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

SARA DEZALAY*

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

Nearly 20¹ 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

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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)).

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

3
4 constitutionalists have generally not been so concerned about the emergencies
5 that are caused by nature ... [b]ecause the cause of these emergencies is so
6 evidently not political, the timing is out of the control of leaders who might
7 benefit from them and the measures that are needed to address the problems
8 are so visible and evident, these have been considered the emergencies least
9 dangerous to constitutional government.⁴

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

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

29
30 3 B. Paitnak, South Asia Director of Amnesty International, quoted in
31 J. Slater et al., ‘Under the Cover of Coronavirus, Governments Punish
32 Adversaries and Reward Friends’ *The Washington Post*, 30 April 2020,
33 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>.

34
35 4 K. L. Scheppele, ‘Underreaction in a Time of Emergency: America as a Nearly Failed
36 State’ *Verfassungsblog*, 9 April 2020, at <<https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/>>.

37 5 Slater et al., op. cit., n. 3.

38 6 K. Kovacs, ‘Hungary’s Orbanistan: A Complete Arsenal of Emergency Powers’
39 *Verfassungsblog*, 6 April 2020, at <<https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>>.

40 7 E. Peluso Neder Meyer and T. Bustamante, ‘Authoritarianism without
41 Emergency Powers: Brazil under COVID-19’ *Verfassungsblog*, 8 April 2020, at
42 <<https://verfassungsblog.de/authoritarianism-without-emergency-powers-brazil-under-covid-19/>>.

43
44 8 S. Platon, ‘From One State of Emergency to Another: Emergency Powers in
45 France’ *Verfassungsblog*, 9 April 2020, at <<https://verfassungsblog.de/from-one-state-of-emergency-to-another-emergency-powers-in-france/>>.

1 II. THE RULE OF LAW VERSUS EXCEPTION, OR THE CONUNDRUM
2 OF LOOKING THROUGH A ONE-WAY GLASS
3

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

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

28 The prominence of the Schmittian-Agamben vision of the political in
29 scholarly debates in the wake of state responses to the 9/11 attacks put
30 the emphasis on the *rupture* induced by emergencies and the potential
31 tilting of political regimes – from liberal democracy to its so-called nemesis,
32 authoritarianism. The ongoing surge of populism around the world – including
33 the tsunami of Bolsonaro's election as Brazil's President in January 2019
34 despite the uncritically acclaimed success story of the anti-corruption 'Lava
35 Jato' ('Car Wash') operation in the country – has widely been conceived as
36 the expression of a zero-sum relation between *progressive* globalization – as a
37 vision of historical progress articulated by (Western) liberal democracy – and
38 counter-globalization trends perceived as *regressive*: a pathway to illiberal
39 democracy, 'competitive authoritarianism',⁹ or outright dictatorship.¹⁰
40

41
42 9 S. Levitsky and L. A. Way, *Competitive Authoritarianism: Hybrid Regimes after the*
43 *Cold War* (2010).

44 10 Y. Mounk, 'The End of History Revisited' (2020) 31 *J. of Democracy* 22; J. Welsh, *The*
45 *Return of History: Conflict, Migration, and Geopolitics in the Twenty-First Century*
(2016).

1 Yet the jargon of exception – as a political stance or an expression
2 of (scholarly) dissent – masks more than it reveals. The wide success of
3 Agamben’s synthesis in IR scholarship¹¹ could arguably be related to the
4 fact that it provided the grounds for political dissent against the policies
5 deployed by US President Bush and continued by Obama. However, it does
6 little to explain either the relationship between emergency and exception or
7 the contradictions embodied by Trump – beyond the ‘crackpot’ representing
8 a ‘lunatic fringe’.¹² To boot: while the caravan of the political jargon of
9 exceptionalism continuously moves, from terror to migrants to pandemic, so
10 too does scholarship have its own thematic swarming effects around trends
11 and buzzwords. Since the heyday of case studies on the global War on Terror
12 during the early 2000s, it is as if the War on Terror had no past nor legacy in
13 the present.

