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The COVID Crisis as a Sample Tube with Contemporary Legal Phenomena

- **ABSTRACT:** *A superficial view of lawmakers' reaction to the current pandemic crisis is that we are witnessing an aberration and a concentration of bad practices. This paper presents a partially opposite thesis that the response of legal systems to this situation is not surprising and an accumulation of several phenomena very characteristic of the contemporary evolution of law. The restriction of personal freedoms, often imposed by means far from the theoretical scope of sources of law described by demo-liberal constitutions, combined with the broad scope and curious details of the extraordinary regulations complete the general trend towards the juridisation of almost every aspect of human activities. Today, the law serves as the dominant tool of creating social and economic order, taking the fields once occupied by other (and now almost extinct) normative systems and at the same time, displacing them. Thus, the more law exists in the everyday circulation, the more demand it creates for further and even more casuistic legal regulation. In this reality, this is the only tool that can be applied in extraordinary circumstances. In addition, the applied legislative techniques are not new. The Polish act known commonly and semi-officially as the 'anti-crisis shield' is a typical 'complex act' aimed at dealing with a particular matter thoroughly through the use of all traditional methods of regulation: civilian, administrative, and penal mixed together in a single text of law. Thus, this regulation also constitutes a perfect (and perhaps the most striking) example of the phenomenon of decodification, especially in the field of private law, since it deals with particular contractual and tort issues as if there were no relevant regulations in the Civil Code, which should (at least theoretically) constitute the core of the private law system.*

- **KEYWORDS:** COVID-19, legislation, juridification, inflation of law, decodification.

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1. Introduction

The on-going COVID-19 pandemic occupies a distinctive role in the social sciences discourse, including jurisprudence. This phenomenon is understandable, but also difficult to clearly pin down and precisely describe. Note that lawyers analysing legislative actions undertaken by governments in connection with the pandemic or attempting to explain the legal practice of the time often submit that we dealing with phenomena that in the best case scenario, are extraordinary and deviate from the norm commonly accepted in the contemporary legal theory of the liberal-democratic West and from the practice prior to the onset of the pandemic. That said, in this paper, we contend with reference to various examples that although the practice of the creation and enforcement of law during the COVID-19 pandemic are not compatible with the theoretical, liberal standards, they do not in principle markedly differ from the practices observable hitherto. The time of crisis that we are currently dealing with serves merely as a magnifying glass or the titular sample tube that captures our attention. It could be surmised that in extraordinary times, facts pertaining to contemporary law more easily reach our consciousness than in more ‘standard’ times when certain phenomena are more ‘dispersed’ and not as conspicuous.

The examples we draw on in this paper are derived from the current legal practice of Poland and other European states. They are subsumed under three general phenomena, which in our view are the most vital and typical for the contemporary legal reality in states in the West, especially those within the civil legal tradition. The fundamental phenomenon here is the increasingly widening and deepened juridification of various spheres of public and private lives, coupled with a constant expansion of the catalogue of actual sources law and a direct consequence thereof, steady decodification, particularly in the field of private law.

2. Law in the practice of the executive and judiciary

The time of the pandemic has been one of extensive—albeit often chaotic, inconsequential, and meandering—organisational activity on the part of public authorities. This applies not only to legislative efforts but also to the activities of the executive and judicial branches of government.

As evinced by the experiences of the last months, not only in Poland, new challenges have culminated in the introduction of previously unknown practices and rules of operation of public offices and courts both ‘on the outside’ (in relation to enquirers and customers as well as parties to on-going disputes) and ‘on the inside’. In the beginning stages of the lockdown, the day-to-day operations of certain public authorities were suspended. These restrictions were subsequently relaxed, remote (online, with the use of distance means of communication) and partially remote modes of work and

