Concepts and Dangers of Authoritarian Law and Politics

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Abstract: *The rise of authoritarian populism and hybrid regimes has become a pressing challenge to liberal democracy, raising urgent questions about the role of law in these political transformations. This paper examines how authoritarian regimes reshape legal systems by creating and deploying what will be termed 'authoritarian law'. The study applies a comparative and theory-oriented approach, systematically engaging with major conceptual frameworks to examine how authoritarian regimes manipulate legal structures for the purpose of political consolidation. The paper aims to contribute to a better understanding of the process of how authoritarian regimes manipulate legal structures and legislative processes, the aim is to identify the specific ways in which populist governments bypass or erode democratic norms. The paper is based on the theoretical investigation on five conceptual traditions: authoritarian legalism, which highlights the emergence of a distinct authoritarian conception of law; the dual state theory, which distinguishes between normative and prerogative forms of law; populist constitutionalism, which uncovers constitutional paradigms departing from liberal norms; the Unitary Executive Theory, which reveals transatlantic dimensions of authoritarian law; and the concept of constitutional dictatorship, which emphasises the use of exceptional measures. Results indicate that authoritarian regimes use law not to safeguard democratic institutions but to erode them through political instrumentalisation and weaponisation of legal processes. The paper concludes that law itself becomes a central institutional framework for stabilising authoritarian rule, undermining its own normative integrity.*

Keywords: ***authoritarian populism, exceptional governance measures, autocratic legalism, dual state, populist constitutionalism, unitary executive theory, constitutional dictatorship***

Exceptional measures of governance in the era of polycrisis

Liberal democracies in Western and Eastern Europe, as well as in North America, have experienced numerous shocks. The second half of the 20th century was marked by a prolonged crisis of liberal democracy and its constitutional paradigm, lasting several decades. Authoritarian populist forces (especially in Europe, the US and Latin America) have exploited the political and constitutional crises that have torn liberal democracy apart to build their own systems in opposition to liberal democracy. Mainly in Europe (above all in Hungary and Poland) have hybrid regimes emerged that have clearly triggered a wave of de--democratisation. However, in the case of authoritarian populisms (although they learn from each other), we cannot speak of any kind of general recipe. In this study, I examine the legal and political solutions developed by authoritarian populist forces to dismantle liberal democracy.

The acute crisis of liberal democracies has been further exacerbated since 2008–2009 and the political systems and societies have been shaken by major, interconnected crises that often overlap. This interconnectedness – what Adam Tooze aptly terms a polycrisis (Henig & Knight 2023) – includes the economic and financial crisis beginning in 2008, the refugee and immigration crisis from 2015, the pandemic starting in 2020 and the war in Ukraine from 2022, resulting from Russian aggression. These crises are global in nature and have affected not only liberal democracies but also authoritarian regimes, both old and new democracies, and countries at the core and (semi-)periphery of global capitalism. These developments highlight the increasing prominence of the executive as a crisis manager and the fundamental transformation of power-sharing paradigms by populist political leaders – paradigms that have traditionally defined liberal constitutionalism. This shift is also significant in the context of the global ecological and climate crisis, as climate movements push climate emergency thinking to the forefront. As a result, these trends are driving a reconfiguration of the traditionally limited constitutional and political role of the executive in liberal democracies – a transformation catalysed by a Zeitgeist shaped by authoritarian populist forces. This part of the study highlights how contemporary emergencies have reinforced existing, new types of authoritarian tendencies. The exploitation of emergencies by authoritarian political forces is a long-standing phenomenon, but contemporary authoritarian populists have used new legal and constitutional (Landau 2013) tools to exploit the weaknesses of liberal democracies and create permanent crisis management regimes, thereby eliminating the remnants of the rule of law.

The rise of the exception

There are few theoretical attempts to address the deep structures underlying the rapidly changing legal-political culture of our time – such as imperial thinking,

new security paradigms and the re-emerging privileges of executive power. In three defining works – *Homo Sacer*, *Remnants of Auschwitz* and *State of Exception* – Giorgio Agamben (1998, 1999, 2005) sought to lay the foundations for a comprehensive theory that attempts to fill this gap. It is particularly timely to examine the state of emergency, as it relates to the enduring problem of sovereign power, which dates back to the Roman Empire and the Middle Ages.

Agamben analyses the state of emergency as a modern institution with roots in the French Revolution and the World Wars. By the mid-20th century, however, it had become a dominant and paradigmatic form of governance (Humphreys 2006: 677). His theory offers a legal explanation that applies to relational systems of human existence that are not subject to law. In defining the state of emergency, law is constantly attempting to 'colonise' life itself. Agamben outlines two main trends regarding the legal relationship of a state of emergency to law. According to the first – represented by figures such as Santi Romano, Maurice Hauriou and Costantino Mortati – the state of exception falls under positive law, as it is considered an autonomous source of law (Agamben 2005: 23). This approach is accepted by international law and, in many cases, domestic legal systems. When a public crisis (such as an environmental or economic catastrophe) threatens the 'life of a nation', international treaties and many constitutions allow for the temporary suspension of certain fundamental rights guaranteed by the state. Clauses of this kind, which codify derogations from the normal legal order, authorise the state to take unavoidable emergency measures (Hickman 2005: 655). According to those who interpret the state of emergency within the framework of the legal system, this development represents the highest achievement of contemporary international (and domestic) law. While this conception of the state of emergency remains grounded in law, it simultaneously violates individual rights – thus, according to Hickman (2005: 659), creating a two-tier constitutional system. This perspective views the state of emergency as a natural or constitutional right of the state to defend itself.

The other trend explored by Agamben – represented by Paolo Biscaretti di Ruffia, Giorgio Balladore-Pallieri and Raymond Carré de Malberg – conceives of the state of emergency as fundamentally outside the legal order, as something that precedes and is essentially distinct from law. From this perspective, constitutional approval of a state of emergency is merely a pragmatic acknowledgment of the limits of constitutional rule. As Alexander Hamilton famously stated: 'The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed' (Madison et al. 1987: 185). In this sense, it is neither possible nor desirable to constrain executive power through judicial accountability mechanisms during emergencies. Rather, a legal vacuum – or exceptional legal space – must be created in which the state can act without restriction until constitutional order is restored. However, under such circumstances, the

normal structures of legal protection come into conflict with the demands of an exceptional state, which requires extreme flexibility (Humphreys 2006: 679).

