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# Departure from the Rule of Law as Consolidation of Biopower: Example of Polish Legislation Justified by Fighting the COVID-19 Pandemic

## 1. Introduction

The crisis we know as the COVID-19 pandemic has deeply transformed all areas of social life. As of this writing, its ultimate consequences and ramifications still cannot be predicted. It is unquestionable, however, that at least in Poland, a grave crisis has visited itself on the law: its creation, its application by the administration, and its perceived function. Throughout this article, I will be interpreting this crisis as the solidification and consolidation of biopower. The goal of this article is mainly to make an initial contribution to the working out of interpretative categories for the legal developments we are witnessing and also to demonstrate that these developments are part of a longer process of the impact of the discourse of necessity on law. The choice of Poland is justified, on the one hand, by the fact that the country has adopted pandemic solutions ("lockdowns", "social distancing", etc.) similar to those used in the majority of countries of the world and especially the largest countries of the European Union; hence, the legal realities of Poland appear to be representative. On the other hand, its relatively peripheral location and the accusations of "populism" and of isolating itself from the rest of the European Union levelled against the country's government since 2015 (similarly to Hungary) suggest the universality of the new legal developments and the possibility of justifying them in a variety of discourses, whether stressing human rights or popular sovereignty.

Biopower is a concept popularized by Michel Foucault; where referencing it, I am drawing on his concept. However, I apply the term in a narrower meaning. Namely, I perceive biopower as the contribution of ideas and practices justified by the findings of the various branches of natural science to the disestablishment of paradigms hitherto recognized as fundamental to the creation and application of law, that is, the due process of law or its formal justice.

I proceed from the assumption that the creation and application of law must be grounded in *phronesis* – the Aristotelian prudence, that is, the intellectual process of

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assessment of not only the means but also the ends (hence its essential link to politics understood as the pursuit of a "good living"). Thanks to the discernment of both the ends and the means in the same cognitive act, one gains an opportunity to distinguish individual cases and an insight into specific situations. Phronetic rationality is established by entering into a dialogue with tradition, though at the same time the knowledge being sought is "merely" probable. It is the practical knowledge achievable in social matters. I assume (in reliance, in particular, on Pierre Legendre's concepts referenced below) the phronetics of law to justify and at once enable it to acquire the property referred to as justice (or fairness, equitability, etc.) in its formal sense: predictability, non-retroactivity, generality of regulation, and so on. If, on the other hand, the law becomes subordinated to paradigms justified on the basis of natural science (or the findings of social sciences eager to emulate natural science), it ceases to fulfil its function. However, this phenomenon does not consist in drawing upon what is recognized as scientifically objective knowledge in the creation and application of law, which is a matter of course and in no way conflicts with the phronetic paradigm. Rather, biopower invades the legal sphere as a discourse of necessity, based on justifications grounded in the laws of nature (biology) and the need to physically protect the populace or perhaps satisfy its aspirations focused on material goods. Such a necessity is in itself the very opposite of the fine art of balancing the various competing interests, appreciating the importance of form and ritual, distinguishing the various individual cases, as well as all that which, in the opinions of such authors cited here, such as Hannah Arendt and Pierre Legendre, to which I subscribe, protects freedom and social spontaneity. The colonization of law by biopower appears to be best reflected by the symbolics of law being dominated by materiality and physicality.

I will be interpreting this phenomenon through the prism of concepts formulated by those writers who have observed the emergence of biopower (although not necessarily defined it in this way) and exhibited the awareness of its consequences, especially in the field of jurisprudence. When viewed from the perspective of current experiences, these concepts all come together in a way that allows us to forge a certain ideal type of biopower with which to describe the legal developments we are currently witnessing.[2]

The purpose of this article is to analyse the impact of the crisis referred to as the COVID-19 pandemic on law and in no way to pronounce on the medical aspects of its spread or express a moral or political judgement of the actions justified by the need to contain it.

## 2. Destruction of the rule of law in Poland in 2020

One of the core ideas legitimizing a liberal-democratic regime is the idea of rule of law or, continentally speaking, of a rule of law state. This idea is not limited to merely recognizing the existence of the individual rights enshrined in the constitution, establishing certain requirements of form that law needs to take, or recognizing that the will of the

[2] On the Foucauldian concept of biopower see e.g.: V.W. Cisney, N. Morar (eds.), *Biopower: Foucault and Beyond*, Chicago–London 2016; M. Dillon, *Cared to Death*, "Foucault Studies" 2005/2, pp. 37–46; T. Lemke, *Biopolitics: An Advanced Introduction*, New York 2011; T. Lemke, *The birth of bio-politics: Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality*, "Economy and Society" 2001/2, pp. 190–207; M. Holmer Nadesan, *Governmentality, Biopower, and Everyday Life*, New York–Abingdon 2008; A.W. Neal, *Cutting Off the King's Head: Foucault's Society Must Be Defended and the Problem of Sovereignty*, "Alternatives: Global, Local, Political" 2004/4, pp. 373–398; M. Ojakangas, *On the Greek Origins of Biopolitics: A Reinterpretation of the History of Biopower*, London–New York 2016.

people or nation must be expressed through certain institutions restricting the will of the "empirical" majority. Rather, it expresses a certain myth of at least potential rationality of the law. The idea of the rule of law presupposes rational law-making and also the subjectivation of the recipients of legal norms as rational persons. The attribution of rationality to the abstracted lawmaker is a consequence of an earlier decision that the lawgiver represents the common will and therewith it pursues the common good in the best possible way, that is through the choice of the best possible means – such as an entity guided by political "good faith" is capable of choosing. The subjectivation of the recipients, on the other hand, is founded on acknowledging them as holders of rights, some of which are guaranteed directly by the law's justice in its formal sense.[3] Thus, the law must necessarily have both a rational nature and a positive impact on the rationality of social life.

Recent Polish legislation based on justifications grounded in the need to fight the pandemic does not appear to meet these requirements. It is instead characterized by outright departure from the principles of formal justice articulated in Article 2 and numerous other provisions of the Constitution.[4] Only some examples of this phenomenon will be identified below.

