Solidarity and COVID-19

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Solidarity and COVID-19: An Introduction

Wouter Veraart, Lukas van den Berge & Antony Duff

1. Good and bad governance in a pandemic

Since the beginning of the global COVID-19 pandemic in early 2020, ethicists and legal philosophers have grappled with societal, political and medical issues raised by the new predicament. One of the first to do so was the Italian philosopher Giorgio Agamben.[1] His public interventions in this domain have been controversial, but his Foucauldian alertness to the significance of the contemporary moment[2] could not have come as a surprise to anyone familiar with his work. Already in 2015, five years before the start of the pandemic, Agamben addressed the connection between epidemics, health and sovereignty in the context of Thomas Hobbes' *Leviathan*. Discussing the presence of two plague doctors on the famous frontispiece of *Leviathan*, Agamben remarks:

> 'Like the mass of plague victims, the unrepresentable multitude can be represented only through the guards who monitor its obedience and the doctors who treat it. It dwells in the city, but only as the object of the duties and concerns of those who exercise the sovereignty.'[3]

Agamben's worry that the continuing presence of the virus will legitimize a permanent state of exception in which the lives of citizens are subjected to unmediated power in the form of biopolitics, is well-known.[4] Somewhat lesser known, however, is Agamben's awareness of the fact that the connection between sovereignty, health and epidemics is at least as old as social contract theory itself.[5] We agree with Agamben that it is important to reflect on the fact that Hobbes developed his theory of sovereignty in a context not only of civil war, but also of epidemics. In this latter context, the maxim *salus populi suprema lex esto* – borrowed by Hobbes from

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1 See Lukas van den Berge, 'Biopolitics and the Coronavirus. Foucault, Agamben, Žižek', *Netherlands Journal of Legal Philosophy* 49 (2020): 3-6.

2 See Jürgen Habermas, 'Taking Aim at the Heart of the Present: On Foucault's Lecture of Kant's "What Is Enlightenment"', in *Critique and Power. Recasting the Foucault/ Habermas Debate*, ed. Michael Kelly (Cambridge MA/London: The MIT Press, 1995), 149-154.

3 Giorgio Agamben, *Stasis. Civil War as a Political Paradigm* (Stanford: Stanford University Press, 2015), 48.

4 See, *e.g.*, Nicolas Truong, 'Giorgio Agamben: "L'épidémie montre clairement que l'état d'exception est devenu la condition normale"', *Le Monde*, 25 March, 2020.

5 Agamben (*Stasis*, at 47-48) mentions the interesting study by Francesca Falk, *Eine gestische Geschichte der Grenze* (München: Wilhelm Fink Verlag, 2011), referring particularly to a chapter called 'Schnabelmasken: Sanität, Souveränität, Selektion' (63-90).

Cicero – appears to acquire a concrete meaning which it otherwise would have lacked.[6]

When Hobbes wrote *Leviathan* in the midst of the seventeenth century, the plague was endemic in London, with the biggest outbreak – in which the city lost 15% of its population – occurring in 1665-1666, less than fifteen years after *Leviathan* was first published (in 1651). Interestingly, another iconic moment in the history of political and legal thought can also be connected to the plague. 'The Allegory of Good and Bad Government', a fresco series which can still be admired in the Palazzo Pubblico in Siena, was painted in 1338-1339 by the Sienese artist Ambrogio Lorenzetti. Only a decade later, in 1348, Lorenzetti would become one of the early European victims of what was later known as the Black Death, the catastrophic outbreak of the plague between 1347 and 1352, during which between 45% and 60% of the population in Europe died.[7]

In a blog post that appeared in the summer of 2020, the American philosopher Zev Trachtenberg has tried to make sense of the looming presence of the plague just 'outside' the borders of the Sienese fresco series. How should these be understood in the specific context of an approaching pandemic?[8] Trachtenberg points to the fact that Lorenzetti's 'Allegory of Good Government', in which the good city is pictured, has no outside: '[E]verything that matters to the story it tells is visible; there is little sense that what is beyond the frame is relevant.' Somehow, the good city appears to be built on the easy assumption of 'minimally habitable environmental conditions'. However, this way of understanding 'good government' may be 'dangerously hubristic', as it 'encourages a deluded expectation of invulnerability'. According to Trachtenberg, 'we should expect unforeseen natural hazards, e.g. unexpected disease vectors, as surely as the return of the repressed'.[9]

Trachtenberg does not deny that Lorenzetti was deeply aware of the vulnerability of the city state's public institutions. However, the frescos are preoccupied with internal threats: the 'Allegory of Bad Government' depicts a model of government which, being morally bankrupt, propagates division, greed and war, and brings the city state on the brink of disaster. In the context of the pandemic, highlighting this internal threat to governance is still useful, as Trachtenberg also points out. Morally sound political and social institutions will be much better equipped to respond to the situation as soon as disaster strikes.[10]

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6   Agamben, *Stasis*, 48.
7   On Ambrogio Lorenzetti in general and his fresco series on good and bad government in particular, see, *e.g.*, Patrick Boucheron, *The Power of Images* (Cambridge: Polity Press, 2018), with further references.
8   Zev Trachtenberg, 'Our Pandemic and Siena's Plague: Looking Outside Lorenzetti's Fresco', 29 July 2020, available at https://inhabitingtheanthropocene.com/ (last accessed: November 2021).
9   Trachtenberg, 'Our Pandemic and Siena's Plague'.
10   Trachtenberg, 'Our Pandemic and Siena's Plague': 'The basic idea is simply that the moral character that is the core of the republic's "inside" is expressed in political and social structures which enable better or worse responses to external dangers, anthropogenic or natural.'

In sum, both the *Leviathan*'s frontispiece and the 'Allegory of Good and Bad Government' can be connected to the threat of a pandemic, but neither of them is capable of visualizing it directly. On the frontispiece the sick and other inhabitants of the city are notoriously absent. Their existence can only be derived indirectly, from the presence of the city buildings and a few soldiers and doctors who can hardly be distinguished on the city grounds. Also in the 'Allegory of Good and Bad Government', a reference to external threats is absent. The 'diseases' which are depicted in the 'Allegory of Bad Government' are self-inflicted and internal: they all have a strictly moral, not a biological, character.

Perhaps depictions of sound government – in which the sovereign body is represented as a unified and well-functioning whole – are necessarily oblivious to external threats, such as the possibility of a devastating pandemic. The old idea of *mens sana in corpore sano* ('a healthy mind in a healthy body') might help us understand the 'hubris' of an idealized public body. The image's deliberate forgetfulness of possible disease and death makes the 'body politic' look even more powerful, untouchable and trustworthy.

However, when the pandemic strikes, this appearance of invulnerability can no longer be sustained. The pandemic not only hits the population at large, but also destabilizes one of the basic assumptions on which the political, legal and medical institutions are built. If the citizens can no longer rely on 'minimally habitable environmental conditions', the structures of their institutions themselves are put on the line. The ensuing crisis, its depth and length, the range of options which present themselves to 'control' the virus, all have an impact on the conditions of their living together, and will potentially disrupt its coherence.

How can governing in response to a global pandemic affect the living together of people and peoples in national and international communities? What does good – or bad – government within political, legal and medical institutions look like in such a predicament? This broad question is taken up in this special issue in no less than thirteen contributions, with a specific focus on the concept of solidarity, a moral-legal-political notion which is often invoked in situations in which the bonds within a community are put under serious pressure.

2. The concept of solidarity

Although the meaning of solidarity as a concept is multifaceted and not clearly defined, the origin of the term in Roman law is not in doubt. Solidarity as a legal notion can be traced back to the Roman law of obligations. By the phrase *in solidum teneri* ('to be held liable for the whole'), the Roman jurists referred to a form of liability in which several debtors are each liable for the full amount or the full performance since the underlying obligation was considered to be *indivisible*.[11] Only after

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11   Julius Christiaan van Oven, *Leerboek van Romeinsch privaatrecht* (Leiden: Brill, 1945): 402-403; Reinhard Zimmermann, *The Law of Obligations. Roman Foundation of the Cilvilian Tradition* (Oxford: Oxford University Press, 1996), 53, n. 136.

the French Revolution did solidarity become a much broader political-legal concept, often understood as a moral and sometimes legal responsibility of individual citizens for the whole of the community.[12] Presently, the concept in this latter, broader meaning figures in numerous constitutions and treaties, such as Article 2 of the Treaty on European Union, one of the two main treaties on which the EU is based.[13]

In his early work *The Division of Labor in Society*, the sociologist Emile Durkheim famously distinguished between two forms of solidarity: 'mechanical solidarity' based on what individual members of a community have in common, and 'organic solidarity', flowing from their mutual differences. Mechanical solidarity refers to the bonds between members of a relatively close community of like-minded people, sharing a system of strongly held moral convictions and beliefs: criminal law and punishment are connected to mechanical solidarity, as 'criminal' is what offends this 'common consciousness' and 'punishment' conveys the public shock in the form of a repression.[14] Organic solidarity, by contrast, is based on the complementarity of people who are fulfilling specialized tasks and functions in a highly complex and industrialized society. The bonds of 'organic solidarity' therefore do not spring from similarities, but from the fact that the division of labour makes the individual aware of both its dependency on *and* its specific contribution to the lives of others and the life of the community, understood as an harmonious 'whole'; legal sanctions within this domain of social and economic exchanges have a non-punitive, 'restitutory' character and are aimed at 'restoration of the *status quo ante*'.[15]

While describing this latter type of solidarity, Durkheim uses the metaphor of the community as a living organism to underline the symbiotic nature of this special bond between the individual and the larger whole:

> 'This solidarity resembles that observed in the higher animals. In fact, each organ has its own special characteristics and autonomy, yet the greater the unity of the organism, the more marked the individualisation of the parts. Using this analogy, we propose to call "organic" the solidarity that is due to the division of labour.'[16]

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12   See Hauke Brunkhorst, *Solidarity. From Civic Friendship to a Global Community* (Cambridge MA/London: The MIT Press, 2005).

13   See Andreas Grimmel, 'Solidarity in the European Union: Fundamental Value or "Empty Signifier"', in *Solidarity in the European Union. A Fundamental Value in Crisis*, ed. Andreas Grimmel and Susanne Giang (Cham: Springer, 2017): 161-175; Vestert Borger, *The Transformation of the Euro: Law, Contract, Solidarity* (PhD diss., Leiden University, 2018): 23-48.

14   Émile Durkheim, *The Division of Labor in Society* (New York: The Free Press, 1997), 40; 61.

15   Durkheim, *The Division of Labor in Society*, 68. Recently, Lisa Herzog has argued that Durkheim's organic solidarity also comprises a notion of equality of opportunity, as people should be able to 'spontaneously' choose their professions, thus connecting commutative with distributive justice. See Lisa Herzog, 'Durkheim on Social Justice: The Argument from "Organic Solidarity"', *American Political Science Review* 112 (2018): 112-124.

16   Durkheim, *The Division of Labor in Society*, 85.

According to Durkheim, morality 'consists in being solidary with a group and varying with this solidarity'. Being solidary is understood as a 'very strong feeling of the state of dependence in which [the individual] finds himself',[17] whereas solidarity, as 'the integrating element in a whole', deprives the individual of 'some of his freedom of movement'.[18] Durkheim's organic solidarity, therefore, thrives in a highly diverse environment with lots of room for individualization, self-realization and specialization, but this does not imply unlimited individual freedom. On the contrary, the sentiment of 'being a part of the whole, the organ of an organism', may not only inspire 'daily sacrifices', but occasionally also 'acts of utter renunciation and unbounded abnegation'.[19]

Durkheim denies that a complex, industrial society in which organic solidarity predominates would have a weaker moral basis than the more homogeneous and 'primitive' society in which mechanical solidarity, based on a common system of beliefs, is central:[20]

> 'Why should more dignity attach to being complete and mediocre than in leading a more specialised kind of life, but one more intense, particularly if we can recapture in this way what we have lost, through our association with others who possess what we lack and who make us complete beings?'[21]

Durkheim's understanding that human beings can only become 'complete' in their relations and associations with others appears to resonate with the African philosophical concept of Ubuntu, in which 'a person is a person because of or by or through other people', an affinity that we cannot explore further here.[22] Nevertheless, writing in the late nineteenth century, Durkheim also admits that this 'new' morality as the main source of coherence in 'our present-day societies' is '[…] *still not developed to the extent which from now onwards is necessary for them*.'[23]

There is a lot in Durkheim's concept of organic solidarity that makes it interesting at this moment in time. First of all, his understanding of solidarity as, primarily, a moral notion – and not, as in Roman law, a legal obligation – driving people's inner motivations and feelings to act in a certain way, captures the fact that solidarity is often 'called upon' or 'appealed to'. Acts of personal sacrifice, of renunciation on behalf of the whole community, are exemplary expressions of solidarity *because* of their voluntary nature. This also means that it is problematic to legally enforce solidarity – *e.g.* by implementing a system of compulsory vaccination – without

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17   Durkheim, *The Division of Labor in Society*, 173.
18   Durkheim, *The Division of Labor in Society*, 331.
19   Durkheim, *The Division of Labor in Society*, 173.
20   Durkheim's assumption that mechanical solidarity is the dominant form within so-called 'primitive' societies is clearly wrong, see Lewis Coser, 'Introduction', in Durkheim, *The Division of Labor in Society*, xxiv.
21   Durkheim, *The Division of Labor in Society*, 334.
22   See, *e.g.*, Edwin Etieyibo, 'Ubuntu, Cosmopolitanism, and Distribution of Natural Resources', *Philosophical Papers* 46 (2017): 139-162, at 142.
23   Durkheim, *The Division of Labor in Society*, 174. Our emphasis.

connecting to a 'solid' moral basis within the actual, living communities of people(s) who together make up the republic. In that light, Hobbes' frontispiece image of Leviathan as an idealized, artificial body politic, somehow hovering *above* the republic while obfuscating the real lives, minds and bodies of its concrete inhabitants, seems patently insufficient.[24]

Second, Durkheim's concept of organic solidarity, explained by the popular nineteenth century metaphor of human society as a living organism, appears to be particularly fitting in a context of a virus which operates as a global threat to humankind as a biological species. In the globalized economy of the 21st century, the scope of organic solidarity, grounded in the division of labour, clearly transcends national and regional boundaries and cannot be understood otherwise than as global. Moreover, confronting humans primarily as biological agents, the current pandemic befits an era which climate scientists have recently begun to understand as the Anthropocene, a geological epoch in which humanity as a biological species has become 'a force of nature in the geological sense', whose numbers and technologies 'have an impact on the planet itself'[25] – implying that, from now onwards, humans no longer have the luxury to deny their state of dependency towards the biosphere which surrounds them or to ignore their bonds of solidarity *vis-à-vis* the well-being of non-human forms of life and other elements of nature on this planet.[26]

If addressing the crisis caused by the pandemic in an adequate way would call for a global – or even ecological – version of Durkheim's organic solidarity, we can only conclude, with Durkheim, that, unfortunately, the ties of solidarity that we would currently need *between* the countries and peoples which together make up humanity as a biological species are 'still not developed to the extent which from now onwards is necessary for them'.[27] The contributions to the present special issue in a way reflect this predicament, since only a minority of them address the theme of solidarity and COVID-19 from this encompassing, global perspective – whereas its urgency can be illustrated by the persistent, extremely unequal distribution of vaccines along the global North-South divide.[28] Nevertheless, we believe that this special issue will contribute to a better, critical and nuanced understanding of the role

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24   If Hobbes' *Leviathan* has in fact 'two bodies', the artificial 'Body Politic' *and* the community of mortals inhabiting the republic, he appears to be ensnared in the same complexities as the medieval jurists who preceded him. See Ernst Kantorowicz, *The King's Two Bodies. A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1981): 437: 'The jurists themselves, who had done so much to build up the myths of fictitious and immortal personalities, rationalized the weakness of their creatures, and while elaborating their surgical distinctions between the immortal Dignity and its mortal incumbent and talking about two different bodies, *they had to admit that their personified immortal Dignity was unable to act, to work, to will or to decide without the debility of mortal men who bore the Dignity and yet would return to dust*.' Our emphasis.
25   Dipesh Chakrabarty, *The Crises of Civilization. Exploring Global and Planetary Histories* (Oxford: Oxford University Press, 2018): 172-173.
26   For a similar argument, see the contribution of Luigi Corrias in this volume.
27   Durkheim, *The Division of Labor in Society*, 174.
28   In August 2021, UN Secretary General António Guterres called COVID-19 vaccine equality the 'most pressing issue of our times'. See https://news.un.org/en/story/2021/08/1097202 (last accessed: November 2021).

of law and solidarity beyond the boundaries of the nation state in these years of the global pandemic.

3. The contributions

The thirteen contributions which make up this special issue are divided over five interrelated subthemes. In this last section we will briefly introduce these subthemes and the related contributions, in the order of their appearance in this volume.

a. Solidarity and community

The first four contributions interrogate the tensions within the community, caught between, on the one hand, the challenges of the pandemic, and, on the other hand, the enforcement of protective legal measures taken to keep the outbreak of the virus under control. In 'Solidarity and COVID-19', *Marli Huijer* describes a paradox in how governments are using solidarity as a rhetorical means to combat the pandemic. Building on the work of Michel Foucault, Huijer shows that governments often invoke solidarity in order to legitimize drastic disciplinary measures such as social distancing and lockdowns. Medically effective, these measures also reinforce widespread social isolation and therefore risk destroying the communal ties which, being the main source of solidarity, are so strongly needed to keep the basic commitments of individuals towards the community alive. Restoring these vital ties may be complicated because the exceptional measures risk prolonging themselves indefinitely or even turning into a permanent regime.

In his essay 'Solidarity and Community', *Luigi Corrias* explores two different conceptions of solidarity in the time of pandemic. Taking as his point of departure the relation of the individual to the local community, Corrias distinguishes between a conception of solidarity that is 'necessarily' connected to a group that shares a 'historically contingent final vocabulary' – as suggested by Richard Rorty – and another conception, 'solidarity of the shaken', which has been proposed by Jan Patočka. Whereas Rorty's conception appears to suffer from certain inconsistencies, Patočka's 'solidarity of the shaken', being based on 'the human capacity to build a community, even under difficult circumstances', may offer a more promising and imaginative way to grasp the potentialities of solidarity during the pandemic.

In 'Sick and Blamed', a Chilean case study into the dubious functioning of criminal law enforcement during the pandemic, *Rocío Lorca* relies on Durkheim's notion of 'mechanical solidarity'. According to Durkheim, criminal justice strengthens and affirms solidarity within the community by responding to an offense against the 'common consciousness' in a passionate way, expressing public outrage. In the Chilean case, however, punishment was meted out to a group of people who were unable to comply with the restrictive measures, because they were living in a deplorable state of rampant inequality which had been exacerbated under the pandemic. Therefore, a strict policy of law enforcement against these 'offenders' was

meant to strengthen the community's solidarity under the pandemic, but in practice clearly undermined it.

The danger of not being receptive to the precarious situation of the other, is also the central theme in 'Welcoming the other in a pandemic society', by *Thomas de Jong* and *Carina van de Wetering*. The arrival of the pandemic has disrupted our relations with people and things, which means that people need to find new ways to connect to each other and to their material worlds. Reflecting on this situation, De Jong and Van de Wetering signal the instrumental way in which solidarity is used by politicians, government officials and scientists, as a means to 'sell' general policies that are ever more beneficial and efficient – a totalizing tendency in which 'the other' is reduced to an object of calculation. With reference to the work of Emmanuel Levinas and Jacques Derrida, they stress the need not to lose sight of the incalculable 'otherness' of the other, and for an openness towards the other as a necessary counterweight to the calculative reasoning which dominates in political discourse.

b. *Solidarity and freedom*

How should solidarity during the pandemic be understood in relation to people who are reluctant to conform to the rules and guidelines, and are invoking the protection of their individual freedoms? In his article 'Living with others in pandemics', *Konstantinos Papageorgiou* argues that within a liberal democracy, the state cannot bear the sole responsibility for fighting the virus. Given the threat the virus poses to the conditions of our living together as free and equal citizens, the state's obligation to ensure public health care for all citizens must necessarily be complemented by the responsibility of each one of its inhabitants *vis-à-vis* the well-being of others. Consequently, people who refuse to comply with reasonable policies in order to combat the virus, such as vaccination, could, by democratic means, legitimately be legally compelled to do so. Individual freedoms within a democracy are not absolute or free of charge: they do not come without responsibilities and duties towards others, the state, and, ultimately, humanity as a whole.

In 'Suffering from vulnerability', *Benno Zabel* approaches the clash between solidarity and freedom during the pandemic from a different angle. Zabel sketches a development in which the legal order of liberal societies not only protects the negative freedom of the individual citizens, but – increasingly – also behaves as a care-taker of the 'fears and insecurities' which accompany this freedom. During the COVID-19-crisis, care as a function of law has taken the upper hand, leading to measures aimed at promoting general well-being and security, at the cost of being at times repressive, authoritarian and excluding. Enough reason to rethink the connection between vulnerability, freedom and law: Zabel proposes an inclusive conception of law, in which the vulnerability and freedom of legal subjects are acknowledged, but the authoritarian tendencies of a 'caring' legal order are counterbalanced by an emancipatory agenda. According to Zabel, a revaluation of maturity, trust and solidarity at the community level will create room for equal participation in society and the legal order.

In their article 'Solidarity, religious freedom and COVID-19', *Miriam Gur-Arye* and *Sharon Shakargy* discuss the clash between solidarity and religious freedom in an Israeli case study: the refusal of the ultra-Orthodox sects in Israel to comply with some COVID-19 regulations, such as those restricting mass prayer in synagogues or studying Torah in the yeshivas. The authors identify two explanations for this refusal, one based on religious beliefs and another on the socio-political wish to keep the ultra-Orthodox community separate from society and public life. Should this refusal to obey the rules be honoured as a legitimate 'cultural defence'? Gur-Arye and Shakargy argue that it should not, pointing to the main aim of the COVID-19 restrictions, which is to reduce the spread of the virus: the special duty to protect the lives and health of others temporarily overrides the deep wish to continue the religious practices.

c.   Solidarity and crisis

The COVID-19-pandemic has caused a global health crisis, a wave of exceptional laws and other measures, and, in some cases and situations, states of emergency in countries, cities and hospitals. What does solidarity mean in a crisis or a state of exception? Probably the most notorious ethical dilemma in this regard is the problem of triage at intensive care units, arising when hospitals are confronted with an unprecedented influx of patients, a situation known as 'code black'. *Tobias Arnoldussen* addresses this issue in his Dutch case study 'Dividing the beds'. However, his main focus is not the ethical dilemma itself – the puzzle involving utilitarian and deontological solutions – but the question 'Who is leading the discussion?': the government, lawmakers, society or certain organizations? In his reconstruction of the public debate around 'code black' in the Netherlands, Arnoldussen shows how the medical expert organizations gradually took control over the discourse, a position which was in certain respects beneficial for them. Embracing Ulrich Beck's conception of cosmopolitan solidarity within a risk society, Arnoldussen is critical of this development: it transforms 'code black' from an ethical dilemma – which ideally should be a shared responsibility of everyone – into a management problem that supposedly concerns no one other than the expert managers who are now to make the decisions.

In 'What solidarity?' *Candida Leone* uses Durkheim's distinction between mechanical and organic solidarity in her analysis of three examples of how Dutch contract law responded to the economic fallout of the COVID-19-crisis. Briefly analyzing the application of the legal provision of unforeseen circumstances with regard to commercial lease contracts, the offering of consumer vouchers in cases where the service provided by the contract could not be delivered, and, lastly, a case of salary cuts as a condition for the reception of state aid, Leone concludes that the solidarity involved cannot always be fully equated with Durkheim's organic solidarity. Elements of mechanical solidarity appear to play an additional role as well, implying that both forms of solidarity remain relevant for the analysis of private law within modern legal systems.

Amalia Amaya Navarro, in 'The exceptionality of solidarity', starts with a question: Why is it that we are so much readier to help each other in times of crisis than in

normalcy? This is a tricky question because, in her analysis, most reasons we have to be solidary in a time of crisis also appear to apply in normal times. This leads to the central question: What would be needed for solidarity – understood as being close to 'fraternity', based on the acknowledgment of a common humanity – to last beyond a time of crisis? Answering this, Amaya Navarro discusses different factors to be taken into account. First of all, solidarity needs to be 'solidified' in formal, legal, structures, both within the state, and at the supranational and global level. Another important factor mentioned is that solidarity cannot, without contradiction, be pursued in an exclusionary way, but should always be realized in ways that promote, rather than erode, larger solidarities.

d.   Solidarity and populism
How does the pandemic affect our reasonableness, and our willingness to act on a sense of justice, which are core conditions of democratic decision-making within a pluriform liberal society? Departing from John Rawls' theory of political liberalism, *Matt Matravers* shows in 'Justice and coercion in the pandemic' that the pandemic has exacerbated several existing problems within liberal democracies, such as structural inequalities in income, wealth and opportunities, and unreasonable forms of populism and conspiracy theories. As a result, basic assumptions which in Rawls' theory are more or less taken for granted are currently being tested. One of the questions raised by Matravers is whether those who refuse to be vaccinated are unreasonable, and what that means for how they ought to be treated. Since the group of the unvaccinated is diverse, there is no simple answer to these questions. In addition, the problem of the coercion of the unreasonable raises the fundamental question of how to demarcate the limits of the reasonable in a liberal democracy.

Massimo La Torre, in his essay 'Populism, the kingdom of shadows, and the challenge to liberal democracy' delves further into the phenomenon of populism, which appears to thrive in the years of the pandemic. Defining populism as 'a distinct ideal-type of approach to power, which can be defined by specific descriptive properties', La Torre points out how social distancing, lockdowns and the prohibition on touching each other, have provided the ideal conditions for a mediated universe, in which a dangerous alternative to liberal democracy can flourish. Using Guy Debord's *La société du spectacle* as his main point of reference, La Torre describes how in this digital world of 'screens', icons, and images, truth and political argument are no longer sought, but replaced by a visual experience, a show, ruled by a phantom leader.

e.   Global Solidarity
In the last contribution to this special issue, 'Global solidarity and collective intelligence in times of pandemics', *José Luis Martí* paints a bleak picture of the global struggle against the virus. While the COVID-19 pandemic can be described as a twofold global threat – which means that it is both a common problem for the entire world and that its solution can only come from a coordinated global response – the efforts to organize political solidarity on an institutional global level to combat the virus have all failed. This does not mean, however, that institution-

alized global solidarity is an impossibility. What is first needed are thicker and more empowered institutions. In the second place, more democratic forms of global decision-making are needed to keep these institutions accountable and legitimate. In order to realize democratic ways of decision-making at a global level, emergent digital technologies, such as data analytics and artificial intelligence, can be used.

These thirteen papers strikingly illustrate some of the challenges that the pandemic poses to political and legal theorists – and some of the ways in which responses to those challenges can illuminate and advance our understanding of the fundamental political ideal of solidarity.

Solidarity and COVID-19

A Foucauldian analysis*

Marli Huijer

Introduction

Solidarity is often presented as a core value underpinning our dealings with the COVID-19 pandemic. Politicians called for it to persuade teenagers and adolescents to help protect vulnerable senior citizens, or to stimulate citizens to unburden the care workers by obeying the social distancing and other anti-corona regulations. Out of solidarity the EU members states decided to provide member states with the lowest rates of vaccination with extra 'solidarity vaccines'. The United Nations as well as human rights organizations worldwide frequently called for international solidarity among countries to fight the COVID-19 pandemic.

In these examples, 'solidarity' is conceived as a moral value or political principle that can be invoked to press or encourage citizens, states and governments to take care of vulnerable or poor persons, groups or countries, without asking something in return or even at considerable cost for themselves. Lacking in this conceptualization is that in order to put solidarity into practice, it needs to be embedded in a social infrastructure, a common 'world', where people meet, act and interact with each other. Even global solidarity, though based on the idea of an imagined community of mankind, not only represents a moral or political value but also a social, infrastructural dimension. Social conditions, concrete practices and social contexts in which people live and act together, and experience their interdependence, are as important for putting solidarity into practice as moral or humanitarian considerations.[1] This is especially the case in times of crisis: social connections strengthen social resilience and increase the chances for survival.

This article investigates what effect the measures to fight and control the coronavirus, taken by governments under the banner of solidarity, have on the conditions that motivate people to care for others, nearby and far away, without expecting something in return. I will argue that lockdowns, quarantines, corona apps and

1 Related to biomedicine, sociologist Barbara Prainsack and biomedical ethicist Alexia Buyx understand solidarity as a practice, as something that is *enacted*, rather than as an abstract value, normative ideal, or inner sentiment. Analyses of solidarity have to take into account concrete practices, policies and contexts, including how the actor of solidarity is related to the human, natural and artefactual environments. Barbara Prainsack and Alena Buyx, *Solidarity in Biomedicine and* Beyond (Cambridge University Press, 2017), 45-48.

other disciplining and controlling measures negatively affect the social cohesion in society as well as the quality of the public sphere. The disciplining and controlling mechanisms that governments enforced on individuals and the population at large weaken what Hannah Arendt called the 'web of human relationships', the intangible world in-between people that originates in people's acting and speaking directly to each other.[2] Moreover, the options to interact with strangers vastly declined, which also erodes the conditions that enable and motivate people to care for unfamiliar or strange others.

This article starts with the entrance of the modern concept of solidarity in the western political domain. Elaborating on the historical studies of Michel Foucault, it shows how the intertwinement of a medicine of epidemics and a national state enabled nations to express solidarity and take care for the poor, diseased and miserable within the national borders. Over the course of centuries this intertwinement resulted in health regimes that subject all citizens for their own good to disciplinary and controlling mechanisms. Second, I portray the anti-corona measures as an ensemble of medical interventions, disciplining and controlling mechanisms. I will argue that the side-effects of these mechanisms and interventions, which governments enforced in order to lower the infection, morbidity and mortality rate due to COVID-19, significantly limit the opportunities to act together and practice solidarity. Bottom-up initiatives, democratic deliberation and public exchanges of arguments hardly had a chance to develop. I conclude that, in order to uphold the practice of solidarity, it is not only important that the regulations taken to fight and control the coronavirus are turned back after the epidemic, but also that both governments and citizens invest in the restoral of social cohesion, the public sphere, democratic deliberation and, more generally, the web of relationships that conditions what we as human beings are.

Solidarity, medicine of epidemics and nation state

Solidarity as a political concept emerged in Western Europe in the eighteenth century.[3] Until then, the care of the vulnerable – the sick, the poor and orphans – mainly depended on the charity of religious and private organizations. Sufferers of leprosy, a disease that ravaged Europe for centuries and only disappeared after the Middle Ages, received care thanks to the values of mercy and compassion.

The awareness that the nation had a social and collective duty to assist the vulnerable arose already in the seventeenth century, with the first development of national states in Western Europe.[4] Charity and compassion became less important and gradually gave way to solidarity and other humanitarian values. Due to the

2   Hannah Arendt, *The Human Condition. Second edition* (Chicago and London: The University of Chicago Press, 1998), 183-184.
3   Steinar Stjernø, *Solidarity in Europe. The history of an idea* (Cambridge: Cambridge University Press, 2004), 27.
4   Michel Foucault, *Naissance de la Clinique* (Paris: Presses Universitaires de France, 1963), 39, see also 42-43.

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French Revolution, solidarity became a political concept: solidarity, understood as brotherhood, would pave the way out of inequality and injustice.

The nineteenth century development of modern nation states, in which nation, state and territory overlap, coincided with the rise of a medicine of epidemics. Starting in the eighteenth century, medical doctors and governments wanted to map the incidence and distribution of diseases that affected a large number of persons simultaneously (at that time, the name epidemic referred to the large number of affected persons rather than to the contagiousness).[5] The institutionalization of this new way of observing epidemic diseases brought about 'a medicine of epidemics', which not only mapped epidemic diseases, but also implemented health regulations and a medical police to survey people's compliance with the regulations. As Foucault wrote:

> 'A medicine of epidemics could exist only if supplemented by a police: to supervise the location of mines and cemeteries, to get as many corpses as possible cremated instead of buried, to control the sale of bread, wine, and meat, to supervise the running of abattoirs and dye works, and to prohibit unhealthy housing.'[6]

The intertwinement of a medicine of epidemics and the modern nation state brought about a health regime that expended its reach from the poor and the vulnerable to all citizens. Solidarity became delegated to the state, and later on also to sub-state organizations such as medical institutions, insurance companies and welfare funds. By optimizing the health of each individual as well as the population at large, the outcome was expected to be best for everyone, the poor and vulnerable included.

Foucault describes how a constellation of disciplinary and controlling (or regulatory) techniques developed, which incites individuals and society at large to behave as healthy as possible. Starting in the seventeenth century, a 'political technology of life', 'biopower' or 'power over life' evolved in two principle forms: the first, an 'anatomo-politics', focused on the individual body. It administrated all human bodies, disciplined them, optimized their capacities, increased their usefulness and integrated them into systems of economic control. The second, a 'biopolitics of the population', focused on the biological life of the population at large. It supervised, governed and controlled the population's proliferation, birth and death rate, health level, life expectancy, average life span and so on.[7] The first, disciplinary power ruled by dissolving the multiplicity of men 'into individual bodies that can be kept under surveillance, trained, used, and, if need be, punished'. The second, regulatory

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5   Foucault, *Naissance de la clinique*, 22.
6   Foucault, *Naissance de la clinique*, 25 (trans. A.M. Sheridan in Michel Foucault, *The Birth of the Clinic. An Archaeology of Medical Perception* (Taylor & Francis e-Library, 2003), 25).
7   Michel Foucault, *Histoire de la sexualité I. La volonté de savoir*(Paris: Éditions Gallimard, 1976), 182-183. See also Michel Foucault, *Society must be defended. Lectures at the Collège de France, 1975-1976*, trans. David Macey (London: Penguin Books, 2003), 239-263.

or controlling politics massified the multitude of bodies into a global mass, that is man-as-species or the human race.[8]

These two interconnected biopower forms were the poles of a development in which all biological processes became administered, surveyed, disciplined and regulated at a small-scale as well as a large-scale level. Life entered into history, as Foucault wrote, that is, 'the entry of phenomena specific to the life of the human species into the order of knowledge and power, into the field of political techniques'.[9] The highest function of these bipolar (anatomic/disciplinary and biological/regulatory) political technologies of life was not to put into practice the solidarity with the vulnerable or the poor, but to invest through and through the biological life of all individual bodies and the entire population.

In the gradual refinement of this health regime during the nineteenth and twentieth century, the anatomo-politics transformed into the contemporary molecular politics, which has opened the option to engineer (or discipline) the biological life at the smallest, molecular level, as sociologist Nikolas Rose argues in his book *The Politics of Life Itself*.[10] The post-war transformation of national states first into social welfare states, in which solidarity was taken for granted, and subsequently into (neo)liberal states that delegated responsibility for health to smaller organizations, such as municipalities, companies or private organizations as well as to individuals themselves, has produced today's 'biological citizens', who not only enthusiastically engage with their own health, but also claim to have a right to health and well-being and thus a right to live as long as possible.