The problem of state of exception is the political and legal sovereignty in the framework of constitutional institutions and, more precisely, the state of exception relies on the rise of the executive power. There is a complex relationship between the state of emergency and the presidentialisation with regard to the rise of the executive power. The (excessive) dominance of the executive power is a general trend in today's political systems, and the characteristic is that this dominance is embodied in a single political leader, even if it is not accompanied by significant changes in public law in the given public law system (Poguntke & Webb 2005: 1). At first glance, one might even think that populist leaders are pioneers of the new type of the presidentialisation process, but the application of the state of exception shows that it is different indeed. The main components of the presidentialisation process are: the head of the executive is not accountable to the legislature; the head of government is elected by the people; the head of implementation is empowered to govern and therefore also bears political responsibility (Poguntke & Webb 2005: 2–3). In contrast, in classical parliamentary systems, the relationship between the legislature and the executive is much closer and the parliament has strong powers of accountability and responsibility and enforces them. In presidential systems, the head of the executive acquires extremely strong executive powers and resources, giving him unparalleled political autonomy vis-à-vis the legislature as a whole, so the head of the executive has the necessary political leadership. For all these reasons, Poguntke and Webb see presidentialisation as a developmental process that enhances the control and autonomy of political leadership over power within the governing party(ies) and the executive branch, and promotes electoral processes that focus on political leadership (Poguntke & Webb 2005: 4–5). That is, presidentialisation transforms the exercise of democratic power in three main respects: executive, partisan and electoral. However, it is not necessary for these trends to take the form of changes in public law.

In my view, the process of presidentialisation has undergone a dramatic transformation, with executive power increasingly relying on the unlimited authority granted through the state of emergency. However, the global ecological and climate emergency places this dynamic in an entirely new context. This unprecedented, long-term crisis cannot be addressed through conventional extraordinary measures alone. Unlike other emergencies – such as economic or security crises – the climate crisis is ongoing, diffuse and systemic, thereby challenging the traditional logic of short-term emergency governance.

Authoritarian populism and exceptional measures

Michael Hardt and Antonio Negri argue that the separation of war from politics was a fundamental objective of modern political thought and practice, shared

by both liberal and non-liberal theorists (Hardt & Negri 2004). This consensus has since collapsed, as authoritarian populist regimes increasingly implement the kind of permanent states of exception theorised by Giorgio Agamben (1998, 2005). As Michael Head observes: 'The early years of the twenty-first century have seen increasing resort to emergency-type powers or claims of supra-legal executive authority, including by the Western countries regarded as the world's leading democracies' (Head 2016: 1). In the wake of the COVID-19 pandemic and ongoing global social crises, the expansion and normalisation of emergency powers has become one of the defining features of our time – perhaps more than ever before.

The clear boundaries of war have eroded; war and peace have, to some extent, merged, and the expansion of emergency powers reflects this shift. Authoritarian populist regimes recognise these tendencies and increasingly rely on emergency governance. These regimes often wield the punitive power of the state to manufacture political enemies and eliminate them – effectively producing modern iterations of *homo sacer* (Agamben 1998). In this context, emergency measures and the emergence of marginalised social groups – cast as contemporary homo sacer – have become defining features of today's authoritarian populist systems. These developments reveal how states of exception are no longer temporary responses, but integral tools of governance and control.

Authoritarian populism can be understood as the use of exceptional measures to maintain political power, and the COVID-19 crisis has further fuelled this phenomenon. According to Agamben (2014), there has been a fundamental transformation in the concept of governance – one that 'overturns the traditional hierarchical relation between causes and effects. Since governing the causes is difficult and expensive, it is safer and more useful to try to govern the effects' (Agamben 2014). Authoritarian populist regimes exploit objective crises – such as wars, public health emergencies and migration – for their own political purposes. They shift focus to internal, subjective crisis management, in which resolving the social problems caused by these crises is no longer the priority. Instead, as Agamben argues, the central political aim becomes the permanent management of crises – to sustain and govern the exceptional situation, often without pursuing meaningful social outcomes. These regimes increasingly manage the effects of crises they themselves have helped create, marking a profound shift in political strategy. As Agamben puts it:

> The ancien régime aimed to rule the causes; modernity pretends to control the effects. And this axiom applies to every domain, from economy to ecology, from foreign and military politics to the internal measures of police. We must realize that European governments today have given up any attempt to rule the causes; they only want to govern the effects. (Agamben 2014)

In such a context, purported or manufactured exceptional situations provide authoritarian populist regimes with an opportunity to criminalise political opposition. They portray targeted groups as internal enemies and claim to protect the public from threats they themselves have constructed. This represents a shift from traditional governance to a form of rule dominated by police power, where the normal becomes exceptional and, as Antal (2019: 29–30) observes, anything becomes conceivable.

The COVID-19 pandemic offered a unique opportunity to observe the functioning of emergency legal regimes during a global crisis. One of the most comprehensive studies in this area was conducted by Ginsburg and Versteeg, who compiled a substantial dataset documenting the responses of approximately 106 countries from the outbreak of the pandemic through mid-July 2020 (Ginsburg & Versteeg 2020). The authors analysed emergency governance during the pandemic within the conceptual framework of existing emergency models, with particular attention to the roles of legislatures and courts. Their findings revealed that the most common governmental response involved the legislative model: 52% of the countries surveyed relied on legislation to address the pandemic. This approach was adopted by several established democracies, including Germany, France, the Netherlands, Switzerland, Austria, the United States, Australia, Belgium, Taiwan, South Korea, South Africa and Japan (Ginsburg & Versteeg, 2020: 25). While 89% of the surveyed countries had detailed constitutional emergency provisions, only 43% of them actually declared a constitutionally grounded emergency. In total, 40% of the full sample – including countries without such constitutional protocols – declared an emergency. This group included Spain, Hungary, the Czech Republic, Armenia, Sierra Leone and Senegal (Ginsburg & Versteeg 2020: 25). Importantly, the study also found that the decision to activate constitutional emergency provisions was not strongly correlated with the authoritarian or democratic nature of the regime. In fact, 42% of democratic regimes and 33% of authoritarian regimes made use of such provisions (Ginsburg & Versteeg 2020: 25). However, there were notable exceptions where emergency governance was exercised solely through executive measures, without a clear legal or constitutional basis. Countries such as China, Cuba, Cameroon, Saudi Arabia, Sudan, Cambodia, Rwanda, Laos and Tanzania fell into this category (Ginsburg & Versteeg 2020: 25).