The Polish constitution does not allow for a fully discretionary restriction of legal rights in a situation of emergency. It provides for conditions of a temporal, subject-related, and scope-related nature for the implementation and application of such restrictions. The proper legal instrument for the imposition of restrictions on constitutional rights of individuals is, according to the Constitution, the introduction of the state of natural disaster (Polish: *stan klęski żywiołowej*), which is one of the three extraordinary measures (Polish: *stan nadzwyczajny*), the other two being the state of emergency (Polish: *stan wyjątkowy*) and martial law (Polish: *stan wojenny*).[5] Its availability is restricted in time – the cabinet (Council of Ministers) may impose it for a limited duration, not exceeding 30 days, with any subsequent extensions being subject to approval of the Sejm (the lower house of parliament), as mandated by Article 232 of the Constitution. In accordance with Article 233(3) of the Constitution, a statute establishing the scope of a limitation of human and civil rights in a time of disaster may curtail those defined in Article 22 (freedom of business activity); Article 41(1), (3) and (5) (personal freedom); Article 50 (inviolability of the home); Article 52(1) (freedom of movement and stay within the territory of Poland); Article 59(3) (the right to strike); Article 64 (property rights); Article 65(1) (freedom of employment); Article 66(1) (the right to safe and healthy conditions at work); and Article 66(2) (the right to rest). This does not mean that in a state of natural disaster it is possible to limit legal rights in a fully arbitrary manner. Pursuant to Article 228(5) of the Constitution, actions taken as a result of the introduction of one of the extraordinary measures must correspond to the intensity of the threat and should aim for the earliest possible restoration of the normal

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[3] According to concepts prevailing from the latter half of the 18th century to the mid-20th century, these two goals were secured by the abstract and general form of the statute. Modernly, however, the rationality of law is perceived rather as resulting from the rationality of the legal institutions tasked with safeguarding traditional legal rights and human rights.

[4] Constitution of the Republic of Poland of 2 April 1997 (Polish title: Konstytucja Rzeczypospolitej Polskiej z 2.04.1997 r., Dz. U. Nr 78, poz. 483 ze zm.), hereinafter: the "Constitution".

[5] For emergency or exception as a theretico-legal category see: K. Dobrzeniecki, *Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością* [Eng. *Law in the Face of Exceptional Situations. Between Legalism and Necessity*], Toruń 2018.

functioning of the state. Moreover, in the light of Article 31(3) – which provides that any limitations on the exercise of constitutional freedoms and rights may be imposed only by statute and only when they are necessary in a democratic state for the protection of its security or public order, or the environment, health, public morality, or freedoms and rights of others – such limitations cannot infringe on the essence of such rights and freedoms.

The state of natural disaster was not introduced in Poland when the pandemic started, but since March 2020 the Council of Ministers has enacted regulation after regulation containing significant restrictions on constitutionally protected rights of individuals. One striking example of a violation of the principles of rule of law in their formal aspect is the imposition and enforcement of the obligation to cover one's mouth and nose in public areas. Leaving aside the question whether its imposition in the form of an executive regulation, even within the limits of statutory delegation, meets the requirement of being imposed by statute (Article 31(3) of the Constitution), until 29 November 2020 the executive regulations imposing this obligation lacked even that foundation. A statutory delegation to issue a regulation in this matter was established only by Article 15(2)(c) of the Act of 28 October 2020 Amending Certain Acts in Connection with Counteracting the Crisis Relating to COVID-19,[6] which amended, among other provisions, Article 46b of the Act of 5 December 2008 on Preventing and Fighting Infections and Contagious Diseases in Humans.[7] The amendment came into force on 29 November 2020. Notwithstanding that, the prime minister (President of the Council of Ministers), the highest executive officials of the state, and leaders of opposition parties (with the exception of Confederation Liberty and Independence, Polish: *Konfederacja Wolność i Niepodległość*), had much earlier acknowledged this particular obligation as binding, even while admitting that the regulations imposing it had not been enacted in a fully constitutional manner (as attested by the very need to eventually enact the amendment). Constitutional rights were therefore curtailed on the basis of moral and customary considerations.[8] The principle of proportionality (Articles 2 and 31 of the Constitution), including the aspects of utility, necessity and proportionality in the strict sense, was excluded from consideration in the process of enacting regulations restricting individual rights.[9] There is no trace whatsoever of any consideration by the legislature of the views of those scholars who deny the existence of a pandemic, or the inutility of the means applied to counteract it, or their manifest disproportionality to the intensity on the encroachment on individual rights.[10] Physicians publicly disputing the existence of the pandemic are subjected to disciplinary measures by professional regulators. Such practices meet with no opposition from state

[6] Polish title: Ustawa z 28.10.2020 r. o zmianie niektórych ustaw w związku z przeciwdziałaniem sytuacjom kryzysowym związanym z wystąpieniem COVID-19 (Dz. U. z 2020 r. poz. 2112), hereinafter: the "Act of 28 October 2020".

[7] Polish title: Ustawa z 5.12.2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (Dz. U. z 2020 r. poz. 1845), hereinafter: the "Act of 5 December 2008".

[8] See e.g.: exclusion of Member of Parliament Grzegorz Braun from the Sejm's deliberations on 18 November 2020 by Deputy Speaker of the Sejm Włodzimierz Czarzasty (from the opposition party Sojusz Lewicy Demokratycznej [Eng. Democratic Left Alliance]), because Brown refused to cover his face, claiming there was no egal obligation to do so. See: TVN 24 Polska, 18 November 2020, https://tvn24.pl/polska/posel-grzegorz-braun-wykluczony-z-posiedzenia-sejmu-nie-chcial-zalozyc-maseczki-4754364, accessed on: 16 May 2021.

[9] Concerning this principle see, among others, judgments of the Constitutional Tribunal: of 26 April 1995 (K 11/94), OTK 1995/1, item 12; of 30 October 1996 (K 3/96), OTK 1996/5, item 41; of 23 November 2009 (P 61/08), OTK-A 2009/10, item 150.

[10] Among many statements, see e.g.: Great Barrington Declaration, https://gbdeclaration.org/, accessed on: 19 June 2021.

authorities.[11] The violation of the principle of proportionality in the strict sense – prohibition against excessive interference with individual rights – is manifested also in the absolute disregard of the consequences the relevant regulation or government action can have for the society as a whole or a group of people or an individual. For example, Article 48a(4) of the Act of 5 December 2008 (provision in force since 1 April 2020), introduced immediate enforceability – on the day the recipient was served the decision – of fines imposed by decisions of the State Sanitary Inspectorate for non-compliance with the requirements, prohibitions and restrictions imposed under Article 46 or Article 46b. This provision authorizes fines of up to PLN 30,000 (with the country's average salary in 2020 being PLN 5,168.93), which fines, pursuant to Articles 48a(6) and 48a(7) of that Act, are enforced *ex officio* within seven days of the service of the decision (in practice they are collected from the recipient's bank account), even though they are not yet final and appeal to a higher authority is possible.