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

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

31 Focusing on the routinization of emergency as a *modus operandi* of
32 government in liberal democracies provides a welcome shift of attention
33 towards the specificities of the logics of emergency themselves – beyond
34 the binary that would locate the latter either in the rule of law or in
35 the state of exception.¹⁴ Attending to what Foucault terms ‘dispositive’ –
36 that is, the complex assemblage of rules, bureaucratic apparatus, and executive
37

38 11 J. Huysmans, ‘The Jargon of Exception: On Schmitt, Agamben and the Absence
39 of Political Society’ (2008) 2 *International Political Sociology* 165; D. Bigo and L.
40 Bonelli, ‘Ni État de Droit, ni État d’Exception : L’État d’Urgence comme Dispositif
41 Spécifique?’ (2019) 112 *Cultures & Conflits* 7.

42 12 Z. Williams, ‘Totalitarianism in the Age of Trump: Lessons from Hannah
43 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>>.

44 13 Bigo and Bonelli, op. cit., n. 11, p. 8, my translation, emphasis in original.

45 14 Id.

1 prerogatives that foster a street-level, daily administrative despotism – opens
2 up interesting paths. It points to fracture lines that continuously (re)produce
3 divides between ‘us’ and ‘them’, ‘inside’ and ‘outside’ as a modality
4 of government – both in the synchrony of the intra- and inter-sectoral
5 adjustments fostered by the framing of situations *qua* crises¹⁵ and in the
6 diachrony, by tracing the genealogy in the long term, of the ‘dispositives of
7 security’ mobilized to respond to crises.
8
9

10 III. LAW(YERS): THE IRONIC BLIND SPOT IN THE NEXUS 11 BETWEEN EXCEPTION AND THE RULE OF LAW 12

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

31 Part of the difficulty relates to the concept of the rule of law itself; as
32 Scheppele notes, ‘[t]he rule of law is one of the few political desiderata that
33 generate little opposition from any corner of the world. It compels so much
34 agreement because it is a famously fuzzy concept.’¹⁷ Law overwhelmingly
35 remains a black box in the Politics and IR literature. It provides an immutable,
36 ahistoric, and functional background to the dichotomy between the rule of law
37

38 15 See M. Dobry, *Sociologie des Crises Politiques: La Dynamique des Mobilisations*
39 *Multisectorielles* (2009).

40 16 D. M. Trubek and M. Galanter, ‘Scholars in Self-Estrangement: Reflections on the
41 Crisis in Law and Development Studies in the United States’ (1974) *Wisconsin*
42 *Law Rev.* 1062; D. M. Trubek ‘Living in the Contradiction: Globalization and Its
43 Discontents’ in *Invisible Institutionalisms: Collective Reflections on the Shadows of*
44 *Legal Globalization*, eds S. Ballakrishnen and S. Dezalay (2021) 241.

45 17 K. L. Scheppele, ‘The Rule of Law and the Frankenstate: Why Governance Checklists
Do Not Work’ (2013) 26 *Governance* 559.

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

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

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

40 18 A. Lecatellier, ‘L’État d’Urgence Sanitaire: Une Innovation qui Pose Question’
41 *The Conversation*, 19 March 2020, at <[https://theconversation.com/letat-durgence-
42 sanitaire-une-innovation-qui-pose-question-134078](https://theconversation.com/letat-durgence-sanitaire-une-innovation-qui-pose-question-134078)>.

43 19 I. Ermakoff, *Ruling Oneself Out: A Theory of Collective Abdications* (2008).

44 20 See ‘Constitutional Resilience Debates’ *Verfassungsblog*, December 2018, at
45 <<https://verfassungsblog.de/category/debates/constitutional-resilience-debates/>>.

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

1 This normative understanding of the role played by law to foster the
2 resilience of the rule of law is correlated with specific normative projections
3 of the function played by lawyers themselves, *qua* agents of the rule of
4 law. Scholarship focused on the roles of lawyers in times of crises tends to
5 overwhelmingly construe them as legal *heroes*, as missionaries of the rule
6 of law²² – thereby reducing their less palatable roles as mercenaries at the
7 service of the powerful to anomalies.²³ Yet, to take again the example of Judge
8 Moro, this leads to over-emphasizing the ratchet effects of the individual gains
9 enabled by emergency politics – thereby obscuring longer-term structural
10 patterns that could help to make sense of these as *more* than opportunistic
11 side effects. The risk, indeed, is to overlook contradictions that existed from
12 the outset and that are crystallized in the momentum of conjunctural crises.