Concepts of legislation in authoritarian regimes

In the following, I will attempt to demonstrate that the role of law and constitutionalism is crucial in the establishment and development of modern autocracies. As David Landau argues: 'constitutional change needs to be viewed as a core part of modern authoritarian projects' (Landau 2013: 213). However, authoritarian regimes dismantle liberal constitutionalism in various ways and

on the basis of different theoretical constructs. This study attempts to summarise the theoretical approaches on which autocracies base their legal and constitutional frameworks. I will outline what I consider to be the five most significant historical and contemporary trends shaping the impact of authoritarian political regimes on law and its normative content.

The general analytical framework for this review is authoritarian legalism, which posits that authoritarian regimes develop a distinct conception of law – one that serves the consolidation of power while maintaining a façade of legality. The second framework is the dual state theory, which highlights the coexistence of normative (rule-based) and prerogative (arbitrary) forms of law within authoritarian systems. Third, the concept of populist constitutionalism helps uncover the constitutional paradigms that underpin populist political thought and justify its departure from liberal democratic norms. Fourth, the Unitary Executive Theory draws attention to the transatlantic dimension of authoritarian law, emphasising how executive power is increasingly concentrated – even within democratic systems – under the guise of constitutional legitimacy. Finally, on both historical and theoretical levels, the concept of constitutional dictatorship captures the central paradox of this investigation: the possibility that authoritarian regimes may establish legal and institutional frameworks that are formally constitutional and widely accepted as legitimate, yet fundamentally incompatible with democratic constitutionalism.

Autocratic legalism

The emergence of authoritarian regimes raises fundamental questions about the legality and legitimacy of these political systems. It is no coincidence that these issues have gained prominence amid the ongoing crisis of liberal democracies and the rise of populist parties and movements. The legal challenges posed by authoritarian regimes are central to the concept of autocratic legalism, developed by Kim Lane Scheppele (Scheppele 2018). Scheppele employs the notion of autocratic legalism to describe how, beyond the inherent constitutional tensions found within liberal democracies, a charismatic autocratic leader can exploit a political majority to construct a constitutional and political order that appears democratic in form but is authoritarian in substance. As she explains:

> There is a wide but normatively justifiable variation in the institutional forms and substantive rules that one can find among constitutional-democratic states. Within those legitimate variations, some combinations of these forms and rules prove toxic to the continued maintenance of the liberal forms of constitutional democracy. And the new autocrats are finding those combinations…. Intolerant majoritarianism and plebiscitary acclimation of charismatic leaders are now masquerading as democracy, led by new autocrats who first came to power

> through elections and then translated their victories into illiberal constitutionalism. When electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda, I call this phenomenon autocratic legalism. (Scheppele 2018: 548)

Scheppele highlights the dichotomy that characterises authoritarian regimes and approaches – a theme that will be central in what follows – and traces it back to the political history and history of ideas of the interwar period (Scheppele 2018: 562–563). She argues that the leaders of contemporary autocracies operate within a framework of legalism rather than liberal constitutionalism. Liberal constitutionalism, as a normative political theory, is committed to the protection of rights, the separation and limitation of powers, the defence of the rule of law and the promotion of liberal values such as tolerance, pluralism and equality (Scheppele 2018: 562–563). According to Scheppele, what fundamentally distinguishes the constitutional and political design of liberal democracy from authoritarianism is its substantive (i.e. normative) relationship to law and constitutionalism. She characterises authoritarian legalism as a form of exaggerated legal positivism – concerned solely with legal formalism, devoid of any substantive constitutional commitments. As she puts it:

> Legalism's requirements are simply formal: law meets a positivist standard for enactment as a technical matter when it follows the rules laid down, regardless of the content or value commitments of those laws. Laws that meet the test of legalism are enacted according to law; laws that meet the test of constitutionalism must substantively comply with the principles of a liberal legal order. (Scheppele 2018: 562–563)

For this reason, Scheppele argues, the constitutional court is typically the first political target of authoritarian leaders in liberal democracies – since it acts as a guardian of constitutional values and is empowered to strike down laws that violate them. Authoritarian legality – i.e. legality without constitutional normativity – undermines constitutionalism itself. Yet paradoxically, autocratic leaders continue to seek formal legality and legitimacy (Scheppele 2018: 563). This helps explain why the grey zone of extraordinary measures and the dual state – themes discussed below – are particularly significant for contemporary autocracies. It is also important to note that beyond legal formalism, the (re)public law system constructed according to a regime's own constitutional paradigm plays a crucial role for populist leaders. The concept of populist constitutionalism will help illuminate how authoritarian populism affects legal normativity not only in form but also in substance. In other words, the authoritarian turn does not merely dismantle the legal systems of liberal democracies – it replaces them with an entirely new legal order.

Dual state

The paradigm of the dual state (der Doppelstaat) was originally developed by Ernst Fraenkel to analyse the legal order of National Socialist Germany under Hitler. He elaborated this concept in detail in his seminal work, *The Dual State: A Contribution to the Theory of Dictatorship* (Fraenkel 2017). More recently, the concept has been revisited and expanded upon by Jens Meierhenrich in *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Meierhenrich 2018), which builds on and reinterprets Fraenkel's theoretical framework.

A key aspect in understanding the National Socialist legal order is the Nazi takeover itself (*Machtergreifung*). The primary objective of the National Socialists was to legitimise the processes of 1933–1934. Crucial steps in this process – most notably, the suspension of fundamental rights following the Reichstag fire and the passage of the Enabling Act, which transferred legislative power to Hitler – were designed to create the appearance that these developments conformed to the legal norms of the Weimar Constitution (Vinx 2023: 101). However, from a legal-historical perspective, this process cannot be regarded as legitimate.