rotational work (workers on stand-by duty or division into groups who performed their tasks interchangeably) were ushered in, and new rules governing contact with enquirers were put in place (e.g. service of hard copy official correspondence by sanitary services who disinfected the mail). Many of these solutions did not have a clear legal basis, and decisions on the implementation thereof were made on the spur of the moment with reference to the life experience and intuition of heads of public offices or officials. Only thereafter (in Poland this was at the end of March 2020, i.e. approximately two weeks after the pronouncement of the pandemic state of emergency that brought about severe restrictions of rights and freedoms for citizens and businesses) did parliament officially approve of some of these practices by amending the law, which envisaged the *ex lege* suspension of court time limits in certain cases including in respect of tax and customs inspections, and fiscal and judicial-administrative proceedings. (Under the law, during the pandemic state, certain court time limits in an enumerated class of cases shall not commence, while those already commenced shall be suspended for the duration of the state.) In general, for more than two months, public authorities at large (including local government and the majority of non-government organisations) entered a 'state of hibernation', disposing only of the most urgent matters. Even though the ultimate effect of this situation remains to be seen, it can already be forecast that what amounted to an actual 'freeze' of authorities disposing of court disputes and administrative proceedings shall bring about such a backlog of cases that the 'wave' so created will not only contribute to the lengthening of time necessary to deal with enquiries in the future, but may also turn into a real threat to the realisation of individual rights by public administration and impede the constitutional right to a fair trial (due process) (which entails the right to have one's matter considered by a court within a reasonable time).

It is underscored that the Polish 'COVID legislation'³ was not limited to regulating the operations of government outlets during the pandemic and related due process issues, but an attempt was made (which tendered partially positive results) to legislate in a manner so that agents possessed with rights and freedoms do not endure negative effects of the disease or the freeze of the operations of public authorities. For example, in accordance with the new Polish provisions, if by virtue of being quarantined or medicated because of COVID-19, a driver-car owner fails to perform a mandatory vehicle check-up, the validity of the previous check-up was extended until seven days of the expiration of the medication period or quarantine (Germany adopted analogous laws). In addition, taxpayers saw the deadline for the settlement of personal income tax declaration duly extended. (For years, it was the rule in Poland that personal income tax declarations were to be filed by the end of April every year. In 2020, this deadline was extended until 31 May).

3 The main Polish legislative act aimed to deal with the COVID-19 crisis was adopted on 2 March 2020 and is popularly known as the 'Anti-Crisis shield'. Its full and official title is: ustawa z dnia 2 marca 2020 o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Dz. U. z 2020 r., poz. 1842).

While many actions taken by legislators and public authorities during the time of COVID have been not only a product of concern for the safety of officials or comfort of public administration, but also considered the rights and freedoms of citizens and businesses and protection of the legal system as known hitherto, the conduct of the government—especially the activity of the legislative branch—has given rise to social controversies and critical voices from the legal community. In question here is not only the sense of certain decisions (e.g. the Polish government, in the name of the need to isolate and reduce the number of infected persons, promulgated the temporary closure of forests, which was rigorously enforced by the police and other state forces), but also the modes and forms of law-making.

3. Legislative practice

Above all, the reality of ‘grappling with the COVID pandemic’ has increased the dynamics of operations of central government authorities, in particular from the legislative and executive branches. This has been the case in respect of the parliament (which in Poland comprises two chambers: lower (Sejm) and higher (Senate)), which engages in law-making (legislative) activity within its competence to enact laws. For example, executive authorities (e.g. Cabinet ministers) have recently promulgated numerous regulations (new ones and amendments of those already in force but considered in need of updates). In addition, legislative enactments of other kinds have also been important. These dynamics have made it so that the time between the appearance of an idea to legislatively intervene to the promulgation of a law in the official journal (Journal of Laws) and its entry into force has been radically shortened. Instances of the ‘creation and entry into force of laws in real time’ have been observed whereby a high-ranking official during a press conference would orally expound on a previously unknown draft law along with a brief statement of its reasons, and then sign ‘live’ (before journalists, television cameras, and thousands of viewers) such a regulation into law, which is then within hours promulgated in the official journal and enters into force on the same day. This practice—evidently partly justified on account of the COVID pandemic—defies the principles of good legislation consisting of *inter alia*, rational legislative planning, convincing reasons for a given draft law, comprehensive analysis of a regulation’s consequences, consultations with stakeholders and non-governmental organisations, and compliance with *vacatio legis* time periods (thus ensuring that a new law shall not come into force on the date of its promulgation and that persons subjected thereto have an opportunity to acquaint themselves with it and adjust accordingly to its requirements)⁴. In contrast, the COVID reality has generated a situation where an unexpected decision of a politician becomes a source of universally applicable law, and as such, is immediately enforced. In fact, the familiar timetable of legislative works has

4 OECD, 1994, p. 12.

become fiction as the consultation process has been replaced by unilateral statements from decision-makers, and media stories (TV programmes, Internet news, or radio broadcasts) have often become a more reliable source of information about binding law than the official Journal of Laws.