13 Therefore, how can we go beyond the question of how law *responds* to
14 exceptional power and look through the looking glass of exception by tracing
15 what law *does* to power?
16

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

18
19 Those are precisely the questions triggered by Rick Abel's monumental
20 volumes *Law's Wars*²⁴ and *Law's Trials*,²⁵ which offer the first comprehensive
21 study of the legacy of the War on Terror on rule of law legal frameworks and
22 institutions in the US. This is the reason why this Special Supplement opens
23 with a contribution by Abel, built out of these two volumes, as a point of
24 departure.
25

26 As Abel argues, the response by the US and the liberal camp to the 9/11
27 attacks was framed and legitimized through a reference to war, enshrined in
28 exceptional politics both at home and abroad. As his analysis testifies, this has
29 also placed exceptionalism at the core of contemporary US politics, not only
30 by stressing the limits of rule of law institutions but also by durably testing
31 their capacity for resilience. As an *inventory* of the impact of the War on Terror
32 on rule of law legal frameworks and institutions, Abel's surveys constitute
33 a unique departure, in Law and Society scholarship, from the consensual
34 understanding of the relationship between the rule of law and the state of
35 exception as either a transient or an irrevocable dichotomy. The US response
36 to the War on Terror was institutionalized through rules escaping the rule of
37 law, but it was also operationalized through rules by exception within the remit
38 of the rule of law. Yet exception bears a cost on the present; if no inventory is
39

40 22 See T. Halliday et al. (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (2012).

41 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.

42 24 R. Abel, *Law's Wars: The Fate of the Rule of Law in the US 'War on Terror'* (2018).

43 25 R. Abel, *Law's Trials: The Performance of Legal Institutions in the US 'War on Terror'* (2018).
44
45

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

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

17 Such an apparently unlikely comparison – between the unpromising
18 environment of South Africa of the 1980s and the US' vibrant, mature
19 democracy – prompted us to push the discussion further to ask: has the War
20 on Terror paved the way for the ongoing attacks on the rule of law that we
21 are witnessing today in the US and elsewhere in the world? Does the War on
22 Terror even remain a relevant yardstick to account for, and contrast, ongoing
23 attacks on the rule of law? Or should those be traced in longer-term structural
24 patterns? Built around Abel's volumes, this Special Supplement stems from
25 a workshop organized under the sponsorship of the *Journal of Law and*
26 *Society* and the Cardiff Centre of Law and Society Annual Conference that
27 took place at the Cardiff School of Law and Politics on 30 April and 1 May
28 2019. It brings together an array of scholars hailing from different disciplinary
29 traditions across Law and Society and Politics/IR. As the Special Supplement
30 is published by a Law and Society journal, its first ambition is to push and
31 question disciplinary boundaries as a way in which to go beyond a focus
32 restricted to the dichotomy between the rule of law and exception.

33 34 35 V. FROM EXCEPTIONALISM TO CRISES AS BOUNDARY MAKING

36
37 Looking through the looking glass at law itself – that is, at legal frameworks
38 in their geo-political context and foremost at legal professionals themselves –
39 this Special Supplement asks what variables, in the synchrony and the
40 diachrony, help to explain the force of law in times of crises. Examining the
41 nexus between legality and crisis beyond the normative values attributed to
42 law demands breaking with scholarly convention in two ways.

43
44 26 R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994*
45 (1995).

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

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

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

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

37 Individually, the contributions adopt a micro or a more macro perspective,
38 attentive to the roles played by agency, specifically that of lawyers, or focused
39 more broadly on structural patterns. Collectively, this Special Supplement
40 explores these questions both in the synchrony and the diachrony, across time
41 and geographical scales: in judicial and bureaucratic responses to terrorism,
42 but also in the trajectory of the state, imperialism, globalization, and the
43

44
45 ²⁷ Dobry, *op. cit.*, n. 15.

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

13 14 15 VI. *DE TE FABULA NARRATUR*: THE STRUCTURAL AND 16 CONJUNCTURAL GAMES OF THE RULE OF LAW 17

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

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

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

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

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

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

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

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