For Carl Schmitt, the prominent theorist of the exceptional legal order, the transition was both legally valid and revolutionary in substance. He explicitly rejected the notion of legal continuity, arguing that the Nazi seizure of power was lawful in form but revolutionary in content, and that the Enabling Act of 1933 constituted not only a legal measure but also a revolutionary act. According to Schmitt, the legal constraints imposed on legislative and executive power by the Weimar Constitution no longer bound the new regime – even though a new constitutional order was never formally introduced. Ernst Fraenkel, a German jurist who experienced and later critically analysed these events, concurred that the Weimar Constitution was no longer in force under the National Socialist regime. He, too, rejected the premise of legal continuity. Fraenkel referred to the Reichstag Fire Decree of 28 February 1933 as 'the constitutional charter of the Third Reich' (Meierhenrich 2018: 2). This decree suspended several fundamental rights guaranteed by the Weimar Constitution, including habeas corpus, freedom of expression and of the press, freedom of association and assembly, the secrecy of postal communications and protections against search and seizure.

Fraenkel, however, rejected Schmitt's claim that the Nazi takeover constituted a revolution – namely, that it had successfully established a new legal order with its own legitimacy. In Fraenkel's view, the regime change represented nothing more than an 'illegal coup d'état' (Fraenkel 2017: 4). He argued that the Nazis deliberately sought to preserve the fiction that Germany remained a state governed by the rule of law, while in reality their true objective was the complete eradication of legality in any meaningful sense (Vinx 2023: 103). This produced a deliberately ambiguous situation in which legality and illegality were

interwoven – a condition that suited the regime's purposes perfectly. The powers claimed by the Nazi leadership had no grounding in the Weimar Constitution (which had already been sidelined by rule through emergency decrees), yet no new constitutional framework was established. Instead, the existing constitutional order was gradually supplanted by a permanent state of dictatorship.

Fraenkel developed the dual state framework to describe an impossible yet essential condition for political power under National Socialism. At the heart of Fraenkel's concept is the idea that the Nazi legal order can best be understood as a dual state – comprising a normative state and a prerogative state. The prerogative state was led by the political leadership, whose sole objective was the implementation of Nazi ideology. It operated entirely outside the bounds of positive law and was not subject to judicial oversight. In contrast, the normative state was administered by a (nominally apolitical) bureaucratic apparatus, responsible for maintaining the ordinary functions of the state. This sense of perceived 'normality' encompassed the administration of criminal justice in non-political cases, private law affairs and aspects of economic regulation. According to Fraenkel, it was the prerogative state that became the principal instrument for maintaining and expanding the absolute dictatorship (Fraenkel 2017: 5).

Lars Vinx summarises this concept by highlighting the constitutional and legal 'no man's land' that has consistently characterised the extraordinary exercise of power:

> The dual state thesis points out that the governance of Nazi Germany still did rely, in large part, on established legality. A normative state, governed by law, continued to exist. But the agents of the Nazi regime, of the prerogative state, were at liberty to disregard that normative order and to intervene by the use of extra-legal, dictatorial measures whenever they saw fit. The resulting dictatorial power, however, was not used to build a new constitutional order but simply to secure the permanent ascendancy of the Nazi party, which was unable or uninterested (or both) in reestablishing the rule of law. (Vinx 2023: 103)

The concept of the dual state, however, has not remained confined to its original association with National Socialist Germany as described by Fraenkel. In his analysis, Bas Schotel argues that the legal systems of liberal democracies themselves exhibit characteristics that resonate with the dual state model. Schotel specifically identifies features within administrative law that, while not inherently authoritarian, make it particularly susceptible to authoritarian uses. As he explains:

> I do claim that administrative law is distinctly better suited to cater for authoritarian rule than civil and criminal law. If constitutional and fundamental rights constraints are lifted then one finds little to no legal resources within

> administrative law to resist authoritarian rule. To put it differently, it seems that the authoritarian tactics of regimes in democratic decay only violate constitutional and fundamental rights law, but are completely in compliance with administrative law. (Schotel 2021: 197)

In other words, Schotel highlights that authoritarian tendencies are not entirely alien to liberal democracies. Administrative law, in particular, can embody both the normative and prerogative aspects of Fraenkel's dual state. While judicial review of administrative actions is formally available, Schotel emphasises that in practice this review is often limited or ineffective, thereby creating space for prerogative-like governance even within systems nominally committed to the rule of law (Schotel 2021: 197–198). Schotel thus draws attention to the fact that, on the one hand, the law can be a tool in the hands of authoritarian political regimes, while on the other hand, political domination over administrative law in declining democratic systems carries with it the possibility of a further authoritarian turn:

> Under administrative law almost all administrative decisions are susceptible to judicial review covering all relevant aspects of a decision (points of law, facts and policy). This allows authorities to claim a legality bonus as all their decisions are subject to judicial scrutiny. By the same token, administrative law also grants regimes in democratic decay ample leeway to target and marginalize opponents. (Schotel 2021: 221)

Populist constitutionalism

Today, the constitutional paradigm of liberal democracies – legal constitutionalism – has come under increasing criticism from various perspectives. One of the most significant critiques, while remaining within the normative framework of liberal democracy, is political constitutionalism, as explored by scholars such as Richard Bellamy (Bellamy 2007). Political constitutionalism challenges the primacy of judicial review and legal formalism, emphasising instead the centrality of democratic deliberation and political accountability. However, populist constitutionalism moves beyond the bounds of liberal democratic theory. It offers a more radical critique that calls into question the previously taken-for-granted nexus between liberalism, democracy and constitutionalism. Within this framework, authoritarian populist parties and movements have begun to articulate alternative constitutional paradigms. These paradigms are informed by political agendas that explicitly oppose liberalism and, by extension, the liberal conception of democracy and constitutional governance.