In general, under ‘normal conditions’, the pace of law-making and the governments’ ability to immediately impose its decisions on the governed should be a cause for concern, deserving of criticism, and approached with suspicion. (The pace of legislative activity usually generates the risk of insufficiently thought-through decisions, disregard of public consultations, absence of opportunities to hear expert opinions, ignorance of opposition voices, etc., i.e. numerous factors relevant from the perspective of the rationality of law-making.) However, in extraordinary situations such as the SARS-CoV-2 pandemic, we are compelled to accept (or at least partially justify) this ‘expedited’ manner of proceeding and at times compromise in other ways that would be off-limits in an ‘ordinary situation’.

The pace of proceeding has engendered other consequences for the quality and form of legislation. A symbolic example of the peculiarity of the ‘COVID legislation’ has been the ‘pandemic special laws’, namely legal acts that aspired to the status of ‘comprehensive regulations’ of the entirety of matters affected by the pandemic. Such laws (enacted not only in Poland and other continental European states, but also in Anglo-Saxon countries⁵), previously unplanned, purported to regulate a wide range of issues of both a public and private character, which were yet to be the subject of the legislator’s attention and entirely unregulated. The scope of the laws encompassed provisions in respect of rules of the organisation and operation of the healthcare system (including the organisation of hospitals and medical institutions, new rules on financing, and the rights and obligations of doctors and other healthcare employees), social services, national and higher education, the police and other law enforcement agencies, the objectives and mode of operation of local government and professional associations, non-governmental organisations and corporations (e.g. an option for collective corporate bodies to adopt resolutions online), courts and public offices, undertaking business activity (restrictions imposed on businesses in various industries including catering, tourism and entertainment, hairdressing and beauty, food production, transport), further performance of incurred obligations (e.g. the possibility to have repayment of loans deferred), changes to labour law (introduction of so-called telework), public law obligations (taxes, customs, other levies), social security (subsidies, grants, exemptions, loans), and individuals’ personal obligations (e.g. mandatory disinfection of hands, covering the mouth and nose in public places, rules governing behaviour in public use spaces, prohibition on organising gatherings and demonstrations). The ‘COVID special laws’ conflated provisions pertaining to the operations of confectioneries and gyms with laws laying down rules governing the organisation of funerals, and political rights (postponement of parliamentary elections or change of the electoral procedure from

5 For instance, see the relevant English legislation: *An Act to make provision in connection with coronavirus; and for connected purposes*, more widely known as the *Coronavirus Act 2020*.

voting in person to voting by mail) with laws angled against speculators. Consequently, their legislative construction must have been equally peculiar as the special laws were very complex, overly detailed, replete with *leges speciales*, purported to amend at once dozens or hundreds of acts, and difficult to understand without having recourse to the context of the entire legal system. Therefore, a meaningful perusal of these acts was a challenge both for laymen and experienced lawyers well versed in applying law. Their wording suggests that the drafting process involved persons without any legislative experience or basic awareness of legal terminology. (Considering the pace of legislative works, it cannot be ruled out that many drafts were authored by persons without competence in legal drafting techniques.) One may therefore risk the hypothesis that—in the case of the ‘COVID special laws’—work under time pressure and without knowledge of economic realities led to the drafting of laws essentially constituting a real-life socio-economic experiment. Not only in Poland was the aftermath such that parliament had to on numerous occasions (often within days) amend the ‘special laws’ by means of... adopting another ‘COVID special law’.

It is worth emphasising that the internal cohesion of the ‘COVID special laws’ and their coherence with the legal system at large has given rise to justified doubts. An analysis of the particular provisions prompts the question regarding whether lawmakers purported to apply analogous solutions to similar situations. For example, why were hairdressing salons closed but beauty parlours could stay open. Why were gyms permitted to operate but swimming pools were not, and why were fashion stores in malls closed, but boutiques of comparable scale and profile situated outside such malls were allowed to stay open? These regulations evoked critical voices as to their compatibility with the constitutional principle of equality under the law and non-discrimination by public authorities (and the principle of fair competition among businesses), and some have floated the suspicion that the legislative decisions could have been influenced by lobbies.