Another example of departure from the paradigm of the formal justice of law is the absence of *vacatio legis* for regulations which provide for considerable interference with individual rights. Particularly striking among those was the ban on entering cemeteries on All Saints' and All Souls' Days, that is, 1 and 2 November 2020, issued on 30 October 2020.[12] The prohibition was announced in the afternoon of 30 October 2020. The result was a "race" to cemeteries that very evening in order to pay respects to the dead. Some regulations imposing restrictions on constitutional rights entered into force the day after promulgation. This was the case of the Regulation of the Council of Ministers of 9 October 2020 and the Regulation of the Council of Ministers of 1 December 2020 Imposing Specific Restrictions, Obligations and Prohibitions in Connection with the State of Epidemic,[13] as well as the aforementioned Act of 28 October 2020. In case of the Regulation of the Council of Ministers of 26 November 2020 Imposing Specific Restrictions, Obligations and Prohibitions in Connection with the State of Epidemic[14] it was two days. The temporal aspects of this legislation are becoming increasingly fluid and ephemeral. For example, the Regulation of the Council of Ministers of 9 October

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[11] For example, the proceedings before the "medical court" (Regional Medical Disciplinary Board) to suspend the medical licence of Anna Martynowska, a physician from Lądek-Zdrój, E. Wilczyńska, *Lekarka przekonuje, że żadnego COVID-u nie ma. „Biedaki w kombinezonach bez sensu się trudzili"* [Eng. *A Doctor Persuades, that There Is No Covid. "Poor Fellows in Overalls Toiled for No Reason"*], Wyborcza.pl, 11 July 2020, https://wroclaw.wyborcza.pl/wroclaw/7,35771,26109828,lekarka-przekonuje-ze-zadnego-covidu-nie-ma-sa-ludzie-starsi.html, accessed on: 16 May 2021; B. Kwiatkowska, *Dolny Śląsk. „Rzekoma epidemia". Lekarka nie wierzy w COVID-19. Odsunięta od zawodu* [Eng. *Lower Silesia. "Apparent Epidemic". A Doctor Does Not Believe in COVID-19. Suspended in the Practice of Profession*], Wrocław.wp.pl, 4 August 2020, https://wroclaw.wp.pl/dolny-slask-rzekoma-epidemia-lekarka-nie-wierzy-w-covid-19-odsunieta-od-zawodu-6539494913538880a, accessed on: 16 May 2021.

[12] Paragraph 1(6) of the Regulation of the Council of Ministers of 30 October 2020 Amending the Regulation Imposing Specific Restrictions, Obligations and Prohibitions in Connection with the State of Epidemic (Polish title: Rozporządzenie Rady Ministrów z 30.10.2020 r. zmieniające rozporządzenie w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, Dz. U. z 2020 r. poz. 1917). It amended the Regulation of the Council of Ministers of 9 October 2020 Imposing Specific Restrictions, Obligations and Prohibitions in Connection with the State of Epidemic (Polish title: Rozporządzenie Rady Ministrów z 9.10.2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii, Dz. U. z 2020 r. poz. 1758, 1797, 1829 i 1871), hereinafter: the "Regulation of the Council of Ministers of 9 October 2020", by adding, among others, the current paragraph 28a.

[13] Polish title: Rozporządzenie Rady Ministrów z 1.12.2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. z 2020 r. poz. 2132), hereinafter: the "Regulation of the Council of Ministers of 1 December 2020".

[14] Polish title: Rozporządzenie Rady Ministrów z 26.11.2020 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii (Dz. U. z 2020 r. poz. 2091), hereinafter: the "Regulation of the Council of Ministers of 26 November 2020".

2020, which entered into force on 10 October 2020, was amended eleven times until its repeal on 28 November 2020, and the Regulation of the Council of Ministers of 26 November 2020, which entered into force on 28 November 2020, was replaced by the Regulation of the Council of Ministers of 1 December 2020, which entered into force on 2 December 2020.

There has also been a departure from the fundamental principle of administrative law, namely that the administration's activities that affect the legal standing of individuals must take the form of an administrative decision communicated in writing, meeting mandatory requirements defined by statute, and thus being capable of review by a higher authority.[15] Quarantines are imposed without issuing an administrative decision and can be communicated to the recipient orally, by computer networks or telecommunications means, including by telephone (paragraph 3b of the Regulation of the Council of Ministers of 9 October 2020). A number of administrative and general courts have regarded provisions discussed above as unconstitutional and quashed penalty decisions from the sanitary administration (State Sanitary Inspection) or tickets from police officers.[16] Such fines, however, continue to be imposed and enforced. What is particularly symptomatic is the reaction to the *Otwieramy* ("We are opening")[17] action undertaken by restaurateurs on the brink of bankruptcy, who opened their restaurants in spite of the months-old unconstitutional order to close them. In many situations the police physically blocked customers' access. In turn, the government's uncertainty as to the legal status of its own regulations was demonstrated when the prime minister publicly referred to the ban on movement from 7.00 p.m. on New Year's Eve to 6.00 a.m. on New Year's Day as an "appeal", while the cabinet's spokesman, followed by the health minister, called it a prohibition with legal force backed by a severe administrative penalty.[18]

## 3. Foucault: sovereignty and governmentality

To explain these developments, reference to Michel Foucault's concepts seems appropriate. In his view, three discourses of power can be distinguished in the Modern Age, from a non-subjective perspective: sovereignty, disciplinary authority (discipline), and governmentality (French: *gouvernementalité*). Sovereignty had been dominant until the 17th century. Its goal is not to form individuals or societies, but to secure material benefits from them. The goal of the exercise of sovereign power is the ability to exercise it, that is, self-preservation of power.[19] This discourse is not based on any calculation of ends and means: "The theory of sovereignty is, if you like, a theory which can found absolute power on the absolute expenditure of power, but which cannot calculate power with minimum expenditure and maximum efficiency."[20] The way to legitimize power in the discourse of sovereignty is legitimate sovereignty, which is a legal institution, while

[15] See e.g.: judgment of Supreme Administrative Court (in Wrocław) of 31 August 1984 (SA/Wr 430/84), OSP 1986/9–10, item 176, and judgment of Supreme Administrative Court of 5 January 2007 (I OSK 568/06), LEX no. 290659.

[16] See e.g.: judgment of the Provincial Administrative Court in Opole of 27 October 2020 (II SA/Op 219/20), LEX no. 3093916.

[17] See: Otwiera.My, https://www.facebook.com/otwieramy, accessed on: 16 May 2021.

[18] See: K. Kolibabski, *Zakaz przemieszczania się w sylwestra. Do której można wyjść z domu? Jaki grozi mandat?* [Eng. *The Ban of Movement on the New Year's Eve. Up To Which Hour Are You Allowed to Leave Home? What Is the Amount of the Fine?*], Gazeta.pl, 31 December 2021, https://next.gazeta.pl/next/7,173953,26650548,zakaz-przemieszczania-sie-w-sylwestra-do-ktorej-mozna-wyjsc.html, accessed on: 16 May 2021.

[19] M. Foucault, *Society Must Be Defended, Lectures at the Collège de France*, New York 2003, p. 36.