One of the most influential experts in the study of populist constitutionalism is Paul Blokker, who has argued that authoritarian right-wing populism has

a conceptual constitutionalism paradigm (Blokker 2019: 535). The main starting points of populist approaches to constitutionalism are a general critique of liberalism, in particular its depoliticising tendencies, and a rejection of the idea that citizens will be distant from institutions and potentially alienated under the constitutional structure of liberal democracy. Thus, according to Blokker, one of the main messages of populist constitutionalism is, in principle, to bring constitutionalism closer to society, to reduce the distance between institutions and the people in order to make democracy more tangible (Blokker 2019: 536). In other words, populist constitutionalism cannot be seen as anti-establishment at all, but on the contrary – a specific strategy of institutionalisation is characteristic of these political forces.

Blokker argues that populist constitutionalism is grounded in the principles of popular sovereignty and majority rule – both of which are core elements of modern constitutional democracy – and can, at least initially, be viewed as a democratic project. However, drawing on his analysis of post-2010 constitutional changes in Hungary and Poland, Blokker highlights the substantial authoritarian potential embedded within populist constitutionalism. While populism appeals to democratic ideals, it often leads to their distortion through the adoption of extreme and one-dimensional interpretations. This process undermines fundamental tenets of democratic constitutionalism, including pluralism, inclusiveness and genuine civic participation in constitutional processes (Blokker 2019: 536).

According to Blokker, the populist conception of law is marked by a distinct instrumentalism, whereby law is mobilised in the service of a popular-collectivist political project (Blokker 2019: 545). In this framework, the populist elite maintains dominance over the political agenda by continuously invoking constitutional issues and norms, thereby eroding the boundary between ordinary politics and constitutional governance. This blurring results in the frequent rewriting and reinterpretation of constitutional provisions and the systematic reshaping of constitutional court jurisprudence. Such practices, Blokker argues, precipitate a crisis of the rule of law as understood within the liberal constitutionalist tradition. The consequence is a growing arbitrariness in governance: institutional checks on executive power are weakened, legislative processes become less transparent and more unpredictable and the accountability of populist governments to the broader public is significantly diminished.

Blokker characterises populist constitutionalism's relationship to law as one of 'legal scepticism' or even 'a dislike of law' (Blokker 2019: 549). This perspective provides a crucial lens for understanding how populist constitutionalism transforms the function of law, particularly in resisting its traditional role as a safeguard against authoritarian tendencies. Drawing on a lineage of critique that can be traced back to Carl Schmitt's constitutional and political philosophy, populist legal thought emerges as a reaction against the law-centred and

court-centric model of liberal constitutionalism. From the populist viewpoint, liberal constitutionalism is not only a normative framework but also a concrete institutional regime that systematically curtails political agency – especially that of executive leadership – through judicial review and fundamental rights protections (Blokker 2019: 549). Importantly, populist constitutionalism does not reject law or legal normativism per se. Rather, it challenges the liberal notion of law as a neutral, autonomous and apolitical construct – an idea also central to the critique underlying the dual state paradigm. As Blokker observes:

> The populist understanding of the law denies its closed, self-sufficient, and self-referential nature, and emphasizes the ultimately always already political nature of the law. Hence, the law in the populist view becomes inseparable from extra-legal sources, such as political power and the societal community, and is in this repoliticized. As such, for populists the law always needs to be the expression of the "national interest". (Blokker 2019: 550)

Consequently, populist critiques of the liberal rule of law also target its foundational emphasis on individualism, which is seen to undermine political unity and the collective identity central to populist ideology. In this framework, law is legitimised not through procedural neutrality or institutional autonomy but by its alignment with the will of the people as interpreted by populist leaders. The authority of the rule-makers themselves becomes the primary guarantee of legitimacy, rendering liberal notions of impartiality and bureaucratic restraint not only unnecessary but ideologically suspect (Blokker 2019: 550).

Unitary executive theory

In the constitutional theory and political practice of the United States, the Unitary Executive Theory (UET) has emerged as a significant step toward authoritarianism, primarily due to its radical reinterpretation of the separation of powers and the elevation of the executive branch above both the legislature and the judiciary. The UET asserts that the president, as the singular head of the executive, must retain comprehensive control over all executive operations, thereby severely constraining the capacity of Congress and the judiciary to exercise meaningful oversight. This shift is not merely theoretical; it reflects a broader contemporary trend toward the centralisation of executive power – a tendency that has been markedly intensified by successive crises, including terrorism, public health emergencies and economic disruption. Although the consolidation of executive authority is not unique to the American context – parallels exist in various parliamentary systems – the distinctly American articulation of the UET has provided a framework for legitimising expanded presidential power even outside the context of exceptional circumstances. As

such, it signals a deeper transformation in the understanding of constitutional democracy, in which the balance of powers is reconfigured in favour of an increasingly autonomous and dominant executive.

Importantly, the strengthening of executive power cannot be adequately explained solely through the concept of presidentialisation as identified in earlier scholarship; rather, it marks a more fundamental transformation in classical theories of the separation of powers. The ascent of authoritarian right--wing populism, coupled with an increasing reliance on exceptional measures for governance, has entrenched this trend, frequently under the formal veneer of legal and constitutional legitimacy. The historical trajectory of the Unitary Executive Theory (UET) in the United States – particularly during the Reagan and George W. Bush administrations – demonstrates how the ideological foundations for executive supremacy have been systematically developed within the democratic constitutional order itself. This evolution effectively blurs the boundaries between liberal constitutionalism and authoritarian legalism, as legal forms and constitutional rhetoric are repurposed to justify and solidify concentrated executive authority.

The theory of unitary executive power serves as a conceptual bridge between the radicalising American Right and broader international trends in authoritarian populism, underscoring the transatlantic diffusion of Schmittian approaches to concentrated political authority – an issue central to this volume. A seminal articulation of this theory emerged in Morrison v. Olson (1988), where Justice Antonin Scalia issued a lone dissent that has since become foundational for proponents of the unitary executive. In that case, the majority upheld a statute that allowed for the appointment of special prosecutors with a degree of independence from the president and the attorney general. Scalia, however, grounded his dissent in a literalist reading of the Constitution, quoting the first line of Article II: 'The executive Power shall be vested in a President of the United States'. He then asserted, 'this does not mean some of the executive power, but all of the executive power' (Millhiser 2020; Dorf 2023). Scalia's position foreshadowed the intensifying push for a dominant executive, unconstrained by internal fragmentation or external oversight – a trend with profound implications for liberal constitutionalism.