Solidarity and anti-corona regulations

The way governments and sub-state organizations approach the COVID-19 epidemic today cannot be seen as independent from the health regimes that have been developed since the seventeenth century. Today's medicine of epidemics, consisting of epidemiologists, virologists and other biomedical specialists as well as public health and behavioural scientists, intertwined with national state and sub-state apparatuses are the leading agents in what is called the 'corona crisis'.

The anti-corona regulations staged by this intertwinement of a medicine of epidemics and (sub)state organizations consist of an ensemble of
a   medical interventions;
b   disciplinary mechanisms;
c   controlling mechanisms.

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8   Foucault, *Society must be defended*, 242-243. See also: Michel Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977-1978*, trans. Graham Burchell (New York: Palgrave, 2007), 1-27.
9   Foucault, *La volonté de savoir*, 186 (trans. by author).
10   Nikolas Rose, *The politics of life itself. Biomedicine, power, and subjectivity in the twentieth-first century* (Princeton and Oxford: Princeton University Press, 2007).

Whether these measures are proportionate or not in terms of COVID-19 morbidity and mortality is not the subject of this article. The issue at stake is how these regulations and interventions affect the conditions that enable and facilitate the practicing of solidarity.

Medical interventions
Most governments, medical advice boards and care professionals chose to offer patients affected by COVID-19 the best possible care at the ICU, hospital, nursery home or at home. Since most European countries have national health care insurance systems, which enforce solidarity by obliging all individual citizens to pay insurance fees, it is a commonly held view that each person insured should be helped in situations of need.[11] The epidemic brought the limits of this practice soon into view, while many countries did not have sufficient ICU and hospital capacity to help the large numbers of COVID-19 patients – let alone to provide out of solidarity 'critical care beds' to patients of neighbouring countries. Moreover, care for non-COVID-19 patients had to be postponed or cancelled, a practice that generated heated debates about who deserved solidarity: should the care for COVID-19 patients have priority over the care for patients waiting for breast cancer surgery or with heart problems? Rather than supporting the solidarity that governments and medical specialists called for, these debates gave rise to polarization.

Something similar happened in relation to vaccination. The call for solidarity used by governments and public health organizations persuaded many to get vaccinated, but it also fuelled annoyance about people refusing vaccination. Do patients who deliberately choose not to be vaccinated still deserve solidarity and care? Or should they be punished for their refusal and have no or only limited access to public events or even to hospital care?

A decrease in solidarity is also seen in a global perspective. The pandemic generated competition among nations to be the best performing in terms of infection, morbidity, mortality and vaccination rates. Daily comparisons published online incited governments and medicine to look for strategies that further lowered these rates. In this competition the practice of solidarity was, and still is, limited to each country's own citizens and population. Solidarity with other countries, especially with the poorer ones, is low, as became evident when rich countries prioritized vaccination of its own population far above worldwide vaccination.

Disciplinary mechanisms
In order to prevent the massive spread of coronaviruses and based on the – often exclusive – advice of virologists and other biomedical specialists, most governments have enforced a variety of disciplinary mechanisms, including lockdowns

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11   Bioethicist Ruud ter Meulen calls this solidarity 'interest solidarity', meaning that 'individuals pay their financial contributions to the health and social care system merely because they have an interest to do so. They see their contributions as an "investment" in the health care system in the expectation that they will be helped in situations of need'. Ruud ter Meulen, 'Solidarity, justice and recognition of the other', *Theoretical Medicine and Bioethics* 37 (2016): 517-529.

(enclosure of citizens in their houses or in nursery homes, work from home, bans on gatherings, limited travelling), quarantine for infected individuals, closure of educational institutions, museums, libraries, gyms and so on, and behavioural measures such as social distancing, limiting of social contacts, frequent hand washing, coughing and sneezing into the elbow, and wearing face masks. Assuming that a call for solidarity was not enough to bring citizens and the population at large to the desired behaviour, parliaments introduced special COVID-19 related legal measures, *i.e.*, declared a state of emergency or adopted temporary emergency acts, to be legally able to enforce the lockdown and other disciplinary measures.[12] Although the precise effect of each singular measure is not yet known, it is evident that the sum of these significantly decreased the infection, morbidity and mortality rates.[13]

The side-effect of these mechanisms that force individuals to practice social distancing is that they negatively affect the options to have face-to-face interactions with neighbours, friends, family members, colleagues, acquaintances, co-citizens and strangers. Relationships, especially with people not belonging to the private sphere or one's own digital bubble, became more distanced. Much of the day, online life took over from offline life, thereby eroding the social conditions needed for mutual engagement, mutual bonding and support for people outside of the immediate life sphere. The many efforts governments in Europe have taken since the beginning of the twenty-first century to increase social cohesion in today's meritocratic and progressively more multicultural and diverse societies[14] threaten to get lost because of the lengthy absence of real-life society during the epidemic. The web of human relationships, that according to Hannah Arendt exists 'wherever men live together', where people share their stories and act together, is losing its strength.[15]

Complaints that going back to normal will bring social obligations that people no longer feel for make it likely that the social disconnections during the epidemic will have enduring effects on people's social and societal engagement. Telling is also that the initial, spontaneous and voluntary acts of solidarity, such as collective clapping for healthcare workers and voluntary distribution of food to vulnerable persons enclosed in their homes, soon declined. Ever more individuals and groups started to emphasize the interests of the group they belonged to: the elderly and vulnerable persons and groups demanded more protection for themselves from the government; young people more freedom of movement; shopkeepers, pub owners and museum directors more opportunities to stay open, etc. Self-interest or the interests of one's own group won out over solidarity with others and other groups. Not only solidarity with citizens within one's own country declined, but also soli-

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12   https://www.europarl.europa.eu/cmsdata/226107/No.29_Emergency_Laws_and_Legal_Measures_
      against_COVID-19.pdf.
13   https://www.science.org/lookup/doi/10.1126/science.abd9338.
14   Xavier Fonseca, Stephan Lukosch and Frances Brazier, 'Social cohesion revisited: a new definition
      and how to characterize it', *Innovation: The European Journal of Social Science Research* 32, no. 2
      (2019), 231-253.
15   Arendt, *The Human Condition*, 184.

darity with people in poorer countries – which had from the start not been paramount for national governments.

The bar on face-to-face interactions also negatively affect the public sphere, which is, as Hannah Arendt argued, the public common world where we meet and appear to each other, see and hear ourselves and others, and thus create reality.[16] Being able to interact with others in the social and public sphere is a vital condition for the involvement with and binding to others, and therefore for social solidarity. In this setting solidarity is not grounded in obedience towards government regulations aimed at saving all the human lives that we can afford to save, nor in universal principles as brotherhood or justice and equality for all, but in the social connections and relationships that people enact at a daily level. The closing of most public meeting places, public debating centres, pubs, libraries, theatres and other places where people normally meet to discuss, severely challenged the conditions for democratic deliberation, civic activities, and public debates.

What seems to counteract this argument is that during the pandemic a wave of public protests has taken place. Yet, as political sociologist Paolo Gerbaudo analyzed, most of these protests have a 'premodern', lowly organized form with 'sudden gatherings of people, limited organizational structures, lack of representatives and multiplicity of protest claims'. The social discontent these pandemic protests express could be the prelude to more intense social conflict in societies that are ever more unequal and divided, he warns.[17]

Controlling mechanisms
After the first phase, in which governments and medicine expected that lockdowns and other disciplinary mechanisms would eradicate the virus and stop the epidemic, a second, more realistic path was taken: the virus is here to stay, and as humans we had to learn to live with it. Eager to normalize the population's morbidity and mortality rate, the goal became 'to control the virus'. Governments, public health organizations and tech companies started to set up a broad array of digital controlling mechanisms: corona contact tracing apps, testing facilities, field labs, vaccination apps and algorithms, which jointly made it possible to track the movements of smartphone users (infected and non-infected), to alert them if they had been in close proximity to an infected person, to notify the recent contacts of infected persons, to identify smartphone users' vaccination and corona test status (by scanning a QR code), and to allow or disallow access to restaurants and other semi-public spaces. Whereas disciplining mechanisms are territorialized, enclosing individual bodies in specific spaces, controlling mechanisms are de-territorialized: they survey and massify the multitude of behaviours, movements and exchanges via smartphones, apps and digital networks in order to control and regulate them.

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16   Arendt, *The Human Condition*, 50-52.
17   Paolo Gerbaudo, 'The Pandemic Crowd Protest in the Time of Covid-19', *Journal of International Affairs* 73 (2020): 61-76.

The side-effect of these controlling mechanisms is that each person who does not belong to one's household is perceived as a potential deadly risk. This risk perception of others induces a psychological distancing that, in combination with the social distancing of the disciplinary mechanisms, increases the social *distance* towards others outside of the private sphere. An example of this distancing is that the shortage of ICU beds led to a decline in solidarity with persons having obesity or refusing vaccination: they were seen as a security risk and blamed for not taking responsibility for their own and others health.

The calls to solidarity in relation to the COVID-19 pandemic suggest that western healthcare systems are still based on solidarity, even though neoliberal principles of individual responsibility prevail today in most western countries. Solidaristic values, taken for granted in national states and social welfare states, have been replaced by neoliberal values in the twenty-first century. This shift has heralded the end of solidarity: each of us is held accountable for one's own health and well-being.[18]

In the hope to revive the solidarity in light of COVID-19, political leaders, healthcare professionals and citizens expressed phrases like 'Fighting the virus together' or 'controlling the virus together' – if only to make people accept the medical interventions, disciplinary and controlling mechanisms that governments, advised by teams of medical specialists, deemed necessary to minimize or normalize the COVID-19 death and disease rates of their population. In terms of discourse this revival has been successful: the word solidarity echoed all over the media, in political domains, healthcare institutions, schools, companies and neighbourhoods.

Yet, talk about solidarity, no matter how important, does not guarantee that the practice of solidarity 'functions and flourishes', to paraphrase Prainsack and Buyx.[19] Rather the opposite seems to be the case: the erosion of the social conditions that enable and facilitate the practicing of solidarity, induced by the measures to fight and control the virus, could bring about a further disappearing of solidarity in societies that already have a high level of individualism.

After the epidemic

In his book *Discipline and Punish* Foucault argues that the disciplining mechanisms developed for a state of emergency, *i.e.* the seventeenth century pest plague, brought about disciplining schemes, facilities and institutions that subsequently spread throughout the whole social body. Rather than disappearing after the plague, they swarmed over the societal organism and produced what Foucault called 'the disciplining society'.[20]

18   Prainsack and Buyx, *Solidarity in Biomedicine and Beyond*, 23.
19   They speak of 'background conditions' that are important for solidaristic practice and policy to function and flourish. Prainsack and Buyx, *Solidarity in Biomedicine and Beyond*, 172.
20   Michel Foucault, *Discipline and punish. The birth of the prison*, trans. Alan Sheradan (London: Penguin Books, 1977), 209 ff.

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Whether today's disciplinary and controlling mechanisms that governments enforced under the banner of solidarity – but subsequently by legal measures – to fight the current state of emergency, *i.e.* the COVID-19 epidemic, will continue after the epidemic and, for example, be used to fight other risks and threats, is hard to say. However, that many of the disciplinary and controlling mechanisms will not be reversed now that the advantages of disciplining individuals and governing populations have become clear, is beyond doubt. Even massive contestations and protests will not bring back the 'old normal'.

That is worrisome, since it is likely that the enclosures, lockdowns, apps and other disciplinary and controlling measures will reinforce the trend towards individualization, less social cohesion and a less well functioning public sphere, thereby further eroding the practice of solidarity. To counter that development active investments are needed, both by governments and citizens, to restore and restrengthen the social conditions that enable and facilitate social cohesion, the public sphere and the enactment of solidarity. Whether these kind of investments will be strong enough to counteract the side-effects of the governments' corona approach will remain uncertain – even more so if the mechanisms and legal measures enforced would not be turned back after the epidemic is over.

Solidarity and Community

From the Politics of the Clan to Constituent Power*

Luigi Corrias

1. Introduction

Solidarity seems to be a concept with multiple meanings. While it is being invoked more and more often during the COVID-19 pandemic, the notion remains far from clear. This short article aims to make a contribution to the ongoing discussion on the meaning and value of solidarity. It is by no means my goal to give an extensive overview of the subject. The aim of this contribution is more modest. My guiding hypothesis is that solidarity is always and necessarily linked to the concept of community. A plea for solidarity will, in other words, directly lead one to the question: solidarity with whom? This relation between community and solidarity, giving way to the question regarding the ground of our living together, will be the angle taken in this article.

The argument unfolds in the following steps. First, I take a historical perspective, elucidating how solidarity has played a key role in a number of instances in the past. The concept of solidarity is usually traced back to the *obligatio in solidum* in Roman law, where it referred to a form of common liability. Later, solidarity was invoked, for example, during the French revolution under the banner of fraternity in the slogan *liberté, égalité et fraternité* – still the national motto of the republic of France and the republic of Haiti. I will also discuss how philosophers and social theorists have understood the concept. This brief historical overview already shows how solidarity and community are always interlaced.

In the remainder of the article, I will directly focus on this relationship between community and solidarity, in order to distinguish between different interpretations. On the one hand, solidarity may be understood as extending only to those who belong to the same community as us. In this reading, solidarity builds upon an already existing community and applies to members only, excluding those who do not belong to it. I will argue that such a reading is untenable for philosophical reasons and undesirable for political ones.

Therefore, I present an alternative interpretation. Invoked by those who aim to question the *status quo*, solidarity also plays a key role in practices of contestation. In these contexts, it focuses on collective action and the reimagination of political community. This interpretation has a history within the phenomenological tradition, more specifically in the work of Jan Patočka. Also, one can find it in political

practice. The article ends by articulating how this alternative interpretation of solidarity might prove helpful in making sense of our current predicament of a global pandemic.

2.   The concept of solidarity

When we take a look at the etymology of solidarity, we can find the following: 'solidarity (n.); 1829, from French *solidarité* "communion of interests and responsibilities, mutual responsibility," a coinage of the "Encyclopédie" (1765), from *solidaire* "interdependent, complete, entire," from *solide* (see solid (adj.)).' So,[1] the concept of solidarity seems to have French origins. This French link with solidarity also becomes apparent in the social struggles of the 1840s, where solidarity was invoked in order to claim social inclusion and political rights.[2]

Despite these French roots, the basic idea underlying solidarity is usually traced back to Roman law: the *obligatio in solidum* denoted a form of joint liability for a financial debt where 'each person was individually responsible for the liability of the group; i.e. everybody was liable *in solidum* (= for the whole)'.[3] What transpires in the Latin *solidus* is a certain solidity: in being in solidarity with others, one is part of a solid whole.[4] In other words, underlying the concept of solidarity we may find the notion of group or community. More than that, solidarity seems to point not just to any kind of community but to one based on a common ground or solid foundation.[5] Theoretically, the key question of solidarity – also taken up in this article – is what to make of this ground or foundation.[6]

The notion of solidarity seems immediately linked to the fundamental question of humans living together. Hence, it will not come as a surprise that it is widely discussed in sociology and social theory. Émile Durkheim, one of the founding fathers of sociology, wrote extensively on solidarity.[7] In his *The Division of Labour in Society* (1893), Durkheim distinguished between two types of solidarity: mechanical and organic solidarity. Speaking from a functionalist perspective, society appears as a set of sub-systems with specialized functions. In a traditional society, the division of labour is not yet fully developed. Solidarity in such a society may be called mechanical in the sense that tasks are passed on by one generation to the next, performed in an automatic way, with law playing mostly a repressive role. Within modern society, the division of labour evolves. As a consequence, the sub-systems within society will need to co-operate in order to attain coherence and order within

1   'Solidarity', Online Etymology Dictionary, last accessed 30 August 2021, https://www.etymonline. com/word/solidarity#etymonline_v_23854.
2   Lawrence Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?', *British Journal of Politics and International Relations* 9 (2007): 173.
3   Ludger Hagedorn, 'Introduction. Solidarity beyond Exclusion,' *Baltic Worlds* 8 (2015): 87.
4   Gustav Strandberg, 'The Solidarity of the Shaken', *Baltic Worlds* 8 (2015): 101.
5   Strandberg, 'The Solidarity of the Shaken', 101.
6   Strandberg, 'The Solidarity of the Shaken', 101.
7   For my interpretation of the work of Durkheim, I rely on Anton Zijderveld, 'The Legal and Moral Dimensions of Solidarity', *Netherlands Journal of Legal Philosophy* 35 (2006): 312-313.

society. Durkheim calls the solidarity within such societies organic, whereas law helps in facilitating cooperation.

Still in the field of social theory, Anton Zijderveld goes as far as to state that solidarity forms part of the human condition.[8] Central to solidarity is, he argues, a 'sense of mutual dependence and responsibility' as it plays out in symbolic interaction.[9] This kind of interaction hinges on trust as a moral phenomenon.[10] The importance of trust may perhaps be fully recognized only from the negative, *i.e.* from the experience of losing trust. Jean Améry famously described his torture as the triple loss of trust in the world, home and dignity.[11] Taken in this fundamental sense, trust seems to refer to a common world of meanings, norms and values that is crucial for human interaction.[12] Without this common world solidarity is impossible. As Bernhard Waldenfels aptly observes: 'On the whole, the phenomenon of trust refers to the *bond*, the *nexus*, which holds together the members of a community, creating the requisite solidarity. Solidarity does not mean something like an affective fusion, a racial homogeneity or a fixed common good; it simply means that one does not separate one's well-being from that of the Others. What is at stake here is the *syn-*, the *con-*, or the *mit-*, without which there would be nothing like a *koinonia*, a community or society: in short, there would be no *living-together* (συζῆν), no *Mitsein*.'[13]

Given that solidarity seems to refer to the very basis of our living together, it is not surprising that one finds philosophers struggling to articulate the conceptual core of solidarity.[14] Hans-Georg Gadamer, for instance, stresses the ambiguity of the concept of solidarity. He tries to connect solidarity to the much older notion of friendship, a concept with a rich philosophical history. The true meaning of solidarity remains elusive. On the one hand, the bonds between people in certain groups or communities lead to obligations of solidarity. On the other hand these bonds may turn into friendship that remains forever indefinable, as it may only be valued in lived experience.[15] Sometimes, solidarity springs from a natural connection, such as a common homeland.[16] This feeling of solidarity can also be experienced if one is hit by some kind of catastrophe, like a bombing in war.[17] Certain events have the power to make strangers appear as members of the same community, *i.e.* people towards whom one feels obligations of solidarity. Real or, as Gadamer puts it,

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8   Zijderveld, 'The Legal and Moral Dimensions of Solidarity', 306.
9   Zijderveld, 'The Legal and Moral Dimensions of Solidarity', 306.
10   Zijderveld, 'The Legal and Moral Dimensions of Solidarity', 309.
11   Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities*, trans. Sidney Rosenfeld and Stella P. Rosenfeld (Bloomington, Indiana: Indiana University Press, 1980), 21-40.
12   Zijderveld, 'The Legal and Moral Dimensions of Solidarity', 307.
13   Bernhard Waldenfels, 'Responsive ethics', in *The Oxford Handbook of Contemporary Phenomenology*, ed. Dan Zahavi (Oxford: Oxford University Press, 2012), 433.
14   Hans-Georg Gadamer, 'Friendship and Solidarity', trans. David Vessy, *Research in Phenomenology* 39 (2009): 11.
15   Gadamer, 'Friendship and Solidarity', 5.
16   Gadamer, 'Friendship and Solidarity', 7.
17   Gadamer, 'Friendship and Solidarity', 10.

'authentic' solidarity depends on individuals who seriously affirm it and step up when the moment arrives.[18] The Latin *solidum* at the core of solidarity points to payment in the sense of counting or receiving payment (*der Sold*). Gadamer thus emphasizes that solidarity is something one should be able to count upon, like real, not counterfeit, money.[19] In that sense, solidarity seems to refer to some sort of reliability, loyalty or comradeship, indeed a social bond that is implicit but necessary in the life of a community.[20]

Summarizing this short historical overview, one may say that solidarity is a concept with many meanings. Nevertheless, most conceptions have three characteristics in common.[21] They, first, denote a kind of support. Second, they sustain that this support supposes some kind of group or community based on a common characteristic, or shared goal. The third and final point is that solidarity requires some sort of reciprocity, *i.e.* it forms part of the social fabric where institutions play an important role. Furthermore, solidarity manifests itself on different levels: between individuals, as accepted behaviour within a group, and on the formal level of norms and institutions.[22]

3. Solidarity, fraternity, humanity

Coming back to the basis or ground of solidarity, one could interpret this foundation as a knowable, stable and pre-existing basis of community. In this respect, one may speak of 'solidarity against'.[23] In this interpretation, solidarity seeks to protect those within the community against those outside of it by grounding itself on a firm basis. Through this solid basis, the group gains independence, excluding itself from an outside. This kind of solidarity is far from romantic, as it can also be found in criminal groups or religious sects.[24] It would be a mistake, therefore, to identify solidarity with justice.[25] 'Solidarity against' may be seen as part of a politics of the clan,[26] where the community exists solely and exclusively of those of one's own kin.[27] When a group has established itself, it often takes a plea of solidarity. However, internal divisions may rise to the surface again when the group is confronted

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18   Gadamer, 'Friendship and Solidarity', 11.
19   Gadamer, 'Friendship and Solidarity', 11.
20   Gadamer, 'Friendship and Solidarity', 11.
21   Barbara Prainsack, 'Solidarity in Times of Pandemics', *Democratic Theory* 7 (2020): 125.
22   Prainsack, 'Solidarity in Times of Pandemics', 126. Contemporary perspectives, as one may find them in the work of Habermas, Honneth and Brunkhorst amongst others, cast solidarity in terms of institutions and/or recognition. In this short article, I cannot discuss this literature. For a good overview, see Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?', 174-176.
23   Leonard Neuger, 'Some Thoughts on Solidarity', *Baltic Worlds* 8 (2015): 91.
24   Neuger, 'Some Thoughts on Solidarity', 91.
25   For a disentanglement of solidarity and justice, especially in the context of EU policy, see: Bertjan Wolthuis, 'The European Union between Solidarity and Justice', *Acta Politica* 56 (2020): 261-275.
26   Hagedorn, 'Introduction. Solidarity beyond Exclusion', 89.
27   Neuger, 'Some Thoughts on Solidarity', 91-92.

with external threats.[28] A group may turn into a violent institution in its urge to constrain its members into subservience. This violence makes evident that the constitutive promise of solidarity also brings with it the threat of coercion when the obligations of solidarity are not taken seriously.[29] One may find this kind of rhetoric in the speeches of many right-wing populists who found their politics upon the (presumably) solid basis of a given community with an own place or *Heimat* and a firm identity.[30]

In the history of the notion of solidarity, this interpretation comes close to that of fraternity, as it was invoked during the French revolution. This use of the term has led to a debate between French philosophers Jacques Derrida and Jean-Luc Nancy. In his reinterpretation of fraternity, Nancy speaks of a breach in the horizon of sense that accompanies every democracy.[31] Nancy defends fraternity as pointing towards and reminding the legal order of this breach.[32] In this way, he connects solidarity to a political openness: a democratic regime guarantees the conditions under which this breach in the horizon of sense is kept as a constant reminder of the impossibility of an ultimate closure of the question of sense. In other words, solidarity gestures towards an outside of the law of every legal order, an outside that cannot ever be recuperated by that legal order. As such, solidarity is a necessary but not a sufficient concept: it may be seen as the model of 'having to adjust to living together'.[33]

Derrida has severely criticized the notion of fraternity in political contexts for its inherent exclusionary and gender-biased nature, even when it were to be taken symbolically rather than literally.[34] He points out that the concept is linked to a specific group of values, namely those 'of the neighbour (in the Christian sense), the like, and finally, in the last analysis, bringing together the values of the neighbour and the like, the values of man, of the rights of the humanity of man: the brother is always a human brother. Let us not forget this overwhelming and thus terribly blinding fact: the brother of which one speaks is always a man. (...) The humanity of man is born as fraternity'.[35]

Derrida seems to refer to two major problems with the concept of fraternity. The first problem is its anthropocentrism: fraternity always refers to a *human* brother,

28   Lisa Guenther, 'A Critical Phenomenology of Solidarity and Resistance in the 2013 California Prison Hunger Strikes', in *Body/Self/Other: The Phenomenology of Social Encounters*, ed. Luna Dolezal and Danielle Petherbridge (Albany, NY: SUNY Press, 2017): 58.

29   Guenther, 'A Critical Phenomenology of Solidarity and Resistance', 58.

30   I develop this argument more fully in: Luigi Corrias, 'The Immediacy of Populism and the Unrest of Democracy: A Phenomenological Inquiry into the Public Sphere', in *Vox Populi: Populism as a Rhetorical and Democratic Challenge*, ed. I. van der Geest, H. Jansen and B. van Klink (Cheltenham: Edgar Elgar, 2020), 163-177.

31   Jean-Luc Nancy, 'Fraternity', *Baltic Worlds* 8 (2015): 100.

32   Nancy, 'Fraternity', 100.

33   Nancy, 'Fraternity', 99.

34   Jacques Derrida, *Rogues. Two Essays on Reason*, trans. Pascale-Anne Brault and Michael Naas (Stanford, California: Stanford University Press, 2005), 56 and 58.

35   Derrida, *Rogues*, 60.

thus excluding brotherhood between humans and non-human animals, or the environment. The second problem is its androcentrism: fraternity always refers to a human *brother*, thus excluding women and most members of the LHBTIQ+ community. The misogyny that can hide in claims to solidarity may even be found in groups that have been applauded for the involvement of women and their emancipatory potential, such as the Polish trade union *Solidarność*.[36]

Both problems highlighted by Derrida refer to a decentring or violently marginalizing of what does not live up to the norm of the 'human brother'. Derrida, consequently, draws the problematic political consequences of a plea to fraternity: it 'might follow at least the temptation of genealogical descent back to autochtony, to the nation, if not actually to nature, in any case, to birth, to *naissance'*.[37] As soon as 'birth' obtains a political meaning, Derrida seems to say, such as in autochthony, popular sovereignty, or the link between nationality and *ius soli*, this leads to several problems.[38]

'Solidarity against' must be rejected on both philosophical and political grounds. Philosophically, it wrongly assumes the availability and accessibility of the final ground or foundation of our community. Politically, 'solidarity against' uses this foundation as a means to exclude: 'solidarity against' may thus lead to violent forms of nationalism, xenophobia and other detrimental political consequences.[39] In the next section, I will present an alternative understanding of the relationship between solidarity and community.

4.   Solidarity, ethnocentrism, finitude

In distinction to 'solidarity against', one can speak of 'solidarity for'. Understood in this way, solidarity comes into play at the moment 'that you jointly take responsibility for somebody or something, that you create a community of mutuality, where you as a member of the group act with consideration and without self-interest for the benefit of this group or its individuals'. Note that also here there is a reference to community, to the first-person plural of a 'We'. Yet, contrary to the given community that acts as the firm ground for 'solidarity against', the community of 'solidarity for' is *in statu nascendi*. It has the risky, explosive and anarchic character reminiscent of revolutions. Hannah Arendt famously characterized revolutions as the only phenomena that confront us with political beginnings,[40] and with beginning or natality as a quintessential political faculty.[41] Anarchic should therefore also be understood literally as without an *arche*, without a (firm) ground. Hence, the risk involved, and the courage needed in those willing to take this risk. 'Solidar-

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36   Ewa Majewska, 'Between Invisible Labor and Political Participation: Women in the Solidarność Movement and in Today's Politics in Poland', *Baltic Worlds* 8 (2015): 94-97.

37   Derrida, *Rogues*, 61.

38   Derrida, *Rogues*, 61.

39   Neuger, 'Some Thoughts on Solidarity', 92.

40   Hannah Arendt, *On Revolution* (London: Penguin Books, 1963), 21.

41   Hannah Arendt, *The Human Condition*(Chicago: The University of Chicago Press, 1958), 9.

ity for' harbours the same risky endeavour of contesting the given order and opening up the possibility of a new community. In the remainder of this section, I will discuss two variations of 'solidarity for': one developed by Richard Rorty, the other by Jan Patočka. I will argue that Rorty's views, however interesting for as far as they go, need to be rejected. Jan Patočka's ideas on 'the solidarity of the shaken' are, I believe, a better starting point to make sense of our current predicament.

In conceptualizing solidarity, Rorty's starting point is the work of Wilfrid Sellars, who viewed moral obligations as 'We-intentions', delimiting them to a bounded whole, 'the communities with which we identify'.[42] Accordingly, Rorty explicitly rejects an understanding of solidarity that casts it as a universal norm extending to all human beings, a kind of 'human solidarity' resonating with 'our essential humanity'.[43] Instead, Rorty argues that it presupposes a community of 'one of us', pointing to 'something smaller and more local than the human race'.[44] In this way, solidarity is not understood as an ahistorical foundation but rather as something historical and contingent, to be produced within concrete communities.[45] Within such concrete communities, feelings of solidarity are the strongest.[46] Rorty argues that solidarity, as he understands it, is 'necessarily' connected to a group that shares a 'historically contingent final vocabulary'.[47] The latter can be understood as the ultimate grounds people may give to express their deepest beliefs and convictions.[48]

Rorty defends, in his own words, a type of ethnocentrism.[49] To understand what he means by this, it is important to know what he rejects. As a liberal speaking to a liberal audience, Rorty argues against the cultural relativism that makes us, liberal people, into so-called '"wet" liberals' who 'have become so open-minded that our brains have fallen out'.[50] In this sense, his view is rather an anti-anti-ethnocentrism pitted against the rejection of ethnocentrism on the basis of Enlightenment rhetoric.[51] It comes with the task for liberals to recognize that their ideals developed at a specific time and place but are not less worth fighting for, since they are the best bet for the peaceful coexistence of different cultures, Rorty submits.[52] So, Rorty's ethnocentrism is of a peculiar type where the 'we' refers to a 'we, liberals' always willing to extend the community.[53] He argues that 'we, liberals' are 'the peo-

42   Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 190.
43   Rorty, *Contingency, Irony, and Solidarity*, 189.
44   Rorty, *Contingency, Irony, and Solidarity*, 198.
45   Rorty, *Contingency, Irony, and Solidarity*, 194-195.
46   Rorty, *Contingency, Irony, and Solidarity*, 191.
47   Rorty, *Contingency, Irony, and Solidarity*, 192.
48   Rorty, *Contingency, Irony, and Solidarity*, 73.
49   Rorty, *Contingency, Irony, and Solidarity*, 198.
50   Richard Rorty, 'On Ethnocentrism: A Reply to Clifford Geertz', *Michigan Quarterly Review* 1 (1986): 526.
51   Rorty, 'On Ethnocentrism', 532.
52   Rorty, 'On Ethnocentrism', 532-533. For an incisive critique of Rorty's views on ethnocentrism and liberal solidarity in the context of a multicultural society, see Rudi Visker, *Truth and Singularity. Taking Foucault into Phenomenology* (Dordrecht: Kluwer Academic Publishers, 1999), 357-374.
53   Rorty, *Contingency, Irony, and Solidarity*, 198.

ple who have been brought up to distrust ethnocentrism' and the community of liberals is for that very reason 'dedicated to enlarging itself'.[54] In this process, the leading question ought to be: 'Are you suffering?'[55]

There are a number of problems with Rorty's ideas on solidarity. The first problem is that he seems to be contradicting himself. On the one hand, he explicitly rejects a notion of universal solidarity, either secular or religious. On the other hand, he concludes with a plea to extend the community of 'we, liberals' on the basis of an acknowledgement of suffering. In this way, he seems to point to a human affect or feeling that may be extended to all, making human suffering into a universal category.[56] Another problematic aspect is that Rorty proposes that solidarity be based on the distrust of ethnocentrism. Yet, it remains unclear how solidarity can be built on distrust, since, as we have seen above, it actually presupposes trust.[57]

Furthermore, by using the first-person plural of a 'We', Rorty is dependent on an act of representation.[58] However, this act always comes too early: since it is constitutive for community, it actually calls into being what it claims to represent. Representation is therefore a necessary but never a neutral act: in constituting the community it also draws its boundaries, thus excluding other potential understandings of the community. So, even a community of 'We, liberals' based on the susceptibility of another one's suffering will remain exclusive. As a consequence, Rorty's liberal ethnocentrism ultimately remains just that: a variety of ethnocentrism. His plea for a vulnerability to the suffering of others remains tied to the standard set by 'We, liberals'. Rorty seems unaware of the negative consequences of making liberalism the measure of all things. Indeed, he risks not really taking seriously the other, except for his or her suffering. This attitude is also present in the liberal idea of humanitarian aid. Hence, Rorty's understanding of solidarity, despite his explicit rejection of invoking a principle of humanity, takes the humanitarian 'shape of a caregiving operation'.[59] With Zijderveld, one may also speak of a 'victimological solidarity' that is based on charity and moral gestures. The problem is that this is 'in the end an unintended perversion of solidarity as it deprives its

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54   Rorty, *Contingency, Irony, and Solidarity*, 198.
55   Rorty, *Contingency, Irony, and Solidarity*, 198.
56   Wilde, 'The Concept of Solidarity: Emerging from the Theoretical Shadows?', 176.
57   Hagedorn, 'Introduction. Solidarity beyond Exclusion', 90.
58   I build here on the concept of representation as developed by Bert van Roermund and Hans Lindahl. See among many sources: Bert van Roermund, 'First-Person Plural Legislature: Political Reflexivity and Representation', *Philosophical Explorations. An International Journal for the Philosophy of Mind and Action* 6 (2003): 235-250 and Hans Lindahl, 'Intentionality, Representation, Recognition: Phenomenology and the Politics of A-Legality', in *Political Phenomenology: Experience, Ontology, Episteme*, ed. Thomas Bedorf and Steffen Herrmann (London: Routledge, 2020), 256-276. See also Luigi Corrias, 'Populism in a constitutional key: Constituent power, popular sovereignty and constitutional identity', *European Constitutional Law Review* 12 (2016): 6-26.
59   Alain Finkielkraut, *In the Name of Humanity: Reflections on the Twentieth Century*, trans. Judith Friedlander (New York: Columbia University Press, 2000), 91.

subjects of their most relevant human asset, namely the ability to establish one's life according to one's plans, initiatives and practical engagements'.[60]

Instead of the liberal idea of solidarity as it was introduced by Rorty, I will now turn to Jan Patočka's 'solidarity of the shaken' in order to find a better way to make sense of our current predicament. Interestingly, the 'solidarity of the shaken' unlocks the community-building promise of solidarity. As we have seen, the concept of solidarity refers, on the one hand, to a solid ground or constituted community. On the other hand, however, solidarity may be understood as a process of founding a community. Understood in this way, solidarity builds upon the sociality of humans, as it is studied in the social sciences. Yet, this inherent sociality of the human condition is not some kind of frozen essence. Rather, it points to the human capacity to build a community, even under difficult circumstances.[61] For this community building capacity of human beings, which is the constituent potential of solidarity, one may also use the notion of solidarization, referring to a process rather than to a fixed state.[62] In the vocabulary of constitutional theory, one may refer to the doctrine of constituent power to grasp this founding potential of solidarity.

