ПИРОН Πυρρων АКАДЕМИЧНО ЕЛЕКТРОННО СПИСАНИЕ ЗА КУЛТУРА И ИЗКУСТВА

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Necessity Does Know Law

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Not kennt kein Gebot (necessitas non habet legem, necessity knows no law) is a German proverb with a similar effect to that of the Bulgarian tale about Woe[1]. This is due to the fact that the legal traditions of most, if not all, nations contain borderline situations such as "inevitable defence", "extreme necessity", "self-help", which have their well-deserved place and recognition. The law is a system of regulation of human relations whereby the rules *are not directly dependent* on the natural characteristics of facts. At the same time, the individuals they are addressed to *have the freedom* to obey or disobey them, and respectively have sanctions imposed on them in the latter case. At times, though, the objective circumstances restrict this independence and freedom abruptly, and necessity, need and distress rush into our social world instead. The factual not only becomes a norm, but norms themselves assume the character of natural dependence. The distinction between causes and grounds for action gets blurred. The possibility of a choice within the perimeter of freedom thus melts away and disappears, and hence the concept of seeking accountability and attributing blame. The law switches from normal to abnormal mode of operation. Is this an overnight change, though?

It is rather a gradually advancing change. If we assume that the law functions in a normal situation, we would expect that it preserves a certain status quo. The formulation of legal norms, their implementation by public authorities and the administration of justice in courts are all guided by the principle of legal certainty and aim at preserving the credibility of law. Any unusual and unforeseen circumstances, or any force majeure, may destabilize the normal state of affairs. People seeking refuge from a hurricane may enter other people's homes, asylum seekers may cross foreign borders during military conflicts; since ancient times, we have not only become reconciled with that, but we have also recognized such actions as justified; further to that, we have imputed reciprocal obligations of enduring them. However, need (necessity) in such cases has become justification (Rechtfertigungsgrund). That is to say, the power of any vital lack (of goods or resources), the power of any natural or political pressure, a sudden disruption of the usual course of life due to an economic or health crisis rearrange the balance of legal norms abruptly, but we *find a justification*, meaning "excuse", to give preference to any of those – for example, protection of life – over respect for private ownership or sovereign territories. There are, however, situations where need

[1] Irrespective of its Latin prototype, this phrase is particularly popular in Germany. Not least because it was pronounced in the Reichstag by Reich Chancellor Theodor von Bethmann-Hollweg as grounds for the attack on Belgium during World War I and with full awareness that this act was a violation of international law.

(necessity) rushes into the legal order in such a manner that it blows up. Then the cause of the emergency reduces any response capacity to zero or makes it the only available instrument. It "brings us back" or "dismantles" us to the state of nature (after Hobbes), where no idea of breaking the rules exists, where the word "order" makes no sense, and where no accountability is assumed for any action. In this case, need (necessity) has long *wiped out the limits of law* and has denied us the possibility to find out or even consider *justified grounds;* instead, it has reduced us to the state of *absolving any results of blame*.

The difference between the two levels of need (necessity) stands out in the meaning of Roman legal maxims such as "Necessitas est lex temporis et loci" (Seneca), "Necessity is the law of a particular time and place", and "Necessitas dat legem, non ipsa accipit" (Publilius Syrus)," Necessity gives the law without itself acknowledging one", which are less radical than the German proverb. The law has not vanished into thin air in either of the above maxims; instead, it has become individualized. So the possibility of a counter-thesis, "Necessity does know the law", is no longer a mere whim.

However, I will highlight the nature of obligations and rights in both situations of need (necessity). The presence of justified grounds triggers not only rights but also obligations. Moreover, any Universalist concept of morals, any rule of law identifies and recognizes obligations that have their justification rather than being a reciprocal consequence of rights with the status of fundamental or human rights. These are the obligations of mutual assistance and solidarity. Therefore we have to put up with people in distress who find refuge on our property without our consent, or with refugees who cross our borders with no permission. The justified grounds apply to both other people's rights and our obligations. In comparison, situations, where the limits of law are obliterated, render us speechless.

And yet, not quite so. Because both justification and absolving are not an end in itself, but means. They are supposed to restore things to their normal state. And mind you, not to a barely satisfactory condition, but (at least) to the state that existed before the misbalance.

Against this general background, where shall we place a "state of emergency" – a situation in which the country is in trouble, and need (necessity) has affected the whole political organism?[2]

[2] Certain moderation is visible in other Latin maxims too: Necessitas inducit privilegium quoad iura privata; Necessitas publica maior est quam private; Necessitas tempore silent privilegia.