Since then, numerous debates have emerged regarding the centralisation of executive power in the United States. The Unitary Executive Theory (UET) has a long-standing history, with presidents from Harry S. Truman to George W. Bush consistently defending the continuity of executive authority, rejecting claims that the US Congress has been permitted to encroach upon the executive domain (Yoo, Calabresi & Colangelo 2005). A central issue is whether the Constitution establishes a 'unitary executive' – vesting all executive power solely in the president (Yoo, Calabresi, & Colangelo 2005: 601) – or whether it provides for a more limited executive authority. Ahmad Chehab argues that

'The "Unitary Executive Theory" (UET), underlying current presidential logic, seeks to effectively liberate the President from legislative or judicial constraint. The result is a self-styled conception of emergency constitutionalism' (Chehab 2007: 1499). While the unitary executive theory is a distinctly American concept, its underlying rationale resonates with broader trends in governance, both in Europe and globally. This was particularly evident in the context of the extraordinary governmental measures adopted during the COVID-19 pandemic.

Constitutional dictatorship

Emergency governance is a much more indirect means of centralising executive power and building autocracy than an open military coup d'état. It is no coincidence, therefore, that the literature on the legal and political-philosophical aspects of emergency rule has long placed emergency rule within the concept of 'constitutional dictatorship', expressing concern that governments might undermine democracy by abusing their powers to unconstitutionally utilise the apparatus of exceptionalism. The theory of constitutional dictatorship became intertwined with the state of emergency. Between 1933 and 1948, during the collapse of European democracies (Weimarisation), this became apparent, and the discourse became linked to Carl Schmitt's emerging theory of the state of exception. It took shape in Schmitt's book *Dictatorship*, first published in 1921 (Schmitt 2014). Legal decisionism, following Schmitt's influence, has evolved into a political strategy based on the idea that the sovereign possesses unlimited and total power – not only because the principle of the separation of powers is invalid (since they are concentrated in one hand) but also because the separation of powers is not valid in time. The dictator's power, which may have initially been limited to a certain period, becomes unlimited.

From both an ideological and historical perspective, the contradictions of exceptional government become evident in the work of Clinton L. Rossiter, who openly attempted to justify constitutional dictatorship (Rossiter 2009). He argued that democratic constitutionalism, based on the separation of powers, was suitable for normal circumstances, but in a crisis, the rules of democratic government could be temporarily altered to whatever extent necessary (granting more power to the government and reducing rights for the people) in order to overcome dangers and restore normality (Rossiter 2009). Rossiter was aware that constitutional dictatorship, like the state of exception, had already become a paradigm of governance in the interwar period. Echoing Walter Benjamin's observations, Rossiter explained that exceptionalism had become the rule: the dictatorship of the executive and legislation by administrative means were not temporary but had become widespread even in peacetime. Agamben criticises Rossiter, whose 1948 remarks foreshadowed the increased dangers to democracy posed by the paradigm of the state of exception, which remains relevant today:

'no sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself' (Rossiter 2009: 306). At the same time, Rossiter recognised the power of the 'genie out of the bottle' and argued that exceptional governance should be confined within constitutional limits (necessity test, time limit) (Ginsburg & Versteeg 2020).

The dangers of authoritarian law

Based on what we have seen so far, we can see how the suspension of the rule of law in the era of polycrisis has led to the rise of authoritarian populism. Next, we witnessed the concepts and practices that authoritarian populism relies on to establish the constitutional foundations of their own authoritarian legal systems. Among other things, this study aims to contribute to the examination of the effects of authoritarian populism by providing a comprehensive and interrelated overview of the various forms of authoritarian legalism, since the analysis of individual trends can be found separately, but their coordinated presentation can contribute to a deeper understanding of authoritarian populism. In this section, we supplement this by examining how the legal approaches of authoritarian regimes undermine liberal constitutionalism and the rule of law, and beyond that, how they damage the normative frameworks that hold the law together. First, I examine how the pragmatic, formalistic and overly positivist approach of authoritarian legalism irreversibly damages the normative content of law and how this is exacerbated by the use of law as a weapon of the political system. The weaponisation of law means that authoritarian law will not only damage the legal systems of liberal democracies, but will generally strip law of all moral content, thereby eliminating the normality based on legal predictability.

Law without morals and weaponisation of law

With the crisis of liberal democracy and the legal and political responses to exceptional circumstances, authoritarian regimes have begun to reinterpret constitutional democracies both politically and constitutionally. At the heart of this transformation lies the redefinition of political sovereignty,[1] now increasingly concentrated in the executive branch and elevated to a hegemonic position. This process entails the abandonment of the core assumptions of prior constitutionalism – assumptions that were designed to prevent the concentration of

1 In authoritarian regimes, this reinterpretation of sovereignty often involves claiming the perceived/real interests of the people by appealing to a nationalist political identity. This was the case in Hungary, among others, where sovereignty became a central issue in the Orbán regime after 2010 due to the shift of numerous debates with the EU towards a sovereigntist direction. The Orbán regime placed sovereignty within the framework of national constitutional identity and deduced from this that, despite various criticisms, it had been granted virtually unlimited constitutional powers due to its two-thirds majority (Maes 2024).

power – and the subordination of law as a mere instrument of politics. As the 'Weimarisation' tendencies of the interwar period demonstrate, the excessive and sustained dominance of politics can easily lead to the totalisation of political power. When politics is unbound from its legal – and, consequently, moral – constraints, it can hold a political community in a state of permanent exception. In other words, even in this transformed landscape, shaped by ongoing crises and the suspension of normalcy (a condition that will likely become inescapable in the wake of global ecological and climate crises), it remains crucial to uphold the core moral constraints of constitutionalism. The permanent state of exception, employed by governments, severely damages the democratic immune system of both society and the individual. It undermines any mechanisms of social self-defence – something governments are quick to exploit. As seen during the COVID-19 pandemic, the promise of security became a political rallying cry under which freedom-restricting measures were introduced – not to protect society, but to secure the position of those in power. Drawing on both twentieth-century and contemporary parallels, we can learn a great deal from how totalitarian politics emerged in the past – and perhaps even more from the ways in which societies responded.