Further, having followed legislative activity, between April and June, one may broadly generalise that the efforts were both expeditious and unconventional to the extent that certain fundamental questions have been prompted, for example: ‘Exactly what rules/laws are currently in force?’ ‘Since when have they been in force?’ ‘What is the source of law?’ ‘Is there any (and if so, what?) legal basis for the government intervention?’ Doubts must have arisen where in an effort to curb the number of new COVID cases, new restrictions were implemented whose ‘legal basis’ was found in an internal regulation, ‘direction’, ‘recommendation’, or ‘good practice’ (formally, merely a legally non-binding suggestion of government officials). At other times, a government representative made a statement at a press conference or bills that have not come into force (as they had not been promulgated in the Journal of Laws). One could surmise that in recent weeks, the line between what is binding and what is not has been blurred, as has that between sources of universally applicable and internal law, what is within the boundaries of law, and what is illegal. A ‘factual deconstruction’ of the legal system has

in this way been completed: a legal system that has traditionally been perceived as a unified, coherent, closed, hierarchical, rational, and orderly system of legal norms⁶.

4. Rights of individuals at a time of crisis

Note that the government reaction to COVID and regulations enacted in connection with the pandemic have increased the presence of the state in the private sphere of individuals (natural persons and businesses). While the imperative of acting ‘in an extraordinary situation/in a state of necessity’—that is, the need to mitigate losses and prevent new infections—is understandable, it is hardly contestable that the government is active in the lives of its citizens, local communities, and market relation to a greater extent than even last year. Implications of this activity are easily observable. Examples include the obligation to wear face masks, draw up declarations on one’s health condition, prohibitions and restrictions of movement (closed borders, stay-at-home orders, closure of public and private buildings such as malls), obligation to furnish reasons for leaving the house upon government demand, curtailment of private property guarantees (permissibility of confiscations or use ‘for public purposes’), and interference with contractual relations. Also important are potential or real violations of privacy rights (collection by the government of information and data concerning gatherings, family, and romantic lives of virus carriers; verification by state services of compliance with self-quarantine rules), encroachment on the right to information and freedom of speech (censorship of certain content in the public sphere), and exercise of the right of freedom of religion (restrictions imposed on certain religious practices and closure of churches). This has ushered in a peculiar brand of ‘statism’ in respect of spheres previously free from state intervention, including personal, private, family, and socio-economic lives, which espoused relations moulded spontaneously and conditioned by local culture, customs, and habits. Another consequence of the above is that the previously used private law method of regulation of these relations (entailing principles such as freedom of contract, party autonomy, or *volenti non fit iniuria*) has been replaced with a public law method (whose rationale is ‘hard’ regulation and the provision for state force as a means to ensure its enforcement).

It appears that the contemporary restrictions levied on the private sphere and constitutional freedoms are only a preface to regulations to be enacted in connection with a future economic crisis (which is to be anticipated after the conclusion of the COVID pandemic). With reference to the experiences of European and Anglo-Saxon states of the first months of the pandemic, one may posit that decision-makers’ thought processes have been dominated by interventionist concepts that found expression (contained in the ‘COVID special laws’) in provisions envisaging state compensation and welfare for the victims of lockdown (especially businesses, employers, and employees)

6 Teubner, 1997, p. 768.

in the form of exemptions, deferments, and direct payments: forgivable, interest-free loans, helping grants, and sometimes even cheques, vouchers, or cash. Although it is difficult to roundly criticise the concept of state aid and its form, in the context of the on-going pandemic and global economic crisis one must conjure up thoughts of the Great Depression and proposals of John Maynard Keynes and his disciples⁷.

Finally, by enacting new regulations—in the face of difficulties with their enforcement (the sanitary restrictions imposed on businesses and natural persons, attaching *inter alia* to freedom of movement, undertaking business activity, and obligations to wear face masks or socially distance have met with resistance from citizens and in an ostentatious form, from so-called COVID sceptics, not only in Poland)—legislators uniquely often appended thereto criminal provisions that allowed for disciplining (through financial and custodial sanctions) those reluctant to comply. This issue goes beyond the scope of this paper, but serves as a starting point for an interesting analysis in the field of the sociology of law of how the absence of mass social approval for a new regulation (insufficient legitimacy of law) adversely affects its effectiveness, thus that the government then subsequently strives to ‘push it through’ by criminal sanctions⁸.