Suppose we look up the equivalent of the Bulgarian phrase "extreme necessity" in dictionaries. In that case, this is what we find: Notstand (German) = state of emergency (English) = état d'urgence (French) = necessitas (Latin).

If we try "state of emergency", the results will be more or less the following:

(a) state of emergency (English) = état d'urgence (French) = necessitas (Latin),

(b) Ausnahmezustand (German) = Notstand (German).[3]

If we look for ways to explain the presence of the two words in the German legal reality, we will find out that in English, this is possible through state of emergency vs state of exception.

Therefore, at a purely linguistic level, state of emergency (Notstand) and state of exception (Ausnahmezustand) give expression of different intuitions; in fact, they bear reference to the two levels at which need (necessity) rushes into the normal state of legal order. At the same time, the German word "Ausnahme" is nothing more than an "exception", which we are aware of by the usual way of existence of the law. On the other hand, the meaning of the Bulgarian word "emergency "is not equivalent to that of "exception" and is loaded with connotations of breaking the rules, not individualizing them.

Of course, the meaning and significance of legal concepts are mostly conventional. Therefore any historian (general or legal one) will confirm that Germany passed 17 Enabling Acts (Ermächtigungsgesetze) during World War I, and ten more from 1919 through 1927; on 23 March 1933 (after the Reichstag fire on 27.02) it adopted a new one under the full name *Law to Remedy the Distress (need, hardship, Not) of the People and the Reich*, which remained in force until 20 September 1945; and finally on 30 May 1968, the so-called Notstandgesätze. In effect, lawmakers have not doubled terms by introducing Ausnahmezustand, and it remained a concept of theory. Their attention was on ways to expand and transfer powers, on the suspension of laws and fundamental rights.

In contrast, in the field of theory, thanks to Carl Schmitt, the understanding of an emergency state denoted by the particular term Ausnahmezustand, marked unexpected progress. But suppose we consider theory from the perspective of the usual disagreements between the teachings of natural law and legal positivism. In that case, we will realize that it

[3] To a certain extent: state of emergency (Bulgarian) = état d'urgence (French) = pouvoirs exceptionnels (French).

upholds the existence of a *supra-positivist law* as regards the introduction of an emergency state. Schmitt's statement that the (liberal) legal order may get blocked makes him assign a role and functions to theory, which would help find a way out of the system's blockage. Initially, the emerging solution looked like a dictatorship that could save the state and restore legal order. Gradually, however, he assigned creative functions to this dictatorship. This ultimately led him to conclude that no powers could be attached to this role, and it depends entirely on the so-called decisionism at the core of sovereign power. Within it solidifies the model of a constitutional monarchy whereby the ruler relies – in the conditions of an abnormal situation – not on law but God's mercy, thus finding political embodiment of the idea of absolute emergency of a miracle in theology and religion.

Schmitt's theory was born after World War I. In the wake of the 9/11 attacks, Giorgio Agamben gave the theory a new twist by his theses that need (necessity) is subject to no definition at all, and that any implementation of a legal norm contains not only discretion but a touch of decisionism too. Thus the emergency state moves away from the "form of law science" and to the "form of a legislative act"; the zones of anomie become commonplace and something permanent for the legal order in general.

Regretfully, Agamben pays no attention to the attempts to tame the concept of Notstand by using the term Ausnahmezustand, by which we refer to a level located halfway through the normal and abnormal state of the law, where we have justified grounds at our disposal. At the same time, obligations and rights are not deprived of meaning. The model he failed to consider *distinguishes between suspension and restriction of fundamental rights*. His starting point is not the meaning of "emergency" – as to be found beyond the law, but the "exception" which is inherent in the law.

Does this mean that he paved the road to a solution which is entirely legal-positivist by nature? Not really. Because it does not preclude the possibility of such legal-positivist transfer of powers having the same effect as taking advantage of a supra-positivist law. The solution I have in mind, and Agamben does not, has to do with the legal "handling" of the problem of the Urban Guerrilla Warfare, urban terror, in the 1970s in Europe, which at that time had not yet spread to foreign countries. By the way, I don't have a clue why Agamben never raised the issue of whether the mafia in Italy was a phenomenon of calamity and therefore was worth fighting against in the form of an emergency state.