It is therefore worth recalling the consequences of the constitutional and legal abuses of National Socialism, as previously discussed, and the responses that followed the Second World War. One of the most significant of these responses is Gustav Radbruch's famous formula, articulated in his 1946 essay 'Statutory Lawlessness and Supra-Statutory Law' (Radbruch, 2006). In this work, Radbruch argues that unjust laws must be regarded as 'flawed law' when the conflict between law and justice becomes intolerable (Bix 2011). His critique is directed primarily at German legal positivism: 'Positivism, with its principle that "a law is a law," has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal' (Radbruch 2006: 6). He frames his analysis around the tension between justice and legal certainty, and proposes a now-classic principle to address it:

> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people—unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law," must yield to justice. (Radbruch 2006: 7)

Radbruch also refers to a qualified case in his formulation, for in his view, when there is not even an attempt to enforce the truth in the creation of a particular law, that is, when, in his view, equality is deliberately betrayed by the enactment of the act, it is not only flawed, but lacks legal quality (Bix 2011: 46). Radbruch puts it this way:

> It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. (Radbruch 2006: 7)

In my view, when law is instrumentalised by the executive as a means of concentrating power – what we might term authoritarian law – we are witnessing a shift beyond Radbruch's notion of 'defective law' toward a form of legality that is increasingly morally and professionally questionable. In the 21st century, it is essential to critically reassess our understanding of what constitutes law, as politics is ever more frequently producing (exceptional) situations in which political decisions are granted legal normativity without sufficient scrutiny, public controversy or professional deliberation. This trend not only undermines the quality of legislation but also threatens the very existence of law as envisioned by Radbruch's formula. Moreover, the consequences are equally damaging for politics itself: when policies are imposed through legal means devoid of deliberation and negotiation, politics loses its democratic and dialogic character – its very political quality. As Radbruch rightly observed in relation to National Socialist Germany, the so-called legal order that arose under the dual state was not a genuine legal system at all: 'Measured by this yardstick, the coherent parts of national socialist law never acquired the dignity of valid law' (Radbruch 2006: 7).

Exceptional legal measures and authoritarian law, rather than safeguarding the normal functioning of legal and political systems – as they were historically intended to do – have increasingly become tools for dismantling that very normality. A key dimension of this trend is the instrumentalisation of law itself, where law is no longer a shield but a weapon. In this context, it is useful to cite David Kennedy, whose concept of lawfare captures this transformation: 'law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war'. Kennedy points out that law can now achieve what once required bombs and missiles: the seizure and control of territory, the demonstration of political resolve and even the breaking of an opponent's will (Kennedy 2016: 258). This fusion of law and warfare has a dramatic effect: the boundaries between normality and exception, between war and peace, become increasingly blurred. Kennedy also references a revealing observation within the US military – that law can often serve as a more effective instrument of warfare than direct combat. As he explains:

> When the military buys up commercial satellite capacity to deny it to an adversary – contract is their weapon.... When the United States uses the Security Council to certify lists of terrorists and force seizure of their assets abroad, they have weaponized the law.... It is not only the use of force that can do these things. Threats can sometimes work. And law often marks the line between what counts as the routine exercise of one's prerogative and a threat to cross that line and exact a penalty. (Kennedy 2016: 258)

All of this demonstrates that the weaponisation of law is closely tied to the erosion of the moral content of law – a concern famously articulated by Gustav Radbruch. The institutionalised form of this phenomenon is what may be termed authoritarian law. In such a context, the political instrumentalisation of lawmaking – examples of which, both historical and contemporary, have been explored throughout this volume – inevitably undermines the integrity of law itself. When law becomes merely a tool of political management, its moral and normative foundations are destabilised. As we have seen, law that lacks normative embeddedness may still qualify as law in a purely formal or procedural sense, but it cannot be regarded as law in a substantive or ethical sense.

Normativity and normalcy

This paper has sought to provide a comprehensive overview of the key challenges confronting the systems of law and democracy in the early decades of the 21st century. These challenges can be grouped into three interrelated clusters: (1) the long-standing crisis of liberal democracy, marked most prominently by the rise of authoritarian populism; (2) the emergence of an era of governance through extraordinary measures, wherein authoritarian tendencies are increasingly embedded in practices of emergency management; and (3) the consequent transformation of legal normativity itself under authoritarian pressures. Taken together, these developments signal a gradual erosion of the normative foundations traditionally associated with law and democracy in the historical and geographical context of liberal constitutionalism. The central question for contemporary legal and political theory, then, is whether a return to 'normality' is possible – more specifically, whether law can still serve as a guarantor of normality – or whether, in a persistent state of polycrisis, we must come to terms with the primacy of politics and its capacity to continuously (re)construct what is considered normal.

The question of normality – and the role of law in sustaining or disrupting it – has become increasingly central in contemporary social science research. A particularly compelling contribution to this debate comes from Mark Neocleous, who challenges the conventional liberal distinction between normalcy and emergency. According to Neocleous, these categories are not truly sepa-

rable but should rather be understood as interdependent aspects of the same political reality (Neocleous 2006). He writes: 'In separating "normal" from "emergency", with the latter deemed "exceptional", this approach parrots the conventional wisdom that posits normalcy and emergency as two discrete and separable phenomena'. This liberal framework, he argues, assumes the existence of a 'normal' order governed by rules – characterised by the separation of powers, entrenched civil liberties, deliberative public policy and the rule of law – while casting emergencies as temporary aberrations requiring strong executive authority and the suspension of legal norms and rights. However, Neocleous identifies two underlying ideological assumptions in this view: first, that emergency rule is a deviation rather than a structural feature of liberal democracy; and second, that the emergency/normalcy dichotomy neatly maps onto a division between constitutional and nonconstitutional action. In this way, liberalism attempts to preserve the idealised integrity of the constitutional order by treating emergencies as exceptional breaks, even as it simultaneously empowers the executive to override constitutional constraints in moments of perceived crisis (Neocleous 2006: 207).