To sum up the above remarks, the ‘COVID legislation’ has the following characteristics: (a) previously unseen pace of the legislative process; (b) absence of legislative planning: taking *ad hoc* intuitive law-making decisions; (c) disregard for the *vacatio legis* requirement in respect of new law and adoption of retroactive solutions (in defiance of the principle of *Lex retro non agit*); (d) lack of transparency and dubious rationality of the decision process (incoherent communications relayed by decision-makers or absence of information on the reasons for a given regulation, difficulty with attribution of responsibility to a particular minister for a given provision of the ‘COVID special laws’); (e) absence of the consultation process or a fiction thereof (e.g. adoption of new rules governing the undertaking of business activity by restaurateurs without consulting the industry); (f) surge in activity of interest groups and lobbies, which capitalising on the chaos and pace of legislative works, attempted to ‘tailor bespoke regulations for themselves’ directed against their market competitors; (g) subpar formal and legislative quality of the new laws and deficiencies in the legislative technique (imprecise terminology, legal definitions incoherent with the current wording of the law and previous laws, loopholes, internal contradictions, and the overall excessive size, complexity and unclear layout of the ‘COVID special laws’); (h) disruption of previous classifications of sources of law (e.g. divisions into codes, other acts, supra-act laws; divisions into universally applicable laws and so-called internal law. In practice, the line between ‘hard’ and ‘soft’ law has also been blurred. Furthermore, a host of issues regulated hitherto in local law—legal acts enacted by local government agencies—have been ‘transferred’ to state-level legislation, and field agencies have adopted their own solutions, often separate from and at odds with laws enacted by the central government.);

7 For instance: Rezza Baqaee and Farhi, 2020; McKee and Stuckler, 2020.

8 On this topic, see *inter alia*: Tyler, 1990; Bottoms and Tankebe, 2012.

and(i) a sizable number of criminal provisions (envisaging severe sanctions even in the case of lack of intent).

Can the aforementioned problems with the COVID legislation be considered only temporary, 'an accident at work' caused by the unusual circumstances of the pandemic? Unfortunately, the abovementioned phenomena are neither transitional nor local. The pathologies around the enactment and enforcement of law, which have intensified and revealed them with double force during the pandemic, have attached to the legislation of liberal-democratic societies for years. An exhaustive description of these is not possible here; however, they should be identified.

5. Inflation of law as a general phenomenon

The notion of inflation of law (legislative inflation), although used in both the academic literature and opinion writing, is rarely defined and as such, understood differently. However, it seems that under the umbrella of this wide category—which is rightly so connected with the undesirable economic phenomenon of loss by money of purchasing power—there is a string of negative trends: juridification of public life, a tendency to fastidiously regulate every aspect of human activity, excessive specificity and casuistry of provisions, coherence within a legal system as a result of lack of consistency of the legislator and haphazard legislative changes, fast-paced changes in legal wording due to amendments, lawmakers' 'verbosity' evinced by inserting into laws (acts) provisions that are superfluous, and difficulties in obtaining knowledge about the law and its effective enforcement.

Simply put, inflation of law in contemporary liberal-democratic societies has both a quantitative (excessive number of legal provisions/increase in the quantity of legal acts currently in force) and qualitative (expansion of the scope of legal regulation by subjecting to legislation spheres of public life previously unregulated, overzealous ambition of the legislator to regulate everything) dimension. Commentators pinpoint that two inter-connected, albeit contradictory, tendencies are simultaneously at play here: an ever-increasing number of binding provisions/acts and a decrease in their substantive and technical quality. 'Legislative production in the (post)modern society has reached critical quantitative limits. The causes of legislative inflation are multiple both in number and in nature. (...) Thus it can be asked whether the overproduction of legislation is due to its decreasing quality in so far as the defects of bad legislation are compensated by introducing a new legislative intervention, resulting in an ever accelerating growth of legal systems'⁹.

Naturally, there are many reasons for quantitative and qualitative regulatory increases; therefore, inflation of law cannot be explained simply by the incompetence of lawmakers. One may also point to the necessity of implementation of EU law (which

9 Eng, 2002, p. 65.

is also often over-regulated and of low quality from the perspective of legislative technique¹⁰, expanding state interventionism, evolution and inflation of human rights (an increasingly broader catalogue of human rights necessitates the introduction of guaranteeing procedures and institutions), technological development, changes in public and economic lives, issues where regulation is necessary (e.g. in fields such as biotechnology, environmental protection), errors in the legislative process, and the activity of interest groups (which often treat regulation as an opportunity to attack their competitors).

Inflation of law and general over-regulation engender such complications that experienced lawyers often struggle to answer questions about the current state of the law. One must concur with the observation that ‘there is no doubt that the law has always been complicated. It is a frequently heard complaint these days that we suffer from legislative inflation and that legal procedures are interminable and uncertain. But Leibniz wrote as early as 1678 that it “is not possible to know the law without a very large library”, while Bentham in an open letter to the American citizens said: “Everywhere the common law has set foot, security has disappeared”. At that time, we may say that the law was only complicated, while today we are obliged to talk about its complexity¹¹.