[20] M. Foucault, *Society Must*…, p. 36.

the method of operation of power in this discourse is law (understood by Foucault not so much as a non-subjective practice with its own independent characteristics, but as an expression of the ruler's will). Within the framework of sovereignty discourse, the political power is clearly separated from other types of power and from social practices. Of course, according to Foucault, the ideology having co-created the sovereignty discourse masks all-encompassing relationships of domination.[21] At the same time, as Foucault points out, the sovereignty idea has persisted until the present day as a justification of power and – in the form of the idea of national sovereignty or the concept of an individual vested with individual rights – as a criterion for its critical evaluation.[22]

According to Foucault, from the 16th century, the demise of the medieval personalized form of power marks the advent of its two new forms (discourses). First, in the 16th and 17th centuries, disciplinary power appears as something intended for the formation of specific individuals by their subjectivation – internalization of commands and prohibitions, particularly manifest in schools, military barracks, hospitals and production plants. The following century brings the discourse of governmentality, focused on achieving impact on the entire populace. Governmentality is to consist in the management of the relationship between people and things by organizing people's material livelihoods according to (allegedly) rational, scientific rules. It therefore consists in the management of material (natural, economic or social) conditions of people's lives and of the operation of power.[23] This discourse attributes to power the task of creating of a "security" sphere governed by rational rules of care about the material well-being, preservation of the population's health, desired procreativity, and suitable living standard. The *modus operandi* of governmentality is also different. Whereas sovereignty imposes prohibitions and discipline – mostly commands, governmentality wants to manage on the basis of empirical data. Governmentality's goals are no longer a legal construct, as was the case with sovereignty (e.g. common good, reduced, according to Foucault, to the exercise of power by a specific sovereign), but are meant to proceed from findings of fact. The ends are also to be pursued and achieved by means other than legal, with law being one of the instruments of that pursuit.[24] According to Foucault, in the modern field of power, all of these discourses are combined, also in the ideological aspect, in biopower – a type of power which took shape in the 18th century and has dominated the landscape ever since.[25] In his opinion, however, the problem of sovereignty has not vanished; on the contrary, along with the growing autonomy of governmentality it gains all the more spotlight. Nor is discipline disappearing. Thus, biopower has three aspects (discourses or forms) – juridical (sovereignty), disciplinarian, and that of governmentality. The three discourses mutually condition and serve one another.[26]

The conclusion has to be that while Foucault places the ideological justification of power (symbols, myths, etc.), as well as law mainly in the discourse of sovereignty, it cannot be denied in keeping with the reasoning underlying his concepts that the ideas forming the other two discourses, especially governmentality, fulfil an important ideological

[21] M. Foucault, *Society Must*…, p. 26.
[22] M. Foucault, *Society Must*…, p. 37.
[23] M. Foucault, *Security, Territory, Population: Lectures at the Collège de France*, *1977–78*, Chippenham–Eastbourne 2009, pp. 20–23.
[24] M. Foucault, *Security*…, p. 47.
[25] M. Foucault, *Security*…, p. 1.
[26] M. Foucault, *Security*…, pp. 7–9. "Getting these systems of security to work involves a real inflation of the juridico-legal code". M. Foucault, *Security*…, p. 7.

role in particular with regard to justifying the extent of the administration's interference with the lives of the individuals.[27] On a high level of generalization, one can thus conclude that in the Modern Age the ideological justification of power has come to be the material welfare of individuals and society (a governmentality factor), protected and promoted by law shaped by and expressing the people's will (a sovereignty factor) and, simultaneously, the formation of the individuals themselves, allegedly in their own best interest and for the common good, with the use of legal methods is intended (a disciplinary factor). One can also see a mechanism by which the discourses overlap. Sovereignty appears to admit only of state power, a political power *par excellence*, and no such thing as, for example, medical power. However, discipline and governmentality, even more so, both allow for some branching out. The omnipresence of power gains a theoretical and ideological justification both in the sovereignty discourse and in the governmentality discourse. As a method of protecting individuals' rights and, at the same time, an expression of national sovereignty, this type of power seeks justification from law; on the other hand, such power, allegedly having a scientific justification, is assumed not to contain anything problematic anymore, but a sort of "life world".

The question comes to the fore whether the omnipresent power, citing "objective scientific truths", will not in reality be a power aimed solely at self-preservation and additionally immunized from any critical evaluation due to the borrowing of legitimacy from scientificity. Such power will be eager to shape individuals by invoking scientific methods, but doing so with its own interest in mind. This could be manifested in the full emergence of biopower: the seizing of control over politics and law by "biology".

## 4. Arendt and Legendre – necessity in the realm of freedom

The subject received particular attention from Arendt. According to her, the Modern Age is a time of gradual disappearance of the public sphere, connected with attempts to replace it with technical methods of society formation. This is a consequence of an inverted hierarchy of the aspects of the human condition. In the pre-modern world, the liceity of human action proceeded precisely from the existence of this hierarchy, with the *vita contemplativa* at the top, and within the *vita activa* – from the superiority of action over production and production over labour. The Modern Age, in destroying this hierarchy, not only placed the active life above the contemplative, but it also recognized labour as the most important kind of activity, superior to production, and almost totally lost the understanding of action. The result is that the public sphere is founded on non-political principles, characteristic of labour. The reason for labour, in turn, is the need to satisfy the necessities of life. Those enter the public sphere in the form of the social issue: manifestos presenting the satisfaction of economic needs as the main political goal. Their satisfaction, therefore, it presented as a necessity, which is the opposite of freedom.[28]

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[27] This comes with the necessary proviso that Foucault notes the correspondence between discipline and statism, as well as governmentality and laissez-faire, from which follows the necessity to establish a sphere of individual freedom (M. Foucault, *Security*…, pp. 48–49). One could agree with the foregoing, provided the discourses were to be considered each in its "ideal type".

[28] See Arendt's reflection on the *sui-generis* colonization of the public sphere by the social issue and the resulting state of permanent revolution. H. Arendt, *On Revolution*, London 1990, p. 69ff, and pp. 108–109, 132–134; H. Arendt, *The Human Condition*, Chicago–London 1998, p. 47ff.

The common life being subjected to quasi-natural "laws", according to Arendt, forged the essence of the 20th century's totalitarian systems. To Nazism, those were the laws of biology and rights of the race. To Communism – the laws of history determined by the development of production relations. None of the laws or rights were capable of application in the sphere of political life, alien to them by their very essence. The result was lack of any principles of common life, subsumed by a never--ending, wholly indeterminate, process of history. This led to the disappearance of all political orientation points, which, in normal societies, guarantee a minimum of predictability. Liberty (the freedom to act) and equality (a condition for acting) disappeared, for there were no longer any actors (acting subjects), only executors. With every human relationship having been deemed political, the public sphere, defined and constituted in opposition to the private sphere, disappeared altogether. Everything was subsumed by "society" – an organization controlled according to (pseudo-)technical principles.[29] So was law. Arendt emphasizes that law's stabilizing aspect is intrinsically linked to its creative aspect, though with an indirect impact – precisely through the demarcation of a border preventing the subordination of liberty to necessity. In political societies, this function consists in the introduction of newborns, that is, a biological factor, into the sphere of language and institutions. Law (in the institutional sense) or, more strictly speaking, its creative character enables political action (the creation of a "new beginning").[30] Without institutional--symbolic mediation, the common life can become a never-ending pursuit of biological needs or laws (allegedly) governing nature.