Patočka bases himself on the front experiences of the soldiers of WW I:

> 'The front is not simply a flaming line where the accumulated energies of hostile masses are released and mutually neutralized. It is also the locus of a distinctive Life shared only by those who dare step right up to it and only for as long as they dare remain there. It seems to me that one could show the front is not simply a line of fire, the interface of people attacking each other, but it is also in some way the "crest of a wave" that bears the world of humans toward its new destiny.'[63]

Patočka analyzes the experience of the frontline as one that leads to the loss of all meaning.[64] War is both the highest point of technological civilization, its triumph over the mythical world, and, at the same time, the boundary of this civilization,

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60   Zijderveld, 'The Legal and Moral Dimensions of Solidarity', 326. One could even argue that the addressees of this perverted kind of solidarity are no longer taken seriously as subjects, since this conceptualization of solidarity seems to be based on an asymmetrical relationship between generous benefactors on the one hand and suffering victims on the other hand. For a similar argument regarding the downsides of the increasing role of victims in Dutch criminal trials, see Wouter Veraart, 'De vervaging van het rechtssubject; de opmars van het slachtoffer', *Aers Aequi* 54 (2005): 246-251.

61   Agustín Fuentes, 'A (Bio)anthropological View of the COVID-19 Era Midstream: Beyond the Infection', *Anthropology Now* 12 (2020): 28-29.

62   For this notion, albeit used in slightly different meaning and context, see: Bettina Ahrens, 'The Solidarisation of International Society: The EU in the Global Climate Change Regime', *GLOBUS Research Papers* 5/2017 – October 2017.

63   Jan Patočka, *Heretical Essays in the Philosophy of History*, trans. Erazim Kohák (Chicago and La Salle, Illinois: Open Court 1999), 125.

64   Hans Rainer Sepp, 'Die Grenze der Solidarität. Der Erste Weltkrieg und die Phänomenologie', *Tijdschrift voor Filosofie* 76 (2014): 784.

showing its utter meaninglessness.[65] The whole becomes meaningless, since a fundamental discontinuity has come to the surface, breaking the meaningful unity.[66] It is a social 'zero point' and exactly because of that it opens the door for solidarity, understood as this common experience of meaninglessness.[67] Solidarity is thus intertwined with a bodily experience of being affected that coincides with the disintegration of a meaningful world.[68]

As Patočka puts it:

> 'The solidarity of the shaken is built up in persecution and uncertainty: that is its front line, quiet, without fanfare or sensation even there where this ruling Force seeks to seize it. It does not fear being unpopular but seeks it out and calls out wordlessly. Humankind will not attain peace by devoting and surrendering itself to the criteria of everydayness and its promises.'[69]

The 'solidarity of the shaken', one of the central concepts of his *Heretical Essays in the History of Philosophy*, is a boundary experience.[70] When the weight of our finitude is felt and we experience a loss of meaning, a community is shaken in its entirety.[71] This experience is both one of sheer meaninglessness and the opening of new possibilities for meaning.[72] It is, in short, 'the common loss of a common ground'.[73] The 'solidarity of the shaken' is a solidarity after and as a response to this loss, acknowledging its wound as a shared experience.[74] The 'solidarity of the shaken' does not so much take us 'beyond' political values and economic order.[75] Rather, it situates us below. In this dimension, solidarity is born in the smallest actions that slowly but steadily build an atmosphere of trust. Understood in this way, solidarity may well be a key term to describe what has been happening in Central and Eastern Europe during the 1970s and 1980s.[76] The name of the famous Polish labour union – *Solidarność* – is a case in point. It signifies a movement from below: the building of civil society against an authoritarian state, the focus on micro-politics against macro-politics.[77] Whereas an authoritarian system thrives on fear, suspicion and distrust, the roots of solidarity lie in openness, trust and love.[78] Patočka's reflections are important to our predicament because they point to this

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65   Sepp, 'Die Grenze der Solidarität', 785-786.
66   Sepp, 'Die Grenze der Solidarität', 787.
67   Sepp, 'Die Grenze der Solidarität', 788-789.
68   Sepp, 'Die Grenze der Solidarität', 791.
69   Patočka, *Heretical Essays in the Philosophy of History*, 135.
70   Strandberg, 'The Solidarity of the Shaken', 102.
71   Strandberg, 'The Solidarity of the Shaken', 101-102.
72   Strandberg, 'The Solidarity of the Shaken', 102.
73   Strandberg, 'The Solidarity of the Shaken', 102.
74   Ludger Hagedorn, 'Final Remarks', *Baltic Worlds* 8 (2015): 104.
75   Contra: Hagedorn, 'Final Remarks', 105.
76   Jacek Kołtan, 'Between anti-politics and post-politics. A history of the idea of solidarity', in *Understanding Central Europe*, ed. Marcin Moskalewicz and Wojciech Przybylski (London: Routledge, 2018), 468-474.
77   Kołtan, 'Between anti-politics and post-politics', 468-474.
78   Kołtan, 'Between anti-politics and post-politics', 468-474.

constitutive potential of 'the shaken': once we have experienced an existential shock, this may also form the beginning of a new and responsible type of community.

Contrary to Rorty's extension of the community of 'We, liberals' to the whole of humanity by the recognition of the suffering of 'others', Patočka's ideas situate us in a common experience of meaninglessness, an experience that renders us humble and urges us to reimagine the meaning of community. The 'solidarity of the shaken' reminds us to live responsibly: 'responsible for ourselves, and for others, and for the world, because life is not about living in the sacrifice of others, nor of consuming finite resources.'[79] In the next section, I will briefly consider what this might mean for our condition under the current global pandemic, focussing on three interrelated themes: the relation between solidarity, liberty and the state; the interconnectedness of humans with each other and with non-human animals; and the relation between the local and the global.

5. Solidarity and COVID-19

What seems to transpire in the COVID-19 pandemic is a certain tension between liberty and solidarity. The measures taken to combat the coronavirus are often defended with an implicit or explicit reference to solidarity. The slogan of the Dutch government is a case in point: 'Only together we will get the coronavirus under control'.[80] Notice the explicit use of the first person-plural. Demonstrations against the measures are often voiced in terms of individual liberties. This tension is not so surprising when one realizes that the human rights of *individuals* were suspended for measures taken for the sake of the *collective* goal of public health. Yet, the relationship between solidarity and individual liberty during the pandemic is more complicated than that. As Steven Lukes comments:

> 'Under the dire circumstances of the covid crisis social solidarity takes the unanticipated, paradoxical form of "self-isolation" and what is called "social distancing," exhibiting fear of contact with friends, neighbors and strangers. The distancing is actually physical with a social goal: it is practiced in collective self-defense to restore the social solidarity that renders individuality possible, providing the social framework, social norms and social bonds that will enable people to live their normal individual lives, as before.'[81]

Acting in solidarity with others actually takes the form of an extreme act of individuality: self-isolation. Furthermore, by collectively pursuing self-isolation we may once again attain a society where individual liberty is possible. Solidarity and

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79 Daniel Brennan, 'Vaclav Havel, Jan Patočka: The powerless and the shaken', *Symposium: Canadian Journal of Continental Philosophy / Revue Canadienne de Philosophie Continentale* 18 (2014): 156.
80 'Alleen samen krijgen we corona onder controle.'
81 Steven Lukes, 'Social Solidarity', *IWMpost Magazine of the Institut für die Wissenschaften vom Menschen/Institute for Human Sciences*, no. 125, spring/summer (2020): 10.

liberty stand in a relationship to one another where we can only achieve the one by pursuing the other.

From the perspective of solidarity, the social nature of the human being is emphasized: the way in which the human environment is always and deeply interrelated politically, economically etc. It is, ironically, exactly from this interrelatedness that the rise of the COVID-19 pandemic should be understood.[82] Empirical studies have shown that while acts of solidarity increased at the beginning of the COVID-19-crisis, at a later point, interpersonal solidarity actually decreased.[83] At the same time, the crisis has exacerbated already existing inequalities within societies.[84] Hence, the pandemic has underlined the crucial need for institutionalized forms of solidarity as key to resilient societies.[85] Furthermore, in the buying and distributing of the vaccines, there has been little solidarity, with countries often blatantly pursuing their self-interest and greedily making the availability of vaccines into a symbol of political superiority.

Lawyers have pointed out that the measures intended to fight the pandemic may have been necessary, but were also severe infringements of fundamental rights of individuals, often taken for granted without the normal constitutional guarantees of a democracy under the rule of law. At the same time, states with a robust medical infrastructure in place have had more opportunities to save the lives of their citizens. What we witness is, however, not simply 'the return of the state'. More importantly, given the fact that those already more vulnerable have been hit the hardest by COVID-19, this pandemic raises the question what role the state ought to play in providing general healthcare. This question urges us to rethink the responsibility for care and health in times that the neoliberal philosophy all too eagerly has presented these issues chiefly as a private matter of individual citizens, with each person getting what they deserve according to their personal choices and efforts. This meritocratic ideal has surely gone bankrupt.

Since our global interconnectedness was one of the conditions for the spread of COVID-19, we need to rethink what this interconnectedness actually entails. Rethinking our relation to non-human animals and to ecosystems is an important step in this regard.[86] Just as is the case with climate change provoked by human action, the COVID-19 pandemic dissolves the strict separation between human and natural history – which is central to humanist thinking.[87] Climate change forces us, humans, to understand ourselves as a true geological force with a real impact on the planet and its living conditions.[88] This has led to emphasizing the interconnectedness between human and non-human animals and the climate. In short, this

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82   Fuentes, 'A (Bio)anthropological View of the COVID-19 Era Midstream', 25.
83   Prainsack, 'Solidarity in Times of Pandemics', 128.
84   Prainsack, 'Solidarity in Times of Pandemics', 129.
85   Prainsack, 'Solidarity in Times of Pandemics', 130.
86   Fuentes, 'A (Bio)anthropological View of the COVID-19 Era Midstream', 29.
87   Dipesh Chakrabarty, 'The Climate of History: Four Theses', *Critical Inquiry* 35 (2009): 201.
88   Chakrabarty, 'The Climate of History', 206-207.

has led to humans being seen as a species.[89] More accurately, humanity is a species always in relation to other species.[90] The pandemic teaches a similar lesson. Our interconnectedness with other species was (most probably) the origin of the pandemic. Also, the lockdowns that were announced around the globe had remarkable positive effects on the environment: from cleaner air in Delhi to the return of wildlife to the canals of Venice.[91]

At the level of international relations, the pandemic may urge us to rethink the relationship between the local and the global. While, as has been pointed out, the pandemic and the speed and intensity of the spread of the coronavirus was a result of globalization, the closing of borders halted huge parts of global interaction. People started questioning the benefits of outsourcing production to countries with low wages and little social protection, when it turned out that essential medical items were not fabricated within the EU. This very same EU, despite attempts to the contrary, did not manage to unite in a common action plan to fight the pandemic or buy vaccines. More sadly, while many countries in the Global North have convinced their populations to get vaccinated and are even considering whether a third dose is needed, a lot of countries in the Global South struggle to buy enough vaccines. In that sense, one can say that international solidarity is still found wanting.

The new appreciation of the local can, however, also be put to use for more positive purposes. As people may be more eager to defend their 'own land' than to take action against global warming, the rhetoric of the local may be a better strategy within debates on climate change.[92] This brings us back to Rorty's plea to start from our specific time and place, albeit without the arrogant presumption that bourgeois liberalism offers the best recipe to grasp, let alone escape, our current predicament. Rather, with Patočka, we may come to understand this moment as the time that responsibility needs to be taken and solidarity needs to be assumed for societies and environments, human and non-human animals, existing communities and communities to come.

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89   Chakrabarty, 'The Climate of History', 213.
90   Fuentes, 'A (Bio)anthropological View of the COVID-19 Era Midstream', 25.
91   John Brunton, '"Nature is taking back Venice": wildlife returns to tourist-free city', *The Guardian*, 20 March 2020, last accessed 30 August 2021, https://www.theguardian.com/environment/2020/mar/20/nature-is-taking-back-venice-wildlife-returns-to-tourist-free-city; Mark Kinver, 'Then and now: Pandemic clears the air', *BBC News*, 1 June 2021, accessed 30 August 2021, https://www.bbc.com/news/science-environment-57149747.
92   Bruno Latour, *Down to Earth: Politics in the New Climatic Regime*, trans. Catharine Porter (Cambridge and Medford, MA: Polity Press, 2018), 8.

Sick and Blamed

Criminal Law in the Chilean Response to COVID-19*

Rocío Lorca

Following Emile Durkheim, the criminal law is considered to express and strengthen social solidarity. By providing a space for the expression of collective outrage through punishment, the norms challenged by the crime are sustained and reinforced. At the same time, it is a well-known aspect of criminal justice that it configures groups of people who are both overpoliced and underprotected.[1] This configuration comes at the cost of criminal law's legitimacy,[2] and its capacity to serve solidarity.[3] The Chilean use of criminal law as part of the response to the COVID-19 pandemic provides an interesting example of the tension between these two characteristics of the criminal law and of the importance of social context for the legitimacy and value of punitive practices.

As in most parts of the world, the Chilean government called upon ideas of social solidarity to fight the pandemic of SARS-CoV-2. Citizens were required to stay at home, use their masks, and later to get vaccinated, not just as a means to protect themselves but also to protect others. In order to secure compliance, the government relied heavily on the criminal law. However, because lockdown restrictions and prosecutorial policy did not take into account social background and people's ability to comply with the law, prosecutions soon created groups of people who were being both over-exposed to disease and death, and over-exposed to control, blame and punishment. This made it very clear that the sacrifices to be made out of

1 Kimberlé Williams Crenshaw, 'From Private Violence to Mass Incarceration', *UCLA Law Review* 59 (2012): 1418; Dorothy E. Roberts, 'Abolition constitutionalism', *Harvard Law Review* 133 (2019): 1; Judith Butler, *The force of nonviolence: An ethico-political bind* (Brooklyn: Verso, 2021); Tracey L. Meares, 'Charting race and class differences in attitudes toward drug legalization and law enforcement: Lessons for federal criminal law', *Buff. Criminal Law Review* 1 (1997): 137; Monica Bell, 'Police Reform and the Dismantling of Legal Estrangement', *The Yale Law Journal* 126 (2017): 2054-2150.
2 See for example, Antony Duff, *Punishment, Communication and Community* (New York: Oxford University Press, 2001), 179-197; Antony Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial', *Ratio* 23, no.2 (2010): 123-140; Stephen. P. Garvey, 'Injustice, Authority, and the Criminal Law', in *The Punitive Imagination*, ed. Austin Sarat (Tuscaloosa: The University of Alabama Press, 2015), 42-81; Rocío Lorca, 'Punishing the Poor and the Limits of Legality', 2018 *Law, Culture and the Humanities* (online first; Tommie Shelby, 'Justice, deviance, and the dark ghetto', *Philosophy & Public Affairs* 35, no. 2 (2007): 126-160.
3 Joseph E. Kennedy, 'Monstrous offenders and the search for solidarity through modern punishment', *Hastings Law Journal* 51 (1999): 829; David Garland, *Punishment and modern society* (Chicago: University of Chicago Press, 1993), 75-80; Henrique Carvalho and Anastasia Chamberlen, 'Why punishment pleases: Punitive feelings in a world of hostile solidarity', *Punishment & Society* 20, no. 2 (2018): 217-234.

a sense of social solidarity were actually to be borne primarily by society's most vulnerable members who were least able to bear them.[4]

In this article, I will claim that the configuration of this overpoliced and underprotected group became so visibly unjust and inconsistent with solidarity that it severely undermined the legitimacy of criminal justice as an appropriate tool to deal with lockdown violations. This lack of legitimacy was expressed in a strong opposition from the judiciary to some of these prosecutions, but also in an unheard-of change of prosecutorial policy which included an instruction to consider the offender's social background in the exercise of prosecutorial discretion. While the impact of these policies is yet to be seen, they are meaningful in crystallizing the importance of social context for the legitimacy and usefulness of the criminal law.

Solidarity and the criminal law

In the Roman law of obligations, solidarity referred to contracts where each and all the debtors were individually liable to respond for the whole of what was owed (*in solidum*). The debtors formed a *solid* compact which acted as one entity, and this solidity provided assurance to the creditor who could demand the total sum of the obligation from any of the debtors.[5] This technical concept of solidarity, still in use in many jurisdictions,[6] gave way to both normative and descriptive ideals. In moral and political theory, for example, solidarity came to be understood as a principle that justifies duties of care, cooperation, and mutual assistance.[7] This conception has appeared in the criminal law to sustain institutions such as the crime of failure to rescue[8] and the justification of necessity.[9]

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4   See Mauro Basaure, Alfredo Joignant and Aldo Mascareño, 'Between Distancing and Interdependence: The Conflict of Solidarities in the COVID-19 Pandemic', *Sociological Perspectives* 64 (2021): 706-725. At page 715, the authors describe this issue as a new *social question* that has been triggered by the pandemic.

5   See Soazik Kerneis, 'Solidaridad contractual, solidaridad orgánica. Aproximación histórica y antropológica,' in *Espacios del conocimiento: sujeto, verdad, heterotopías. Actas VIII Escuela Chile-Francia* 2014, ed. L. Gallardo and I. Pincheira (Santiago de Chile: LOM, 2016), 73-84. Solidarity also appeared in Roman *penal* law, but often in the shape of cumulative liability, *i.e.*, all the offenders were liable for the whole of the damage and the victim could get the full amount from each and every one of them. Reinhard Zimmermann, *The Law of Obligations. Roman foundations of European contract law* (Cape Town, Wetton and Johannesburg: Juta & Co. Ltd, 1990), 1020.

6   In civil law countries it is still called 'solidarity' while in common law it is known as joint and several liability, see Lewis A. Kornhauser and Richard L. Revesz, 'Joint and several liability', in *Encyclopedia of Law and Economics* (Edward Elgar Publishing Limited, 1998).

7   According to Kerneis, solidarity as a principle of political action took the space of both the republican ideal of fraternity and Christian charity, see Kerneis, 'Solidaridad contractual, solidaridad orgánica', 82.

8   A crime which is more common in civil than common Law countries, see Andreas von Hirsch, 'Criminalizing failure to rescue: a matter of "solidarity" or altruism', in *Crime, punishment, and responsibility: The jurisprudence of Antony Duff*, ed. Rowan Cruft, Matthew H. Kramer and Mark R. Reiff (Oxford: Oxford University Press, 2011), 241-253; and Liam Murphy, 'Beneficence, Law, and Liberty: The Case of Required Rescue', *Georgetown Law Journal* 89 (2000): 605.

9   While the justification of necessity is sometimes based on the lesser evils principle, solidarity has also been an influential explanation for this doctrine, see: Javier Wilenmann, *La justificación de un delito en situaciones de necesidad* (Madrid: Marcial Pons, 2017).

Rocío Lorca

In social theory, mostly due to the influence of Emile Durkheim's work, the concept of solidarity has been used to explain what keeps societies integrated.[10] And according to the French sociologist, this is indeed the central function of the criminal law. In his account, punitive practices express, sustain, and strengthen mechanical solidarity, which consists of a shared morality and framework of meaning that integrates society.[11] Mechanical solidarity is not the only kind of solidarity that maintains social cohesion, but it is the one that pertains to punitive practices.[12]

In Durkheim's theory, the relationship between punishment and social solidarity is reflexive. Crimes are behaviours that violate norms considered sacred by the collective conscience of a society, triggering a shared outrage and 'passionate and vengeful' response.[13] Punishment constitutes the expression of this response which in turns sustains and reinforces the norm that has been challenged by the offender. As a result, criminal law serves solidarity by providing the opportunity for a cycle of outrage and punishment that strengthens a society's normative order.[14] This means that penal policy must speak to the real shared sentiments of a society.[15] If penal policy is out of sync with these sentiments, it risks losing its force and authority and may end up creating more disruption than cohesion.[16]

This reflexive nature of the relationship between punitive practices and social solidarity allows us to understand the importance of social context in criminal law's capacity to serve positive social functions.[17] For punishment to express a common sense of justice and sustain solidarity, there must already be a bond that holds us together and allows us to identify a guilty offender against whom we can direct our outrage.[18] When these conditions are not obtained, punitive practices are unlikely to contribute to social solidarity, at least not in the sense that Durkheim had in mind. For example, when repressive law falls heavily on the very group that is least protected by the social scheme, it becomes harder to find this guilty offender. In these cases, punitive practices may create a legal environment which is destructive

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10   Roger Cotterrell, *The Sociology of Law* (London: Butterworths, 1984), 79-82.
11   Emile Durkheim, *La División del Trabajo Social*, trans. Carlos G. Posada (México D.F: Colofón, 2007), 79-120.
12   In modern societies the paradigmatic form of solidarity according to Durkheim is *organic* solidarity, whose source is specialization and the division of labour that determines the interdependence among individuals (See Garland, *Punishment and Modern Society*, 24-25).
13   Durkheim, *La División del Trabajo Social*, 95-99.
14   See Garland, *Punishment and Modern Society*, 29-33; and Kennedy, 'Monstrous offenders and the search for solidarity through modern punishment', 844-846.
15   Garland, *Punishment and Modern Society*, 28; 75-77.
16   As David Garland has argued, 'punishment can only protect and regenerate what is already well constituted by other means – it is ancillary to moral education, not its central part', see his *Punishment and Modern Society*, 42.
17   This relationship that has become very relevant in normative theory, under the influence of Antony Duff's theory of punishment. In the terms proposed by Duff's communicative theory, the criminal law calls people to answer as members of a community of fellow citizens. If that community has failed to treat them as such, then it must repair that relationship in order to claim a proper standing to call them to answer in a court of justice (See Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial').
18   Kennedy, 'Monstrous offenders and the search for solidarity through modern punishment', 848.

rather than supportive of social cohesion. In the terms proposed by Monica Bell, we can call this 'legal estrangement', *i.e.*, a process through which penal institutions signal to some people that they are not full members of a society, entitled to equal concern and respect.[19]

Criminal law as a tool to contain the pandemic: the Chilean case

The Chilean response to COVID-19 offers a good example of the way in which social injustice can undermine the capacity of punishment to sustain and express social solidarity.

In terms of social context, we could very briefly describe Chile as an exceptionally unequal society, compared both to other Latin American countries, and to other members of the Organization for Economic Cooperation and Development (OCDE) to which Chile has belonged since 2010.[20] Inequality in Chile is also extremely segregated, with most of the economic and political power of the entire country concentrated in a few neighborhoods within the city of Santiago.[21]

The levels of both poverty and inequality have grown significantly since the beginning of the pandemic. Before the pandemic, 16.5% of families reported 'not having enough' to cover their needs; in July 2020 the percentage had grown to 48.8%.[22] The percentage of people living in poverty went from 8.6% in 2017 to 10.8% in 2020, and in Santiago, the most populous city of the country, it went up from 5.4% to 9.0%.[23] In terms of inequality, the difference in income between the 10% poorest and the 10% richest went from 39.1 in 2017 to 416.6 in 2020.[24]

These high levels of inequality have been manifested in numerous ways during the pandemic. Here I would like to focus on how they configured a group which on the one hand had greater levels of morbidity and mortality from COVID-19 and, on the other hand, was being more controlled, blamed and punished.

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19   Bell, 'Police Reform and the Dismantling of Legal Estrangement', 2083-2089.
20   See generally, PNUD, *Desiguales. Orígenes, cambios y desafíos de la brecha social en Chile* (Santiago de Chile: Programa de las Naciones Unidas para el Desarrollo, 2017). In the Region, for example, Santiago has one of the greatest gaps in life expectancy (8.9 years for men, 17.7 years for women), see Usama Bilal *et al*., 'Inequalities in life expectancy in six large Latin American cities from the SALURBAL study: an ecological analysis', *The lancet planetary health* 3, no. 12 (2019): e503-e510. Regarding the position of Chile in terms of its GINI coefficient, see the 'Gini index (World Bank estimate)', The World Bank, accessed 22 August 2021, https://datos.bancomundial.org/indicador/ SI.POV.GINI?locations=CL-OE&most_recent_value_desc=false.
21   Claudio Agostini *et al*., 'Segregación residencial de ingresos en el Gran Santiago, 1992-2002: una estimación robusta', *Eure (Santiago)*, 42, no. 127 (2016): 159-184; Manuel Antonio Garreton, 'City profile: Actually existing neoliberalism in Greater Santiago', *Cities* 65 (2017): 32-50.
22   'Encuesta social Covid-19', Observatorio Social, Ministerio del Desarrollo Social y la Familia, accessed 25 August 2021, http://observatorio.ministeriodesarrollosocial.gob.cl/vizdata/covid19/index.html.
23   'Encuesta Casen en Pandemia 2020', Ministerio de Desarrollo y Protección de la Familia, accessed 23 August 2021, http://observatorio.ministeriodesarrollosocial.gob.cl/encuesta-casen-en-pandemia-2020.
24   *Ibid*.

In early March 2020, the first cases of COVID-19 were detected, mostly in the richer neighborhoods of Chile, presumably imported by Chileans who were returning from summer vacations in Europe.[25] Within a few weeks, the outbreak was out of control, hitting most neighbourhoods of Santiago, rich and poor alike.[26] The Chilean authorities quickly ordered the suspension of all school classes and imposed a national curfew as well as a series of 'dynamic lockdowns'.[27] As soon as these sanitary policies were implemented, both the government and the media started focussing on individual behaviour, attempting to convey a sense of outrage against those who were not complying with the 'stay-at-home' regulations.[28]

For this purpose, the Chilean National Prosecutor (*Fiscal Nacional*) instructed prosecutors to use Article 318 of the Penal Code against non-compliant people.[29] This statute criminalizes behaviour that endangers public health, and while not long before this the *Fiscal Nacional* himself had interpreted the norm as requiring the creation of actual danger, he now argued that the mere violation of lockdown restrictions was enough to constitute commission of the crime.[30] This broad punitive strategy was assisted by the legislature, which passed a law that enhanced the punitive enforcement of sanitary restrictions.[31] Prosecutions skyrocketed. Between January and March 2020 only 51 cases related to Article 318 were brought to Court; in the period between April and June, the number grew to 5,932, and between July and September it reached 68,154 cases.[32] The criminal law became, in this way, a central part of the Chilean strategy against COVID-19.

In the beginning this might have been an effective way of sustaining sanitary rules as well as of shifting responsibility towards individuals,[33] but it soon became evi-

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25   See the first epidemiological report from the Ministry of health (30 March 2020): 'Informe epidemiológico. Enfermedad por Covid-19 Chile', Departamento de Epidemiología del Ministerio de Salud, accessed 23 August 2021, https://www.minsal.cl/wp-content/uploads/2020/03/INFORME_EPI_COVID19_20200330.pdf.

26   See the epidemiological report from the Ministry of Health (14 April 2020): 'Informe epidemiológico. Enfermedad por SARS-CoV-2 (COVID-19) Chile 13-04-2020', Departamento de Epidemiología del Ministerio de Salud, accessed 24 August 2021, https://www.minsal.cl/wp-content/uploads/2020/04/Informe-EPI-13042020.pdf.

27   See Resolución 860 Exenta, Ministerio de Salud, 16 March 2020. Dynamic lockdowns have been to date the main policy to restrict mobility in Chile. They consist of different degrees of restrictions imposed in each municipality on a weekly basis. The most intense level is *quarantine* which entails an absolute prohibition on circulating in public space; this was first declared on 25 March for seven neighborhoods of the City of Santiago, and by 15 May it was imposed all over the metropolitan area.

28   See for example, Press Room, 'Subsecretaria de Salud Pública anuncia drásticas sanciones por incumplimiento de medidas para contener Covid-19', *Department of Health of Chile*, 6 May 2020.

29   It is important to note that the Chilean Office of the Prosecutor is an extremely hierarchical institution, where prosecutors must obey the *Fiscal Nacional*'s instructions when they exercise their own prosecutorial discretion.

30   See Instrucción General, Fiscal Nacional, 57-2020 and also see note 48.

31   Ley 21.240 of 20 June 2020.

32   Data obtained directly from the statistical webpage of the Judicial Power, see: 'Poder Judicial en números', Poder Judicial, accessed 15 August 2021, www.numeros.pjud.cl.

33   According to Ulrich Beck, institutions often shy away from responsibility and shift it to the individual. See Ulrich Beck, *Risk society: Towards a new modernity* (Sage, 1992,) 48-49.

dent that lack of compliance was not necessarily expressive of indifference, but was largely determined by economic need.[34] Mobility studies showed that after the introduction of the lockdown regulations, richer neighbourhoods were able to reduce their mobility by more than 50%, while the poorest ones managed only a 30% reduction.[35] As usual, the impact of social and economic conditions was not taken into consideration by the police or prosecutors.[36] An example of this can be found in the celebratory way in which the government and the media presented a series of collective detentions of 'street vendors'.[37] All this meant that by the end of May 2020, the less privileged members of our society were not only having a harder time protecting themselves by staying at home, but were also the ones receiving more punishment.[38]

This created awareness of the fact that individuals were not always being rightly blamed for failing to comply with stay-at-home regulations, and that responsibility also fell on the government for not providing conditions that made lockdowns feasible.[39] Quickly, the impact of inequality became more pronounced as we learned that inequality and poverty not only imposed a greater vulnerability to prosecutions and punishment, but also entailed a greater degree of COVID-19 morbidity and a much higher rate of mortality.[40]

34 Monica Gerber *et al*., 'Taking Care of Each Other: How Can We Increase Compliance with Personal Protective Measures During the COVID-19 Pandemic in Chile?', *Political Psychology* 42, no. 5 (2021): 863-880.

35 'El impacto de las dos primeras semanas de cuarentena masiva en la Región Metropolitana', Instituto de Sistemas Complejos de Ingeniería COVID-19, accessed 25 August 2021, https://isci.cl/wp-content/uploads/2020/06/Reporte-3-ISCI-movilidad-11-de-junio.pdf. Other studies have determined the difference is 61% against 40%. See Ayesha S. Mahmud *et al*., 'Socioeconomic status determines COVID-19 incidence and related mortality in Santiago, Chile', *Science* 372(6545) (2021).

36 To the contrary, both police and prosecutors clearly displayed their regular bias against the poor. See Duce, Mauricio, and Ricardo Manuel Lillo, 'Controles de identidad realizados por Carabineros: Una aproximación empírica y evaluativa sobre su uso en Chile', *Revista de Estudios de la Justicia* 33 (2020): 167-203; and Fundación Paz Ciudadana and Fundación San Carlos de Maipo, 'Estudio sobre los niveles de exclusión social en persona privadas de libertad'(Santiago de Chile, 2016).

37 Ignacio Guerra, 'Operativos policiales dejaron más de 100 detenidos tras jornada de intensas fiscalizaciones en la Región Metropolitana', *Emol*, 25 June, 2020, Web Edition.

38 After the first couple of months of the pandemic, Puente Alto, which is one of the poorest neighbourhoods of Santiago, had the highest rate of prosecutions in the capital, almost double the rates of richer areas such as Vitacura and Las Condes. See Sebastián Labrín and Fredi Velásquez, 'Quiénes, cuándo y dónde rompen la cuarentena', *La Tercera*, 20 June 2020, Coronavirus section, online edition.

39 There were big protests in some areas of Santiago to denounce people's inability to comply with lockdown due to hunger. See, for example, Drafting Staff, 'Coronavirus en Chile: las imágenes de las protestas en Santiago por la difícil situación económica creada en Chile por la pandemia de covid-19', *BBC News Mundo*, 19 May 2020, online edition. Mayors also protested against the government for not providing conditions for compliance, see, for example, Editorial Staff, 'Alcaldes reaccionan al anuncio de cuarentena total en Santiago', *ADN Radio*, 13 May 2020, online edition.

40 Mahmud, 'Socioeconomic status determines COVID-19 incidence and related mortality in Santiago, Chile. Before the publication of this article, these estimations were already part of public knowledge due to the active vigilance over the pandemic that Chilean scientists had and shared through social media. See, for example, one of the reports made periodically by Think Tank Espacio Público: Camila Arroyo *et al*., 'Informe sobre la evolución de la epidemia de covid-19 en Chile', *Espacio Publico* (3 July 2020): https://www.espaciopublico.cl/wp-content/uploads/2021/06/CoVid_Chile_23072020_vf.pdf.

The judiciary, however, objected to this broad prosecutorial policy, which was rapidly configuring a group of citizens estranged from concern and protection. The first cases that proved unsuccessful in court were proceedings against homeless people, where the judiciary basically argued that curfew and stay-at-home regulations could not apply to those who did not have a home. In these cases, the Supreme Court even declared that by being detained their rights had been violated, because instead of prosecuting them the police should have offered them protection.[41]

Regarding non-homeless offenders, the Public Defender's Office made a strong case showing that controls and prosecutions were too clearly biased against people who were not engaging in risky behaviour, but merely violating regulations in order to sustain themselves and their families.[42] Scholars denounced the inappropriateness of a punitive strategy that focused on individuals who violated curfew or lockdown restrictions instead of on public officers or employers who failed to fulfill their duties, although the latter had much greater impact on public health.[43] This view was later endorsed by the Supreme Court, who declared that only people who were engaging in behaviour that was effectively risky were in violation of Article 318 of the Penal Code.[44] And while the Supreme Court did not make an explicit declaration on the question of social and economic background, it did make it harder to prosecute those who were violating lockdown restrictions out of economic need.[45] Even the Constitutional Court followed the trend by declaring Article 318 unconstitutional.[46]

Throughout the first year of the Pandemic, the *Fiscal Nacional* had to react to both growing social awareness of the impact of inequality and the resistance of the judi-

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41 See the decisión of the *Corte Suprema* in Case 16913-2021 Amparo, 4 March 2021. See *Corte de Apelaciones de San Miguel* in Case 546-2020 Penal, 5 March 2021; *Corte de Apelaciones de San Miguel* in Case 353-2020 Amparo, 31 July 2021. Protection instead of detention was indeed the instructed policy ordered by the Ministry of Social Development see *Protocolo para el Resguardo de las Personas en Situación de Calle en Estado de Excepción Constitucional de Catástrofe*, 20 March 2020, Ministerio Desarrollo Social y Familia.

42 Santiago's chief Public Defender, Víctor Providel: 'Detenciones y formalizaciones por cuarentena no consideran urgencias de personas vulnerables', *Defensoría Penal Pública*, accessed 25 August 2021, http://www.dpp.cl/sala_prensa/noticias_detalle/10427/detenciones-y-formalizaciones-por-cuarentena-no-consideran-urgencias-de-personas-vulnerables.

43 Fernando Londoño, '¿Responsabilidad penal para los infractores de la cuarentena? Revisión crítica de la Ley Nº 21.240: más micro que macro', *Revista de Ciencias Penales* 57, no. 1 (2020): 428.