However, aligned with the positivist legal tradition and rule of law within its liberal meaning—legal provisions that have been cast in words and promulgated in the official journal were to serve as a safeguard of individual rights and freedoms—it was predicted as early as 100 years ago that the phenomena of ‘inflation’, ‘flooding’, or ‘over-production’ of law (especially when coinciding with often-changing legal landscape) would likely pose a risk for businesspersons whose activity would wind up increasingly more regulated and the maxim of *Ignorantia iuris non excusat* would acquire a new ironic meaning in this context¹².

Other problems are connected with inflation of law, such as the deterioration of legislative technique in contemporary regulations, a slump in the coherence and transparency of the legal system, activity of pressure groups and lobbies that exert their clout against the government to ensure the passing of regulations that benefit themselves, difficulty with establishing the wording of law currently in force, and the

10 This is confirmed by EU legal documents, for example, the so-called Mandelkern Report, 2001.

11 Ost and van den Kerchove, 1999, p. 146.

12 ‘During a short address, which I had the honor of delivering at the Commencement Luncheon of Columbia in June 1904, I referred briefly to the growing tendency in this country to multiply the written law, and as a necessary corollary, the unwritten law as well. It was suggested that this ever-increasing volume of crude and undigested enactments was injurious to commerce and needlessly vexatious and burdensome to every professional and business man (...) While the law mills are in operation, no man who has money invested in a business venture feels secure. He may awake any morning to find that a bill has been introduced, which if passed, will turn his capital to ashes. He feels that he is sleeping over a mine of legislative dynamite, which ignorance, stupidity, or malice may explode and destroy the patient toil of year’. Coxe, 1906, p. 102.

frequency of changes of the legal system. All these pathologies emerged at the time of COVID.

6. Juridification of public life

While the phenomenon of juridification of public life is correlated with inflation of law, it stresses not only the quantitative-qualitative aspect of legal provisions, but also the sphere of regulation. To simplify, inflation of law is more related to legislative technique (and to administrative law and legal theory), while juridification is primarily within the orbit of interest of legal sociologists¹³. When discussing juridification of life (or to use the term coined by J. Habermas¹⁴, *colonisation of life by means of law*), it is argued that legal regulation is omnipresent. The concern is there are no more 'private' spheres free from legislative interference: 'Juridification' is another such pathological form, when law comes to invade more areas of social life, turning citizens into clients of bureaucracies with what Foucault might call 'normalising effects' (...). If properly designed and robustly executed, democratic institutions are supposed to ensure that the law does not take this pathological form but is subject to the deliberation of citizens, who thus author the laws to which they are subject¹⁵.

Zygmunt Ziemiński, an eminent legal theorist after the Second World War, correctly emphasised that this issue is relevant not only in the Polish context, but also worldwide¹⁶. The phenomenon may largely be explained by the realisation of the doctrine of state interventionism and expansion of functions of a contemporary welfare state¹⁷, and by perception of rights as claims leveraged against the government¹⁸. This situation must engender a growth in bureaucracy, statism of private relations and the private sphere, replacement of private law regulation with public law solutions, and the uprooting by law of other norms that regulate public life (e.g. religious, moral, ethical, and customary norms)¹⁹. It is stressed that juridification is a danger to human freedom and privacy, and represents a response to human needs and expectations: the perception of a legal system and the state as a guardian, father, and patron²⁰.

13 Turska, 1987, p. 166.

14 'In his Theory of Communicative Action, Habermas diagnosed certain forms of legal intervention (of "juridification" or "legalisation") as a mode of "colonisation", of undue assimilation of the lifeworld to the structure of the economic and administrative system. (...) The idea is that there are certain forms of social relationship or certain forms of social relationship or certain forms of social life and certain types of conflict that are not amenable to legal regulation'. Peters, 1996, p. 125.

15 Stanford Encyclopedia of Philosophy: Jürgen Habermas.

16 Ziemiński, 1987, p. 66.

17 Teubner, 1988, p. 3; Deflem, 2013, p. 81.

18 Wallop, 1994, p. 47.

19 Blichner and Molander, 2005.

20 Zacher, 1987, p. 411; Frank, 1949, p. 18..

Although these phenomena have appreciated in strength (and will likely intensify as the pandemic and economic realities worsen) in connection with the COVID pandemic, they tally with a string of events and tendencies that have long been present. A radical dissonance is thus created between constitutional principles (including the rule of law, good government), recommendations of international organisations, and political declarations regarding good legislation²¹ and expert opinions on one hand, and practice on the other.