From a different point of departure, Pierre Legendre arrives at similar conclusions.[31] In his concepts he borrows from Jacques Lacan's categories of psychoanalysis, though combining that perspective with the study of history and the practice of positive law. According to Legendre, man as a subject and society as an organized group are constituted by the "Prohibition" against the unrestricted pursuit of a desire, the other side of the same coin being the imperative of differentiation.[32] Its functioning requires legitimacy by Reference, that is a symbol to justify social links and political power.[33] Reference, if properly fulfils its role, is not totalitarian, with the symbolic "absolute" at once imposing an absolute limit on action.[34] According to Legendre, the West's specific characteristic is the placement of Reference in the sphere of common symbols legitimizing power, that is "politicity", and law; whereas "Law" is the name Lacan gave to the entire symbolic (linguistic) order. Legendre transferred this metaphorical

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[29] H. Arendt, *The Origins of Totalitarianism*, San Diego–New York–London 1973, pp. 460–479; compare: A. Barut, *Prawa człowieka – symboliczna podstawa sfery politycznej czy czynnik jej zaniku? Polemika Claude'a Leforta z Hanną Arendt* [Eng. *Human Rights – Symbolic Foundation of the Political Sphere or a Driver of Its Disappearance? A Polemic Between Claude Lefort and Hannah Arendt*], "Studia Polityczne" 2015/2, pp. 7–25.

[30] H. Arendt, *The Origins*…, pp. 460–479.

[31] The part of my article concerning the concept put forward by Legendre is a modified and abbreviated version of my earlier paper: A. Barut, *Prawo jako konstytuowanie człowieczeństwa. Koncepcja Pierre'a Legendre'a* [Eng. *Law as the Constituting of Humanity. Pierre Legendre's Concept*], "Studia Prawnicze KUL" 2017/2, pp. 7–25.

[32] P. Legendre, *Sur la question dogmatique en Occident* [Eng. *On the Dogmatic Question in the West*], Paris 1999, pp. 28–41.

[33] P. Legendre, *Zbrodnia kaprala Lortiego. Traktat o ojcu* [Eng. *Corporal Lortie's Crime. A Treatise on the Father*], Warszawa 2011, p. 57.

[34] P. Legendre, *Zbrodnia*…, p. 219. The English common law is to serve as an example of the legitimization of law by finding a political "absolute" in the "empty place", the mere possibility of a meaning – as expressed by the formula, "the King can do no wrong". Its message is not that the power is absolute but that it cannot be reduced to governance by a single individual. See: P. Legendre, *Le désir politique de Dieu. Étude sur les montages de l'Etat et du droit* [Eng. *The Political Desire for God. Studies on the Assembly of the State and Law*], Saint-Amand–Montrond 2005, p. 336.

understanding of law to law in the "colloquial" sense.[35] To Legendre, law is both positive legislation and a set of specific images and topoi of legal practice (family, debt, responsibility, guilt, punishment, etc.) and ultimately the entire symbolics of the Prohibition. It is precisely the artificiality of law, its theatricality, and rituality that offers protection against becoming identified with the absolute object. In the West it plays the same role as a totem or taboo in other societies. "The law separates things and words"[36], enabling them to exist. Otherwise the two would conflate into one single totalitarian straightforwardness.[37] The nature of law, as Legendre frequently notes, is "dogmatic", if one is to understand dogma as that which must be said or played out on the scene, or of which the rationality and veracity transcends the scientistic understanding of rationality and empirical understanding of truth. In order to highlight the subject-creating function of law, Legendre calls upon the image of the symbolic Father – which is to be the "founding" image, communicating to the individual his/her place in the social structure.[38]

For Legendre, the function of law, of course, is not only to establish the order of filiation and symbolically shape the subject, but also to regulate conduct – properly allocate rights and obligations by rationally, judiciously finding (creating) their criteria. In the context of law, the key person is the interpreter – the judge, and its key expression is casuistry.[39] However, the symbolic function of law also emerges as a prerequisite for its "practical" aspect. The symbolic function enables one to perceive the individual's ontological insufficiency, preventing any retrograde, "incestuous" falling back on political "directness" – be that the "objective" laws of biology or the physical needs of the individual. In the historical aspect, Legendre asserts, rational interpretation constitutes the opposite of recognition of materiality and physicality (corporeality) as an expression of the Reference.[40] However, nowadays such an understanding of law is more of an ideal. Legendre takes the view that an era of politico-legal anarchy has arrived. A stark example of that crisis was to be found, according to him, in the Nazi ideology and practice of racism. Civilization and subjectivity are constituted by symbolic filiation (as manifested in the Council of Jerusalem's rejection of mandatory circumcision). Nazism, on the other hand, assumed biological filiation. Who was to live and who was to die was decided by the flesh. Thus it was, as he called it, a butcher's conception of filiation. In this way symbolicity gave way to literality, and the Freudian symbolic "murder" played out on the imaginary scene was displaced by empirical murder.[41]

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[35] P. Legendre, *Sur la question*…, p. 34; C. Douzinas, *The End of Human Rights*, Oxford 2000, pp. 301–305, 311; Ch. Saint-Germain, *Les leçons de Pierre Legendre sur la casse subjective: nouvelle clinique juridique autour du tiers*? [Eng. *The Lessons of Pierre Legendre on the Subjective Breakage: A New Legal Clinic in the Matter of Third Parties?*], "Revue de droit. Université de Sherbrooke" 2011/41, p. 686.

[36] P. Legendre, *Sur la question*…, p. 197 [my translation – A.B.].

[37] P. Legendre, *Sur la question*…, pp. 193–207, 220–221.

[38] P. Legendre, *Zbrodnia*…, p. 82.

[39] The perception of legal text as an expression of the Reference does not presuppose its literal construction, for if the text's core function is to be symbolic, then it cannot be conveyed in a direct way. In Legendre's opinion, such law came into existence on the wave of the interpreters' revolution in the 11th and 12th centuries, becoming foundational to the specificity of the West. In this way European law is to differ from Jewish law or Muslim law, wherein a rule of conduct is directly linked to theological narration, hence the text is construed literally (P. Legendre, *Sur la question*…, pp. 54–55, 159, 164–172).