44 The instruction established that the mere violation of curfew was not enough for criminal prosecution under Article 318, see *Oficio FRM N°2378/2021*, 7 May 2021, and *Oficio FRV N°196/2021*, 6 May 2021. See also the press release in Víctor Rivera, 'Efectos del fallo de la Suprema: Carabineros cambia criterios para detenciones durante toque de queda', *La Tercera*, 11 May 2020, section La Tercera PM).

45 See the decisions by the Chilean *Corte Suprema* in Cases 125436-2020, 25 March 2021; 149239-2020, 20 April 2021; and 131966-2020, 23 April 2021.

46 On its first declaration related to Article 318, the *Tribunal Constitucional* declared Article 318 unconstitutional only in the sense that the sanction of prison was considered a disproportionate punishment (Case 8950-2020, 5 January 2021). Later, in April, the tribunal changed its view and held that it was completely unconstitutional as it did not satisfy the requirements of the principle of legality (Tribunal Constitucional, Case 10296-2021, 1 July 2021). It is important to note that these declarations of unconstitutionality do not have general effects but only apply to the specific case that is brought to the Court.

ciary by changing its prosecutorial policies several times.[47] A salient example of this was the decision of the *Fiscal Nacional* instructing prosecutors to consider social and economic context in exercising their prosecutorial discretion.[48] By 2021, the *Fiscal Nacional*'s prosecutorial policy was officially re-oriented from a very wide conception of what constituted blameworthy behaviour (which included mere violation of lockdown by individuals) to a restricted focus on what has been called 'top-down' risky behaviour, such as that of employers who do not follow sanitary regulations or people who hold illegal super-spreader events.[49]

Some conclusions

The criminal law can only serve what Durkheim called mechanical solidarity if there is a real sense of outrage against individual behaviour and a social context that sustains that outrage. When lawbreakers appear to be forced to act against the social order, partly because the social order shows no concern for them, it is hard to find a sufficient basis for the mechanisms of solidarity through punishment. While a focus on individual guilt or blame can at times effectively disguise the importance of social context, in the case of the Chilean response to COVID-19, this was prevented by a broad prosecutorial policy against lockdown violations that amplified the impacts of underlying conditions of inequality.[50] This policy created a group of people who were being very clearly underprotected and overpoliced. The impact of inequalities was so great, and the configuration of this group so visible, that calling upon ideals of social solidarity to justify the criminal enforcement of sanitary restrictions became almost insulting. This forced the *Fiscal Nacional* to develop a 'socially sensitive' prosecutorial strategy, something that we have not often seen despite Chile's inequalities. The changes in policy by the *Fiscal Nacional* suggest that the legitimacy of the criminal law was being challenged to a point that made it hard to sustain, and that perhaps, at times, penal institutions can be made accountable for acting in ways that create estrangement rather than cohesion.

There is one last aspect of this case that merits being noted here. If the *Fiscal Nacional* was forced by social awareness and evidence to consider social background in the case of Article 318, this could have an impact in other areas of the criminal

47 The *Fiscal Nacional* delivered a series of instructions to Chilean prosecutors, constantly altering the approach that they were to take against lockdown violators. These were all done through email. And while they are public documents, they have not yet been duly published. To the best of my knowledge, the first instructions came on 19 March 2020, when the *Fiscal Nacional* went against his own previous understanding of Article 318. See above note 31. After this, there are instructions dated 26 March, 20 June and 31 August 2020. Then in 2021, changes in prosecutorial policy continued to take place in reaction to Court's decisions, in instructions delivered on 30 March and 4 May.

48 On 20 June 2020, the *Fiscal Nacional* delivered an instruction to all Chilean prosecutors through email, ordering them not to prosecute lockdown violations done in order to get basic resources to survive. This instruction has been publicly acknowledged by the *Fiscal Nacional* on his *Cuenta Pública* 2020-2021, see 'Cuenta Pública 2021. Fiscal Nacional, Jorge Abbott', Ministerio Público, accessed 25 August 2021, http://www.fiscaliadechile.cl/Fiscalia/quienes/discurso_2021.pdf.

49 Fiscal Nacional, 'Cuenta Pública 2021. Fiscal Nacional, Jorge Abbott'.

50 Fundación Paz Ciudadana and Fundación San Carlos de Maipo, 'Estudio sobre los niveles de exclusión social en persona privadas de libertad'.

law, such as crimes against property committed by extremely poor offenders. Perhaps the pandemic has altered the way in which we perceive our current social scheme such that the inequalities that it made so visible, may continue to demand policy changes into the future.

Welcoming the Other in a Pandemic Society

Thomas Jacobus de Jong & Carina van de Wetering

1. Introduction

'Am I my brother's keeper?' This biblical question from the Old Testament has gained more resonance since the emergence of the coronavirus disease COVID-19). Am I responsible for the well-being of the other? The fight against the coronavirus demands from me that I not merely follow the rules for my own sake, but also for the sake of the other. Examples that immediately come to mind are social distancing, wearing a face mask, working from home, regular hand washing and testing for an infection. To abide by these rules is a show of support in the spirit of solidarity, sometimes described as 'corona solidarity'.[1] This notion signals the ethos of responsibility we should have for each other, prompted by the coronavirus. However, it is not entirely clear what solidarity means in practice. Does it show solidarity to deny friends or family the opportunity to visit their elderly loved ones in nursing homes? Moreover, what about the allocation of intensive care beds on the basis of age as the main criterion? Or the closure of schools to keep children and even parents at home to slow down the spread of the disease? The longer the coronavirus is present, the more people are questioning the necessity of corona measures and the way they are enforced.

It is through discourse that these questions arise and are discussed. The notion of discourse refers to a system of meanings through which we engage with people and things. What counts as solidarity is understood in terms of shifting meanings or meaningful practices. With the projection of COVID-19 as a crisis of pandemic proportions, a so-called crisis discourse has emerged in which politicians generate new meanings to get a sense of stability and normalization within society.[2] This coronavirus crisis discourse (hereinafter referred to as coronavirus discourse) can be conceived as an attempt to arrive at a new shared understanding of a world that has fundamentally changed due to the virus. In this regard many governments have called upon modern science and technology to make sense of the virus in order to establish and help legitimize their corona policies. Consequently, scientists have become faces for corona policy in several countries where there are substantive research efforts, for example, dr. Anthony Fauci in the United States and dr. Anders Tegnell in Sweden. The Dutch government receives its advice from a body of specialists and experts (Outbreak Management Team) chaired by dr. Jaap van Dissel.

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1   Compare *Kamerstukken II* 2019/20, 29689, nr. 1073, 3; Rosaliene Israël and Erik Olsman, 'Laat coronasolidariteit een blijvertje zijn', *Het Parool*, 25 May 2021, Opinion section; Björn Bremer and Philip Genschel, 'Corona Solidarity', *EUIdeas*, 7 May 2020, https://euideas.eui.eu/2020/05/07/corona-solidarity/.
2   In some countries the virus has not been treated as a crisis, including Brazil under the Bolsonaro administration and the United States under the Trump administration.

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For the government, the primary objective is to optimize its performance: the most efficient equation of government measures and obtained results. This is accompanied by a calculative mode of thinking, in which the encounter with the other, the social relationship, is quantified or made programmable. All kinds of factors are taken into account to increase the output (the control of the virus) and cutback of the input (the restrictions upon the freedom of citizens). What should be problematized, however, is that even the principle of solidarity is subjected to calculative demands of the corona policies within the discourse; the policies dictate the parameters through which the responsibility for the other gains its form. To be solidary with one another is not only bound by the rules, but is also often equated with rule abidance.

In this contribution, we aim to critically reflect upon this conception of solidarity by asking what the meaning and scope of solidarity is in a society at the mercy of a pandemic. We question the formulation of solidarity within the coronavirus discourse by drawing upon insights of Levinas and Derrida. Here solidarity is characterized as the primary responsibility we bear for the other, to which the other as 'wholly other' invites me. This is not a collective responsibility that I choose to accept or dismiss; instead, it is a unique responsibility which inescapably is entrusted to me. The appeal of the other, that manifests itself in the presence of the face (*visage*), cannot be addressed in a general sense. It desires a personal response which cannot be captured by a single rule or calculation; rather, it is rooted in ethical openness for what the concrete situations asks of me. From this perspective, solidarity compels us to critically reflect on the corona policy.

In what follows, we will first give an outline of what a discourse entails and the disruption that followed the outbreak of the virus. This provides us with a basic knowledge of the way discourse shapes our understanding of the world and how the coronavirus constituted a new arrangement of meanings. It will also equip us with the necessary tools to scrutinize the principle of solidarity. Specific attention will therefore go out to the encounter with the other, the social relation, since this is the primary domain of solidarity. In addition, we aim to focus on the legitimation of the corona policy and the way in which the criterion of performativity (or efficiency) relates to solidarity. Against this backdrop, we like to present a distinctive approach of responsibility for the other as formulated by the works of Emmanuel Levinas. This responsibility resists the calculative tendency of the coronavirus discourse to reduce the other to an object or theme under the heading of solidarity. Although Derrida sides with Levinas to a considerable degree, we argue that he places solidarity in the distance between the meanings of the coronavirus discourse (calculability) and the face of the other that commands me (beyond calculation). In the final section we will explore this further with regard to the notion of undecidability.

2.   Discourse and identities

The concept of discourse relates to one of the key insights of Martin Heidegger that our understanding of the world is founded on and guided by a fore-understanding, that is derived from one's concrete existential situation.[3] This fore-understanding is not objective or thematic in nature, but signifies a preconceptual understanding that stems from a practical dealing with people and things. We are thrown into the world; in other words, situated in meaningful discourses and practices, which is not of our choosing but wherein we always find ourselves.

Building on Heidegger, the very notion of discourse has given rise to various definitions, that exceed its common meaning as conversation or debate. Specifically, thinkers associated with poststructuralism, including Jacques Derrida, Michel Foucault, Ernesto Laclau and Chantal Mouffe have put forward the most comprehensive discussion of discourses. Taking these authors as a starting point, David Howarth defines discourses as 'historically specific systems of meanings that form the identities of subjects and objects'.[4] These specific systems can be related to political, economic, scientific, legal, religious or other realms. Identities are about the various manifestations or manifold positions, which people or things, such as an elderly person, a nurse or infectious disease can have.[5] It concerns all possible meanings pertaining to something or someone as part of a particular discourse. For instance, an 'elderly person' is an identity that can mean many things, such as vulnerable, not economically viable, but also discursive meanings such as wise or holy can be articulated, or linked to the 'elderly person'. This, in turn, helps to shape other identities. Hence, discourses are 'system of meanings' which highlights that identities are dependent on each other; if an *elderly* person is articulated as 'not economically viable', a *young* person is most likely to be presented as a near opposite. Discourses display a 'relational' constellation of meanings of young/old, strong/weak since 'meaning is conferred by particular systems of significant differences'.[6]

Through our historically located horizon of socially shared meanings, we view our world and engage with people and things. We approach people and things through discourses and meaningful practices by which their identities are configurated, that is, socially related to each other.[7] This does not mean that relations between identities cannot change: identities are not fully solidified and at times even contested. For example, the coronavirus was initially associated with the flu, a lower death rate, and therefore it was associated with a lack of urgency to receive special-

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3   See Martin Heidegger, *Zijn en Tijd*, trans. Mark Wildschut (Nijmegen: Sun, 2013), 196-202.
4   David Howarth, *Discourse* (Buckingham: Open University Press, 2000), 9, 11.
5   Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics* (London: Verso, 2003), 115. David Howarth, *Discourse*, 108.
6   Howarth, *Discourse*, 101. Other binaries are, for instance, black/white, male/female, developed/developing, depending on the discourse.
7   In the post-structuralist literature the notion of 'social relation' can equally pertain to both people and things. In this contribution we will only speak of the social relation as the encounter with another human being.

ist emergency care. The identities are always in flux since subjects and objects are in need of repeated fixation of meanings. As Paul Ricoeur writes as part of a hermeneutic account of discourse, discourse has a 'fleeting existence' which 'appears and disappears'. He adds: 'Discourse, we shall say, is realized as event but understood as meaning.'[8] Similarly, Ernesto Laclau and Chantal Mouffe find that identities can never find completeness: the articulated meanings only fill up momentarily through their partial fixture in the discourse.[9] Nevertheless, some understandings can become more salient in a particular context than others. A hospital is *normally* a location where you always have access to specialist help, at least in most wealthier countries. Also, your home is not often regarded as your workspace since you regularly have to 'go to work'. The subjects and objects are thus 'assumed' to mean certain things over others; the elderly person is usually identified as 'not economically viable' rather than 'holy'. These everyday assumptions about what subjects and objects mean to us are taken for granted and accepted as normal in our daily lives.

In pre-corona times, our relationship with the other is thus deemed familiar to us; the other is a friend, grandfather, neighbor, colleague, physician, but can also be a thief or a drunk and so on. All these relations are discursive in that the other can be identified through the partial fixation of particular meanings. The friend or neighbor is identified by its familiar qualities and roles which pertain to particular assumptions. In the everydayness of our conduct toward people and things, the other remains implicit. The other is taken for granted within our habitual activities as our daily conduct is submerged in meaningful discourses and practices.[10] When I walk outside in the Netherlands during the day, I assume that I will not be assaulted by the runner that passes me by and when I head to the supermarket to buy groceries, I am not reflectively aware of all the assumptions that guide my actions and dealings with other customers or employees. We know our way around in the world without always being thematically aware of our surroundings. With reference to Heidegger, these assumptions are enabled through prior understanding set in a historical background and not as a reflective process of the human mind.[11]

3. The coronavirus as rupture of the discourse

The coronavirus presents a rupture through which our reality and accompanying assumptions are disrupted. The confrontation with the (threatening) virus changes our relationship with people and things as it constitutes a new arrangement. The partly stable and secure articulations of meanings and identities are unsettled. What is disrupted is our *experience* that cannot find meaning in the pre-existing

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8   Paul Ricoeur, 'Metaphor and the Central Problem of Hermeneutics', in *Hermeneutics: Writings and Lectures, Volume 2*, trans. David Pellauer (Cambridge: Polity Press, 2013), 48.
9   Laclau and Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics*, 111.
10   Laclau and Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics*, 109.
11   See Jason Glynos and David Howarth, *Logics of Critical Explanation in Social and Political Theory* (Routledge: Abingdon, 2007), 158.

discourse.[12] This is also described as dislocation, which is the case when a particular event does not match the assumptions; it cannot be represented by the meanings, and therefore, not be integrated within the former horizon of meanings.[13] This rupture helps to realize a coronavirus discourse through which new identities are formulated.[14] To put it more specifically, our friends become a potential danger and our homes turn into workspaces. Subjects including politicians and the media can formulate a new discourse: the virus can be made meaningful through their discursive utterances. In other words, 'if the structure is dislocated und thus incomplete', there is an intervention by a subject 'to re-suture it'.[15] In that moment, the politician or media representative is not determined by partly stable and secure meanings conferred to identities of the previous discourse. The crisis of identities demands a decision: it compels politicians and the media to identify anew and to act in an attempt to bring closure.[16] This process of closure is a response to the rupture of meanings which never finds completion. It also designates the problematic of enclosing people and things in meanings, as will be discussed in the following chapters.

With regard to the disrupting effects of the coronavirus, parallels can be drawn with 9/11. Similar to the coronavirus crisis, scholars who study 9/11 argue that Americans were confronted with an event which challenged their assumptions more directly than other times.[17] Americans experienced a situation of greater fragmentation of their partly stable assumptions through which they questioned their own identities. Their 'mode of being is experienced and disrupted'.[18] Americans were thus acutely aware of the planes hitting the Twin Towers, but they were not able to give meaning to it as the event was not assumed to happen within their horizon of meanings. The attack by the second plane suggested foul play, but why would the land of the free be under attack and who was this enemy who seemingly

12 David Howarth and Yannis Stavrakakis, 'Introducing Discourse Theory and Political Analysis', in *Discourse Theory and Political Analysis*, ed. David Howarth *et al*. (Manchester: Manchester University Press, 2000), 14.

13 Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and* Žižek (Oxford: Blackwell, 1999), 148. Howarth and Stavrakakis argue that there are two ways to view dislocation; as the ever-present instability of identities that are always in flux, or an experience which cannot be represented through prior discursive meanings. Torfing refers here to the latter. See David Howarth and Yannis Stavrakakis, 'Introducing Discourse Theory and Political Analysis', 14.

14 See a discussion about the realization of a crisis discourse: Laura Henderson, 'Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse', *Netherlands Journal of Legal Philosophy* 47, no. 1 (2018): 56.

15 Aletta Norval, 'Hegemony after Deconstruction: The Consequences of Undecidability', *Journal of Political Ideologies* 9, no. 2 (2004): 142.

16 Ernesto Laclau, *New Reflections on the Revolution of Our Time* (London: Verso, 1990), 60. See also David Howarth, *Discourse*, 109 for a discussion about how a subject can possibly take decisions by gaining room for their own political subjectivity rather than always being constrained by structures of meanings.

17 See for instance Jack Holland, 'From September 11th, 2001 to 9-11: From Void to Crisis', *International Political Sociology* 3, no. 3 (2009): 275. Richard Jackson, 'Security, Democracy, and the Rhetoric of Counter-Terrorism', *Democracy and Security* 1, no. 2 (2005): 150. Dirk Nabers, 'Filling the Void of Meaning: Identity Construction in U.S. Foreign Policy after September 11, 2001', *Foreign Policy Analysis* 5, no. 2 (2009): 192.

18 Glynos and Howarth, *Logics of Critical Explanation in Social and Political Theory*, 110.

manifested itself out of nowhere? Some authors argue that there was initially a 'void of meaning', a discursive vacuum where the event was incomprehensible to the American public.[19] The existing US foreign policy discourse failed to incorporate the meanings of the 9/11 event, which was eventually filled by the Bush administration and the media.[20] This rupture helped to articulate a new trajectory, the War on Terror discourse, which resonated with other already recurrent discursive meanings for US foreign policy. As Jack Holland writes, 'In and of itself, 9/11 was not a crisis' but it demanded a resolution where it was 'retrospectively constituted as a crisis'.[21]

In a similar way, the outbreak of the coronavirus in the Netherlands serves as a concrete example of a case in which the existing discourse failed to incorporate the new meanings that were brought into being due to the coronavirus. The experience for many citizens was an unfamiliar one. It was initially made meaningful by assuming, for instance, in the very early stages that the coronavirus was the equivalent to a fever and therefore one should remain level-headed about it, or that it would mainly remain a problem for China and unlikely to set foot in our backyard. Over the weeks, the virus was presented by the Outbreak Management Team as manageable for Dutch health services. Dutch society would not be vulnerable to the disease, even with cases of corona in other European countries at the rise.[22] With the first patient in the Netherlands being diagnosed with the coronavirus on 27 February 2020, the disease continued to be treated as an illness that could remain local by containing it through simple hygienic measures and a few extra measures in the southern provinces where Carnival celebrations had been allowed to continue. The articulation of the disease as a real danger for fellow Dutch citizens did not fit the assumptions and was therefore not considered within the horizon of meanings. This event appeared to be unfathomable and was therefore not constituted as a crisis.

However, the coronavirus continued to spread; a few of the first patients lost their lives and several hundreds were committed to the hospital in the first week of March.[23] The virus constituted a rupture of assumptions held by the Dutch public whereafter partly stable assumptions shifted. There was a 'void of meaning' as in the case of 9/11, which demanded a resolution of how to understand and approach the virus. While Prime Minister Mark Rutte initially still called upon his fellow citizens to merely stop the practice of shaking hands, this was soon followed by an

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19   Nabers, 'Filling the Void of Meaning: Identity Construction in U.S. Foreign Policy after September 11, 2001', 193. Holland, 'From September 11th, 2001 to 9-11: From Void to Crisis', 277.
20   Initially, individual Americans therefore drew upon meanings from, for instance, popular culture, to comprehend and make sense of the event. See Holland, 'From September 11th, 2001 to 9-11: From Void to Crisis', 277-279.
21   Holland, 'From September 11th, 2001 to 9-11: From Void to Crisis', 283.
22   Frank Hendrickx and Huib Modderkolk, 'Februari: de verloren maand in de strijd tegen het coronavirus', *de Volkskrant*, 11 April 2020, https://www.volkskrant.nl/nieuws-achtergrond/februari-de-verloren-maand-in-de-strijd-tegen-het-coronavirus~b09e4c7a8/.
23   Derk Stokmans and Mark Lievisse Adriaanse, 'Hoe Nederland de controle verloor: de corona-uitbraak van dag tot dag', *NRC Handelsblad*, 19 June 2020, https://www.nrc.nl/nieuws/2020/06/19/hoe-nederland-reageerde-op-het-nieuwe-virus-uit-china-van-niks-aan-de-hand-tot-blinde-paniek-a4003075.

'intelligent' lockdown, an unprecedented trajectory for the country, even though the policy restrictions were relatively light.[24] Indeed, Prime Minister Rutte mentioned in the announcement of the 'intelligent lockdown' on 16 March: 'Many people will recognize the feeling that we have been in a rollercoaster in these last few weeks which seems to be accelerating in speed. You ask yourself: Is this really happening?'[25]

The coronavirus discourse enabled a new relationship with the other; the former relationship with the other does no longer hold. With the rupture of the discourse, the identities of people and things become visible; most of their relations need to be renewed against different meanings. The other becomes 'seen' as the assumptions suddenly change.[26] We gain awareness that our world does not look 'natural' to us anymore. The way we see our neighbor or a passer-by is not taken for granted anymore in our daily lives, but it emerges therein as a potential danger in light of the coronavirus from whom we literally have to distance ourselves in the public space. The rupture also manifests itself in a change of meaningful practices in approaching the other in our daily lives. We move away from the other on the sidewalk or we figure out when the supermarkets are the least crowded. There is a change in meaningful practices of washing hands and covering our mouths in order for us not to get into close proximity to the other. Indeed, the other is the one whom I need protection from through the spread of the coronavirus, but ironically, it is also the one who needs to be protected from the spread. This relationship with the other is thus accompanied by hygienic measures, measures at home, and restrictions in the public place. In the Dutch context, it meant the onset of the 1.5 meter society. This type of measure could not be easily integrated within the old discourse, similarly to avoiding handshakes, while earlier suggested hygienic measures (washing your hands, sneezing or coughing in the pit of your elbow or the use of paper napkins) could. The other thus becomes visible as part of the coronavirus crisis. Our everyday practices become more visible to us as they are 'experienced' through the risks we take and the weighing of these risks in each instance of encountering the other. These weighing of risks become part of our reflective foreground until the new situation is normalized.

4.   Performativity and solidarity

As we have discussed in the previous section, a new coronavirus discourse emerged following the rupture in our daily lives. In an attempt to bring closure, many politicians generated new meanings so as to gain a sense of security and normalization within society. In order to do that, politicians try to overtake other meaningful

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24   The void of meaning also manifested itself in light of meaningful practices such as the handshake. Until the announcement on 9 March 2020, Prime Minister Mark Rutte and the Minister of Health Bruno Bruins even continued to shake hands with delegates up to 5 March 2020.

25   Prime Minister Mark Rutte, 'TV-toespraak van minister-president Mark Rutte', *Rijksoverheid*, 16 March 2020, https://www.rijksoverheid.nl/documenten/toespraken/2020/03/16/tv-toespraak-van-minister-president-mark-rutte.

26   Howarth, *Discourse*, 109.

understandings in a coalition with scientists. The formation and maintenance of such a coalition is also referred to as a 'hegemonic' political project, where assumptions about the coronavirus are shared and reinforced through policies to which the public is swayed to comply.[27] Without this coalition, assumptions about the coronavirus would be more open for contestation.[28] The discourse is an attempt to limit the struggle of the 'true' meaning of the coronavirus and the nature of government intervention, amongst groups through counter discourses.[29]

The reason why particular meanings as part of the coronavirus discourse become dominant over others is related to the question of legitimacy. This refers to a process whereby the authority of a political actor or rule is accepted and abided by. In identifying the new discourse politicians gain legitimacy through their ability to 'successfully articulate, appeal, and gain acquiescence' as their discursive understandings about the coronavirus resonate with their audience.[30] In case of legitimacy of coronavirus policies, most governments appeal to scientific knowledge and insights, which are presented as meaningful in the fight against the coronavirus. This increases the acceptance for the policy within society. However, this is not the whole story, because in itself science cannot legitimize political decision-making. For example, the empirical evidence that social distancing helps to reduce the spread of the virus is not enough of a reason to build a policy around. If we further unpack this, we need to ask why society takes the importance of scientific knowledge and insights for granted. Scientific knowledge and insights are seen as meaningful because there is a principle at stake that justifies the political claim made on the basis of scientific evidence. In this regard, Jean-Francois Lyotard refers to the technical criterion of performativity or efficiency, that is to say, the most efficient input/output ratio.[31] This deals with the increase of output against the decrease of

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27 David Howarth, 'Power, Discourse, and Policy: Articulating a Hegemony Approach to Critical Policy Studies', *Critical Policy Studies* 3, no. 3-4 (2010): 310. In general, there is a rich discussion about what hegemony means, starting from Lenin and Gramsci to Laclau. One of the more recent insights from, for instance Laclau, is that spaces can be opened up for subjects to articulate their demands when hegemonic structures are fractured. See for further background information, David Howarth, *Discourse*, 109-111.

28 What the coronavirus crisis in The Netherlands has shown from March 2020 until March 2021 is that assumptions about the virus are not entirely taken for granted. Government intervention is seen, for instance, to be ineffective or to erode civil liberties, both linked to doubtful scientific claims, which has led to a surge in anti-lockdown protests. For example in January 2021, violent protests erupted as a reaction to the Dutch government's decision to impose a curfew, which was the first time this measure was enacted since the Second World War. At another instance, the movement *Viruswaarheid* (Virus truth) contested the imposed curfew through court and won the first installment.

29 The notion of resistance has been subject to some discussion. Laclau and Mouffe acknowledge the possibility of resistance because they argue that any domination is a continuous attempt, while Michel Foucault has more difficulty incorporating the idea of resistance by the subjects against structures of domination. As Laclau and Mouffe argue: 'Any discourse is constituted as an attempt to dominate the field of discursivity, to arrest the flow of difference, to construct a centre.' See Laclau and Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics*, 112.

30 Jack Holland, *Selling the War on Terror: Foreign Policy Discourses after 9/11* (Routledge: London, 2013), 21.

31 Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geoff Bennington and Brian Massumi (Manchester: Manchester University Press, 1984), 46-47.

input. Within the coronavirus discourse, politicians claim to employ scientific insights in order to gain better results or realize less costs, and consequently, to achieve the optimalization of their performative achievements.

According to Lyotard, postmodernity can be characterized by the reduced role for philosophy in legitimizing scientific knowledge. The postmodern society displayed a crisis of narratives, because the (philosophical) narratives, including political projects such as Marxism and Liberalism, have lost their credibility to offer the cloak of legitimacy. Instead, performativity has emerged as a new legitimizing narrative. Corresponding with the informatization of society we are increasingly predisposed to think in terms of efficiency.[32] Within the discourse everything is reduced to meanings of quantifiability and usefulness since information becomes a means to dominate reality. Science considerably contributes to this tendency through technological advancements, whilst it also finds legitimacy upon efficiency. On the one hand, science makes it possible to get to grips with the 'reality' of the coronavirus discourse, or in other words, the increasing control by the government. On the other hand, this increase in power is made possible by a goal-oriented and efficient investments into scientific research.[33] So through its measures and rules, the government tries to tackle the virus with the help of scientific knowledge and insights: more control equals greater output. But at the same time the government aims at the increase of scientific input, because more relevant knowledge means better control of the virus.[34]

In this regard it is somewhat striking to find that the moral notion of solidarity, my responsibility for the other, becomes subordinate to the criterion of performativity. As part of the coronavirus discourse, solidarity is often presented as secondary and derivative to the corona policies. You are mainly in solidarity with the other by your abidance with the rules. Accordingly, it may be desirable to be concerned about the others' well-being, but it is only appropriate within the boundaries of what is permitted. The responsibility for the other receives thus a calculative or programmable content that is associated with getting the spread of the virus under control. Moral choices are combined with counting and measurements. For the coalition of politics and science the social relation is first of all an element of calculation in determining the corona policy. Repeatedly, mathematical models are employed to display the effect of particular measures. At the foreground a measuring unit which makes possible the comparison of alternatives prevails: the basic reproduction number through which the rate of transmission of an infection can be measured.[35] The reproduction number and solidarity are in a sense similar to communicating vessels. The quicker the virus spreads, the more politicians are legitimized to tighten the rules through which my responsibility finds its meaning. In this fashion the coronavirus discourse draws up frontiers to identify who or what

32   Lyotard, *The Postmodern Condition: A Report on Knowledge*, 6-9, 47.
33   Compare with Lyotard, *The Postmodern Condition: A Report on Knowledge*, 47.
34   Compare with Lyotard, *The Postmodern Condition: A Report on Knowledge*, 47.
35   See also the website of the National Institute for Public Health, 'Modelling the Spread of the CoronavirusSARS-CoV-2', accessed 29 March 2021, https://www.rivm.nl/en/novel-coronavirus-COVID-19/modelling.

is included or excluded: what is efficient and what is not. Some meanings become more dominant while other meanings resonate less and are even concealed. Indeed, when the coronavirus discourse is successfully articulated, the meaning of efficiency becomes natural to us by concealing how it is discursively produced. The hegemony of the input/output ratio is taken for granted.

Against this backdrop we will present an opposing view on solidarity as the welcome made to the face of the other. The welcoming of the other, my responsibility for the other as wholly other, lies at the heart of the philosophy of Emmanuel Levinas. In the following section we will attempt to explore this further. The final section tries to bring both views on solidarity together, drawing upon the thought of Derrida.

5. The face of the other

Within the coronavirus discourse the encounter with the other, the social relation, is thus mostly conceived in terms of infection risk and calculation. The other is reduced to an object subjugated to calculative reasoning. With reference to Levinas, the hegemonic coronavirus discourse reveals itself as a totality which totalizes the social relationship by limiting it to discursive meanings connected to the coronavirus. The notion of totality symbolizes here a closed whole that does not merely enclose things but also people. The philosophical works of Levinas can be characterized as a protestation against such totalization of the other, in that the other radically breaches every totality or transcends it.[36] The other is the absolutely other or wholly other (*tout autre*), meaning that even though he exists in relation to totality, he remains absolutely separated from it.[37] For Levinas, this unique alterity or otherness, is founded on the idea of infinity, which is a reference to God. The wholly other, as presented by the face,[38] is the trace of God. The idea of infinity, that makes the individuality of the other infinite and designates its height, cannot be captured by categories or concepts.[39] It resists any objectification, whereby the other escapes from the totalizing grip. In fact, the social relation is always an excess or a surplus, that is exterior to the totality, but also stands at the basis of it.

Levinas speaks in this context of a discourse prior to discourse.[40] Every impersonal or calculative discourse, such as the coronavirus discourse, implies an encounter with the other, through which one speaks face-to-face. In the living presence or epiphany of the face, the other manifests himself as an interlocutor as he comes before me and speaks to me. The other does not appear as an object or theme to be

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36 Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, trans. Alphonso Lingis (Pittsburg, PA: Duquesne University Press, 1969), 35 (5).
37 Compare Emmanuel Levinas, *Het Menselijk Gelaat*, trans. Otto de Nobel and Ad Peperzak (Bilthoven: Ambo, 1971), 110.
38 We will follow the usual translation of the French term *visage* as face.
39 This is highlighted by Levinas by capitalizing the letter 'O' when he speaks of the Other as wholly other. Since he is not consistent with its use, we will abstain from it.
40 Levinas, *Het Menselijk Gelaat*, 100.

dominated, for instance an infection risk, a corona patient or vulnerable elder, but invokes me as a person in its infinite alterity. In other words, as someone who cannot be reduced to the meanings which are attached to him as part of the totality of the coronavirus discourse. Rather than being an identity *of* whom one speaks, the other is the person *to* whom one speaks. Therefore, Levinas comments pejoratively about 'com-prehension' (*com-prendre*) of the other, connotating it with seizing (*prendre*), apprehension or taking possession.[41] The other as an interlocutor is 'not a known, qualified content, apprehensible on the basis of some general idea', but is 'refractory to every typology, to every genus, to every characterology, to every classification'.[42] The discourse between me and the other is a relationship whose terms are separated by an untraversable distance, which resists totalization, that is to say, assimilation within one common framework or system of meanings.