7. 'General' decodification and decodification at a time of crisis

Juridification and deconstruction of the accepted order of sources of law is accompanied by another phenomenon. The decodification of private law is not a novel observation: the origins of its constitutive elements and consequences appeared many decades ago. It should also be noted that civil codes have never in principle achieved the objective of being comprehensive and complete. Notwithstanding, only in the last half century has decodification gained pace and unsurprisingly, been named relatively recently²². It is currently a popular subject in the legal scholarship²³. For the purposes of this analysis, we define decodification as a phenomenon or group of phenomena leading to a situation where in formally codified private law systems, civil codes are gradually losing their completeness and coherence, and consequently, their status as sources of private law deteriorates. This coincides with the entire system of private law losing its axiological (and logical) cohesion, and the traditional values of a liberal, bourgeois civil law, which 19th-century commentators considered permanent and incontrovertible, are now on the back foot.

A myriad of observable instances of decodification are evident in contemporary legal systems in Europe; however, from the perspective of this paper, the focus is on the fact that since time immemorial, many legislators have been striving to stay on top of dynamic changes in socio-economic relations and new issues emerging on the market because of the 'production' of an increasingly larger number of special (specific) laws. Comprehensiveness, historically an assumption underlying civil codes, was coupled with the stability of their regulations thanks to appropriate flexibility of provisions, the prevalence of general clauses in some states (e.g. Switzerland), and delegation of factual adjustments of the law to courts. However, the dynamics of the 20th century falsified these assumptions, and even civil law institutions, which are typically not subject to fundamental changes, are often regulated in special acts. The most fitting example in this context is the separate ownership of premises, which despite its fundamental importance for the economy and fact that it is an emanation of a legal notion that is the crux of the entire private law, has in many states long been regulated in special acts. The predominant cause for this is that separate ownership of premises is regulated

21 OECD, 1994, p. 12.

22 Irti, 1979.

23 Murillo, 2001; Rivera, 2013; Rudnicki, 2017; Su, Longchamps de Bérier and Grzebyk, 2019.

together with mutual relations between owners-neighbours and the constitution of their associations, issues that would not readily fit within civil codes. Therefore, legislators have opted for a new ‘comprehensive’ method of legislation whereby all regulations pertaining to a given issue are grouped in one act, instead of the historical idea centred on codification that dictated that all regulations private in character shall be codified. More laws are drawn up in this manner, thus encompassing all three traditional methods of regulation: civil (private), administrative, and criminal. The Polish legal system is largely based on such laws, which lay down various easily qualifiable provisions as within the realm of private law, but situated among public law regulations.

The production of special (specific) regulations in the EU Member States is evidently further fostered by the duty to implement directives, especially those regulating consumer protection. In this regard, divergent viewpoints among legislators are discernible as they sometimes—Germany being the prime example—attempt to incorporate new consumer laws into civil codes. On other occasions, directives are transposed into domestic law through the enactment of new special acts. In Poland, notwithstanding the endorsement of the German model, a host of regulations implementing consumer directives is contained within special laws, and some have been placed within the civil code. Finally, it is emphasised that consumer regulations are an exquisite example of the abandonment of traditional civil law values and dismantlement of the system’s axiological cohesion. In truth, this is not a new phenomenon. It started more than a century ago with the emergence of special laws protecting the first commonly recognised weaker party to legal relations, namely a worker. Soon thereafter, the catalogue of protected agents was expanded to cover tenants of premises and ultimately, with the ascension of consumer protection (every one of us is a consumer in a large majority of contracts we enter into), the *coup de grace* levelled against the concept of equality of parties to private law relations is also observed, one which is still theoretically declared and upheld.

The abovementioned phenomena mean that European legislators have developed a habit of introducing changes into civil law not only by amending the code, but also by drafting special laws (acts) and ceasing to concern themselves with the axiological cohesion of the legal system. It is therefore unsurprising that in a crisis situation, they proceed in line with that habit, hastily enacting and bringing into force a host of extraordinary regulations—located outside the code—within the scope of strictly understood civil law. These provisions pertain particularly to contractual relations, both in business-to-business (B2B) and business-to-consumer (B2C) configurations, and may be found in the COVID special laws passed in states such as Belgium²⁴, Germany²⁵, France²⁶, and Poland²⁷.

