 15.

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

current crisis of global capitalism and the nation-state. Through empirically grounded analyses – focused on North American, Latin American, and Western European as well as Sub-Saharan African contexts – this collective endeavour provides a rich and nuanced understanding of how contemporary manifestations of exceptionalism have their roots in historically entrenched patterns. It expands the focus beyond the specificity of the post-9/11 anti-terror politics in the US, Europe, and globally, towards a diverse range of past and present processes across countries and regions in the world. This enlarged geographical focus emphasizes that the structural patterns in which the rule of law is embedded nationally are also defined by legal globalization dynamics, which are rooted in colonial encounters and imperialism, and contemporary dynamics of hegemony, driven foremost by the US.

VI. *DE TE FABULA NARRATUR*: THE STRUCTURAL AND CONJUNCTURAL GAMES OF THE RULE OF LAW

This collection of nine papers brings together studies of ongoing political and institutional changes (Abel on the impact of the War on Terror in the US; Weill on Islamists' terror trials in France; Mészáros, Engelmann, and de Sa e Silva on the Lava Jato investigation and the ongoing populist surge in Brazil; and Brett on the post-apartheid era in South Africa) and research on past crises and their echoes in the present (Ermakoff on the demise of the Weimar Republic in 1933, Massoud on post-colonial politics in Somalia, and Murray and Wincott on border politics between Northern Ireland and the Republic of Ireland following Irish independence in 1921).

Individually, the papers assembled in this Special Supplement tell idiosyncratic stories. Relationally, they emphasize the relevance of combining the diachrony and the synchrony to assess the force of law in times of crisis. Weill's ethnography of terrorism cases before French criminal courts provides a direct sequel to Abel's inventory of the impact of the War on Terror on rule of law legal frameworks and institutions in the US. The judicialization of the response to the problem raised by French citizens returning from Syria or Iraq, where they fought as ISIS combatants, has positioned French national criminal courts as transnationalized actors in the fight against terror. The terror cases before the French Assize Court from 2016 have taken place in a political context of repressive inflexion, fostered by harsh prosecution policies. Yet it is also precisely the routinization of these cases in the normal operations of criminal proceedings that has enabled the resistance of trial judges – and with them the resilience of the rule of law – against this repressive stance.

'Of you the tale is told.' The case of Brazil looms large in this collection. In their respective contributions, Mészáros, Engelmann, and de Sa e Silva tackle the apparently paradoxical outcome of the Lava Jato operation in Brazil, which led to the victory of the militaristic and extremist Jair

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

Bolsonaro in the presidential elections in 2019. Going beyond the populist backlash explanation, the three articles unpack the diachronic and synchronic variables that help to account for this outcome. Against the backdrop of the celebration of the Lava Jato operation as a 'success story', Mészáros traces the entanglement between politics/economic capture and law in Brazil. The political economy of corruption in the state's trajectory enabled the efficiency of the Lava Jato operation but also played into what he calls a trap of authoritarianism. In turn, de Sa e Silva and Engelmann focus on the apparently contradictory positions of lawyers – specifically anti-corruption prosecutors – such as Judge Moro, in this outcome. Engelmann emphasizes the instrumental role played by international variables – foremost US hegemonic influence in the legal globalization patterns at play in what he dubs the expansion of the 'catechism of the fight against corruption'. The alliance between US think tanks, non-governmental organizations (NGOs), foundations, and a new generation of legal professionals in Brazil – co-opted through US–Brazilian professional networks and legal credentials obtained at Ivy League universities, as well as their proximity to elite business sectors opposed to Lula da Silva's Leftist politics – contributed to carving out a new space of professional corporate legal practice aligned with the US' aggressive export of compliance regimes both in Brazil and globally. The autonomy of this legal anti-corruption movement was further strengthened by the autonomous bureaucratic space institutionalized first during Lula's presidency and then during that of Dilma Rousseff, with a constellation of administrative entities with prerogatives escaping federal hierarchies and democratic scrutiny. Engelmann's conclusion, therefore, is that rather than a paradox, Bolsonaro's election actually constitutes yet another iteration of Brazil's authoritarian pattern. Focusing on the conjunctural legalist grammar used in the fight against corruption, de Sa e Silva tests the political efficiency of the grammar mobilized by the Lava Jato lawyers. From initially invoking the 'enforcement of the law' – notably the novel mechanisms of plea deals and pre-trial detentions introduced under compliance legal frameworks – they also pushed, curbed, and bent the rule of law by appealing directly to 'the people' before the tribunal of public opinion. As he emphasizes, the aura of Moro as champion of the rule of law that expanded his symbolic status globally was also capable of serving a government with illiberal predispositions, leading to a sobering conclusion:

> At a time when illiberal leaders are rising to power and there are hopes that lawyers will protect and preserve a 'rule of law', scholars and policy makers must recognize the slippery, indeterminate character with which this expression circulates and the furtive, deceptive ways in which it can operate.