The discourse inscribed in the face of the other can be characterized as instruction or calling into question, also referred to as interpellation. The face of the other compels me; it puts in question my freedom.[43] Here comes to light the ethical dimension of infinity, that is expressed through language. The infinity which manifests itself in the face, refuses to be reduced to an object or theme and calls upon me to take on my responsibility for the other. This is quintessentially the commandment 'You shall not commit murder' to which the face of the other summons me from the start.[44] It is a commandment coming to me from the height of the other and calling upon me not to totalize the other. When the other speaks to me, meanings are created, as the nudity of the face, the vulnerability of the eyes, are hidden behind words. Consequently, I am charged with the choice to interpret the utterances of the other from the angle of totality – currently the coronavirus discourse – or to open up myself to alterity. I can reduce the other immediately to discursive meanings that are articulated in conjuncture with the coronavirus, or I can indeed listen to what the other is bringing to the fore. Since people are often encapsulated by their totality in which they find themselves, there is little to no room for welcoming the other as wholly other, as a person. This is not the same as being open to criticisms or other viewpoints, because it is fundamentally about ethical openness. That is, the recognition of the other by opening my home and possessions to him, or more precisely, by showing hospitality.[45] In the words of Christ, to whom Levinas often refers with praise: 'For I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you took me in. I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me.'[46] In giving to the other, I put things into question.[47] I do not confine to my own world as if it were a castle with the gate locked, but try to give what is mine to establish community and universality.[48] Hospitality begins when the

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41   Levinas, *Totality and Infinity*, 37-38 (8).
42   See Levinas, *Het Menselijk Gelaat*, 122 and *Totality and Infinity*, 73 (46).
43   See Levinas, *Totality and Infinity*, 84-85 (57-58) en *Het Menselijk Gelaat*, 148.
44   Levinas, *Totality and Infinity*, 199 (173).
45   Levinas, *Totality and Infinity*, 171-172 (146-147).
46   Matthew 25: 35-40.
47   Levinas, *Totality and Infinity*, 75 (48).
48   Levinas, *Totality and Infinity*, 76 (49).

path to the other is not blocked by labeling him in various ways, but when one is prepared to listen to the other, by opening the doors to my private domain, and lay the foundations for a common possession.[49]

The fact that I can choose to open up myself to the other does not, however, mean that my responsibility for the other is predicated upon a choice. I am my brother's keeper, whether I agree or not. It is a duty that stands at the very foundation of my relationship with the other, preceding every act of will or thought.[50] For Levinas, every social relationship is at heart an ethical undertaking. In ethics, in other words, in my primary responsibility for the other, my freedom is bestowed 'investiture' or given substance in order to liberate freedom from the arbitrary.[51] The face of the other questions my freedom, whereby my natural freedom is transformed into a moral freedom.[52] Clearly, this is not about a freedom governed by general rules or principles. Levinas does not present a normative ethical theory.[53] The concrete manner in which I carry my responsibility cannot be dictated by general rational terms. What is deemed a fitting response to the epiphany of the face of the other, the appeal from the other, is dependent on the singularity of the situation at hand. My responsibility for the other is thus a *principium individuationis*; it demands always a unique response to the particulars within a concrete case. Figuring out what is the right thing to do is therefore a personal undertaking which I cannot sidestep by mirroring a general rule or principle. In the words of Levinas: 'The will is free to assume this responsibility in whatever sense it likes; it is not free to refuse this responsibility itself.'[54]

This is not guided by the principle of reciprocity, because my ethical relationship with the other has an asymmetrical character. Different from symmetrical relations, such as the relationship between citizens and members of an association, my responsibility does not entail that the other is responsible: 'Reciprocity is his affair.'[55] This is related to the radical inequality between me and the other as wholly other, that makes my responsibility infinite. The other is my teacher or Master from on high, who teaches me and dominates me in his transcendence. It is up to me to answer upon the calling of the face of the infinite. I can only recognize the other insofar that I do not allow his unique alterity to be engulfed by something

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49   Levinas, *Totality and Infinity*, 76 (49). See also Cees Kwant, 'De Verhouding van Mens tot Mens volgens Emmanuel Levinas', *Streven*, no. 7 (1966): 615.
50   In his later work Levinas describes the primary responsibility for the other in more radical terms as traumatism, obsession and persecution. See Emmanuel Levinas, *Otherwise Than Being, or, Beyond Essence*, trans. Alphonso Lingis (Boston: Kluwer, 1981).
51   Levinas, *Totality and Infinity*, 84-85 (57).
52   Joachim Duyndam and Marcel Poorthuis, *Levinas* (Rotterdam: Lemniscaat, 2003), 21-22.
53   In conversation with Derrida, Levinas notes: 'You know, one often speaks of ethics to describe what I do, but what really interests me in the end is not ethics, not ethics alone, but the holy, the holiness of the holy.' See Jacques Derrida, 'Adieu', in, trans. Pascale-Anne Brault and Michael Naas, *Adieu to Emmanuel Levinas* (Stanford: Stanford University Press, 1999), 4.
54   Levinas, *Totality and Infinity*, 218-219 (194).
55   See Emmanuel Levinas, *Ethics and Infinity: Conversations with Philippe Nemo*, trans. Richard A. Cohen (Pittsburgh: Duquesne University Press, 1985), 98.

common, but open myself to the appeal that concerns me through his destitution and height.[56]

It is in this welcoming of the face that equality is established.[57] This is related to the fact that 'the third party looks at me in the eyes of the other'.[58] With the introduction of the third party, my responsibility is not merely limited to the other, but also extends to all others.[59] The notion of the third party is used by Levinas as a synonym for the whole of mankind. In the epiphany of the face the third party is ineluctable: 'the third arrives without waiting.'[60] That means that the third party cannot be detached from the welcoming of the other, but necessarily transforms the relationship between me and the other into a 'we'. This is how the face of the other refers to equality. Rather than explaining equality through the similarity of people or common values, equality is founded upon hospitality. In this regard Levinas speaks about the 'phenomenon of solidarity' which is akin to the 'original fact of fraternity'.[61] With the third party joining during the ethical encounter with the other, there is the inauguration of a brotherhood or society as my responsibility for the other is converted into a responsibility for all others. Thus, solidarity is constituted not by unity or reciprocity, but the asymmetrical responsibility for the other.

6.   Solidarity and the ordeal of undecidability

As mentioned earlier, Levinas understands discourse as a face-to-face dialogue, where the other invites me to take on my responsibility. This discourse underlies the notion of discourse as a system of meanings, such as the coronavirus discourse, resembling a totality in which the other is addressed as an object or theme. Every thematization already implies the social relation as discourse and ethics. Levinas suggests that it is possible to speak to the other, without totalizing or com-prehending the other in concepts. In the famous essay *Violence and metaphysics*, however, Derrida argues that it is impossible to escape from the totalizing violence in our thinking of the other. The thinking of the other necessarily brings with it that meanings are articulated. To capture the identity of the other is to attach meanings that are understandable to us, even though it pertains to the recognition of his alterity. According to Derrida, we need to accept that alterity manifests itself through language, but at the same time, we need to realize that no discourse it capable of capturing the other fully.[62] In other words, a totality is not closed in upon itself.[63] As discussed, identities can never find completeness, because meanings only fill up

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56   Levinas, *Totality and Infinity*, 200 (174).
57   Levinas, *Totality and Infinity*, 214 (189).
58   Levinas, *Totality and Infinity*, 213 (188).
59   See J. Aaron Simmons, 'Levinas, Politics, and the Third Party', in *The Oxford Handbook of Levinas*, ed. Michael L. Morgan (New York: Oxford University Press, 2018), 285.
60   See Jacques Derrida, 'A Word of Welcome', in Derrida, *Adieu to Emmanuel Levinas*, 29.
61   Emmanuel Levinas, *Totality and Infinity*, 214 (189).
62   Edward Barring, 'Levinas and Derrida', in *The Oxford Handbook of Levinas*, ed. Michael L. Morgan (New York: Oxford University Press, 2018), 145.
63   Compare Jacques Derrida, *Writing and Difference*, trans. Alan Bass (London/New York: Routledge, 2001), 158.

momentarily through their partial fixture in the discourse. The identity of the infinite other can merely temporarily and incompletely be fixed in meanings. In this regard, Derrida poses the other as the wholly other in a different light; as an infinitude or a surplus that cannot be positioned exterior to the totality of the discourse, but is always more than what it is assumed to mean discursively.[64]

This signals that even though the totalizing of the other is inevitable, we cannot succumb to it. The appeal for responsibility inscribed in the face of the other summons me to be open for the wholly other that resists totalization. My appreciation of this field of tension is what Derrida refers to as 'the experience of the impossible'.[65] To recognize the alterity of the other, the display of solidarity, the other has to be reduced to meanings. To put it differently, if we want to do justice to a concrete case, we cannot discard the generalization and calculations of rules and principles. This is also evident within the coronavirus discourse wherein the other is articulated, for example, as an infection risk, a vulnerable elder or a coronavirus patient, in order to keep the spread of the disease in check. Without these particular meanings and rules that accompany it, my responsibility for the other cannot find any practical expression. In welcoming the face of the other, in conveying my concern for the other, I cannot avoid com-prehending the alterity through normative and calculative terms. At the same time, the other becomes enclosed in a category, which insufficiently takes into account the unique situation of the other as the wholly other. In a situation of a face-to-face encounter, something incalculable and unprogrammable comes into play.[66] Something that does not allow for categorization under the heading of performativity; as an element that is subsumed under an input/output ratio.

Solidarity cannot be guaranteed by compliance to the rules. It may be legitimate or lawful to act in accordance with the rules, but that does not automatically make it solidary. Admittedly, my responsibility for the other is dependent upon rules, that is, the order of the calculable or programmable, but it cannot be deduced from it.[67] Otherwise, solidarity would remain secondary and derivative to performativity. Ultimately, the application of a rule or calculation depends upon an ethical decision that should go beyond calculative reasoning.[68] For a decision, as Derrida writes, 'remains heterogeneous to the calculations, knowledge, science, and consciousness that nonetheless condition it'.[69] Contrary to the generality of the rules, the singularity of the situation at hand continuously asks for a *unique* interpretation. The appeal to responsibility for the other demands not merely abidance with the rules, but also the personal undertaking of continuous assumption, approval

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64   Derrida, *Writing and Difference*, 157-158.
65   Compare Jacques Derrida, 'Force of Law: The "Mystical Foundations of Authority"', in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell *et al.* (London/New York: Routledge, 1992), 15.
66   Jacques Derrida, *Deconstruction in a Nutshell. A Conversation with Jacques Derrida*, edited and with a commentary by John D. Caputo (New York: Fordham University Press, 1997), 17.
67   See also Derrida, 'Force of Law: The "Mystical Foundations of Authority"', 23.
68   Derrida, *Deconstruction in a Nutshell. A Conversation with Jacques Derrida*, 19.
69   Derrida, 'A Word of Welcome', 116.

and confirmation of its value, by an reinstituting act of interpretation.[70] In any case, it needs to be reinvented anew what the meaning of the rule is.[71] For I am free to take on my responsibility in whatever sense I like. In this manner the rule is with each decision ethically founded upon solidarity.

Solidarity can therefore also be described as a paradox of dependence (calculability) and independence (beyond calculation), which appears in the moment of undecidability. An undecidable is a key term in Derrida's work, which he connects with the experience of the impossible and his problematization of dualisms.[72] In contrast to indecisiveness or indeterminancy, undecidability is an ordeal which one needs to endure before one can speak of solidarity. An ethical decision to act in response to the appeal to responsibility requires a leap that exceeds all preparative reflections or rational calculations.[73] It is a leap away from the assurance of rules into the depths of the alterity of the singular situation. Similarly, Kierkegaard wrote that what we are used to call a decision does never come straight at you, but you must dare to plunge into it.[74] The decision becomes undecidable, however, because the singular situation again needs surrendering to the rules. Whenever the decision is taken, the rule is again assumed, invented, reinvented and reinstituted until there is the emergence of a next singular situation.[75] This conveys that the ordeal of undecidability cannot be overcome, but haunts every decision. There is no definitive answer as to what counts as responsible. The possibility of a responsible decision comes with the endurement of the unsurmountable experience at which time I can impossibly conform to the rule as well as the situation.[76] Solidarity is neither one polarity, but is always found in the twilight between both. In this regard, solidarity functions as a critical *leitmotif* in the application of the rules. It is an incentive to improve the rules' ramifications.

What this actually means in practice can be illustrated by two examples. Think of a worst-case scenario with a shortage of ICU beds where ICU capacity is at breaking point and therefore all hospitals cannot take in new patients in need of critical care. In the event that this 'black' scenario, as Dutch commentaries refer to it, becomes reality, there is a triage protocol to allocate critical care to particular patients

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70   Derrida, 'Force of Law: The "Mystical Foundations of Authority"', 23.
71   Derrida, 'Force of Law: The "Mystical Foundations of Authority"', 23.
72   See Jack Reynolds, 'Decision', in *Understanding Derrida*, ed. Jack Reynolds and Jonathan Roffe (New York/London: Continuum, 2004), 46.
73   See Jacques Derrida, *The Gift of Death*, trans. David Wills (Chicago: The University of Chicago Press, 2008), 77-78. See also Jack Reynolds and Ashley Woodward, 'Existentialism and Poststructuralism: Some Unfashionable Observations', in *The Bloomsbury Companion to Existentialism*, ed. Felicity Joseph *et al*. (New York/London: Bloomsbury Publishing, 2014), 272.
74   'Datgene wat men beslissing pleegt te noemen komt nooit op een mens af: hij moet er zichzelf in durven begeven'. See Søren A. Kierkegaard, *Kierkegaard. Dagboeknotities*, ed. Wim R. Scholtens and Bernard Delfgauw (Baarn: Uitgeverij Ten Have, 1971), 50.
75   See Derrida, 'Force of Law: The "Mystical Foundations of Authority"', 24.
76   For a discussion about hegemony and undecidability, see Norval, 'Hegemony after Deconstruction: The Consequences of Undecidability', 147.

through general ethical guidelines and non-medical decision-making criteria.[77] The aim of the document is to provide the healthcare worker with an ethical framework to guide them along in order to get to a responsible decision in an ethically fraught situation. A responsible decision can, however, never be assured by following the guidance set out in the protocol. The doctor does not mechanically ration ICU beds on the basis of these criteria and he or she should not behave as such. The ethical decision to act according to protocol in a singular situation does not belong to the order of the programmable and calculable. When the healthcare professional is confronted with the face of the other, presenting its destitution which cries out for responsibility, he will have to decide for himself how the criteria in this singular case should be interpreted. This decision designates a leap beyond 'the programmable application or unfolding of a calculable process' in order to surrender to the impossibility of the decision.[78] For it is the ordeal of undecidability whereby in each case and on the basis of a unique interpretation the compliance to the protocol is founded upon the responsibility for the other.

The second example is a real-life case that the authors came across in which solidarity serves as a critical *leitmotif* in our social relations with the other. In this example, a caregiver approached the resident of an elderly nursing home fully masked in order to give aid and assistance. This meant, however, that the caregiver was suddenly unrecognizable for the elderly resident. As a consequence, the elderly person became anxious during their encounter. In order to calm down the elder, the caregiver decided to pull down the mask to show her face and have a chat, thereby exceeding the rules and calculative meanings of fragility and high risk, and face the undecidability of the situation. Indeed, the general rules within the coronavirus discourse demand that the caregiver wears her facemask and, if possible during her task, keeps her distance. But the singularity of the situation presented by the face of the elder interrupted the caregiver's abidance by the rules, thus requiring a personal response that cannot be sidelined by any calculation or rule. Here lies the ordeal of undecidability in which the caregiver is tossed between her abidance with the rules and the singular situation of the other, without the possibility of complying to both at the same time. The only way to take responsibility is by enduring this impossible experience and reinvent the meaning of the rule. Solidarity can thus be found somewhere between the rules and the concrete case.

7.   Conclusion

In this contribution we explored the meaning and scope of solidarity in a society at the mercy of a pandemic. As point of departure we employed the poststructuralist conception of discourse, as historically specific systems of meanings that form the

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77   The protocol can be found here: Rijksoverheid, 'Draaiboek "Triage op basis van niet-medische overwegingen voor IC-opname ten tijde van fase 3 in de COVID-19 pandemie"', accessed 1 February 2021, https://www.rijksoverheid.nl/documenten/publicaties/2020/06/16/draaiboek-triage-op-basis-van-niet-medische-overwegingen-voor-ic-opname-ten-tijde-van-fase-3-in-de-covid-19-pandemie.
78   Derrida, 'Force of Law: The "Mystical Foundations of Authority"', 24.

identities of subjects and objects. Accordingly, we sought to demonstrate how the spread of the coronavirus has disrupted our relations with people and things. This also affected the way in which our responsibility for each other, solidarity, is given meaning. With the recognition of the disease as a global pandemic, former understandings of the other are not fitting anymore. A crisis discourse is formulated in which the other is identified as dangerous but also in need of protection through corona regulations. Within the coronavirus discourse solidarity is often considered as secondary and derivative to the policy-making of a coalition of politicians and scientists, thereby subjugating solidarity to the hegemony of performativity or efficiency. In other words, meanings of efficiency have become dominant and even natural to us. Based on the works of Levinas, the coronavirus discourse reveals itself as a totality in which the other is reduced to an object of calculative reasoning, hence violating the alterity of the other as wholly other. In the epiphany of the face of the other, I am summoned to take on my responsibility for the other. That is, the hospitable welcoming of the other, the recognition of his alterity, the ethical openness to the wholly other, without reducing him or her to some concept or meaning.

But as Derrida carefully pointed out, it is outright impossible not to totalize the other, because alterity manifests itself through language. Even so, the other can never be fully fixed through meanings within the coronavirus discourse. This entails that although we have to calculate and constitute rules in order to control the spread of the virus, the face of the other compels one to act responsibly in accordance with particulars of the singular situation. In this fashion solidarity can be characterized as a paradox of dependence (calculability) and independence (beyond calculation), that appears in a moment of undecidability. We cannot just abide by the rules, for that would rule out my responsibility for the irreducible alterity of the other. On the other hand, calculation and rules are unavoidable. I am therefore obliged to endure this impossible experience of undecidability, not to overcome it or merge both together, but to reinvent the meaning of the rule in each instance. This requires an ethical decision that exceeds calculation.

Living with Others in Pandemics

The State's Duty to Protect, Individual Responsibility and Solidarity*

Konstantinos A Papageorgiou

1. Experiments and experiences with the pandemic

The SARS-CoV-2 pandemic forced us to change our ways in many respects. Compared to the lethal bubonic plague pandemic ('Black Death') which occurred in Asia, North Africa and Europe from 1347 to 1351, twenty-first century societies have the knowledge and the tools to protect themselves and hopefully to win the war against the spreading of the virus. But there is a price (including some extra problems for liberal democracies). Lockdowns and related restrictions put a strain on private, family and professional life, minimized social events, public gatherings and transactions, limited expression, interaction and communication to narrow channels, digital and other. In a sense, humanity experienced a severe dislocation of normal, civilized life rhythms, a state of affairs that one could perhaps plausibly compare to a state of war. Empty streets and people barricaded behind windows in the safety of their homes strongly suggested this picture, at least during the first lockdowns of spring 2020. This state of affairs, as occasioned by the pandemic, we could never have simulated intentionally, at least not under a liberal democratic regime.

The situation resembled in one sense the *state of nature* fiction that helps us envisage virtual 'what if'-situations, to better understand and explain the reasons that should make us opt for a politically organized social life or life under coercive laws. Even if the pandemic was not a state of nature situation, not even remotely (there was certainly no collapse of civil order), it was a unique opportunity to see important parameters of our life that we normally overlook, with sometimes exceptional clarity. On the one hand, it revealed the importance of relations, goods and values we usually take for granted, such as the availability of friends, the importance of social and cultural life, and last but not least, the excitement city centres offer as places buzzing with human energy, be it for purposes of commerce, education or entertainment. During lockdowns such activities were suspended. On the other hand, it taught us ways to compensate for their absence by, say, spending more time with ourselves, family *and* pets but also using the internet as a surrogate of communication and source of knowledge (and misinformation). Despite all sorts of strains, we did learn (most of us at least) to cope with isolation and soli-

tude,[1] and thanks to many important technological advances we did not go without life's necessities.[2]

The sudden shrinking of social activity and the various restrictions enforced also had serious psychological, social, economic and political repercussions. The restrictions did not necessarily have the same consequences on everybody (*e.g.*, a lockdown is experienced differently if you live in a spacious house with a garden compared to being crammed with other family members in a small flat in a high-rise building, and people living in the country are in this respect privileged compared to those living in the cities), nor were they perceived in the same way, nor was everyone willing to see the limitation of our freedoms to move and assemble, to meet and interact as an interesting experiment, worthy of philosophical reflection.[3] People had to seek compensation for lost income and governments had to find ways and resources to keep their societies and economies functioning. But not all citizens, not even all governments, were of one mind as to what measures were the right ones and a vociferous minority in many countries would have preferred no measures at all or only minimal ones.

These minorities actually challenged the right of governments to enforce temporary restrictions on citizens' freedoms and in many ways resisted government policies. Their dissenting views did not necessarily have one unified source. Some were related to religious creeds and practices. For instance, some Greek Orthodox priests believed in all earnest that the virus could not be transmitted during holy communion, not even during mass in a crowded church. Conspiracy theorists held that the virus was a pretext for carrying out a secret plan to control and dominate the world. Generally speaking, this kind of approach was common among many who take an anti-status quo stance and feel a fatal attraction to populist politicians.

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1   For personal life, confinement marks a freedom of 'solitude', the opportunity to look into ourselves and explore the 'plurality' within, as implied by Montaigne, who defends precisely this 'retreat' as a non-egoistical choice. We are taking one step back only to look at ourselves as reflective beings. In his essay *On Solitude* (1572-1574) he advises us to reconsider our natural desire to associate with others and pursue public ventures, at least for those who have already given to the world their most creative years: 'We have a soul that can be turned upon itself; it can keep itself company; it has the means to attack and the means to defend, the means to receive and the means to give: let us not then fear that in this solitude we shall stagnate in tedious idleness. In solitude, be thyself a throng. Tibullus.' [Michel de Montaigne, *The Complete Works*, trans. Donald M. Frame, with an introduction by Stuart Hampshire (New York/London/Toronto: Everyman's Library 2003), 215.]

2   As Yuval Noah Harari ('Lessons from a year with Covid', *Financial Times*, 26 February 2021, https://www.ft.com/content/f1b30f2c-84aa-4595-84f2-7816796d6841) has pointed out, advanced digital technology, automation and the Internet made not only extended lockdowns viable but also upheld farming, the production of goods and global trade, at least for the so-called developed world.

3   According to many studies age was one important parameter in the differentiation of attitudes. Younger individuals experienced the restrictions as far more repressive than older ones. Other divides are more geographically prompted by historical and political differences. See Ivan Krastef and Mark Leonard, 'Europe's invisible divides: How covid-19 is polarising European politics', *European Council of Foreign Relations*, Policy Brief 1 September 2021, https://ecfr.eu/publication/europes-invisible-divides-how-covid-19-is-polarising-european-politics/.

Related to this stance is also a deep mistrust of scientific knowledge and truth.[4] Some questioned the policy of absolute protection of human life, considering the reaction of governments exaggerated. They believed it was imposed by the power of mainstream media, since the scale of human loss due to COVID-19 was supposedly disproportionately lower than that of other pandemics that afflicted humanity in the twentieth century. Others simply resisted lockdowns with an (only apparently) more plausible rationale. Halting economic activity would be ultimately far more pernicious for the survival of society. They were therefore willing to accept the necessary sacrifice of weaker or unlucky citizens for the greater (economic) good.

2. The state's basic duty to protect

I would like to discuss here a range of important normative questions raised by anti-COVID-19 measures and policies in view of the reactions they triggered. Do governments actually have the right to impose such severe restrictions on individual freedom (especially, one might add, when a substantial number of citizens oppose them), and, furthermore, do citizens have obligations *vis-à-vis* the state, others and themselves to accept such restrictions? I will argue that a democratic state may legitimately enforce laws and policies in order to protect its citizens from risks to life and limb, their basic rights and ultimately their freedom. Even so, there is a natural limit, both factual and normative, to what the state or a government can do in this respect. In that case its policies need to be supported by citizens, at least indirectly. Otherwise government policies will be inchoate and ineffective. But then we also need to ask what moral obligations citizens have towards each other and to what extent these obligations can be legally enforced. Citizens certainly have a moral and a legal duty not to harm others and in some cases at least they have a duty to protect others. How can we extend these ideas in the context of government measures concerning the pandemic? For instance, vaccination has been opposed for various reasons (fear, mistrust, misinformation, etc.) by citizens who consider it their right to reject it as a mandatory measure. They view endorsement of SARS-CoV-2 restrictions or other mandatory measures to be a matter of personal preference touching upon their individual freedom to decide autono-

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4   For some interesting insights in another context (global warming) see Philip Kitcher and Evelyn Fox Kelller, *The Seasons Alter, How to Save the Planet in Six Acts* (New York/London: Liveright Publishing, 2018). The authors discuss the common phenomenon of resistance and distrust towards those scientific findings in particular that can be perceived as threatening. '[W]hen a scientific finding would have enormous impact on the ways people live, on human wants and aspirations, resistance is natural. Indeed it is perfectly reasonable' (Kitcher and Fox Keller, *The Seasons Alter, How to Save the Planet in Six Acts*, 22). However, this natural distrust becomes problematic when amplified by the dissemination of fake news and distortion of scientific information. Democracies are particularly exposed to this danger and its social and political consequences.

mously on what is 'their own'.[5] This attitude also rhymes perfectly with an entrenched, pro-choice anti-paternalism.[6] The problem is that even if this attitude is, in matters that belong to the sovereignty of individuals, in principle correct, it obscures the fact that in some cases the right thing to do relates not to oneself but to others.

We have reason to live with others in organized political societies and submit ourselves as citizens to the authority of a democratic state because we can thus live in freedom with secured rights. For social contract theorists in general, but most eminently Kant,[7] this is not simply the rational thing to do but actually a moral imperative. Our rights can never be secure in a state of nature, even if conceived and overwhelmingly acknowledged, because no authority will be available to recognize and enforce them. And nobody can hope to live an undominated life without secured rights. We therefore need the state, a democratic state, to render our rights secure and, if so, we also have a duty to cooperate and contract with others to create the public institution that has the legitimacy to protect us. In fact, if such a state already exists, if we are born in its jurisdiction, it is not up to us to agree or disagree with its authority in protecting its citizens' rights. No such consent is needed, because the necessity and efficacy of such a protective institution cannot hinge on individual taste and availability. Its authority is not à la carte. We are thus obliged to abide by a democratic state's authority and the laws we are subject to, even if we occasionally disagree with and disapprove of some of these laws. This obligation is concomitant with our right to participate and control the process of democratic will formation and question the justice of our political societies' laws by appealing to properly established courts.

What is the upshot from the above for the issue that interests us? We cooperate with others in order to (create and) uphold a state because this is a public institution that is necessary for the protection of our basic rights, ultimately our freedom,

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5   I believe that freedom and autonomy, even if narrowly construed, do not license or otherwise support such a view. Even a libertarian approach to freedom as 'individuality made normative' (Charles Fried) will have to protect basic individual rights against not only the state but also third persons who endanger rights of others by reckless or otherwise irresponsible behaviour. Law and the state are necessary also for libertarians. Super-individualistic libertarians need the state to support their libertarian understanding of freedom and rights, even if they do not need to entertain an attitude of fraternity or solidarity towards other citizens. The question is whether such a view stripped of the necessary 'solidarity' of the libertarian bent can successfully defend even a narrow list of rights. For an elegant and subtle defence see Charles Fried, *Modern Liberty and the Limits of Government* (London: W.W. Norton & Co., 2007).

6   See Richard H. Thaler and Cass R. Sunstein, *Nudge, Improving Decisions About health, wealth and happiness* (London: Penguin Books, 2000), 10.

7   Immanuel Kant, *Metaphysics of Morals*, trans. and ed. Anne Gregor (Cambridge: Cambridge University Press, 1996), 117 [6:264], 170-171 [6: 312]. For an excellent reconstruction of Kant's argument and a convincing solution to the so-called 'particularity objection' see Anna Stilz, *Liberal Loyalty, Freedom, Obligation and the State* (Princeton/Oxford: Princeton University Press, 2009), 195-204. Stilz, following Kant and Rawls, acknowledges a 'natural duty', in other words an unconditional duty, to participate in a just state. According to this reading (which I follow in the text) our membership as citizens of a particular state and the basic duties such a citizenship entails are not necessarily voluntary.

however construed. As mentioned above, undominated life and secured rights vis-à-vis others and the state, would be unthinkable without law. In fact, we are morally and legally obliged to do everything possible to uphold this institution. Because nobody else has the power and, most of all, the authority to protect us. This not only explains but also justifies a democratic government's right to pass and enforce laws aiming to create an effectively protective framework for its citizens' rights. As I indicated earlier, this particular authority will have to be democratically controlled as to its aptitude and effectiveness and questioned as to its constitutionality, but insofar as its judgements are found and declared valid (conversely until they are found by the courts to be null and void), they apply. Abiding by democratic laws is not at anybody's discretion. Governments, as it seems, have the authority to pass laws and take temporary measures against the spreading of the coronavirus which poses a major threat to life and limb, but also to a civilized society's proper functioning in the domains of politics, economy, health, education and culture. In fact, the development of the pandemic has proven wrong the governments that initially opted for a more lax approach hoping to achieve a so-called 'herd immunity'.

One could (and in fact does) counter: 'Isn't this too sweeping a view? I can understand the necessity of the state and the citizens' obligation to respect its laws. I can also follow the state's obligations to protect us from crime and foreign aggression. Citizens, however, also have constitutional rights, freedom and dignity, and certainly no measure for the protection of public health may reach so far as to violate our constitutional rights. Lockdowns have suppressed freedom of movement, curtailed freedom of assembly, our freedom to be socially and economically active, and most of all our autonomy, our right to decide for ourselves if and whether preventive measures, like vaccinations, can be applied to our own bodies.' In many countries, lockdowns and social distancing rules have been resisted by groups eager to invoke their right to assemble and protest peacefully. Many people disagreed with the enforcement of such measures and protested in public, occasionally exploiting symbols and evoking improper associations with totalitarian systems.[8] Some of these protests were organized by political parties with an apparently plausible political agenda (say, demanding more intensive care units, more funding for public health, hiring more doctors and nurses or allowing food and drink businesses to operate as in the times before the advent of SARS-CoV-2) but others were triggered rather spontaneously by social groups reacting against social isolation and economic hardship and expressing a deeper disaffection with the political system.

Some of these complaints may have been partially legitimate, but involving as they did the risk of further spreading the pandemic, they were clearly addressed in the wrong way and were, at least partly, misconceived. The suspension of some freedoms could be (and in fact in many countries was) compensated by government subsidies and similar measures to counter the adverse side effects. But it was unreasonable to act as if the reason for the restrictions did not exist. For instance,

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8   David M. Perry, 'Covid protesters must stop exploiting symbols of the Holocaust', *CNN Opinion*, 27 April 2021, https://edition.cnn.com/2021/04/27/opinions/covid-anti-vaccine-protesters-yellow-stars-holocaust-perry/index.html.

even if suspension of basic freedoms like the freedom to assemble peacefully was a serious limitation, it was imposed for a present and compelling reason and it was meant to last only as long as it was necessary. The claim of an orchestrated state of permanent exception does not withstand scrutiny.[9] What was most questionable was a kind of unholy alliance between people disadvantaged and in need of support (*e.g.*, owners of small businesses severely hit by restrictions) and an obscure, manipulative, ideologically fixated and ultimately irrational anti-science and anti-government sentiment – usually disseminated through social media. At the end of the day it appears that the complaint voiced was not 'you violate my rights' but rather 'I don't care because I don't trust you, whatever you might be saying or doing'.

3. Our duties to others

In 2021 the protest shifted from the issue of lockdowns (which in the meantime receded as a measure to combat the SARS-CoV-2 pandemic) and focused more on vaccinations. In some countries resistance to voluntary vaccination is particularly critical, since in order to build up an effective defence against SARS-CoV-2 it is necessary to have a very high percentage (over 80%) of the population vaccinated. In many countries barely more than 50% of the population have been vaccinated,[10] and the recent appearance of the highly contagious Delta variant made things even

9   Some authoritarian democracies may well have exploited the opportunity to tighten their grip on minorities and further undermine liberal institutions. But these democracies are stigmatized for their serious defects. Democracies, however, are *per se* imperfect regimes, also because they manifest the 'imperfections' of popular will. The question is whether they are, institutionally speaking, sufficiently immune to 'sinister interests' so as to be able to vet popular will according to fair principles of an equal and free polity. If democracies have done their best in this respect (have they?) and most of all if they have managed to develop institutions that cater to the citizens' needs and freedoms and insulate the influence of partial interests in the public domain, then they have a strong case to claim allegiance. Philip Pettit's remarks on the 'tough luck test' are pertinent here. If democratic governments did everything necessary to protect citizens' health and freedom under institutions guaranteeing popular control, then even those who are for whatever reason disaffected with a certain policy (or government) have no legitimate complain. As Pettit puts it, '[t]he idea behind the test is that the control achieved under the democratic institutions envisaged will be enough to guard against government domination if it enables people to think that when public structures and policies and decisions frustrate their personal preferences, that is just tough luck. By local standards of when loopholes are tolerable and trust appropriate, there is no reason for people to take such unwelcome constraints as the work of a malign will that imposes itself on them or their kind – or, indeed, on ordinary citizens as a whole. Suppose that the policies implemented under a well-functioning system are to a particular subgroup's disadvantage. If the system is operating properly, then members of that subgroup will be able to test the decision-making at one or another contestatory site: via judicial challenge, for example, complaint to an ombudsman, or public protest. And they should be assured thereby – by local standards of assurance – that the process employed and the policy implemented in the decision were both compatible with accepted norms: that is, compatible with the community-wide standards that all accept. Thus they ought to be able to regard the upshot as a matter of bad fortune'. See Philip Pettit, *Just Freedom, A Moral Compass for a Complex World* (New York/London: Norton, 2014), 112.

10   In some countries, even in the European Economic Area (EEA), the percentage is much lower. On 19 September 2021 the rate of fully vaccinated adults was 22% in Bulgaria and 33.1% in Romania. On the other hand, Iceland, Ireland and Malta have reached 90%. See https://www.statista.com/statistics/1218676/full-covid-19-vaccination-uptake-in-europe.

worse, since it can also be transferred to individuals who are already fully vaccinated (let alone the most recently discovered Omicron variant). Those who vehemently resist vaccination usually argue on the basis of the value of individual autonomy and their right of consent to a medical treatment or a medicine administered, even if medically indicated. What is being overlooked, however, is that the vaccination is not administered only for the receiver's own good. A fully vaccinated individual acquires a sufficient degree of protection for herself (a) but indirectly protects all those who will eventually come in close contact with her (b) while further increasing the collective immunity level additionally contributes to the creation of an overall societal defence against the spreading of the virus (c). This is extremely important in preventing the development of further dangerous variants.[11] It seems then that the movement against vaccination is not willing to acknowledge the importance of the social consequences of its stance, relying rather on a misconceived notion of individual freedom and independence from rules. Rights, however, cannot be acknowledged selectively, they apply to all, they are universal and they are certainly accompanied by respective duties. These obvious truths seem to escape those who support anti-vaccination and reject other protective measures on the basis of some ill-conceived notion of individual freedom. In fact many citizens resisted initial lockdowns and other restrictions of movement by building their claims upon a decontextualized notion of 'natural' freedom.

Still, one might ask: 'Why risk my own health for others?' (assuming that the vaccine carries demonstrably a very small percentage of risk). First of all, the vaccinated person protects primarily her own self against a substantial risk of being infected. The risk of a serious side effect from the vaccination is minimal compared to the risk to her own health by being exposed to the virus. Ultimately, it is of course up to her to decide for herself. The idea is not to protect others from harm to self.[12] But no one is entitled to decide over the real risk posed to others. If one lives in society with others and has regular contacts with other people, that is, if one does not live in absolute seclusion, then remaining unvaccinated means a heightened risk for others of becoming infected by the virus (b and c). But again one might ask: 'Why do I have to protect others? Why not care only for myself?'

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11 Preventing the development of further variants depends, however, on global immunization. See also section 6 below.

12 For the classical statement in the context of criminalisation, see Joel Feinberg, *Harm to Self* (NY/ Oxford: OUP, 1986). For an alternative reading of reasons for and against paternalism, see Konstantinos A. Papageorgiou, *Schaden und Strafe, Auf dem Weg zu einer Theorie der strafrechtlichen Moralität* (Baden-Baden: Nomos Verlagsgesellschaft, 1994), 215-243. Some COVID-19 patients resist treatment and intubation. These cases are particularly difficult to solve. Do they have the right to resist and die? Can doctors abide by their will and let them die, even if the lethal consequences of such a decision are evident? The question is whether one should respect their autonomy, their right to decide for themselves, when it is evident that their will has been hijacked by a climate of paranoia. I believe it is more reasonable to let doctors do what they have to do and take the necessary measures to support life, in view of the fact that what moves patients in such cases is not a decision to terminate their lives or not wanting to live but rather an attitude of defiance and mistrust.