[40] For example, in the Middle Ages Roman law overshadowed the normative function of the body, phasing trial by ordeal out of criminal procedure. Resulting from the latter was the separation – constitutive to subjectivity – of one's body from the evidentiary proceedings in which one was involved, and with it the objectivization of a legally relevant fact, separated from the material characteristics of a specific individual – one's physical fitness (P. Legendre, *Le désir*…, pp. 320–321).

[41] P. Legendre, *Zbrodnia*…, pp. 21–29.

Nazism, according to Legendre, was still current. The modern incarnation of Reference – Democracy – is mediatized not by law or by the state, but the idea of Management according to objective, scientific methods. And that idea rejects from consideration anything which is outside its paradigm.[42] The law's symbolic dimension is thus forsaken. Instead, it becomes colonized by social sciences, which emulate natural science. It is precisely in this "management's empire", invoking the completeness of knowledge and its ability to fully transform the world, that the medieval achievement of separation of law and religion is lost.[43]

The "literality" of common life, manifested through the latter's ideologization and technicization alike – both being aspects of the same phenomenon – leads to totalitarianism.[44] According to Legendre, institutions can act in a psychotic manner,[45] too, and psychosis – as was the case with the Nazi regime – can be spread by the state itself.[46] Constitutive fictions disappear from the public life, and the private life, no longer being a space of everyday experience, becomes one of administration and a source of pseudo-political symbolics. Totalitarianism, in Legendre's view, is politicized private insanity. The essence of the management world, abstracted from reality, is delirium.[47] In such a world, law has no function anymore.

## 5. The permanent "state of exception" as a parody of law: Agamben and Butler[48]

Giorgio Agamben expressed this intuition through the idea of "bare life". According to him, in the Antiquity, life in the strict sense – the *zoe* – was excluded from the political space, wherein it could only exist as the life of already socialized bodies – the *bios*. In the Christian Middle Ages it was not a political problem, for life belonged to God.[49] In the Modern Age the politicization of life manifested itself in the charters of human rights emerging at the end of the 18th century, which sought the basis for human rights in a natural and not political fact – the fact of having been born a human being. In that way there emerged the problem of a life excluded from the civic community – the issue of the relationship between human rights and civil rights. The idea human of rights expresses the idea of life as the basis for sovereignty. At the same time, in the idea of citizenship, that life is presented as a politicized life, which shows the foundational paradox of including life in the juridico-political structure by excluding it (separating citizens

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[42] P. Legendre, *Sur la question*…, p. 171ff.

[43] P. Legendre, *Sur la question*…, p. 59ff.

[44] P. Legendre, *Sur la question*…, pp. 68–71.

[45] P. Goodrich, *Nieświadomość jest prawnikiem. Psychoanaliza i prawo w dziele Pierre'a Legendre'a* [Eng. *Ignorance is a Lawyer. Psychoanalysis and Law in Pierre Legendre's Work*], "Kronos" 2010/3, p. 54.

[46] Ch. Saint-Germain, *Les leçons*…, pp. 718–719.

[47] P. Legendre, *Sur la question*…, pp. 66–70.

[48] The part of my article concerning the concepts put forward by Giorgio Agamben and Judith Butler in the light of the concept put forward by Michel Foucault is a modified and abbreviated version of my earlier paper: A. Barut, *A-podmiotowość władzy – mit i rzeczywistość, czyli Zakład Ubezpieczeń Społecznych jako władza „suwerenna"* [Eng. *The Position of Social Insurance Institution in the Perspective of "Sovereignty" Conception of Michel Foucault and Judith Butler*], "Archiwum Filozofii Prawa i Filozofii Społecznej" 2015/2, pp. 27–41. See also: K. Genel, *The Question of Biopower: Foucault and Agamben, Rethinking Marxism*, "A Journal of Economics, Culture and Society" 2006/1, pp. 43–62; T. Lemke, "*A Zone of Indistinction" – A Critique of Giorgio Agamben's Concept of Biopolitics*, "Outlines. Critical Social Studies" 2005/1 pp. 3–13; J. Sawicki, *Precarious Life: Butler and Foucault on Biopolitics*, in: V.W. Cisney, N. Morar (eds.), *Biopower: Foucault and Beyond*, Chicago–London 2016, pp. 229–242.

[49] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford 1998; references in this paper are to the Polish translation: G. Agamben, *Homo sacer*, Warszawa 2008, pp. 174–175.

from non-citizens). In this way, life taken as the basis for the legitimacy of a liberal-democratic regime simultaneously appears as bare life – one divested of rights.[50]

Agamben uses many historical examples to illustrate his ideas.[51] What is of paramount importance to us, however, is his conclusion that at least since WWI there has been a permanent "state of exception" in modern liberal-democratic states, with the trend towards the universalization of the state of exception resulting only in governments no longer invoking the constitutional provisions regulating it.[52] The "state of exception" is to be a state in which the boundary between life and law becomes obfuscated, with law becoming just as unpredictable as life and life becoming just as rigid and unbending as law. It is no longer meant to be the state of operation of the law in an exceptional situation, that is, implementation of legal provisions intended for specific exceptional situations. Nor is it a state of lawlessness, for it transforms naturally into legality through the foundational activity of the political power. Both these states, however indirectly, possess the feature of legality, being either the implementation of law or its precondition. The state of exception is a state of indeterminacy, of wholly arbitrary power, in which, however, the power does not admit its own arbitrariness; thus, it is a sort of parody of either the legal or the natural state.[53] In that state there operates law which does not have the formal properties of law, and extra-legal actions carry "legal force".[54] Agamben regards such law as dummy law, a mere appearance of law, and identifies it with the practice of power or even violence – "life". Thus, form and fact conflate, and so do laws with the authorities' actions not defined by law. The law, on the one hand, loses the formal characteristics of law and becomes as unpredictable as "life", losing its function of protecting the individual.[55] On the other hand, there are the actual actions of the public authority – "life" becomes as incapable of compromise as the enforcement of a legal principle.[56] According to Agamben, the essence of sovereignty is currently manifested in law, which has validity, but not significance or meaning, and which is devoid of content in the sense of enabling "subsuming" a set of facts under a legal principle.

Thus, in Agamben's concept, modern law constitutes in reality an unlawful practice equipped with juridico-political sanctions. At times, however, lip service is paid to the fiction of legal subjectivation. As he notes, this is a fiction of the "pure form of law", that is, a law abstracted by design from the social consequences of its application.[57] The result, in both cases, is reduction of the recipient of the legal precept to "bare life", that is, an individual lacking any political or legal protection. To phrase Agamben's diagnosis in Foucauldian terms, it would appear that the non-subjective field of impact is once again visited by a power not functioning on the basis of the procedures inherent in it, but preoccupied solely with self-preservation. Similarities are also readily visible between Legendre's and Agamben's respective concepts.