In turn, the contributions of Massoud and Brett respectively test the fate of the rule of law in unlikely settings: in Somalia, dubbed a 'fragile state', and in Zuma's patronage politics in South Africa. Yet again, however, these two settings reflect the influence of the US. So-called 'fragile states', argues

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

Massoud, make unlikely candidates for testing the fate of the rule of law. Law, indeed, is seen to be either absent or intermingled with violence. Yet Massoud emphasizes the instrumental role played by religion in the symbolic force and institutionalization of the rule of law in Somalia, thereby pushing against Global North perspectives that see in religion the antithesis of the rule of law. On the contrary, he argues, tracing the societal coalitions of interests undergirding the force of shari'a rules in the historical trajectory of Somalia provides a key to understanding the fate of the rule of law in this country. While Siad Barre's dictatorship developed out of a socialist revolution underwritten by religion as a way in which to control the power of shari'a religious leaders and religion itself as a source of popular dissent, his regime crumbled precisely when he attempted to control the intimate sphere of family relations. The prominence of shari'a courts in combating warlords in war-torn Somalia from 1991 was quashed under the influence of the US, however, in the name of the War on Terror in the post-9/11 international context. Yet Massoud concludes his analysis with the anomaly of Somaliland – an unrecognized state that separated from Somalia precisely by building a theocratic state out of an alliance between religious and business leaders to fight against terror. In turn, Brett provides a direct sequel to Abel's *Politics by Other Means*. The case of South Africa loomed large in the cultural Cold War. The mobilization of law as a shield against the rules of apartheid, which contributed to the demise of the regime, was prompted largely by US foundations whose funded projects in the country aimed to foster the emergence of a new generation of lawyers for the transition. As Brett argues, that law is more effective as a shield than a sword still largely holds true in post-apartheid South Africa today. However, law as a sword can also be two-edged. Brett traces how judicial responses to 'state capture' under Zuma's presidency, through patronage politics clothed as an assault on 'white monopoly capital', contributed to Zuma's downfall. Yet he also points to backlashes against this judicial activism: 'South Africa's courts have … become prisoners of expectations that they were obliged to create in order to sustain the coalition against state capture.' Indeed, judges are now subjected to populist attacks: 'The only new feature is that race has replaced greed as a central explanation for the emergence of corruption.'

The collection closes with the contributions of Murray and Wincott, and Ermakoff. These two contributions explore twin questions. Murray and Wincott question the paradox of the resilience of the rule of law despite the discontinuation of its territorial remit, that of England as a core in the narrative about the United Kingdom (UK) as a nation-state following the creation of the Irish Republic in 1921. On the other hand, Ermakoff asks: how can we account for the use of law as an effective weapon to dismantle the rule of law? Murray and Wincott look at the symbolic and practical modalities of boundary making between Northern Ireland and the Republic of Ireland. Tracing dynamics of border making 'by bricolage' between 1921 and 1972, a period of relative normalcy before the outbreak of the Troubles, their analysis emphasizes the

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School

UNCORRECTED PROOFS

operations of petty officialdom of border making in the shadow of the three-way relationship between London, the Irish Republic, and Northern Ireland. Foremost, their study underlines how these operations unravelled within the remit of a rule of law that remained defined as *imperial* through a symbolic and implicit imaginary that served the political and economic purposes of both the UK and the Republic of Ireland. Their contribution thereby points to the crystallization effect fostered by the conjunctural contemporary events of Brexit in imposing rigidity where previously pragmatism undergirded by continuous, petty violence had operated. Ermakoff confronts the highly contemporary paradox of democratic backsliding through law by revisiting the National Socialist party leadership's assault on the constitutional order of the Weimar Republic in 1933. He posits this case as both exceptional and paradigmatic, on the one hand due to the swiftness of the National Socialists' takeover of the German state apparatus and on the other as an example of the empirical class of regime transitions that revolutionary contenders seek to bring about by using the legal resources of the Rechtsstaat. As he demonstrates, the strength of the Weimar Republic as a Rechtsstaat was paradoxically what precipitated its demise, as it allowed, in particular, for what he calls 'constitutional Trojan horses' – that is, the use of law to redesign the political game. Far from a paradox, the invocation and mobilization of the rule of law for authoritarian purposes was not only explained opportunistically by the ruling out of physical violence as an explicit strategy of power but also proved to be more effective; the commitment to the Rechtsstaat by the primary political opponents to the National Socialist party – foremost the Social Democratic Party – is what eventually paralysed them and led to their compliance to the takeover. Herein lies a powerful conclusion and cautionary tale for the contemporary period. Rather than focusing solely on the outcome of democratic backsliding and the consolidation, upstream, of the rule of law, Ermakoff underscores 'the need to pay close attention to the factors conditioning the impact of legal claims in times of high contention' – that is, how the framing of authoritarian bids for state power as 'legal' affects the possibility of collective action to counter them.

© 2020 The Author. Journal of Law and Society © 2020 Cardiff University Law School