There is a simple and a more complicated answer here. Risking harm to others by increasing the risk of becoming a carrier of a dangerous virus is something everybody has a moral and a civic duty to avoid. That is why, if one is infected by the virus, one should also confine oneself in quarantine. But there is, perhaps, a further aggravating aspect, a special disvalue, in refusing vaccination, which is captured by case (c) above. It is not just about risking harm to specific others with whom one comes into contact. By not vaccinating oneself, one fails to support a mechanism that requires (nearly) everybody's cooperation in order to protect society from the adverse consequences of COVID-19: death, illness, long hospitalization and the rest of the serious adverse side effects of the pandemic on individual and collective life. It is a mechanism that demands (nearly) everybody's cooperation in order to succeed. In a sense, it is like a rescue operation, like saving children threatened by drowning or fire, that similarly requires the concerted action of all present in order to succeed. Imagine a person confronted with such an imminent tragedy – who can help with no substantial risk to herself – refusing to give a hand with the trifling excuse that she will be late to a party! Such a response would not only be shockingly egoistic and callous but would go against a long established tradition in moral thought from Cicero[13] through Matthew to Kant,[14] a tradition that supports a very basic but also foundational moral imperative, the Samaritan duty to rescue.[15] However, exemplifying such callous indifference to the lives of others where one can effectively help is not simply individually immoral, it also defies and fails to respect our 'natural' duties towards other humans and in particular humans we live with, our co-citizens. It is an immoral and unjust behaviour that also carries an immense political, social and legal disvalue. It is in other words not only about 'us' or 'me' and the responsibility towards ourselves or myself, but also about how we stand *vis-à-vis* all others with whom we are committed to live. To disrespect this implicit commitment in its essentials is therefore not only immoral, it is a question of responsibility not only to ourselves but also to others; it is objectively unjust.[16]

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13 See Cicero, *De Officiis* 1.23-24 and the following quote in particular [Cicero, *On Obligations* (Oxford: OUP, 2001), 10]: 'So far as injustice goes there are two kinds: the injustice of those who inflict it and that done by those who do not protect victims from injury when they have the power to.' For a fair but nevertheless critical appreciation of Cicero's views, see Martha Nussbaum, 'Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy, in *The Cosmopolitan Tradition*', Martha Nussbaum (Cambridge Mass./London: The Belknap Press, 2019), 18-63. See also Steven J. Heyman, 'Foundations of the Duty to Rescue', *Vanderbilt Law Review* 47 (1994): 674-755.

14 Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor, rev. Jens Timmerman (Cambridge: Cambridge University Press, 1996), 73-4 [4:423].

15 In fact, the implications of such a duty are far-reaching. We have to accept the establishment and the existence of an institution that rescues our basic rights and freedoms.

16 Actually, a nearly universal vaccination, say up to 90%, seems to be necessary in order to build up herd immunity. What about those who belong to the unvaccinated 10% enjoying the protection of the rest? Is the behaviour of 'free riders' (not all are necessarily free riders, at least not subjectively, because some may refuse vaccination for independent reasons) in this case wrong? I believe it is, because they violate a principle of mutual support and obligation that keeps us together in one political society. Disrespect of these very basic civic duties is a kind of unfairness to begin with. It is not necessary to have contributed in a demonstrable way to a collective harm.

4.   The puzzle of the moral immunity of anti-vaxxers

In view of such risks to others and of the blatant disrespect to co-citizens and other humans manifested in this behaviour, it defies understanding why the 'right' to refuse vaccination is still considered sacrosanct. There are of course many reasons that drive otherwise mature people to adopt an attitude of general denial.[17] Sometimes it is due to sheer confusion and fear (heightened by misinformation and misrepresentation of facts) but sometimes it seems to be suggested by already entrenched feelings of frustration, anger, and sometimes even hate against authority and rule-governed life. Many different social and individual experiences play into this attitude. Whatever the reason that drives anti-vaxxers to recalcitrance, they seem to believe that they have some kind of 'right' to decide independently on this issue, as they certainly have the right to decide whether they should take some prescribed medicine or undergo an operation. But there is no such à la carte right of independence from the authority of democratic laws publicly discussed, properly enacted, and constitutionally tested according to democratic and judicial procedures. Acknowledging such a strong normative standing would render this particular group of deniers unfairly special compared to all the rest.

One might be tempted to read this behaviour and its supporting rhetoric as a mere expression of rational disagreement on a divisive policy issue. It might turn out that it is not our 'autonomy' and our rights to our bodies that provide the decisive argument but freedom of conscience and freedom of religious practice. Maybe those who deny the very existence or the harmfulness of the virus or those who perceive vaccination campaigns as the real threat to society are some kind of conscientious objectors, harbingers of a new era of peace without violence, drugs and evil powers. Needless to say that a belief system that is ultimately based on denial, preposterous as it may seem in some of its versions, encompasses long-supressed and fragmented memories of terrible events concerning, say, government policies and practices of pharmaceutical companies. Absolute power terrifies absolutely. We need to keep that in mind in order to better understand and explain the impasse in today's democratic societies and respond fairly and adequately. However, whatever the excuses on behalf of deniers, governments need to be sincere in speaking out about what is right, even if their message is unattractive or displeasing. It is important in this respect to define risky or harmful behaviour as socially and morally questionable. Governments should not shirk from their responsibility to protect their citizens, while at the same time they should take extra care not to belittle or stigmatize those who express dissent, even if their judgement is compromised by completely irrational premises. It is a delicate but important balance. The

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17   Some people avoid vaccination for none of the above reasons. They do not see themselves as free riders either. They are simply sceptical about vaccines and display a 'wait and see' attitude which implies that, if they are finally convinced, they might take the jab. The arguments above do not apply to them.

state itself should set an example by exerting authority with a soft hand and sincere respect for everybody.[18]

In order to live together we need to learn to respect each other and this can only be learnt by practicing the respective ethos of a fairly shared life among free and equal people. But this attitude cannot be heteronomously enforced, it needs to form and develop spontaneously. A long and interesting discussion in the history of criminal law ideas has proven how senseless and ultimately illegitimate a project of enforcing morals would be. Morality can only result from uncoerced reflection within society. In this vein, Antony Duff carefully distinguishes civic virtue as an aspirational value from civic duty. For instance, citizens with a sense of fellowship to co-citizens should not harbour feelings of hatred, because hatred expresses a desire to exclude others from equal standing of citizenship, but nothing will happen as long as they keep it to themselves. 'To hate another citizen is thus already to lack civic virtue – even if I recognize I should not hate, and behave as I should. If I enact my conduct towards the other person, I violate my civic duty to her. For the enactment of this exclusionary and alienating attitude must involve conduct that is itself exclusionary and alienating. If that conduct is verbal, its meaning is explicit. It says to the other person that she does not belong to the polity.'[19]

Still, why does this happen, why do some people have such enormous difficulty in understanding vaccination as something they owe first of all to themselves, and why do they fail to see that what they decide also concerns others, and why do governments appear to condone such behaviour? If someone presents a threat to others, no one would have qualms about averting the threat. If someone, otherwise completely sane and rational, tends on some rare occasions to have sudden and unpredictable outbursts of violence connected to some neurological disorder, would this person not have a reason to reconsider the threat he poses to himself and others? So how do we account for obstinate denial? Maybe it comes as an echo from an originally correct normative intuition. But in this second coming there is only verisimilitude and not truth. People from the anti-vaccination movement have adopted a misguided view (maybe we should call it an ideology) of 'bodily sovereignty'. No question, our body belongs to us – although I would hesitate to endorse the view that 'we own our body'. The fact that it is *our* body does not imply that for some mysterious, inscrutable reason it lies beyond society's and morality's

18   Even if making universal vaccination compulsory may have the air of a totalitarian dystopia, democratic governments indirectly do force people who work in domains critical for the spread of the particularly contagious Delta variant to take the vaccine or quit their job. A growing number of countries require a shot or a negative test for dining out and participating in other activities. See https://www.reuters.com/world/countries-make-covid-19-vaccines-mandatory-2021-07-13/. For a version of the practice in China: https://edition.cnn.com/2021/07/15/china/vaccine-china-restrictions-zhejiang-jiangxi-intl-hnk/index.html.

19   R.A. Duff, *The Realm of Criminal Law* (Oxford: OUP, 2018), 200-201. Hating others is a problematic attitude not only because it signals disrespect by exclusion but also because it creates permanent dysfunction in human relations. In that sense it differs from anger. Maybe it is humanly unavoidable as an emotion, especially in personal relations. Whatever the case, hate should be controlled and contained when it acquires a political relevance.

realm.[20] That would be as absurd as claiming that a human body is not subject to the law of gravity. A body can literally become a weapon and a body infected can be a lethal weapon for other people, especially those who for constitutional reasons cannot defend themselves, because of some illness or age or both. A comparison with the threat emanating from a person carrying explosives is not unfounded. A body is not an independent and sovereign state (even contemporary notions of sovereignty are shifting!). So this is an utterly wrong and misguided view which has nevertheless survived as a *mere echo* from social and professional practices in situations where respect for the individual body and individual autonomy is, with good reason, acknowledged. The fact that the privacy of one's home is sanctified, and rightly so, the fact that no one is allowed to enter without a warrant, cannot mean that there are no exceptions, if there is an emergency or if the sanctum of a home is the source of a threat to the lives of others.

5.   Whose responsibility?

The duty of the state to protect its citizens obviously does not absolve the citizens themselves from their own (moral and civic) responsibility. Still, some people who are attached to an extreme version of statism seem to believe that the state should exclusively carry the entire burden of protecting its citizens from the virus (maybe this is the other extreme compared to those who believe that the state has no right to take measures to protect its citizens). It is unreasonable to demand full and exclusive protection from the state, not only because of the economic cost but also, and perhaps preponderantly, because of the normative cost. *First of all*, there are questions of limits of available resources. How many beds and intensive care units should be available for those who fall ill? How many doctors and nurses should be hired to treat them? It would be patently irrational (and ultimately unfair) to expect unlimited resources to be committed to the treatment of COVID-19 patients who otherwise take no precautions, disregard rules and refuse to be vaccinated. It would be irrational because it would establish a moral hazard, an incentive not to be vaccinated. Further, it would be unfair to other non-corona patients in need of

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20   Some philosophers invoke an argument from 'intimacy', comparing vaccination with the intimate acts of sex and gestation. According to Travis N. Rieder some acts are too intimate to entitle anybody else to perform them other than the agent herself. So a reason for vaccination never acquires the standing of a duty to be vaccinated. He writes: 'Is getting vaccinated intimate? While it may not appear so at first blush, it involves having a substance injected into your body, which is a form of bodily intimacy. It requires allowing another to puncture the barrier between your body and the world. In fact, most medical procedures are the sort of thing that it seems inappropriate to demand of someone, as individuals have unilateral moral authority over what happens to their bodies.' (Travis N. Rieder, 'There are plenty of moral reasons to be vaccinated – but that doesn't mean it's your ethical duty', *The Conversation*, 20 April 2021, https://theconversation.com/there-are-plenty-of-moral-reasons-to-be-vaccinated-but-that-doesnt-mean-its-your-ethical-duty-158687). I think that intimacy is not so strong a value as to have normative clout when the rights of others and public health are at stake. In social life we have to give up some part of our 'intimacy' without losing our dignity, if we want to interact and meet with others. Nobody carries his home with him upon leaving his house every morning, taking a bus or the metro, working with others at the office or sharing a table at coffee shops.

treatment who would have to wait longer periods or postpone important medical procedures. It would also be unfair to those citizens who could otherwise profit from resources that could be dedicated to other domains (*e.g.*, public investments in education and culture, economic stimuli to combat unemployment, etc.). *Secondly*, some measures, like digital contact tracing (DCT) would be, if applied in a legally unqualified way, too intrusive in terms of privacy and data protection. It should not come as a surprise that in some Asian countries the mandatory use of DCT has proven successful in preventing the dissemination of the virus – but at a normative cost.[21] One can of course imagine infinite other, grotesquely totalitarian, ways to control the pandemic, from close monitoring of private activity to fully suspending human freedom and reducing fundamental needs of expression and interaction to the minimum. But this is not a viable road for democracies. After all, we live in organized political communities under democratic laws in order to enjoy the protections of our basic rights and liberties, in essence our freedom.

This makes it imperative that citizens assume their part of responsibility for themselves but *also* for their co-citizens and their community. In the context of the pandemic this means that individuals are morally obliged to observe the relevant rules concerning lockdowns, wearing masks, social distancing, avoiding large social gatherings, self-isolation (*e.g.*, if they test positive) and last but not least vaccination – even if the state for whatever reason fails to be present. Actually they will have to take all possible precautions not to spread the virus and not to fall ill themselves. Again, one might ask: ΔΙΠΛΑ 'I understand that I have to care for myself (or: in fact, I am too young to be worried since the consequences of an infection will not be severe in my case). But why should I assume responsibility for others? Why should I be doing a job entrusted to the state? Furthermore, why should I suffer all the restrictions related to a pandemic which primarily concerns older age groups? Why should I sequester myself or take the jab, when the threat to my own health is minimal, so that others, mostly older people, can move safely around? Why do they not rather stay home, so that I can move freely?'

Preposterous as this objection may sound, it does resonate with some citizens. It reflects the view that governments abdicated in the case of the pandemic (by failing for instance to convince enough citizens to vaccinate voluntarily) and saddled citizens with their own responsibilities. This view betrays a misunderstanding of the role of the state. The state has the power and the legitimacy to structure social relations and set the relevant rules in order to protect citizens' rights and liberties, but the state cannot and may not take citizens by the hand in order to fulfil its protective role. As mentioned earlier, this would surpass its capacities and the state would overstep its mandate. The state should take care that roads are safe and rules

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21   As the authors of a recent study have found: 'Despite the promising potential of DCT, its introduction gave rise to intense debate over ethical, legal, and societal implications (ELSI). In particular, some characteristics of the Asian approach (mandatory use, centralized protocols, GPS- or cell tower-based geo-location) are seen by many as incompatible with European legal provisions and ethical views about the value of individual privacy.' See Alessandro Blasimme, Agata Ferretti and Effy Vayena, 'Digital Contact Tracing Against COVID-19 in Europe: Current Features and Ongoing Developments', *Front. Digit. Health*, 17 June 2021 | https://doi.org/10.3389/fdgth.2021.660823.

of traffic observed by all drivers but the state cannot sit next to each driver. The responsibility to navigate in social life is ours.[22] It is ours individually and collectively. The expectation that a 'paternal' government will take care of us from the cradle to the grave is based on a dangerous misconception. The responsibility to 'conceive' and lead a successful life is ours only. But it is a responsibility based on a conception of common life with others.[23] The state – following a telling conceptualization by Philip Pettit[24] – can create the necessary infrastructure and institutions of insurance and insulation that enable and guarantee undominated life, but *we* are and remain the pilots of our lives, not the state.

There is, however, a further disquieting claim included in the objection we encountered above. It is the claim that besides mandatory rules enforced by the state, which we are held to respect, we owe no further allegiance, attention and care *vis-à-vis* all others, even if we share a life with them. In fact, the view that younger individuals who are less prone to fall ill – but equally liable to carry and transfer the dangerous virus – are exempt from special duties of care *vis-à-vis* others appears to be an offshoot of this particular attitude. This is not only an egoistic view but also in some sense extremely naïve (as if the quality of being young will last for ever). Still, can we say that those people who are relatively immune because of their age have no duties of care towards older, more endangered generations? If one were to balance advantages and disadvantages one has to admit that younger people were far more burdened by anti-coronavirus measures and restrictions than older ones. This special psychological and material burden should perhaps be somehow factored in and independently compensated. However, even if restrictions like lockdowns and social distancing weigh heavier for younger individuals, it remains a fact that there can be no exception in their case because they can contract the virus and become carriers, even if with mild or no symptoms. Even if one is not seriously threatened, one can thus be a threat to others. After all, life and limb are protected *vis-à-vis* everyone, even those who are too strong and powerful to be beaten up by others (but who can beat up others).

6. Solidarity

I mentioned earlier that the duty to rescue human life (next to the natural duty not to harm others) is a fundamental moral rule of universal recognition. Kant among others has given it powerful philosophical support as a moral duty. The rule seems to originate from particularly tough circumstances of life where help from unknown others is vital for survival. However, it is not only as humans, as moral persons, that we owe this particular duty to others. We also owe it preponderantly

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22   This maybe the ultimate reason why even the most humanist libertarian view, such as Charles Fried's, will ultimately hinge on a society's disposition to develop an ethos of basic solidarity with other humans and co-citizens. We cannot live only in bubbles, wonderfully comforting and stimulating as they might be. But a libertarian view can only rely on the spontaneous birth of such attitudes in society. It does not inspire it.
23   See. Duff, *The Realm of Criminal Law*, 192-201 for a sketch of liberal republic.
24   Pettit, *Just Freedom, A Moral Compass for a Complex World*, ch. 4.

to people with whom we regularly connect as citizens and with whom we share a common social and political fate. We have a duty to rescue others from the prospect of lawlessness and what this condition implies for their freedom and rights. This is one (maybe the simplest and most basic) way to explain why we have to uphold the democratic state and abide by its laws. We also have to take it upon ourselves when we live and interact with others. The responsibility of each one of us *vis-à-vis* others thus complements the state's obligations towards its citizens but it also corroborates the citizens' sense that they form part of a distinct political society of individuals with permanent bonds and a common perception of what they seek. A political society that fails to develop this basic sense of unity of purpose and instil an awareness of fundamental civic duties in its citizens cannot hope to survive for long – not as a society of free people. Individual freedom and well-being cannot exist without an inspiring, even if minimal, sense of a shared collective purpose.

If we live permanently with others, we depend on them for our private aspirations to succeed. We rely on their cooperation individually wherever needed but we also rely on the availability of an institutional backing. As mentioned earlier, this institutional backing is necessary and to a certain extend non-negotiable privately. But no society can survive and reproduce itself if its members care only for their own narrow good and the institutional backing exists only as a support available at discretion for individual endeavours, just a tool box for everybody's use. As many ancient and modern political thinkers have noticed, something more is needed for a society to be a real union, not only among contemporaries but also between generations. The idea of solidarity (which has an interesting genealogy in Christian, socialist and liberal nationalist theory and practice)[25] expresses the need for a basic identification and mutual support primarily among citizens and compatriots but ultimately also among humans. Even if we owe special duties of allegiance to co-citizens with whom we share the liberties and responsibilities of a democratic polity, we have no reason to be partial as to our humanity. Every human is our equal in dignity and worthy of respect. In fact, we also have a special kind of duty and a special political responsibility, different from our duties of allegiance to compatriots, towards citizens of other countries, unable to enjoy the liberties and responsibilities of a democratic polity.[26] We recognize solidarity as a matter of fact when feelings, attitudes and awareness of a common fate dispose a group of people with this particular mindset to act in a united and concerted manner in order to confront an adversity.

But where lies the normative source of solidarity? Although solidarity necessarily presupposes a deeper and permanent bond and not a circumstantial alliance of interest, the value of solidarity is not sufficiently captured by the mere fact that

25   See Andrea Sangiovanni, 'Solidarity as Joint Action', *Journal of Applied Philosophy* 32 (2015): 340-359. Sangiovanni draws on elements from all three traditions in order to construct a plausible view of solidarity based on citizens' joint action as authors of public institutions.
26   See Konstantinos A. Papageorgiou, 'The refugees and our duties', paper presented at the plenary session of the 2017 World Conference of IVR in Lisbon. The session's proceedings will soon be published in English by Steiner Verlag.

such a bond exists among, say, people of the same class, nation or confession. Something more is needed and it is provided by the authority emanating from legitimate political institutions. Thus, the reason why citizens eligible to be soldiers should defend their country against an act of aggression is not because of some emotional stir (more or less easily manipulable) that brings them coincidentally close as co-nationals but rather because of their awareness of what it means for them to live as consciously engaged free and equal citizens in a democratic country under laws of freedom. To be a citizen of a free political society with rights and entitlements entails among other things that one stands exactly in such a relation of obligation to others and towards one's state. That is why abandoning one's compatriots and turning one's back on the democratic state in a situation of emergency, in a moment of crisis and danger, demands at least some kind of explanation and justification.

As we saw, immunizing our societies against the terrible threat from the SARS-CoV-2 pandemic is a complex and difficult process that presupposes everybody's cooperation, including those who doubt the scientific evidence and the efficacy of the vaccines, and those who combine denial with a general attitude of social and political dissent and mistrust of the democratic state, and see the pandemic as an opportunity for governments to expand their power and control. It is unreasonable to doubt the pandemic and the need to combat it, as it is unreasonable and pernicious, not only self-harming, to refuse to comply with measures and restrictions necessary to contain it. After all, now we know that many anti-vaxxers have paid for their absurd stance with their lives. This attitude is so unreasonable and anti-social that there is no reason to condone it. The people who do not take the vaccine (with no special medical indication to the contrary) should not be celebrated as heroes of resistance against evil powers, nor should they be treated as conscientious objectors. Even if they do not care about themselves, they have a duty of solidarity towards other humans and co-citizens to comply with the measures and take the vaccine. Actually, despite appearances, the spirit of denial of anti-vaxxers has no firm grounding in 'autonomy' or an alleged right to decide over their own health. They are morally (and should be also legally) obliged to take the vaccine and protect others, particularly if their profession involves taking care of high-risk people, like patients or the elderly.[27]

I would like to conclude with an aspect of the duty of solidarity I have not mentioned so far. We read that in June 2021 only 0,9 % of people in poor countries had

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27   The fact that governments hesitate to enforce this duty universally is understandable in view of the vociferous opposition in some countries. If so, the state's duty to protect can be discharged in an indirect way by focusing on special groups and making vaccination mandatory for those who are professionally engaged with substantial numbers and in particular with high-risk people. Vaccination should be mandatory for doctors, nurses, caregivers, teachers, bus drivers and others, on pain of exclusion and disqualification for those who refuse to comply.

received at least one dose of a vaccine.[28] It is a sad fact that combating the SARS-CoV-2 pandemic proved to be more of a 'national' than an international issue. To a certain degree it bespeaks of the duty of the shepherd to first look after his own flock in times of danger. Free, democratic, welfare states, however, have duties not only *vis-à-vis* their own citizens but also towards those less privileged and fortunate who live in states that for whatever reason fail to take care of them and to discharge their duties. The legitimacy of democratic states is ultimately founded on the acknowledgment of the right of other people to strive for a common undominated life with secured basic rights and freedom.[29] This particular responsibility of democratic states is not exhausted in some kind of formal recognition. It also demands taking steps of material and symbolic support when needed. Actually, this duty towards other people comes as an extension of the duty to rescue in the largest sense and it can and should be discharged in cooperation with other democratic states that, through institutions of global governance, can offer concerted action and help those in need of survival and stability in their own political habitat. This way democratic welfare states not only contribute to much needed international stability but also protect themselves.

28   Maria De Jesus, 'Global herd immunity remains out of reach because of inequitable vaccine distribution – 99% of people in poor countries are unvaccinated', *The Conversation*, 22 June 2021, https://theconversation.com/global-herd-immunity-remains-out-of-reach-because-of-inequitable-vaccine-distribution-99-of-people-in-poor-countries-are-unvaccinated-162040.
29   Papageorgiou, 'The refugees and our duties'.

Suffering from Vulnerability

On the Relation Between Law, Contingency and Solidarity*

Benno Zabel

> "You can hold yourself back from the sufferings of the world, that is something you are free to do and it accords with your nature, but perhaps this very holding back is the one suffering you could avoid." – Franz Kafka

When observing the developments of modern societies in the context of the pandemic crisis, one sees the fragility of social structures and political agency. One notices especially an ambivalence of legal action, made plain by the conflicting goals of liberal communities. One thinks of the handling of medical resources or the settling of ethical questions. But one also thinks of restrictions to individual and social life, to rights of freedom and assembly and the right to demonstrate, or of the conflicts that result from the sharing of economic burdens. Without doubt the COVID-19 crisis has reinforced if not brought forth disruptive processes in societies, or at least pushed them within people's perceptual horizon. In this article I argue that we can understand the significance of the COVID-19 crisis only when we relate it to the *vulnerability* of forms of life today and the *awareness of vulnerability* of whole societies. The language of vulnerability is an expression of a reality of freedom that has internalized the contingent conditions of its becoming and persisting. In this sense, as a guarantor of order, law guarantees reliable co-existence in society. Yet at the same time, law is the result of this co-existence, which means it is related to the historical dimension and profound experiences of human culture. The legal order is at once necessary and contingent.

According to the thesis of this article, the COVID-19 crisis merely shows in an especially striking manner how difficult it is for today's liberal societies to grasp necessity and contingency as reciprocally conditioning structural moments of freedom. Put bluntly, liberal guarantees of freedom do not eliminate vulnerability but rather promote it. Law, in turn, is an integral part of this dynamic and thus falls into a crisis. But it is also necessary to respond to this crisis of legitimation of law with a new conception of social freedom. Freedom is an achievement that we have to care for collectively, also by legal means. This involves learning to understand anew the social role of solidarity. Upon closer examination, the handling of vulnerability and the experiences of vulnerability point to an overlapping communication and interlacing of diverse spheres of freedom, which must find recognition in the various forms of legal action. Law's function is oriented not only to delimitation but also to *inclusion*. For this reason, too, the crisis of law can be overcome only if there is, in addition to an idea of a protective freedom, the idea of an inclusive

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* Translated from German by Aaron Shoichet.

freedom. Being a subject in a legal order highlights the insight that spheres of freedom must be understood as two-dimensional, as one's own and at the same time mediated through others. Such a conception of freedom by no means aims to subject rights to a rigid regime of duties or to moralize law. Rather, it is about lending reality to the dialectic of the social rule of law and political self-government in free societies. Plural societies do not simply stumble upon processes of inclusion; rather, these processes must be generated in participative action and placed on a stable footing. A critical conception of freedom thus articulates the double-edged power of law that is crystallized in the practices of subjectivization, and it insists on revealing the *suffering from vulnerability* and the *need for inclusion* of open societies.

This thesis and its consequences will be elucidated from three intertwined perspectives. We will begin by reconstructing liberalism's concept of law as part of an encompassing *care regime*. Then we will seek to show that law responds to liberal societies' awareness of vulnerability and thereby brings forth vulnerability. The change of perspective in the final part seeks to reflexively flip modern societies' knowledge of vulnerability by introducing solidarity as a *legal* concept of inclusion. We will then be able to see that the practices of solidarity do not deny the demand of order of liberal legal systems. Instead they point to the fact that the crisis of law and society can be overcome only by recognzsing the social *dependence* of individual expectations of freedom and security.

I. Law and the political anthropology of modern societies

1. *The ambivalence of the promise of law*

Especially in times of crisis and structural change, we notice that a reliable common life, an open society, is hardly obtainable without the infrastructure of the legal order, without the promise of universal equality and political participation. The promise of law is a promise of social spaces of action, for individual rights are only worth something if they can be inserted in social communication and can in this way guarantee self-realization. Securing rights is the badge of enlightened, normative orders, of a state that restricts its power.[1] This applies to the consideration of diverse individual interests, needs and capacities, but equally to the containment of existential fears and insecurities, of scenarios of crises and catastrophes. Now there is no doubt that, following today's understanding of democracy, only the social and political understanding decides what may claim legitimacy as protected positions of right.[2] But this understanding cannot ignore the liberal idea of rights, for the significance of rights consists precisely in that, according to Ronald Dworkin, 'an individual is entitled to protection against the majority even at the cost of the general interest'. In this respect, subjective rights would offer, in Dworkin's words, 'a trump over general utilitarian justification.'[3] In recognizing

1   Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: Norton & Company, 2014).
2   Jürgen Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992).
3   Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 2013), 180, 431.

subjective rights as human rights, basic rights etc., one accordingly articulates the insight that there are individual expectations of freedom that have a legal quality because a subject is entitled to them.[4] In this way, a conception of self-empowerment is mobilized that enables effective individual agency. One need think merely of the numerous forms of action linked to legal claims.

On the other hand, the idea of subjective rights has never been understood in such a way that the individual determines the range of legal positions solely from his or her particular perspective. It is clear not only in the political theory of the *Ancien Regime* but right up to the present liberal constitutional theory that individual spaces for action must be restricted if we are to maintain long-term, universally acceptable legal relations. Rights are not simply available. According to the common account, only in the context of an ordered community with a functioning monopoly of power are they realizable and worth protecting in the case of conflict. This interpretation is by no means new. It was clear already for Thomas Hobbes that rights, natural freedom, could be effectively claimed only by someone who subjected him- or herself to the civil laws. It is the rule of law that draws attention to the legal subject in the first place and generates a lasting trust in the social order. With his contract model, Hobbes is one of the first to conceive of the vulnerability of the individual *politically*[5] and thus to abandon the metaphysical foundations of the tradition. For an enlightened modernity, this link between subjugation, protection and peace is as attractive as it is problematic. This model is attractive because it reconstructs state authority as a socially legitimised and thus recognized entity for securing rights: *auctoritas non veritas facit legem*. For, according to Hobbes:

> The Office of the sovereign, (be it a monarch or an assembly,) consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people;* to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself.[6]

Strictly speaking, Hobbes drafts a *care regime* of the state that encompasses the entire life in society. Care, *cura*, and thus *securitas*, becomes the distinguishing feature of an authority that relies on its own capacity for order. We will come back to this later. The problem that Hobbes's view poses for the concept of a democratic legal order is that he conceives of the link between subjugation, protection and peace in terms of an individual duty of obedience. Thus, in contrast to the modern understanding of freedom, duty is not the reflection of law; on the contrary, law is the reflection of a duty. This duty is determined and asserted through the power of legislation and coercion of state authority. Only then, in turn, does it appear at all

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4   John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (New Haven: Yale University Press, 2003), 2nd treatise, § 44.
5   Thomas Hobbes, *Leviathan*, ed. C.A. Gaskin (Oxford: Oxford University Press, 1996), chap. 13.
6   Hobbes, *Leviathan*, ch. 30, 222.

possible to reliably overcome anxiety and achieve a stable state of peace. Yet we should not overlook that one is thereby exposed to a rigid imperative of security (safety) without oneself having been involved in the grounding of the normative principles essential for this imperative of security. For Hobbes, natural freedom is indeed worthy of protection. But it is also a legal risk that must be constantly constrained. The legalization of the need for security, *i.e.* of a social awareness of vulnerability, leaves behind a precarious subjective status in a positively paradoxical turn. In other words, it is the result of a thoroughly *liberal-authoritarian concept of rights and the security of the legal order*.

At least that is how modern legal theory and political theory see it.[7] The critique expressed against Hobbes from the perspective of democracy is more or less understandable. Individual freedom cannot exhaust itself in the justification of imperatives of security. Rather, freedom has an intrinsic value that must be spelled out politically and legally. Yet Hobbes's insight also remains that the securing of rights and freedoms must be accompanied by legal powers, which ought to harmonize facts and norms, including diverse social interests, with the idea of a stable and secure community. Democratic concepts of law and freedom must succeed, then, in achieving something specific: they must implement a network of intervention mechanisms yet designate it at the same time as an act of *self-government*. For Jürgen Habermas this does not represent a fundamental philosophical problem: 'In the legal mode of validity, the facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty.'[8] In this regard, law must not only mediate the interplay of autonomy and authority, freedom and subjugation; rather, law is also a medium that normatively processes the empirical impulses and needs, the lifeworld perspectives of the subjects. That is, law is an integrating factor. As a legitimate order that has become reflexive, it belongs, according to Habermas,

> to the societal component of the lifeworld. Just as this reproduces itself only together with culture and personality structures through the flow of communicative actions, so legal actions, too, constitute the medium through which institutions of law simultaneously reproduce themselves along with intersubjectively shared legal traditions and individual competences for interpreting and observing legal rules.[9]

The regulating power of law – the monopoly of violence – is thus legitimized in two ways: on the one hand, through the function of political and social order, and on the other, through the democratic process. This understanding of democracy and society is noteworthy especially because it seeks to reconstruct law as a neutral moderator of the most diverse interests, needs and expectations, as an uncontested medium of normative orientation. But the matter is less clear than it initially

7   Franz Neumann, *Die Herrschaft des Gesetzes* (Frankfurt am Main: Suhrkamp, 1980), 128 ff.
8   Jürgen Habermas, *Between Facts and Norms*, transl. William Rehg. (Cambridge, MA: MIT Press, 1996), 28.
9   Habermas, *Between Facts and Norms*, 80-81.

appears. With the verve with which modernity's project of freedom is positioned against Hobbes and the anti-Enlightenment tradition, it is perhaps overlooked that this project of freedom was itself the result of political and social struggles, and still is.[10] This does not mean in any way that one could forego the project of freedom – quite the contrary. And yet it is necessary to examine more clearly the context and the dynamic of securing liberal freedoms and rights. Thus the legal order and the state are tied to a concept of society that understands itself as *value-pluralistic* and *secure from contingencies*. Constitutional appeal to values fills the vacuum that the demise of traditional resources of legitimation such as religion and morality left behind. Whether related to security and solidarity, equality or education, values ensure normative orientation. They have the task of asserting literally what is essential and valuable in the 'needs and conditions of the immediate spiritual life'.[11] This applies to dealing with fears and uncertainties just as much as it does to concern for one's existence in general: *no values, no normative compass*. For this reason it is hardly surprising that there is talk everywhere of communities of values, of a defence of democratic values or of a value-oriented constitutional patriotism (Jan-Werner Müller).[12]

One can see why it is important to mention the significance of values and the semantics of values in how the reproduction of democratic communities takes place. The legal order and politics in the shape of legislation and the application of law not only moderate the diverse conceptions of value of a society; rather, according to Isaiah Berlin, existing life circumstances are continually re-ordered, changed or re-assessed.[13] *Societies long for the coherence of values through law*. The legal power that thereby arises unifies a multitude of regulating techniques employed by administration, the judiciary or the police. Thus democratic securing of law contrasts clearly with pre-modern conceptions. But one can also see that law depends on normative and psychic steering effects and that it must respond to different demands – in the field of economics, security or health policy. Legal norms should guarantee and enforce social conceptions of value. It is these effect mechanisms, this insertion of normality and normative trust against which the legitimacy of the political order is measured.

Yet the conflicting goals of securing rights can thereby hardly be overlooked: conditions of life and freedom can be stabilized only through permanent intervention and regulation. And this is not a one-sided affair, for intervention and regulation fulfil their purpose only insofar as they are matched to the needs and expectations of society. Yet in this way they become dependent on individual and collective interests. To put it plainly: observance of norms in exchange for security. Replacement of traditional resources of legitimation such as religion, morality or ethicality has certainly led to an emancipation of the modern individual. Yet accompanying

10   Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015).
11   Hermann Lotze, *Metaphysik* (Leipzig: Weidmann'sche Buchhandlung, 1879), 324.
12   Jan-Werner Müller, *Verfassungspatriotismus* (Berlin: Suhrkamp, 2010).
13   Isaiah Berlin, 'Two concepts of liberty', in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

the hegemony of law is a *colonisation of the lifeworld* (Jürgen Habermas),[14] which pushes practices of inclusion and solidarity to the margins, or at least neglects them, while at the same time reinforcing experiences of vulnerability.