24 *Loi relative au crédit à la consommation, visant à aider les emprunteurs à faire face à la crise provoquée par le coronavirus*, 27 Mai 2020.

25 *Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht vom 27. März 2020*, BGBl. I S. 569.

26 *Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d’urgence sanitaire et à l’adaptation des procédures pendant cette même période*.

27 See supra note 1.

One cannot fail to notice a paradox here. The civil codes of the states listed above do contain provisions that embody the *rebus sic stantibus* clause, which is supposed to serve as a remedy in situations like those brought about by the COVID-19 pandemic. In other words, the codifiers theoretically ensured²⁸ that civil law is equipped with devices applicable in the event of an unforeseeable change of legal relations and circumstances surrounding the performance of contracts, and the power to modify contractual relations has been delegated to the courts. However, contemporary lawmakers have proceeded as if they have completely forgotten about the existence of these clauses, instead opting for piecemeal, interventionist private law solutions, setting out in the COVID special laws in a highly casuistic fashion that contractual relations shall be subject to whatever type of modifications. This lack of trust towards well-established code clauses is not surprising. The legislator is striving, especially within a democratic system, to adapt regulations as expeditiously as possible and impress the public. These objectives would not be attained by waiting until new judicial constructions of the *rebus sic stantibus* clause adjusted to the times of COVID are proffered. In Poland, the 'lack of trust' between the legislative and executive branches of government on one hand, and the judiciary on the other, mean that permanent delays in civil dispute resolutions and lack of consistent jurisprudence standard disputes between businesses and consumers are not conducive towards according a larger margin of discretion to the courts. The final consideration is even more relevant in this regard, since as noted above, a significant percentage of the special laws enacted in 2020 in Poland, France, and Germany pertained to consumers²⁹.

It cannot be overlooked that the crisis situation compels the legislator to suddenly show moderation in the pursuit of protecting consumer interests and to undertake efforts, at least temporary ones, to balance these interests with those of businesses facing the dangers posed by the crisis. This is best showcased by the aforementioned provision under which consumers must accept vouchers instead of refunds for tickets to mass events that have been cancelled or laws laying down—as in Poland—long, 180 day statutory periods for the refund of a price paid by the consumer. At this time, one cannot expressly conclude whether these regulations presage an intention to better balance the interests of consumers and businesses, or whether they shall be abandoned after discharging its function as an anti-crisis instrument. Regardless, the field of consumer protection constitutes that part of private law to which the most attention of contemporary legislators is devoted, both on a daily basis and at times of crisis.

28 Noteworthy, however, is that German codifiers initially did not include the *rebus sic stantibus* clause in the BGB. It found its way into German law only to the application of a *contra legem* construction by the courts, and was introduced into the code only in 1985 (Zimmermann, 1990, p. 374, pp. 581-582). This fact also represents an interesting aspect of decodification, for in this case, a consistent body of case law turned out to be a source of law more important than the code.

29 Alderman et al., 2020, p. 437–450.

8. Summary

The examples above, which draw on the practice of enactment and enforcement of law during the COVID-19 pandemic, appear egregious compared with the general and still 'holding' legal theory of the liberal-democratic West. They defy generally accepted truths that dictate that law is a coherent system based on clear legislation whose principal product is an axiologically coherent code. Further, they challenge the government's mantras concerning the need to ensure legal security, meticulous enactment, and the consistent enforcement of law and concern for human and citizen rights. However, if these 'academic' theories are replaced with more complex propositions—including empirical observations—pertaining to the character of contemporary law and essence of its processes, the severity of these examples is mitigated. Indeed, from that perspective, they become representative of the abovementioned phenomena such as inflation of law, juridification of public life, and decodification. The crisis context merely amplifies these phenomena, and they may be hardly discernible in normal times.

For these reasons, it is difficult for us to concur with the alarmist contentions put forward in speeches and in legal and political opinion journalism that a 'new quality' is emerging, one that poses a risk to legal systems. The COVID-19 pandemic is the titular sample tube that exposes much more vividly phenomena that have long been ascertained and explained. Therefore, a more forward-looking question is probably in order, namely whether the current situation will become a catalyst for changes in legal scholarship, making way for a mental breakthrough, and bid farewell to the positivist axioms so characteristic of democratic liberalism. Legal theorists and historians capable of analysing our current intellectual struggles with the pandemic from an appropriate perspective will be best placed to answer this question.

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