Petr Agha explores the question of the 'state of the norm' in the context of the EU's economic policy and legal paradigms, particularly in relation to the integration of Central and Eastern European states (Agha 2024). He argues that one of the primary manifestations of the EU's pursuit of normalcy is the emphasis on the rule of law (RoL) as a foundational principle. The discourse surrounding the RoL often centres on notions of 'good governance' and 'democratic values', which are presented as essential components of post-crisis stability and institutional legitimacy. This pursuit of normalcy, Agha contends, has been central to the EU's legal-constitutional turn since 1989 – a shift that introduced counter-majoritarian institutions, promoted juridification across policymaking domains and entrenched a model of 'legal constitutionalising'. This model recalibrated the political landscape by elevating the role of law and establishing a network of legal institutions commonly referred to as the 'juristocracy'. In this system, normalisation is pursued through the harmonisation of legal frameworks across member states, aiming for regulatory consistency and predictability. However, Agha is critical of this legalist trajectory. He argues that it has contributed to a neglect of the structural conditions that underpin social inequality, a technocratic bias in governance and an overemphasis on institutional integrity during crises – often at the expense of addressing underlying social factors (Agha 2024). Furthermore, in the context of exceptional situations, Agha notes that 'the normalization narrative frames emergencies as abnormalities, reinforcing established institutions' authority and perpetuating the sense of inevitability surrounding existing power dynamics' (Agha 2024). In this way, the legal-constitutional order, rather than mitigating crises, may instead entrench dominant political and institutional configurations by defin-

ing them as the natural baseline for democratic governance. It is worth adding that the crisis of the rule of law in the EU has contributed to the failure to take adequate and timely action against authoritarian tendencies within the EU. R. Daniel Kelemen argues that this delay cannot be attributed to the EU's lack of adequate tools to prevent the establishment of autocracies in member states (Kelemen 2022).

Whichever interpretive approach one adopts, it is clear that the three clusters of challenges to liberal democracy and the legal system explored in this volume cast serious doubt on whether legal normativity can continue to serve as a guarantor of normality within the liberal democratic framework. One might argue that liberal democracy – at both the national and EU levels – is undergoing a radical transformation, or that the distinction between normality and exceptionalism is increasingly obsolete, necessitating a unified understanding of the two. However, what we cannot afford to abandon, in my view, is the foundational guarantee offered by legal normativity. Regardless of how we conceptualise the relationship between exceptionalism and normalcy, a legal order that maintains a degree of autonomy from political power – and thereby serves to constrain it – must continue to play a corollary and indispensable role in preserving the integrity of democratic governance.

Conclusions: The rise of the executive and its limits

In times of emergency – whether driven by ecological, public health or social crises – the strengthening of executive power is both a historically and politically natural phenomenon. Equally natural is the constitutional and political desire to limit the use of extraordinary governance measures. In modern constitutional systems, the temporary suspension of normalcy, or the suspension of the constitutional state of affairs, cannot, in principle, be deemed undemocratic, as its ultimate aim is often to protect the established order. As the literature review demonstrates, however, the democratic nature of governance through exceptional means remains a deeply complex question, particularly in situations where societies – both at the national level and within their own communities – may legitimately disagree on the balance between civil liberties and the common good, such as public health. The COVID-19 pandemic, in particular, has underscored the need for a fundamental rethinking of the exceptional governance paradigm, making it clear that we cannot rely on rigid absolutes. In essence, while the concentration of executive power is not inherently anti-democratic, the absence of active (and, by necessity, extraordinary) controls risks rendering it so.

Prior to the pandemic, Anna Lührmann and Bryan Rooney, in their V-Dem analysis, concluded that exceptionalism was not only a cause but also a consequence of the decline of democracy (Lührmann & Rooney 2019: 19). However,

the analysis of the extraordinary legal regimes introduced during the pandemic reveals that both democratic and authoritarian regimes utilised extraordinary governance measures. Importantly, democracies generally managed to implement various control mechanisms. Thus, one of the key conclusions of both Lührmann and Rooney (2019: 19) and the studies on COVID-19 is that it is insufficient to focus solely on the undemocratic effects of exceptionalist governance. Instead, the first step in the analysis should be to examine the specific regime in which executive power is strengthened. In other words, the potential undemocratic consequences of exceptional governance depend heavily on the regime in which these extraordinary measures are introduced. The democratic quality of the normal state is, therefore, strongly influenced by the exceptionalist situation.

It is also promising for democratic controls that studies by Ginsburg and Versteeg have shown that, despite the exceptional and pervasive nature of the pandemic, executive power in democratic systems has not become unconstrained. Their analysis highlights how the various interactions between branches of power, along with the constraints they face, demonstrate the functioning of Madisonian, horizontal and vertical mechanisms of power-sharing (Ginsburg & Versteeg 2020). The authors argue that the extraordinary governance regimes introduced in the context of COVID-19 – despite their complexity and contradictory nature – show that a system of checks and balances, along with mutual cooperation between government institutions, can help strike the right balance between individual interests and broader societal concerns. Of course, they emphasise that there is no single, objectively correct solution to this balancing act (Ginsburg & Versteeg 2020). It is also encouraging, and indicative of the viability of the remnants of democratic rule of law, that in many cases courts, professional organisations, trade unions and civil society at the member state level have stood up to authoritarian tendencies and defended the rule of law against governments.

However, it is also clear from these experiences that complex control over the executive is necessary for the democratic legitimacy of governance by exceptional means. The state of emergency acts as a 'predisposing' factor for authoritarian reversals. As Lührmann and Rooney have explained, reversals toward authoritarianism are nearly 60 percent more likely to occur in years when a state of emergency is declared (Lührmann & Rooney 2019: 18). However, it is important to note that the state of emergency itself should not be seen as the main cause of authoritarian turnarounds. Rather, emergency government instruments provide a convenient structure for leaders to dismantle democratic institutions and reduce resistance to authoritarian shifts. In other words, states of emergency are not necessarily the cause or agent of authoritarian reversals or democratic collapse (Lührmann & Rooney 2019: 18). This is particularly important in the era of ecological and climate crises, where we are increasingly

confronted with deep, accumulating crises. The historical and contemporary experiences of extraordinary governance, such as those during the COVID-19 pandemic, show that it is both necessary and possible to return to the original purpose of extraordinary governance: defending the democratic status quo. However, this requires the effective operation of extraordinary checks on the executive beyond the normal state of affairs.

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