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[50] G. Agamben, *Homo*…, pp. 183–185.
[51] G. Agamben, *State of Exception*, Chicago–London 2005, pp. 33–40, 50–51, 71–73.
[52] G. Agamben, *State*…, pp. 1–4, 14.
[53] G. Agamben, *State*…, pp. 23, 26.
[54] G. Agamben, *State*…, p. 38.
[55] G. Agamben, *State*…, pp. 37–38.
[56] "A law which aspires to wholly become life is nowadays more and more often faced with a life that loses spirit and becomes dead under the form of a legal rule." [my translation from Polish – A.B.] G. Agamben, *Homo*…, p. 255.
[57] In the Modern Age, Agamben finds this trend first in Kant's idea of the form of law, which he employs especially (as perceived by Agamben) in his *Critique of Practical Reason*. See: G. Agamben, *Homo*…, pp. 76–80.

The inevitable conclusion is that law being founded on the paradigm of Management and its transformation into pure arbitrariness constitute two aspects of the same phenomenon. From this perspective, the Foucauldian biopower discourse triangle could be reinterpreted. Here, reference to Judith Butler's concept would be in order. In her interpretation of Foucault, the nature of governmentality is by its very essence extra-legal; in its sphere law is used as a management tactic and not a legitimization tactic.[58] Governmentality operates on principles, too, but in it they are not intended to serve as guarantees for the benefit of the individual, for example by enabling said individual to predict decision outcomes and participate independently in the process of applying the law. Therefore, the role of principles in governmentality is not to establish legal subjecthood. They are not law in the customary meaning of the word.[59] According to Butler, the practice of the US government after 11 September 2001, especially the treatment of detainees in Guantanamo prison, exposed a peculiar process: the emergence of sovereignty within the space of governmentality. Such emergence of sovereignty does not simply consist in the state, understood as a specific entity, using governmentality as a method (in which case legitimization could be considered); it is hardly possible to identify the state in the era of governmentality. Instead, the conclusion should be that within governmentality, "petty sovereigns" are emerging – individuals employing naked violence dressed up as law.[60] Of course, they do not display all the features of traditional sovereigns. Being, as they are, creations of governmentality, they cannot be fully independent as to their scope of action and selection of goals to pursue. For example, civil servants must follow "rational" action programmes with the use of scientifically "proven" methods. However, within the remit of their power or authority, as a result of the erosion of the laws governing the exercise of it, they are free to act in an arbitrary, quasi-sovereign manner.[61]

For Butler, detention for an indefinite time, as practised in Guantanamo and justified with the need to physically protect the populace from terrorism, appears a manifestation of the artificial rebirth of sovereignty, one which, not having the "natural" legitimacy it used to have in the pre-Modern Age, latches onto governmentality like a parasite.[62] In her opinion, it is precisely through the suspension of the operation of law that a new form of power is being created in a peculiarly performative act. By introducing practices suspending the law in the face of an exceptional situation and leaving it up to the officials to decide how long the exceptions are to last and to what categories of entities they are to apply, the modern state becomes a state of permanent exceptionality.[63] Previously, the law was created by a power acting in the "sovereignty" discourse, thus openly acknowledging its own survival as the justification of law (of course, conferring on it some sort of ideological legitimacy, such as the preservation of God-given authority). Modern law, even though it does show some characteristics of "sovereign" law, receives its justification from the logic of governmentality, in the context of which it has always been regarded as a tool for managing the populace.[64] The arbitrariness of law becomes the greater, the more it is concealed behind the slogans of "technique", "administration", etc.

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[58] J. Butler, *Precarious Life. The Powers of Mourning and Violence*, London–New York 2004, pp. 54–55, 94–95.
[59] J. Butler, *Precarious*..., p. 62.
[60] J. Butler, *Precarious*..., p. 56.
[61] J. Butler, *Precarious*..., p. 62.
[62] J. Butler, *Precarious*..., pp. 51–54.
[63] J. Butler, *Precarious*..., pp. 61–64.
[64] J. Butler, *Precarious*..., p. 94.

Where sovereign power is gained by the executive – or simply by the administration – it marks a return to the period preceding the entrenchment of the idea of the separation of powers.[65] An alternative system of (pseudo-)law is created, including an alternative, (pseudo-) legal procedure. For example, military tribunals convened to judge the Guantanamo detainees did not follow universally recognized rules of procedure and yet they were called courts and their actions were called trials and judgments.[66] The use of ambiguities and unclear, vague terminology is symptomatic, according to Butler. By legitimizing contradictions that appear within the discourse, the power justifies its own complete arbitrariness.[67] In Butler's view, sovereignty emerging within the space of governmentality and employing the latter's techniques, i.e. population management (in this case, the management of Guantanamo detainees), does so not through the subjectivation of its members, which would mean imparting self-control habits (as could be expected under the Foucauldian concept of power) but through their dehumanization.[68] The purpose of stripping away the prisoners' human identity is to preclude them from being regarded and treated as the subjects of rights, deserving of a standard trial.[69] In this manner, with the invocation of population management, a category of excluded people, that is, non-people, is created. Through this sort of performative spectacle, the sovereign power also extends the intensity of its impact onto those who still retain the status of legal subjects.[70]

One of the manifestations of the disappearance of law, as described by Agamben and Butler, is thus not only its "fluidity", but also the way in which it becomes identified with arbitrary decision-making. When sovereignty enters the field of governmentality and does so not as a form of legitimacy discourse, but as simply a form of power – the power wielded by the "petty sovereigns" – all the attendant negative characteristics of sovereignty, such as the desire to appropriate goods or the arbitrariness of measures, begin to surface also where they never have done, even before the Modern Age. Then, power is not focused, not even in its ideological aspect, on the subjectivation of the governed and their formation into rational subjects. The measures taken by such power are neither technocratic, nor legal – the power does not employ techniques (rational selection of means to achieve goals beyond the realm of itself or its own preservation), but neither does it employ any idea of common good going beyond the "technical". It wields the law solely as a tool, with no pretence of doing so in order to solidify its own prestige. Therefore, in fact applying the law is not what it does.

## 6. Ideal type of biopower and its application to the phenomenon of destruction of the rule of law in Poland in 2020

Discipline and population management consisted in attempts to reign in the flesh, or corporeality, through subjectivation. In the current day, politicized corporeality appears to be gaining dominion over subjects. The law, colonized by biopower, departs from the

[65] J. Butler, *Precarious*…, pp. 54, 58.
[66] J. Butler, *Precarious*…, pp. 69–70.
[67] For example, no precise criteria for detention are set out. As the officials within US administration put it, the detainees are dangerous people, though not necessarily criminals. See: J. Butler, *Precarious*…, pp. 74–75, 80–82. See Butler's detailed reasoning on the contradictions in the pronouncements of the US administration concerning Guantanamo detentions in: J. Butler, *Precarious*…, pp. 70–71.
[68] J. Butler, *Precarious*…, p. 98.
[69] J. Butler, *Precarious*…, pp. 72–77.
[70] J. Butler, *Precarious*…, pp. 77–78.

phronetic paradigm. A sort of degeneration of law occurs, which one can understand, siding with Foucault and Butler, as a combination of governmentality and sovereignty, or with Agamben, as a parody of law, or with Legendre, as primitivization and infantilization of law. Arendt's concepts, in turn, explain this phenomenon with the colonization of law by the biological discourse of necessity. In its ideal type, it has the characteristics I lay out below.