During the so-called German Autumn, when on 5 September 1977 the Red Army Faction kidnapped the president of the Employers' Association, industrialist Hanns Martin Schleyer, and demanded that some of the detained members of the terrorist group were released in exchange for the hostage, the question was brought up whether the contact between the defendants and their lawyers should be limited. Besides, two years earlier, the Federal Constitutional Court ruled in favour of the obligation of the state to protect the lives of victims of kidnappings. Could this obligation be further expanded? That question was answered by proposals to bring back to life legislative provisions from the times of the Weimar Constitution; others reminded of the possibility for derogation from fundamental rights with the help of Article 15 of the *European Convention on Human Rights* (the way the United Kingdom reportedly did during the conflict with the IRA). Yet, others floated the idea of introducing a state of emergency. The Federal Court of Justice came up with its solution on 23 September 1977 with the help of the notion of justified extreme necessity stipulated by the provision of Article 34 of the German *Criminal Code*, which provides a summary in support of the thesis that: "the general legal idea makes us put up with (in Kauf genommen werden muss) the infringement of a right if this seems to be the only way to save a superior legal good". Ultimately, no emergency state was invoked as was the case later, too, up until the present time.

Supporters of the idea of a state of emergency are trying to preserve the significance of Schmitt's teachings that there will always be moments of contingencies in our lives, situations that are impossible to plan. Therefore we should not miss the chance to leave ourselves a loophole in the Constitution concerning the supra-positivist need (necessity) and governance through "appropriate measures" – using orders, not just laws. And for the sake of preventing perversion, we define the volume of transfer of competencies among the powers. This immediately brings forth the position of the opposing group: such indefiniteness may swell over time and dilute the law. The idea of transfer of the crisis is not by itself sufficient grounds to declare a state of emergency. And if we look closer at the nature of law, we will see that it consists of rules and exceptions. Hence it's worth the attempt at legal anticipation and norm-setting concerning extreme necessity.

The alternative I have in mind finds it inadmissible to suspend fundamental rights; they could be only restricted. Therefore, any recourse to a state of emergency should take into account the proportionality and non-alternative nature of such restriction. Besides, any

restriction should also take account of the essence and core of any fundamental right, and of the limit – human dignity – which no restriction should cross.

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Everything said above is part of the explanation why I find nothing too disturbing about the restriction of the right to travel[4] during the state of emergency declared in Bulgaria on 13 March 2020 due to the coronavirus pandemic; however, I find the fact that the regulation of this institute in the Constitution practically suspends a fundamental right such as habeas corpus a bit bone-chilling: Article 57 (3) makes no mention whatsoever of preservation of the effect of Article 30 concerning the right to personal freedom and inviolability[5]. Suppose we consider the abovementioned restriction of contacts between defendants and lawyers. In that case, we will easily see that it is not absolute because a connection may be allowed after all, although not with specific lawyers. Similarly, at present, in the year 2020, it is not about (absolute) isolation. As regards lockdown rules, we could find justification for those too. Back in the Middle Ages, Europe was already familiar with the restrictive couvre-feu (in French), curfew (in English), "night hour" in Bulgarian, Ausgangssperre (in German). A signal was sounded to put out any lights and fires to prevent the spread of destructive fires. This expression not only remained but is still used to define a precautionary measure – for instance, whenever a procession of raging football fans poses a danger.

Furthermore, not a single law, as far as I can tell, makes a connection between "inevitable defence", "extreme necessity" and "state of emergency". Is the emergency state something of a larger scale and "stronger" than an extreme necessity, or is it comparable to the potential form of a "justified" extreme need? This ambiguity is further nurtured by both recent and long-time life memories, and also well-known historical episodes. Not much time has passed since a Ministry of Emergency Situations (MES) existed in Bulgaria, which supposedly dealt with disasters as part of its daily routine; the more disasters that Ministry identified and handled, the more funding it received. Another trace of trivialization of emergency is to be found in memories from the times of mandatory military service when all types of incidents during that service were characterized as critical incidents. There was no

[4] S. Yotov, *Freedom of Movement and Freedom to Travel*
[5] S. Yotov, *What are we left with once our freedom of movement is taken away?*

other way in a reality where people's lives were arranged to the smallest details. But it is precisely the Russian borrowing of that phrase in the Bulgarian language that brings up in our minds an infamous period of the times of Russian governance in Bulgaria known as the Full Powers Regime (1881-1883) when Prince Alexander of Battenberg divided the country into five districts by a decree and placed "emergency commissioners" - Russian officers – at the head of each, thus usurping the right to govern by decrees for a period of 7 years up to 1888. And what about the infamous *EmCom* – Emergency Committee – from the past of the Soviet state? Instead of trivialization, the relations with the legal order were completely cut.

Have you happened to check out Google's proposed translation of *curfew* into Russian? Police hour!