II.   The fragmented legal subject

To better understand the relation between law and lifeworld, freedom and vulnerability, it seems sensible to 'flip' the perspective. How does autonomy, so highly esteemed in liberal legal systems since the Enlightenment, relate to the individual's experiences of vulnerability? Let us begin with the common paradigm. It states that all political decisions can be justified only in relation to the individual subjugated to law.[15] Individual interests restrict or mobilize sovereign action. In short: *facilitating autonomy creates legitimation*. Now we have already seen, however, that facilitating autonomy frequently occurs more dynamically than is generally assumed in present-day theories of the constitutional state and democracy. But what is at issue in this dynamic? We find an answer to this question if we bring to mind the starting point for constitutional states in securing freedom. Then we will see that in securing freedom, the individual and society are always *presupposed*, that is, conceived by the state and the constitution as *pre-existing*. This means, on the one hand, that the individual and society do not perform a function for the sake of the state or the constitution, but rather that law and the state act and shape for the sake of the individual and society. That this acting and shaping is essentially tied to instruments of intervention and regulation has already been mentioned. On the other hand, it says very little about the *how* of this securing of freedom, about the *content* of the regulation of interests. If law and state employ their ordering power for the sake of individual freedom, then this must be reflected in the handling of interests and conditions of society. Michel Foucault points precisely to this when he emphasizes that a liberal legal system does not simply accept freedom: 'Liberalism is not what accepts freedom. Rather, liberalism proposes to manufacture it in each instance, to arouse it and to produce it.' Law, Foucault continues, thus relates to a subject that appears 'as subject of individual choices that are at once neither reducible nor transmittable.'[16] Legal relations are the result of a regulated freedom. The idea of liberal legal systems rests on making the pre-existing conditions of society into the *ground* of securing freedom. This means that the legal system orients itself to the social, economic and political facts, and from there it orders the variety of legal relationships. That is hardly surprising in a liberal world as we know it. Yet one should not underestimate the explosive power of this conviction that is widely shared today, for when individual autonomy is seen through the lens of pre-existing societal conditions, then all mechanisms *facilitating* autonomy must be systematically oriented towards it. But if that is the case, then the facilitating of autonomy

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14   Jürgen Habermas, *Theorie des kommunikativen Handelns*, Vol. 2 (Frankfurt am Main: Suhrkamp, 1981), 366.
15   John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971).
16   Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978-1979)* (Paris: Seuil, 2004), 66, 276.

is influenced not merely by the differentiation of functions of liberal societies, but also to the same extent by unstable relations that exist between the diverse functional areas, for instance, the economy, culture, religion or private life – areas that the individual has a share in intermittently, temporarily or permanently. The negative liberty that the legal order ought to confer is no longer primarily ethically grounded – as was the case still with Kant and Hegel – but rather the expression of a network of interests. Yet in this sense it is itself unstable and fragile.

This perspective makes clear that the high esteem of the individual results in a series of political and legal consequences (see section II above). Most visible are the interferences of the securing of legal order. Protection, and this means regulation, is not only dependent on the interests being protected. The regulation of law unfolds its dynamic character also in relation to a legal subject who is conscious of his or her fragmentation precisely *through* the promise of autonomy. The legal order justifies the subject's power and powerlessness, but with it also *social disembeddedness* and vulnerability. But the paradox consists in the fact that the liberal project of freedom first generates disembeddednesses and vulnerability and then seeks to curb them by means of the constitutional state. This paradox has consequences for the internal architecture of the legal order, for the implementation of individual self-realization marks at the same time the switch to a legal *regime of care*. Care as a function of law replaces the traditional ethics and marks a flexible infrastructure of regulation.

III.   Suffering from vulnerability: cura and securitas

1.   Freedom and anxiety
Mobilizing the idea of care as a paradigm for politics and law has been discussed many times. It has been pointed out that even Hobbes knew of such a care regime and vehemently defended it. Meanwhile the decisive question is *how* a liberal community employs a care regime of law and *what* exactly it ought to achieve. Looking back at the preceding analysis, we can see that the Janus-faced character of individual autonomy and the ambivalence of legal protection mechanisms have concretely emerged. The problem of this conception of law and autonomy is that, while it takes into account that factual interests (needs and preferences) justify rights, it insufficiently reflects the internal shifts in these factual interests. Increased talk of internal shifts goes hand in hand with an increase in importance of experiencing and overcoming contingency, which influences, in turn, our awareness of vulnerability. For this reason it is not at all surprising that the techniques for realizing freedom by legal means are increasingly linked to the *real* conditions of society.[17] Not eternal life but rather finite and natural life is what governs the universal horizon of expectation (which is also discernible in the current debate concerning contingent human dignity[18]). That is also why freedom appears in the first instance

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17   Niklas Luhmann, 'Kontingenz als Eigenwert der modernen Gesellschaft,' in *Beobachtungen der Moderne* (Opladen: VS Verlag für Sozialwissenschaften, 1992), 93.
18   Avishai Margalit, *The Decent Society* (Cambridge, MA: Harvard University Press, 1996).

as a question of immanence. Yet this freedom of vulnerable forms of life has a further effect that is often underestimated, namely, that *freedom itself generates anxiety*. In this dialectic of freedom and anxiety, suffering from vulnerability becomes undeniable.

Now anxiety as an individual and collective phenomenon is not a novelty of modernity: it has been known in every era.[19] Pre-modern eras had developed a comprehensive arsenal of semantics of anxiety and techniques for processing it. Experiences of anxiety and, its backside, experiences of fear are indicators of sites of existential threat or, at least, perceptions of threat. In the philosophical discourse, fear is associated with a directed response, with a concrete event, while anxiety is associated with an existential state of mind that supersedes every other inner orientation.[20] In the bodies of knowledge on society from the most diverse eras, this analytical distinction has hardly been reflected upon. Under the title of anxiety, we can see instead a conflation of the semantics of fear and the semantics of anxiety. Sigmund Freud, with his theory of anxiety, became especially important and influential by combining together diverse phenomena related to affects and insecurity and thereby preparing the way for a broader understanding.[21] Yet what is new about anxiety in its relation to modernity may be that secular societies have entirely different ways of addressing it. They refer to the experiences of contingency and normative expectations, which are concentrated in the guarantees of the legal order and which – precisely because these societies do not accept a metaphysics of fate – must be spelled out in a semantics of security appropriate to freedom.

Resources for the legitimation of law, state and constitution are visible in the processing of anxiety, but so is the potential for a loss of legitimation and trust. It is this precarious dynamic that we recognize in the COVID-19 pandemic. The pandemic brings about a collective crisis of trust (which in any case could also be observed with the first modern epidemic, the cholera epidemic of 1831/1832). In addition, the spread of bacterial or viral diseases occurs through transmission and infection, yet this invisible and imperceptible infection seems manageable only to a limited extent. Last but not least, there are existential anxieties – social, economic or political – that are reinforced through the media, and there are threatening scenarios that can grow into social hysterias, resentments and excessive irrationality, for instance, if the pandemic is associated with anti-Semitic ideas or the most diverse conspiracy theories.

At the same time, experiences of anxiety are embedded in the cultural memory and standards of rationality of liberal societies and thereby also challenge the model of the legal order. Upon closer examination, the language of anxiety develops its own irresistible force. It is part of public communication and thereby acts very disrup-

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19 Jean Delumeau, *La Peur en Occident (xive-xviiie siècles). Une cité assiégée* (Paris: Fayard, 1978).
20 Søren Kierkegaard *The Concept of Anxiety*, ed. and transl. Reidar Thomte (Princeton, NJ: Princeton University Press, 1980); Martin Heidegger, *Sein und Zeit* (Tübingen: Max Niemeyer Verlag, 1993), §§ 39-42.
21 Sigmund Freud, *Hemmung, Symptom und Angst. Gesammelte Werke*, Vol. XIV (Frankfurt am Main: S. Fischer Verlag, 1986), 111-205, here: 120 ff.

tively (which is clearly discernible in the current pandemic crisis). 'Anxiety,' according to the sociologist Niklas Luhmann, 'resists any kind of critique of pure reason. It is the modern apriorism – not empirical but transcendental; the principle that never fails when all others do.'[22] This means that anxiety as a form of individual or collective self-assurance – and self-preservation – cannot be ignored, but neither can it simply be tolerated as a competing principle. Law would forfeit its normative orienting function and the liberal model of order would implode. Phenomena of anxiety, according to the common discourse, must instead be deconstructed in the *normative grammar of right* and they must be permanently contained. What we can see, however, (more clearly even than did Hobbes) is that the deconstruction and containment of anxiety and vulnerability drives the normative grammar beyond itself.

The handling of phenomena of anxiety and vulnerability reproduces the conflicting goals of modern law. In this respect, constitutional theory and political anthropology highlight the epistemic field and likewise the lines of conflict in practice. Recall Foucault's suggestion that liberalism does not simply accept freedom but must instead continually produce it and regulate it.[23] Law accordingly designates relations of power and authority that are operative in societies. The popular perspective, according to which relations of power and authority can be thought of only hierarchically and as exercised only in a vertical form, does not adequately acknowledge the heterarchical, network-like regulation in modern societies. There is no above and below, inside and outside for relations of power and authority. Without doubt they are invoked by the constitutional state, but they are also acted out in society. Thus, overcoming experiences of anxiety and being aware of the fragility of human existence makes especially clear how fragile and far from obvious civil liberties are. Here we see not only the strong *dependence of reason on experience*, but also how the idea of security becomes increasingly important in the shadow of the liberal guarantee of freedom. Security enters as a resource of meaning in a *disenchanted world* (Max Weber) in an indissoluble competition with freedom. Whether and how normativity asserts itself against nature and factual evidence are questions that depend on how one defines the relation between freedom and authority, between the subject and regulation. This tension between subject and regulation is played out in the care regime of law, where the right to freedom from anxiety and injury is affirmed.

2. *The care regime of law*
What is designated here as the care regime is the answer to the production of anxiety and the all-present insecurity of liberal societies. The care regime, as political, legal and social care, as prevention etc. makes dealing with anxiety and insecurity into a task that *spans society*. To the extent that law replaces morality and religion as hegemonic agencies of meaning, it itself must now unfold *forces of cohesion* to prevent a crisis-induced disintegration of free communities. It is common to illus-

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22   Niklas Luhmann, *Ecological Communication* (Chicago: University of Chicago Press, 1989), 128.
23   Foucault, *Naissance de la biopolitique*.

trate the unique character of the care regime in light of practices of the police as an institution. The police force is considered a prime example of a state-mediated approach to averting danger and of a universal communication of security.[24] The related power to intervene consolidates practices of (self-)discipline, of individual protection and the optimization of freedom.[25] In the constitutional interpretation, the contradicting interests that emerge are thereby attenuated, so that the executive power of the state is connected directly with the principle of legality. This means that the application of law is tied to current laws through the constitution, which ought to enable the realization of stable legal relationships. Yet this interpretation describes the concept of a state under the rule of law for which the functionally differentiated society and the actual relationships are only *another sphere*, which one shapes from *outside* and *into* which one governs or intervenes. Factoring in the preceding analysis of society and crisis, we can see that the constitutional state, society and individuals, though assigned to separate areas of organization, interact with each other and are dependent on each other in manifold ways. This applies to the diverse structures of authority within a community, but also to how interests in a normatively shaped society depend on concrete interests in security. We must not ignore how the supposition of security, which is based on experiences of crisis and vulnerability, comes into open competition with the guarantee of freedom. Once again, a sociological view is helpful, for precisely with this supposition of security, according to Foucault, the liberal community is forced

> to determine exactly to what extent and to what point the individual interest, the different interests, which are individual in terms of diverging from one another and possibly opposing one another, do not constitute a danger for the interest of all. The problem of security: to protect the collective interest against individual interests. Conversely the situation is the same: It will be necessary to protect individual interests against everything that could appear in relation to them as an encroachment coming from the collective interest.[26]

Now the handling and weighing of interests is the daily business of jurists: no one is better versed in this métier. Techniques for weighing interests and determining proportionality make it possible to deal with colliding interests in a flexible manner and thereby guarantee, or so it is thought, an optimization of freedom that is close to life.[27] Yet the demand to permanently work out interests, rights etc. has numerous thrusts that one must see in order to be able to classify correctly the dynamics of action. In order to confront concrete insecurities – the fear of survival, of existence and of losing one's status – and to confront social and economic crises, it is not enough to have available a comprehensive arsenal of steering and regulating measures. Rather, law and politics must also ensure that the plans for control, surveillance and protection also *work* effectively, and this means that they are pub-

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24   Friedrich Balke, 'Zwischen Polizei und Politik', in *Das Politische und die Politik*, ed. Thomas Bedorf and Kurt Röttgers (Berlin: Suhrkamp, 2010), 207-234.
25   Pettit, *Just Freedom*.
26   Foucault, *Naissance de la biopolitique*, 66-67.
27   On this, see Bernhard Schlink, *Abwägung im Verfassungsrecht* (Berlin: Duncker & Humblot, 1976).

licly *perceptible* to all members of the society. The modern political and legal approach to dealing with crises (and not only crises) is increasingly dependent on an expressive and diversified culture of responsibility. This means that responsibilities are justified not merely in terms of events and catastrophes that have transpired, but instead merely through the possibility of the exertion of influence (through the state). Natural catastrophes, for instance, are no longer *mere* natural events if they can be avoided, or even mitigated, through political and legal action. That this may entail substantial costs on the other side is obvious. It applies to diverse forms of state intervention, to intervention in the private sphere and also in freedoms of action or freedoms of profession. It is undeniable that, in exceptional conditions and conditions of repression, we can study the turning points of freely functioning orders precisely by reference to the police and police intervention management. And yet the situation is more complex. Two factors may be decisive: on the one hand, the pronounced *desire* for security and intervention of liberal societies, and, on the other hand, the idea of a universally enforceable orientation to *consequences*. We should briefly consider both.

Let us first consider the desire for security and intervention. This desire must be understood as the consequence of the liberal understanding of freedom. Living circumstances are regarded as fields of interests, superordinate to the legal system and the state, that constantly need to be secured anew. A supposition of security is thus not something that exists or can be formulated abstractly. It arises and changes to the degree that demands of freedom – for instance, through society – are asserted and recognized as being *in need of regulation*. At issue is a process in which demands of freedom, in addressing the legal order and the state, change to duties to guarantee these freedoms. Consequently, fears, threats and insecurities are communicated to the legal order and the state. In return, the communication of the legal order and the state is directed at least also at a *society of fear* (Heinz Bude).[28] And then *laws of fear* (Cass Sunstein)[29] ought to maintain the security of individual freedom and the order of society.

This reciprocal referentiality of rights and duties, of the desire for protection and taking on responsibility, leads to the second factor, the idea of a comprehensive orientation to consequences. Orientation to consequences through law is necessarily tied to relations of intervention and power: without the power of regulation, there are no consequences. Such an initiated increase of significance of psycho-cultural forms of influence points to a network of patterns of language and action that ascribe great importance to the *future* of societies and life circumstances. In the orientation to consequences, we must not ignore the fact that the care regime is a principle that spans society. The aim is clear: normative orientation by *mastering* the future. At the same time, the care regime makes the relatively static concept of responsibility dynamic. In addition to precaution in the classical sense, that is, preventing the violation of legal interests of every kind, it is increasingly about han-

28   Heinz Bude, *Gesellschaft der Angst* (Hamburg: Hamburger Edition, 2014).
29   Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2009).

dling *crises expected in the future*, damage and other destabilising effects. In this way, a whole field of care practices is opened up for the legal order, starting with the general concern for one's existence such as securing a source of livelihood, up to health care, protection from danger and care for crime victims. As the foundation of liberal values should be reflected in the legal system, the care regime takes up the awareness of a fragile existence, promising in return a stable screening of various potential sources of anxiety and insecurity. At stake are the expectations of freedom of the individual and society.

We can easily see the effects of the care regime in the actual legal context. It is about harmonizing the concept of autonomy related to dignity, the person as an end in itself (Kant), with a consequentialist calculus. The interrelation of rights and duties thus designates at the same time a precarious relation. Rights and duties are constantly being redefined, which means that individuals, society, law and state are constantly confronted with changing requirements of behaviour. So if the long-range securing of interests, goods and values – of life, property, subsistence or the public order – is the declared aim and the state's duty, then threats to the legal order and freedom are to be avoided absolutely. Yet violations of the legal order and freedom can be effectively avoided only so long as the practices of care are constantly optimized through laws, and the suppositions of security are matched to the fears, insecurities and, consequently, the expectations of normality of societies. In return, one is *reminded of one's duty*. The state's concern for the individual's existence is tied to clear behavioural requirements, which is why the person concerned must reckon with severe disciplinary measures in the case of violations. Above all, protection from danger sensitizes one to how practices of care may intervene in the cultural memory of liberal societies, for they demand the willingness of *all* to restrict the power of disposal with respect to the private sphere. The effects of coherence that practices of care aim at thus replace traditional legal policy and symbolic politics.

The validity of the preceding analysis can be seen in light of the COVID-19 crisis. First it is critical that individual or negative freedom is grasped as the point of departure of every modern social and legal order. Techniques of self-protection, for instance, one's own protection from infection, are thus supplemented with political demands to match individual behaviour, for instance, social distancing, to concrete crisis situations. Administrative action, by the police etc., thus expands to ubiquitous techniques of care when severe exceptional and emergency regulations – precisely also with a view to the individual's need for security – come into effect and are enforced. One need only think of the lockdowns, the contact bans, the quarantine ordinances or, in Germany, the amendment to the Infection Protection Act, which grants far-reaching competencies of intervention to the government and health care system in the fight against infection. The point here is not about judging these measures in terms of their appropriateness, but rather about emphasizing the importance of not losing sight of the fact that – in the interplay of individual fear of infection, protection of the population and preservation of security and public order – a differentiated *care* regime is establishing itself that is supposed to channel and curb dangers. We need not discuss here whether the result is

a state of emergency that encompasses all areas of society, executed with power through politics and administration, as the Italian philosopher Giorgio Agamben believes.[30] Much speaks against Agamben's interpretation. But even if it were correct, we could still recognize that a state of emergency may be linked to various needs in dealing with crises and is not solely based on the logic of a power-obsessed politics or government. (The fact that such motivations exist is just as indisputable as the fact that states of emergency can be deliberately employed to undermine democracy.) Nonetheless, it is not necessary to refer to a state of emergency to uncover the field of forces and the conflicting goals in the guarantee of rights. This is because the legal esteem of the free subject brings with it the most diverse forms of intervention, and thus of vulnerability and fragility.

The analysis sketched here of society and crisis was necessary in order to reconstruct the ambivalence of the liberal promise of a legal order and to clear the way for a different view. What came to light was a concept of freedom that hinders itself over and over again. A central reason for this self-hindrance is the expansion of tasks of the legal system in liberal societies. The legal system ought to secure the negative freedom of individuals, yet at the same time compensate for the disembedding and accompanying fears and insecurities. The care regime of law is an expression of this expansion of tasks. Meanwhile, this tailoring of tasks also shows that the logic of care leads to paradoxes. In its full variety, *care as a function of law* – as can be observed in the handling of the pandemic – not only appears to promote security and social embedding, but also to be repressive, authoritarian and excluding. By the same token, this is not about identifying an authoritarian logic in the liberal understanding of law, for a liberal legal order as such is not repressive and excluding. Rather, the preceding reconstruction has sought to highlight the conflicting goals and turning points generated specifically by a liberal conception of law. But if the conflicting goals and the turning points are the problem, then the solution must come down to connecting suffering from vulnerability with law in a different way.

IV.   Law and solidarity

1.   *Thinking inclusion*
A starting point can be derived from the idea and practices of *legal inclusion*. This entails a notion of law that actively relates to the precarious nature of the modern experience of the world and the associated crises of trust and destabilisation. Inclusive law exhibits law's dual role – its inner schism – in belonging both to society and to a constitutional order. This gives rise to something like an emancipatory agenda: inclusive law recognizes the need for social participation and with it the urgent need to re-calibrate the power and authority relations between the legal system and society. Inclusive law does not merely passively regulate the experiences of anxiety and vulnerability, the practices of inequality and attempts at exclusion. Rather, it grasps itself as part of a process of understanding in which the

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30   Giorgio Agamben, *A che punto siamo? L'epidemia come politica* (Macerata: Quodlibet, 2020).

dangers of authoritarian power are articulated and not veiled as practices of care. Inclusive law thus recognizes its responsibility towards the ubiquitous crises that were also promoted by the government of free communities. Inclusive law engages with a society that is plural, fragile, and also divided. But most importantly, it understands emancipation, political participation and freedom as practices of recognition and reciprocal critique that span society. How, though, does this work?

Let us return once again to a central insight. It is clear that autonomy, contingency and experiences of vulnerability – as they recently became visible once again in the pandemic crisis – influence liberal societies. Social subjects are defined by vulnerability and the need for protection, and expectations of happiness and of a fulfilling life. Every social medium must take this basic configuration seriously and process it in the appropriate manner. This applies especially to the notion of the legal order with its expansive system for applying norms and laws. Norms and the application of norms are an expression of reliable knowledge derived from life experience, of knowledge about what is *human and all-too human*. In contrast to traditional conceptions, it is suggested here that we should not understand the basic configuration of our forms of life as a naturally given condition for the consciousness of freedom.

Yet something very close is claimed: natural interests and general knowledge of freedom form two sides of the same coin – with respect to individual life and social life. This is not meant to undermine the status of the individual and his or her rights. Quite the contrary: Right and life can be grasped only in their precarious unity and difference. Being free does not mean merely asserting the normative order of our common culture (of education, art, religion etc.) in the face of contingent influences of the environment. Freedom is not a social aggregate state that we can simply manage or defend. Rather, freedom is a praxis that we must produce and in which we all participate, but which we must also fight for and shape over and over again. We can experience freedom as a theoretical and practical happening, experience power and powerlessness; we can reinvent ourselves. We may call this the *power of freedom*.

It is this power of freedom that we, as a community, mobilize in judging. Specifically in our practices of judgement, we can see an interplay of freedom and life, of reason and experience, which ought to open up the possibility of a thinking and acting *according to reasons*. Experiences, of whatever kind, represent the natural element of human life. In these experiences, we experience ourselves as immediately subjective. We speak as affected, vulnerable individuals, perhaps as victims or as individuals revolting against the conditions of society. It nonetheless remains a particular position, which, should it have a social impact, must be opened up discursively through free judgement.[31]

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31   Immanuel Kant, *Kritik der reinen Vernunft*, Akademieausgabe (AA) Vol. IV (Berlin: de Gruyter, 1968), 171; *Kritik der Urteilkraft*, AA V (Berlin: de Gruyter, 1971), 179; Hannah Arendt, *Das Urteilen. Texte zu Kants politischer Philosophie* (Munich: Piper Verlag, 1985), 94; *Was ist Politik? Fragmente aus dem Nachlass* (Munich: Piper, 1993), 20.

Benno Zabel

2. The right of others

This idea of *communal judgement* can also guide our legal action in all areas of society. As legal subjects, we perceive our freedom in profoundly different ways: performatively through a daily confirmation of knowledge and rules; in the form of the professional application of law; and in the fact that we experience injustice or hardships and also for this reason fight for our rights. We do not simply confront law, but also embody it. As beings that are vulnerable and thus sensual, we speak the language of law. Law has effects and we want it to be effective. But we must make sure that we are not entirely at the mercy of our naturalness, the household of feelings and experience. *Being a subject in a legal order* means instead being able to flip reflexively the field of sense and sensuality, of norms and nature. How else could the notion of right be universal? This does not mean that the awareness of vulnerability ought to play only a subordinate role in liberal societies. A notion of right that makes reference to the free power of judgement and comes to its own in an overarching community of judgement does not cause the contingencies of life, the suffering from vulnerability, to disappear. Quite the contrary: a notion of right that takes subjects seriously also adjusts its normative standards to the knowledge of vulnerability and the related experiences. And this is possible because every concept of freedom appropriate for humans *lends a voice to suffering* and objectifies the concrete responsibility of society.[32]

Now the reference to judgement has always been familiar to the notion of right and especially the application of law. Right (law) is a medium of judgement, if not *the* medium of judgement. At issue here is the accentuation of the political and critical dimension of judgement. Such a perspectivity of judgement does not repudiate legal competences. That there is need for juridical capacities is beyond question, even if we disagree in the practical employment of these capacities. However, the perspectivity of judgement takes seriously law's demand of inclusion. Judgement in this sense does not simply regulate and intervene in society from outside. It is not the higher or greater reason. Rather, according to Hegel, it is the reason of subjects that 'must accommodate humans in right'.[33] Precisely through this *dialogicity of reason*, law confers dignity to life and also a power to shape politics in the crisis. Understood in this way, the notion of right is not only instrumental, but also participatory. It is recognized insofar as the right of the individual is also the right of the other. This thought can be spelled out, in turn, in three ideas: the idea of maturity, the idea of trust and the idea of solidarity.

3. The idea of maturity

Maturity is knowledge of the emancipatory power of one's own reasons and intersubjective reasons for action. This means at least two things: on the one hand, the capacity to actively shape forms of life, to critically question them or to simply hold

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32 Theodor W. Adorno, *Negative Dialektik*, GS, Vol. 6 (Frankfurt am Main: Suhrkamp, 2006), 29, 51, 202 f.

33 Georg Wilhelm Friedrich Hegel, *Vorlesungen über Rechtsphilosophie*, in *Philosophie des Rechts. Vorlesungsnachschrift Hotho 1822/ 1823*, ed. Karl-Heinz Ilting (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1973), 96.

them open to change. The idea of maturity takes up the thought that we, as legal subjects, are principally able and willing to make rational judgements about the significance and the consequences of goals that we ourselves selected. This self-reflexivity of social action and judgement does not guarantee the success of any particular project of freedom. Maturity is not a state that is achieved and that exhausts itself in conserving individual civil liberties, but rather a process that proves itself insofar as the legal order can be put in motion or made pervious to social needs. In this regard, in inclusive law the practice of filing suits forms, to a greater extent than has hitherto been the case, the point of intersection between politics and society. That is also why, on the other hand, maturity reflects the insight into not only the *capacity* but also the *necessity for transformation* of social infrastructures, of relations of power and authority. Maturity gives expression to an awareness of vulnerability, which is based on learning processes, both individual and social. For this reason, this kind of maturity situates itself in a history of solving legal problems, but it also knows about the conflicts and the susceptibility to regression of every society. Inclusive law does not veil aporias of freedom but rather addresses and resolves them.

4. *The idea of trust*

It is precisely because inclusive law demands the maturity of the legal subject that a reciprocal relation of trust is possible in general. Trust as trust in the legal order articulates individual and collective expectations of reliable normative orientation and the protection of freedom through institutions. Trust in the legal order consolidates distinct perspectives: the social perspective of legal subjects and the perspective of right as reflexive order (Jürgen Habermas). The perspective of legal subjects encompasses not only, as the traditional liberal position advocates, the expectation of securing right. Rather, legal subjects who enable inclusive law possess and 'invest' a social *tolerance for ambiguity*. This tolerance points to the capacity to essentially accept the processes of alienation that right brings forth through laws, sanctions and processes, and at the same time to foster a *willingness for recognition* (also of constitutions in crises). Such a willingness for recognition knows about the stabilizing and protecting functions of institutions. Moreover, it knows that law cannot exist detached from society's expectations of freedom. Institutions are relay stations of common knowledge and storages of trust in guiding action.

In relation especially to institutions, one can also see, however, the internal tensions that characterize inclusive law and which must be articulated time and again by law. Institutions establish for the long term routines for the administration of justice. Yet it is often forgotten (or even repressed) that, as establishments of solidified praxis in which power accumulates and reproduces itself, institutions rest on human and collective decisions. In this respect, roles in which we navigate in society and in the legal system are a necessary part of the liberal organisation of freedom for the individual and likewise for society as a whole. But they can themselves become instruments of power, instruments for violating the legal order and which acquire an ideological life of their own. Perhaps we see the turning points discussed here most clearly in the current debate concerning the *violence of law*. The perspective and the interest of law must be aimed expressly at restricting the institutional

accrual of power, at making the double-sidedness of violence into a societal affair and at promoting structures of democratic influence.[34] It follows from this that the care regime of law is justified so long as it does not manage the interests in freedom and the protection of rights of individuals in an authoritarian manner. In contrast to an orthodox critique of law, modern societies are hardly conceivable without forms for effectively intervening in conflicts and crises. The solution does not lie in the celebration of the anarchist. Instead we should insist on the insight that law can serve as a medium for securing freedom. By the same token, law can be regarded as reflexive and trustworthy only if it faces its own authoritarian experiences, the existing claims of power and hegemony. Contrary to the self-immunizing forces of legal science, a notion of right and emancipatory thought should become visible that knows of the contingency of orders that are factually given and made – that considers it not only possible but unavoidable to transgress an order-upholding positivism. In performative legal action we see the necessity and the limits of every legality. Ultimately it amounts to the insight that there cannot be a just legal order without a *willingness to transgress order*.

5. *The idea of solidarity*

Inclusive law can be effective only if it, together with society, productively implements the aporias of freedom and the expectations of justice. This means that inclusive law has an interest in stability and change; it is at once political and apolitical. But it reflects this difference *in itself* rather than delegating it to something external, to administrative policies, to the economy and the 'market' or religion. This results in what one may call the *culture of normative conflict*. Law, which is often asserted as homogeneous and self-referential, is in conflict with itself. This does not mean a violent battle for law, but rather the confrontation of legal and *non-legal* forces, and the urgency for change that this confrontation generates. This is supposed to highlight how legal subjects, by participating in the community of free democratic judgement, can themselves bring forth the forces for shaping policy within a society. At no point are they merely self-sufficient political sceptics. Rather, they reproduce, albeit in very different ways, differences within the legal system and society by combining ethical, social and cultural forms of life or relating them to each other, or simply by integrating them into everyday life.

This shows, then, two things. First, in the language game of law, the legal subject is not merely an abstract person or addressee of law; instead, in the language game of law the interests of society solidify into a shifting *praxis* of legal judgement. This praxis of judgement can be found in everyday social life (through which the basic rules of social action are made possible and criticisable in the first place). But it can also be found in the diverse forms of the application of law, in the form of conflict resolution, in the act of punishment etc. Second, a concept of juridical freedom is mobilized, which does not pit the *alienations* through the legal system against emancipatory rights, but rather realizes law and order in their dual roles – that is, law and order function not only imperatively (*i.e.*, in the form of 'You should!'), but

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34   Christoph Menke, *Recht und Gewalt* (Berlin: Suhrkamp, 2011).

are at the same time embedded in the normality of interpersonal sociality in the sense of practical and symbolic participation. In this way, a freedom is guaranteed that *happens* to us and which we must nevertheless *choose*.

Law's capacity for inclusion is especially visible in the fact that it recognises *solidarity as a marker of inclusion* of modern coexistence. Why solidarity? Today we are familiar with solidarity as a medium of cohesion, as the glue of society. It is most often understood in a moral or political sense,[35] because liberal law allows it little or no room given its drift towards possessive individualism. For inclusive law, such a view is not necessary, not because inclusive law would misunderstand individual civil liberties, nor because it wants to transform into morality or politics. Rather, inclusive law insists on a different motivating basis for the acting subject, upon which law, society and solidarity – unlike traditional projects – are situated in a common collective praxis. The solidary component is not merely presupposed – how could it be? – but rather arises as subjects articulate the interests and needs they deem indispensable in the course of the realization of life circumstances fit for human beings. Yet this means above all that subjects and the praxis of freedom *produce each other reciprocally*, change and engage with each other.

In inclusive law, this solidarity component becomes effective by highlighting the entanglement, the dependences among civil liberties. Being a subject and person in a legal order means understanding rights as dichotomous – they are one's own but they are also mediated by others. Equality, for instance, is not a demand that I can assert only for myself and a particular group. Asserting equality means observing one's own level of freedom from the perspective of *all* members of society, which may entail having to reassess one's own legal positions or deferring them in the face of others. This, too, is not about subjecting rights to a rigid regime of duties. Quite the contrary, it aims at enabling us to articulate the provisional nature of what has been achieved, what is aporetic and scandalous, and also the interest in change – that is, it aims at making us aware once again of existential questions, of questions suitable for human beings in our society.[36]

For instance, the recognition in law of the *Ethics of Care* and *Care Work* could give rise to new forms of individual and social action.[37] Especially during the COVID-19 crisis, the debate concerning the ethics of care and care work has sensitized us to the fact that, in liberal societies, we are dependent on the most diverse practices of care, whether at the beginning or at the end of life, in daily life at home or at work. Yet this dependence in liberal societies remains problematic, is even misunderstood when it is regarded merely as sacrifice (especially by women), as 'invisible' work, which is taken for granted or remunerated with below-average pay. Not only societies but political communities as wholes – if they want to remain faithful to

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35 Richard Rorty, *Contingency, irony and solidarity* (Cambridge: Cambridge University Press, 1989), 189 ff.

36 Wendy Brown, 'Suffering the Paradoxes of Rights', in *Left Legalism/Left Critique*, ed. Wendy Brown and Janet Halley (Durham: Duke University Press, 2002), 420-435.

37 The *locus classicus* is Carol Gilligan, *In a different Voice* (Cambridge, MA: Harvard University Press, 1982).

their own standards – must insist that freedom and equal participation can be realized in such constellations of work and life. Recognition in law means that liberal communities should be willing to grant a secure status to these precarious moral positions. In other words, we not only declare our solidarity in the form of empathy or respect towards single individuals or groups (which we ought to do anyway), but rather understand that equal participation in the generated resources must be a universal demand of free communities, which, most importantly, requires protection in the form of rights. This applies not only to the large area of care work, but to the enabling of subsistence fit for humans in general.

In this regard, the handling of fears and insecurities is linked with a culture of (self-)care in which suffering is given a voice and political and legal emancipation converge. Of course we know that the legal order has limits in facilitating solidarity, and must have these limits. In the legal system, spaces for freedom solidify into guarantees that *can be claimed*. Nonetheless, we can see (not only in pandemic crises) that the component of solidarity addresses very generally the integrative achievement of law – especially when we are prepared to understand human dignity for its part as a concept of legal inclusion or, as Hannah Arendt states, a *right to have rights*.[38] With Arendt we can insist that legal relationships have their own political energy. There are legal relationships fit for human dignity only insofar as subjects constantly evaluate existing legal forms, are able to decrypt them as ideological constructions that are antagonistic to freedom. The present-day fight against racism and discrimination and the struggle for diversity and recognition of vulnerability shows how the interest in critique and change does not enter law from outside, but rather works within and through the current order.[39] Inclusive law sees no danger in this, for rights and law are nothing other than institutions guiding judgement. They are always already there, sometimes obstructing the way, defending our subjectivity, but they are also made (by us), and for this reason they can be changed at any time. Precisely here, in this mutability, lies the chance to leave behind ideologies of law without forgetting the aporias.

Here it is again, then, knowledge of the power of freedom and traces of contingency, which procure validity in the mature subject, in communal judgement, and which prevent us from playing out emancipation against law. It is this insight that truly makes law into liberal law.