The line is not drawn between the state of necessity, being an actual state, and the state of the law. The state of necessity, similarly to the state of the law, becomes permanent. Arbitrary power, even though it may be flaunting its disregard of law, hides behind legislative provisions. Its actions are not limited by the principle of moderation and in-depth consideration of the various individual cases, since actions are meant to be fast and effective, but at the same time their effectiveness should depend on their legality, for those who oppose them or even merely criticize them are to be regarded as violating the law.

The requirements of formal justice give way to that which is deemed the objective necessity, and in particular, the principle of proportionality is relegated to the background or set aside, as is the judicious balancing of competing interests based on comprehensive reflection about ends and means. Thus understood law is characterized by unpredictability, and the guaranteeing function disappears. The line between the executive and the legislative is obfuscated, as is the one between the administration's acts of governance and its factual actions.

The actions of a power enacting and applying such "law" are increasingly difficult to justify, even using the criteria of natural science, by which they are supposed to be justified. Thus, they present themselves as being aimed solely at consolidation of power and expansion of its sphere of impact. There occurs a sort of mutual distortion and degeneration by the discourses of governmentality and sovereignty, destroying the nature of each. On the one hand, law attempts to conceal its imperious and political nature by references to "objective" knowledge, especially biological necessity. On the other hand, sovereign power penetrates the space of governmentality: scientific truth gains this status thanks to its administrative recognition by the authority.

A desubjectivation of the addressees of legal principles occurs by negation of the paradigm of governmentality, founded on the assumption of the political power's rationality and the rationality of the holders of individual rights, the paradigm of disciplinary authority, based on the assumption that discipline can be internalized, as well as the paradigm of sovereignty with its intended constitutive idea of a relationship between the governing and the governed. The position of those governed becomes fully dependent on arbitrary actions of those holding power, allegedly not attributable to any specific named author, incapable of justification based on categories of any concept of rationality. A key aspect of biopower, that is, law as a state of exception, emerging in this process of desubjectivation, is the blurring of the line between law on the one hand and purely factual activities ("life") on the other. This can turn into violence, without anyone even trying to pretend there is some sort of legitimacy. Alternatively, we could speak of a reduction of law to its "pure form", that is, creation and application of rules in total abstraction from ethical judgement and from the evaluation of social consequences. This ideal type is the light in which the destruction of law in Poland, described at the beginning of this article, can be viewed.

The law has transformed into a permanent state of exception. The authorities demand obedience to commands devoid of a legal basis, openly admitting that no such

basis exists, or alternatively, characterizing such commands as binding law and as a mere "appeal" at the same time. In this way, a sort of pseudo-law is formed. From the perspective of the administration's conduct and of the reception of its enactments in society, greater emphasis than on official publications (where enactments are promulgated) is placed on press conferences held by the prime minister, the health minister, or even the government's experts. The police and sanitary administration, faced with public resistance, enforce provisions regarded as unconstitutional by the majority of the courts examining them.

In terms used by Foucault and Butler, we could classify this emerging power as sovereignty disguised as governmentality; sovereignty divested of the legitimacy it has so far pretended to have on the basis of ideas of common good and rule of law, with officials, physicians and all others invoking not legislative provisions, but the biological necessity of fighting the pandemic, emerging as the petty sovereigns identified by Butler. Simultaneously, this power is, in a way, also colonizing science through enforced medical consensus backed by disciplinary action or the threat of it.

Those who, as is actually acknowledged, are not actually violating any law – those who are exercising their individual rights, but acting in an "egoistic" or "irresponsible", or otherwise reproachful manner – are publicly stigmatized (even by the highest-ranking officials of the state). The provisions of law have become extremely ephemeral and fluid, and they continue to surprise their addressees. Encroachments on the most fundamental individual rights, occurring by *faits accomplis*, are to have the force of law (example: telephone referrals for quarantine).

To some extent, part of the sphere of this power is Agamben's pure form of law – the fiction of subjectivation of the addresses of legal provisions. Individual rights have not been abrogated through a legislative process by the Parliament, cabinet regulations are enacted in accordance with the procedure, and decisions of the State Sanitary Inspector, imposing immediately enforceable fines (up to PLN 30,000) can be appealed before a higher authority. However, rights of individuals become a fiction when they are effectively withdrawn for a time that is impossible for the addresses of legal provisions to predict, when the meaning and legal status of a regulation are explained in a "binding" way at a press conference, while a fine is collected from the bank account of a locked-down business immediately, even before it has the option to consider lodging an appeal with a higher authority.

**Departure from the Rule of Law as Consolidation of Biopower: Example of Polish Legislation Justified by Fighting the COVID-19 Pandemic**

**Abstract:** Throughout this article the author interprets the crisis of the rule law in Poland in 2020, caused by the phenomenon described as COVID-19 pandemic as the solidification and consolidation of biopower – the impact of ideas and practices justified by the findings of natural sciences to the destruction of paradigms hitherto recognized as fundamental to the creation and application of law, that is, the due process of law or its formal justice.
The point of departure is the assumption that the creation and application of law must be grounded in *phronesis* – the Aristotelian prudence, that is, the intellectual process of assessment of not only the means, but also the ends. Thanks to the discernment of both the ends and the means in the same cognitive act, one gains the opportunity to distinguish individual cases and insight into specific situations. I assume the phronetics to justify law and at once

enable it to acquire the property referred to as justice in its formal sense – predictability, non-retroactivity, generality of regulation, etc. If, on the other hand, law becomes subordinated to paradigms justified with the use of natural sciences, it ceases to fulfil its function. Biopower invades the legal sphere as a discourse of necessity, justified with the laws of biology, the need to physically protect people or, possibly, by satisfaction of their needs in terms of tangible goods. Such a necessity is in itself the very opposite of the fine art of balancing the various competing interests, appreciating the importance of form and ritual, distinguishing the various individual cases: all that protects freedom and social spontaneity.
The purpose of this article is to analyse the impact of the crisis referred to as the COVID-19 pandemic on law and in no way to pronounce on the medical aspects of its spread or express a moral or political judgement of the actions justified by the need to contain it.

**Keywords:** COVID-19, pandemic, biopower, rule of law, Foucault, Legendre, Agamben

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