38   Hannah Arendt, *Ursprünge und Elemente totaler Herrschaft*, 18. ed. (Munich: Piper, 2015), 618.
39   Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine', *The University of Chicago Legal Forum* (1989): 139-167.

Solidarity, Religious Freedom and COVID-19

The Case of the Ultra-Orthodox Sects in Israel*

Miriam Gur-Arye & Sharon Shakargy

Introduction

The ethos of social solidarity plays a significant role within Israeli society. During the COVID-19 pandemic, there were many touching instances of interpersonal solidarity: young people helped the elderly, and money and food were collected and handed out to the needy. However, a different kind of solidarity was required to reduce the spread of the pandemic. Social distancing regulations made it necessary for individuals to change their lifestyle for the benefit of others. Most communities in Israel adhered to the regulations during the first lockdown (25 March 2020 - 4 May 2020). However, as the pandemic went on, the mutual responsibility and personal discipline needed to slow the progress of the pandemic were eroded. Huge weddings and parties were held, bars were crowded, and large-scale prayer services took place, all of which violated social distancing regulations.

Although violations of COVID-19 regulations occurred in various communities in Israel, the refusal to comply with COVID-19 restrictions within the ultra-Orthodox Jewish communities had unique characteristics. Noncompliance with the regulations restricting mass prayers and requiring the shutting down of synagogues and *yeshivas* (Jewish seminaries for men) was ordered by (some of) the ultra-Orthodox spiritual leaders – the rabbis. The police, whose duty it was to enforce the COVID-19 regulations on the ultra-Orthodox sects as on everyone else, were reluctant to do so.

This article discusses the unique tension between social solidarity and religious freedom as demonstrated by the refusal of the ultra-Orthodox sects in Israel to comply with COVID-19 regulations, and suggests that such refusal should not be tolerated, not even in the form of non-enforcement.

The article proceeds as follows. Section 1 discusses the tension between solidarity and freedom. It provides a detailed description of the ultra-Orthodox sects' refusal to comply with the COVID-19 regulations which interfered with their religious life – the regulations restricting mass prayer services in synagogues and studying Torah in the *yeshivas*. Section 2 suggests possible explanations for that refusal, based on either religious beliefs or a socio-political claim to autonomy. Section 3

discusses whether a polity should be willing to tolerate refusal to comply with COVID-19 regulations on the basis of claims of religious autonomy, when that refusal undermines efforts to reduce the risk to the health and lives of society at large.

1. The tension between social solidarity and freedom in Israel during the COVID-19 pandemic

There is an inherent tension between social solidarity and individual freedom. Solidarity-based duties, such as Good Samaritan duties that require individuals to rescue those who are under imminent and severe danger to their lives or health, significantly restrict individual freedom. Individuals have to abandon their other activities in order to be able to act and prevent the danger, with no control over when and where they may be required to intervene. The need for intervention may come upon them at the worst possible time.[1] Legal systems differ in how they resolve this tension. In civil-law systems, the tendency is to prefer solidarity over individual freedom and to impose Good Samaritan legal duties, while in common-law systems, the tendency is to prefer individual freedom over solidarity. In many of these systems the duty to rescue others from imminent danger to their lives or health is imposed on those who bear a special responsibility either for the source of the danger (such as those who own a dangerous product) or to those who are endangered (such as parents towards their children).[2]

The preference for solidarity over individual freedom in Israel stems from the Jewish tradition. The Talmudic dictum that 'all of Israel are guarantors for one another'[3] originally meant that each member of the Jewish people is responsible for the sins of all other members, but later was understood as imposing a mutual obligation on all Jews to care for each other's wellbeing.[4] The ethos of solidarity derived from this Talmudic dictum became a central theme of the Zionist movement, which emphasized social cohesiveness and mutual commitment as resources for the national project.[5] For many years the perception was that Israel does not need to enact Good Samaritan laws: Israelis will always do everything in their power to rescue people in danger.[6] When a Good Samaritan law was eventually enacted in 1998 – with a name derived from the biblical injunction: 'Thou shalt not stand idly

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1   For an elaborate discussion in this context, see, Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 165-69, 171-81.

2   For comparative perspectives, see Kai Ambos, 'Omissions', in *Core Concepts in Criminal Law And Criminal Justice, Anglo-German Dialogues*, ed. Kai Ambos, Antony Duff, Julian Roberts, and Thomas Weigend (Cambridge: Cambridge University Press, 2020), 17-47; Miriam Gur-Arye, 'Boundaries of Criminal Liability: Participation in Crime, Preparatory Offences and Omissions: Book Review of Core Concepts in Criminal Law and Criminal Justice, Anglo-German Dialogues', *Israel Law Review* 53, no. 3 (2020): 392, 404-407.

3   *Bavli, Shavuot* 39a; for a translation, see: https://www.sefaria.org.il/Shevuot.39a?lang=bi.

4   See, *e.g., Sefer Chasidim*, 753 [Hebrew].

5   Oz Almog, *Ha'Tzabar—Dyokan* (Tel-Aviv: Am Oved, 1997) [Hebrew].

6   Maya Nestelbaum, 'Why didn't Passers-by Jump into the Yarkon River to rescue Yasmin Feingold?', *Globes*, 9 May 2009, retrieved from www.globes.co.il/news/article.aspx?did¼1000447417 [Hebrew].

by the blood of thy neighbour'[7] – it was primarily as a symbolic law, with only a fine as maximum punishment for its violation.[8]

Indeed, there were many touching instances of solidarity during the COVID-19 pandemic. Social distancing and the economic crisis intensified the need for help and assistance. During the first lockdown (25 March 2020 – 4 May 2020),[9] ad hoc civic initiatives swept the country. Young people created neighbourhood WhatsApp-groups so that the elderly could use them to seek help; a movement named 'culture of solidarity' arose spontaneously in order to collect and distribute money and food to the needy;[10] and various business assistance initiatives sprang up.[11]

However, a different kind of solidarity was needed in order to reduce the pandemic's spread and to ensure that hospitals would not exceed their capacity to provide adequate treatment to those who developed serious COVID-19 symptoms. It became necessary for individuals to change their lifestyles and daily routines for the benefit of those who were at special risk of being severely affected by the pandemic – the elderly and people suffering from certain health conditions. The social distancing regulations considerably restricted individual freedom. People were required to stay at home; they were unable to meet elderly family members, to have a social life, to go to their workplaces, to send children to school, and more. As the pandemic continued, that sense of solidarity eroded. Huge gatherings within all the communities in Israel – weddings, funerals, parties, the unlawful opening of some businesses, and other personal activities, all of which violated the COVID-19 regulations – took place.[12]

7   *Leviticus* 19:16.
8   When MK Hanan Porat presented the bill in the Knesset, he emphasized that: 'We are witnessing, fortunately enough not in Israel, that in New York and other cities in the world, those who see a person bleeding to death and pass by, indifferently, without giving him any help.' From the Israeli Parliament discussion of Proposed Act, 'Thou shalt not stand idly by the Blood of thy Neighbour', 1995 (first reading).
9   Emergency Regulations (New Corona Virus) (Restriction of Activity) (10th Amendment), 2020', Prime Minister's Office Policies, 4 May 2020, https://www.gov.il/he/departments/policies/dec5044_2020 [Hebrew].
10   Lee Yaron, 'They Just Wanted to Prepare a few Food Packages for the Needy. Nine Months Later They Discovered they Changed the Country', *Haaretz*, 22 November 2020, retrieved from https://www.haaretz.co.il/news/education/.premium-MAGAZINE-1.9318706 [Hebrew].
11   See, *e.g.* Shani Ashkenazi, 'Solidarity in crisis or long-term change: Will social unity remain even when the pandemic passes?', *Globes*, 9 April 2020, retrieved from https://www.globes.co.il/news/article.aspx?did=1001324878 [Hebrew].
12   Noa Shpigel, 'Police Arrested 300 people who broke into the area of the Rashbi Tomb on Mount Meron and attacked Police Officers', *Haaretz*, 12 May 2020, retrieved from https://www.haaretz.co.il/news/law/1.8841121 [Hebrew]; Bar Peleg, 'Thousands visited Tel Aviv Beaches in spite of the Prohibition: Inspectors focused on Bikers', *Haaretz*, 15 May 2020, retrieved from https://www.haaretz.co.il/health/corona/1.8848879 [Hebrew]; Aaron Rabinovich, 'Thousands of Hassidim Took Part in a Jerusalem Wedding against orders', *Haaretz*, 5 August 2020, retrieved from https://www.haaretz.co.il/health/corona/1.9050247 [Hebrew]; Hassan Sha'alan & Gilad Cohen, 'Sixteen weddings were dispersed in Northern Israel: Some Families couldn't care less', *Ynet*, 10 September 2020, retrieved from https://www.ynet.co.il/news/article/ry0dytDVP [Hebrew].

The COVID-19 regulations had a unique impact on ultra-Orthodox daily life, due to the importance that Jewish law attributes to the performance of religious rituals in public. The lives of many religious people, particularly men, revolve around the synagogue. They go there three times a day, every day, to pray in a *minyan* (a group of at least ten men). They often study together and conduct social gatherings there. Additionally, young men are expected to learn Torah all day long in the *yeshivas*. The regulations shutting down the synagogues and *yeshivas* and forbidding mass gatherings required the ultra-Orthodox to abandon both praying in a *minyan* and studying Torah in groups.[13] For at least some of the ultra-Orthodox sects, giving up prayer in synagogues and studying Torah in *yeshivas* was an unacceptable price to pay due to a central tenet of Jewish tradition according to which 'on three things the world stands: on Torah, on worship and on the bestowal of kindnesses'.[14] The belief is that praying and studying Torah together preserves the Jewish people, the Jewish state, and the entire universe. While all religious Jews subscribe to these ideas, the ultra-Orthodox community tends to take them at face value. Members of this group, who are more dependent on the pronouncements of the rabbis, and are less connected to and trusting in state entities, tend not to weigh these ideas against other, secular, considerations. The clash between the ultra-Orthodox convictions and the COVID-19 regulations intensified as the pandemic progressed.

Israel went into the first lockdown on 25 March 2020.[15] As of that date, governmental regulations mandated the closing of *yeshivas* and forbade conducting prayer services indoors;[16] further, as of 1 April, all open-air social gatherings, including prayer services, were forbidden as well. Israel's chief rabbis called on the various congregations to close down their synagogues.[17] However, in mid-March, one of the most prominent leaders of the Ashkenazi-Litvak (non-Hassidic) ultra-Orthodox community – Rabbi Chaim Kanievsky – ordered his followers to ignore the regulations and maintain normal religious life. Soon afterward, it turned out that ultra-Orthodox sects were being disproportionately affected by COVID-19.[18] Special efforts were made to try to reduce the pandemic's spread in ultra-Orthodox cities. Soldiers were recruited to offer assistance and distribute food to the resi-

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13   As part of the shutdown of the entire education system, the regulations shut down all schools and not only *yeshivas*. However, the shutdown of schools (as opposed to *yeshivas*) is not discussed in this article, since it was not a uniquely religious challenge.

14   *Mishna, Avot* 1:2. For a similar, though not identical, English translation, see https://www.sefaria.org.il/Pirkei_Avot.1?lang=bi). Later sources clarify that 'worship' means prayer (*Bavli, Ta'anit* 2a. For the English text, see https://www.sefaria.org.il/Taanit.2a?lang=bi).

15   *Supra* note 9.

16   Noa Landau, Joshua Breiner and Aaron Rabinovich, 'The new Regulations go into effect: Prohibition to Leave Home Surroundings; starting this Evening, Trains will no longer run', *Haaretz*, 25 March 2020, retrieved from https://www.haaretz.co.il/health/corona/.premium-1.8708288 [Hebrew].

17   'Israel's Chief Rabbis give Passover Instructions regarding Covid-19 virus', Chief Rabbinate News, 3 March 2020, https://www.gov.il/he/departments/news/hanchayot-harabanim-erev-pesach [Hebrew].

18   Aaron Rabinovich, 'Morbidity in Ultra-Orthodox Cities: One-third of surveyed Bnei Brak residents are infected', *Haaretz*, 31 March 2020, retrieved from https://www.haaretz.co.il/health/corona/.premium-1.8726268 [Hebrew]. See also Aaron Rabinovich, 'Number of Covid-19 patients in Bnei Brak rises to 730 – Increase of 27% in a Day', *Haaretz*, 1 April 2020, retrieved from https://www.haaretz.co.il/health/corona/.premium-1.8730242 [Hebrew].

dents of these cities, in order to allow social distancing and ensure compliance with the lockdown order.[19] These steps seemed to give rise to a moment of unity and understanding between the ultra-Orthodox community and the general public, particularly the IDF (Israeli Defence Forces).[20] In that moment of solidarity, leading ultra-Orthodox rabbis such as Rabbi Gershon Edelstein and even Rabbi Kanievsky ordered a halt to conducting prayer services in a *minyan*, instructing their followers to pray in private and to shut down the *yeshivas*.[21]

This compliance with the COVID-19 regulations relating to praying and learning Torah did not last long. On the Jewish New Year, 18 September, a second lockdown was declared, with the aim of limiting family gatherings and social mixing in the synagogues during the High Holidays. To enable organized services, permission was granted for indoor services attended by ten people at most, and outdoor services attended by no more than twenty.[22] However, some ultra-Orthodox sects chose to blatantly disregard the regulations, and reports emerged of communities that conducted their Yom Kippur services in gross violation of the ordinances. The services in a synagogue of the Belz Hassidim were attended by 4,000 men, all in one space; in the synagogue of the Ger Hassidim, 3,600 people were in attendance.[23] This scenario recurred during the holiday of Sukkot (October 2020). The Hassidic rabbis ignored the lockdown completely, holding huge indoor services and gatherings.[24]

19   Kobi Nakhshoni, 'Bnei Brak: Residents are confined to Home – Soldiers hand out Food', *Ynet*, 31 March 2020, retrieved from https://www.ynet.co.il/articles/0,7340,L-5705007,00.html [Hebrew].

20   Anshel Pfeffer, 'Soldiers entered Bnei Brak with a Sense of Mission, but mainly helped to improve the Atmosphere', *Haaretz*, 8 April 2020, retrieved from https://www.haaretz.co.il/health/corona/. premium-1.8749979 [Hebrew]; 'You've thrilled us: A Collection of some Letters received by IDF Soldiers', IDF Website, 19 April 19, 2020 (https://www.idf.il/%D7%90%D7%AA%D7%A8%D7%9 9%D7%9D/%D7%97%D7%99%D7%9C-%D7%9E%D7%A9%D7%A8%D7%99-%D7%94%D7 %90%D7%A0%D7%95%D7%A9/2020/%D7%90%D7%96%D7%A8%D7%97%D7%99%D7%9D- %D7%9E%D7%95%D7%93%D7%99%D7%9D-%D7%9C%D7%A6%D7%94%D7%9C/ [Hebrew]; Yaniv Kubovitz, 'IDF has handed out Yiddish-Hebrew Dictionaries to Soldiers deployed to Bnei Brak', *Haaretz*, 5 April 2020, retrieved from https://www.haaretz.co.il/health/corona/1.8742706 [Hebrew].

21   For Rabbi Edelstein's order, see: https://www.bhol.co.il/news/1090980, 31 March 2020, 22:10 [Hebrew]. For Rabbi Kanievsky's order, see: 'Rabbi Kanievsky: "It's Time to stop praying in Minyan"', *Kipa*, 9.3.20, https://www.kipa.co.il/%D7%97%D7%93%D7%A9%D7%95%D7%AA/957703- %D7%94%D7%A8%D7%91-%D7%A7%D7%A0%D7%99%D7%99%D7%91%D7%A1%D7%A7 %D7%99-%D7%99%D7%A9-%D7%9C%D7%94%D7%A4%D7%A1%D7%99%D7%A7-%D7%9C %D7%94%D7%AA%D7%A4%D7%9C%D7%9C-%D7%91%D7%9E%D7%A0%D7%99%D7%99%D7 %9F [Hebrew].

22   Ynet, 'What will be shut down and when, and what is still undecided? This is how the Second Lockdown will look during the Holidays', *Calcalist*, September 13, 2020. Retrieved from https://www. calcalist.co.il/local/articles/0,7340,L-3849603,00.html [Hebrew].

23   Anshil Pepper, 'Infection versus infection: In ultra-Orthodox Jerusalem, Yom Kippur customs overcame the virus', *Haaretz*, 29 September 2020, retrieved from https://www.haaretz.co.il/health/ corona/.premium-1.9192718 [Hebrew].

24   Aaron Rabinovich, 'In Spite of Incidence, many Hassidim build huge "Sukkot"' and prepare for thousands of Worshippers during the Holiday', *Haaretz*, 1 October 2020, retrieved from https:// www.haaretz.co.il/health/corona/.premium-1.9198975 [Hebrew].

The High Holidays of September-October 2020 seem to have been a turning point. Thereafter, significant parts of the ultra-Orthodox sects and their leadership were no longer willing to adhere to the COVID-19 regulations, mainly those requiring the shutting down of synagogues and *yeshivas*. Rabbi Kanievsky decreed that all ultra-Orthodox *yeshivas* should be opened immediately after the Sukkot holiday.[25] From that point onwards, the ultra-Orthodox *yeshivas* remained open much of the time, regardless of the COVID-19 regulations.

The ultra-Orthodox sects' refusal to comply with COVID-19 regulations, which resulted in a disproportionate impact of COVID-19 on their members, with a death toll higher than their proportion in the general population, is puzzling. It stands in contrast to both a fundamental norm in Jewish law, *pikuach nefesh*,[26] according to which saving lives overrides religious rules,[27] and the Jewish sources of solidarity imposing a mutual obligation on all Jews to care for each other's well-being.[28] How can this apparent contradiction be explained?

2. Possible explanations for the ultra-Orthodox sects' refusal to comply with COVID-19 regulations

One possible explanation for the ultra-Orthodox sects' refusal to comply with COVID-19 regulations is based on religious beliefs. According to Jewish law, 'any expression of sanctity may not be [done, recited amongst] fewer than ten [men]'.[29] Based on this rule, many religious commandments (*mitzvot*) are customarily performed in a *minyan*, which is a group of ten men or more. One may pray in private, but the religious rules maintain that private prayer is of lesser quality, and acceptable only when unavoidable.[30] Further, some parts of the prayer may only be recited in public.[31]

Learning (and teaching) the Torah is a pivotal point of Jewish life.[32] According to various Jewish sources, the study of Torah is of greater value than any other reli-

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25 Yehuda Schlesinger, 'Contrary to Instructions: Rabbi Kanievsky Ordered Return to Yeshivas and Schools', *Israel Hayom* 17 October 2020 retrieved from https://www.israelhayom.co.il/article/810855 [Hebrew].

26 Based on the discussion in *Mishna Yoma*, chapter 8 mishna 7.

27 There are only three cardinal sins for which one should let himself die and not commit: the killing of another innocent person, idolatry and incest.

28 See *supra* note 4 and accompanying text.

29 *Bavli, Brachot* 21b. For a similar, though not identical, translation, see https://www.sefaria.org.il/Berakhot.21b.4?lang=bi&with=all&lang2=en.

30 According to the religious principle that a 'victim of circumstances beyond his control is exempted [from the guilt of performing a wrong deed or not performing a *mitzva*] by the Merciful One [=God]', *Bavli Nedarim* 27a, Bava Kama 28b, Avoda Zara 54a.

31 For example, *Kaddish*, the prayer for deceased family members, the Thirteen *Midot*, an essential recurring part of the prayer on the Day of Atonement (Yom Kippur), and the ceremonial reading of the Torah. See Maimonides, *Yad Hachazakah-Ahava*, Tfila, ch.8 halacha A.

32 See e.g. Rambam, *Sefer HaMitzvot*, Ase, 11; Sefer Ha'Chinuch, Mitzva 419.

gious action, its weight equal to a whole list of central *mitzvot*.[33] A Jew is expected to study the Torah at any time and in any place, 'when you sit at home and when you walk along the road, when you lie down and when you get up'.[34] However, Jewish sources also stress the importance of learning in a group (of two or more), as the only way to actually acquire knowledge of the Torah.[35] That is because Torah learners sharpen each other, just as iron tools do.[36] *Yeshivas* are structured according to these principles, such that classes are held in public by rabbis, and later further discussed by students, each student with a regular study partner (*chavruta*) for each class.

Prayer services in a *minyan* and Torah study in *yeshivas*, however important, are supposed to be overridden by the normative superiority of life-saving *pikuach nefesh*, which overrides most religious commandments (as explained above). Indeed, some rabbis explicitly ordered obedience to the COVID-19 regulations on the basis of the *pikuach nefesh* norm.[37] Some went even further: Rabbi Ben-Zion Mutzafi, a prominent Sephardi ultra-Orthodox rabbi, declared that those who disobey the regulations must not be allowed to join a *minyan* since their disobedience risks other people's lives and desecrates God's name by their immoral behaviour.[38] To reconcile Rabbi Kanievsky's contrary orders to keep both the synagogues and *yeshivas* open with the norm of *pikuach nefesh*, a socio-religious explanation based on the notion of *gzerot shmad* may be suggested.

According to Jewish law, the principle of *pikuach nefesh* can be temporarily suspended in times of religious persecution when non-Jewish authorities issue decrees that are aimed at forcing Jews to abandon their faith by violating religious orders (also known as *gzerot shmad*). In such a time, Jews must keep each and every *mitzva*, even at the cost of their lives.[39] Historically, such times have been very few and included extreme circumstances such as the edicts of the Greek King Antiochus (167 BC) and of the Roman Emperor Hadrian (130 CE), as well as the Alhambra

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33 *Mishna, Pe'ah* 1, 1, translation on the Sefaria website https://www.sefaria.org.il/Mishnah_Peah.1.1?lang=bi&with=all&lang2=he: 'These are the things that have no definite quantity [...] and the study of the Torah. The following are the things for which a man enjoys the fruits in this world while the principal remains for him in the world to come: Honouring one's father and mother; The performance of righteous deeds; And the making of peace between a person and his friend; And the study of the Torah is equal to them all.' See also *Bavli, Kiddushin* 40b.
34 Deuteronomy, 6:7 (NIV translation, available at https://www.biblegateway.com/passage/?search=Deuteronomy%206%3A7&version=NIV).
35 Bavli, Brachot 63b. For a similar translation see https://www.sefaria.org.il/Berakhot.63b.12?lang=bi&with=all&lang2=en.
36 *Bavli, Taanit* 7a.
37 Channel 7, 'MK Moshe Gafni Protests: "Real Pikuach Nefesh"', 19 January 2021, retrieved from https://www.inn.co.il/news/464891 [Hebrew]; United Torah Judaism party, 'Literally Pikuach Nefesh', Facebook, 19 January 2021, https://www.facebook.com/yahdutatora/videos/238287847738163 [Hebrew]; https://www.gov.il/BlobFolder/news/meida_rabanut_korona/he/corona_4_הנזהיתו%20 עדכניות%20ובנעיןתוליפת.pdf [Hebrew].
38 Avi Wolfson, 'Great Rabbi Mutzafi: *Kittel* and *Streimel*]ultra-Orthodox garments[won't help those who don't wear a Mask', *Hamechadesh*, 19 October 2020, https://hm-news.co.il/96566/ [Hebrew].
39 *Bavli, Sanhedrin* 74a.

Decree (also known as the Spanish Expulsion, 1492).[40] Although Israel is a Jewish state and ultra-Orthodox Jews are not persecuted, some of them may still feel that the COVID-19 regulations, which restricted both praying in synagogues and studying Torah in groups in *yeshivas*, would pose a spiritual risk to ultra-Orthodox Jews.[41] Therefore, in order to preserve Jewish spiritual life, they may feel obligated to insist on fulfilling any *mitzva*, even at the cost of risking lives.

To explain the refusal to comply with COVID-19 regulations on the basis of *gzerot shmad*, as suggested above, seems extreme. A less extreme explanation is socio-political, and grounded in the need to keep the ultra-Orthodox community apart from Israeli society at large. The notion of apartness and maintaining the tradition to the letter is a crucial part of the ultra-Orthodox ethos, as the faithful have been constantly tried throughout history, yet have managed to preserve the Jewish people.[42] In order to do so, they had to resist the temptation of assimilating into the secular state. Keeping the ultra-Orthodox community separate from the general public strengthens the power of their spiritual leaders – the rabbis – who supervise all aspects of daily life.[43] The COVID-19 regulations threatened both the ultra-Orthodox ethos and the power of their spiritual leaders. Closing synagogues and *yeshivas* was harmful not only to religious life and education, and to the emotional well-being of community members, but also to the autonomy of the community and the authority of its leaders. Indeed, after the first lockdown, the media reported a rise in the number of ultra-Orthodox people obtaining an internet connection in order to work and study online or receive relevant information.[44] Secular influences on ultra-Orthodox daily life could have caused drastic social changes,[45] particularly at a time when the central social institutions of the ultra-Orthodox sects – the *yeshiva* and the synagogue – were supposed to be closed. Refusal to comply with COVID-19 regulations under the orders of the rabbis reinforced the bounda-

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40   *Makkabim* A. a. 45-46; *Shir HaShirim Rabbah* B. 7; Yitzhak Baer, *A History of the Jews in Christian Spain* (Tel Aviv: Am Oved, 1987), 323-325 [Hebrew]; Haim Beinart, *Alhambra Decree* (Jerusalem: J.L. Magnes, 1994), 80 [Hebrew]; Henry Kamen, 'The Mediterranean and the Expulsion of Spanish Jews in 1492', *Past & Present* 119 (1988): 37.

41   See, *e.g.*, Rabbi Yoel Ben-Nun, 'A Foreigner will not Understand this: The ultra-Orthodox Consider the Restrictions as "*Gzerot Shmad*"', *Ynet*, 15 October 2020, https://www.ynet.co.il/judaism/article/Bk2u9nBPv [Hebrew].

42   See, *e.g.*, *Be'er Mayim Chaim*, Exodus 1:1 [Hebrew], deeming that when scripture mentioned that the Israelites became a nation in Egypt, that is because they did not change their names and clothing, and thus remained distinct and were identifiable as a nation separate from the Egyptians.

43   See, *e.g.*, Netta Barak-Corren and Lotem Perry-Hazan, 'Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities' Compliance with COVID-19 Regulations', 7-8, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797433.

44   Anshel Pfeffer, 'Israel After Covid-19: An Opportunity for ultra-Orthodox to Connect to Outer World', *Haaretz*, 28 April 2020, retrieved from https://www.haaretz.co.il/health/corona/.premium-MAGAZINE-1.8803930 [Hebrew].

45   *E.g.*, Nati Tucker, 'Covid-19 shook off ultra-Orthodox Internet and might lead to a deep social Change', *The Marker*, 27 April 2020, retrieved from https://www.themarker.com/advertising/.premium-1.8801015 [Hebrew]; Sivan Klingbail, 'Covid-10 has Connected ultra-Orthodox to the Web and Created a rare Opportunity for an Employment Revolution', *The Marker*, 9 June 2020, retrieved from https://www.themarker.com/career/.premium-1.8906279 [Hebrew]; David Galperin of Gil Group, 'Ultra-Orthodox Digital in the Covid-19 Era', *Israel Hayom*, 27 August 2020, retrieved from https://www.israelhayom.co.il/article/795233 [Hebrew].

ries of the community.[46] By ignoring the COVID-19 regulations, the ultra-Orthodox community not only maintained its normal life and religious observances, but also clearly kept away from the general public and reaffirmed the rabbis' power over the community.

How should the polity react to a refusal to comply with COVID-19 regulations motivated by these kinds of considerations?

3.   Should the polity tolerate refusal to comply with COVID-19 regulations among the ultra-Orthodox sects?

The COVID-19 regulations relating to prayer in the synagogues and learning Torah in the *yeshivas* were hardly enforced on the ultra-Orthodox sects. Police statistical reports reveal that the regulations restricting prayer within the synagogues were enforced on the ultra-Orthodox sects in Jerusalem only once, as opposed to 91 fines imposed in Tel Aviv, which is a more secular city.[47] Many *yeshivas* were known to be open and active despite the lockdown.[48] The media reported an agreement between the police and the leaders of the ultra-Orthodox sects in Jerusalem according to which the police would refrain from enforcing the regulations against mass prayers during the Jewish holidays, as long as the mass gatherings would not be photographed.[49] Could such non-enforcement, which resulted in the *de facto* exemption of the ultra-Orthodox sects from complying with COVID-19 regulations relating to praying and learning Torah, be understood on the basis of the cultural defence?

The cultural defence reflects the willingness of a multicultural society to tolerate, to some extent, either religiously or culturally motivated noncompliance with the law.[50] Tolerance is usually achieved by various legal techniques, rather than by an

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46   Yair Ettinger, 'Has Integration of ultra-Orthodox in Society failed?', KAN News, Video, 1:18 & 1:57, December 7, 2020, retrieved from https://www.youtube.com/watch?v=XDXamCwxU3w [Hebrew].
47   Shirit Avitan Cohen, 'Police: Just One Report was given in Jerusalem during Lockdown for Violation of Prayer Instructions', *Globes*, 12 October 2020, retrieved from https://www.globes.co.il/news/article.aspx?did=1001345348 [Hebrew].
48   Barak-Corren and Perry-Hazan, 'Bidirectional Legal Socialization and the Boundaries of Law: The Case of Enclave Communities' Compliance with COVID-19 Regulations', 10.
49   Aaron Rabinovich, 'The police secretly agreed with Hasidism: they will be allowed to hold mass events – without documentation', https://www.haaretz.co.il/news/law/.premium-1.9210569 [Hebrew].
50   For a general discussion of the cultural defence in the criminal law, see Alison Dundes Renteln, *The Cultural Defence* (Oxford: Oxford University Press, 2005); Mitra Sharafi, 'Justice in many Rooms since Galanter: De-romanticizing Legal Pluralism through the Cultural Defence', *Law & Contemporary Problems* 71 (2006): 139; Julia P. Sams, 'The Availability of the Cultural Defense as an Excuse for Criminal Behavior', *Georgia Journal of International and Comparative Law* 16 (1986): 335, 344; Note, 'Cultural Defense in the Criminal Law', 99 *Harvard Law Review* 99 (1986): 1293, 1309; Caroline Choi, 'Application of a Cultural Defense in Criminal Proceedings', *UCLA Pacific Basin Law Journal* 8, no. 1 (1990): 80, 81; Tamar Tomer-Fishman, '"Cultural Defense," "Cultural Offense", or No Culture At All?: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them', *Journal of Criminal Law & Criminology* 100, no. 2 (2010): 475, 476.

explicit defence. In exceptional cases a legal system may be willing to recognize an exception to its criminal law prohibition for a unique culturally motivated practice. The exception may be granted either implicitly, by interpreting the scope of the prohibition as to exclude the practice, or explicitly.[51] In such cases, the polity does not object to the culturally motivated practice of the minority; the practice is not perceived to be a criminal wrong. Other instances of culturally motivated noncompliance are perceived by the polity as wrong, but nonetheless worthy of tolerance under existing excuses, such as the unavoidable mistake of law defence granted especially to immigrants,[52] or under the doctrine of provocation that allows reducing the charge from murder to manslaughter.[53] In other cases, tolerance of culturally motivated noncompliance is achieved by non-enforcement.[54]

The COVID-19 social distancing regulations created a unique challenge for the cultural defence. As long as minorities are not physically isolated from the rest of the population, their noncompliance with COVID-19 restrictions is likely to undermine the efforts to reduce the spread of the pandemic and to ensure that hospitals do not exceed their capacity to provide adequate treatment to those who have developed serious COVID-19 symptoms. In such cases, minorities who enjoy autonomy with regard to various aspects of their lives cannot legitimately expect that the polity, whose duty it is to protect the lives and health of the entire population, will tolerate their refusal to comply with COVID-19 regulations. This reasoning applies to the refusal of the ultra-Orthodox sects in Israel to comply with the regulations, if we assume that it is motivated by political claims to autonomy based on the need to keep the ultra-Orthodox community separate from Israeli society at large (the socio-political explanation for the ultra-Orthodox sects' refusal to comply with the COVID-19 regulations suggested above). Although significant parts of Israel's ultra-Orthodox community are clustered in specific neighbourhoods and cities, it is by no means isolated from the rest of the population. Members of the community use various services outside the cities in which they reside, and are served by the

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51   As was done in 2012 by the *Bundestag* (the German Federal Parliament) in the case of the performance of non-therapeutic male circumcision on infants, motivated by either Jewish or Muslim religious commandments. For the background leading to the enactment of such an exception, see Reinhard, Merkel and Holm Putzke, 'After Cologne: Male Circumcision and the Law. Parental Right, religious Liberty or criminal Assault?', *Journal of Medical Ethics* 39 (2013): 444-449; Eldar Sarajlic, 'Can Culture justify Infant Circumcision?', *Res Publica* 20 (2014): 327-343.

52   Sec. 17 of the German Criminal Code recognizes an unavoidable ignorance of law as an excuse. For applying that excuse to ignorance based on minorities' culture, see Marin Golding, 'The cultural defense', *Ratio Juris* 15, no. 2 (2002): 146. See also the discussion by Sams, 'The Availability of the Cultural Defense as an Excuse for Criminal Behavior', 338-339, 344.

53   The most cited case is that of Dong Lu Chen, No. 87-7774 (Sup. Ct. N.Y. County, December 1989). For discussion, see Renteln, *The Cultural Defence*, 11. For a general discussion of honour killing in this context, see John Alan Cohan, 'Honour Killings and the Cultural Defence', *California Western International Journal* 40 (2010): 191-2014.

54   For the various techniques of non-enforcement in cases of honor killing, see Badi Hasisi & Deborah Bernstein, 'Echoes of domestic silence: mechanisms of concealment in cases of "Family Honour Killings" in Mandate Palestine', *Middle Eastern Studies*, 55, no. 1 (2018): 1-14. For non-enforcement of the offence of polygamous marriage on the Bedouins in Israel, see Rawia Aburabia, 'Trapped Between National Boundaries and Patriarchal Structures: Palestinian Bedouin Women and Polygamous Marriage in Israel', *Journal of Comparative Family Studies* 48, no. 3 (2017): 339, 343-345.

general hospitals and medical clinics. Due to the interconnections between the ultra-Orthodox and the general population, the former, who refuse to comply with the COVID-19 regulations, are liable to infect others who do not belong to their own community and to impact hospitals' capacity.

Whether the ultra-Orthodox sects' refusal to comply with the COVID-19 regulations should be tolerated becomes a more complicated issue if we assume that the refusal is motivated by religious beliefs, according to which when Jews are forced to abandon their faith, any *mitzva* ought to be fulfilled even at the cost of risking lives (as suggested in the second explanation discussed above).

Due to the importance attached to the freedom of religion, limitations on the exercise of religion, even for the sake of reducing the pandemic in order to protect life and health, ought to be considered carefully. Indeed, in various legal systems some of the COVID-19 limitations on the exercise of religion were considered disproportionate and therefore held to be unconstitutional. The US Supreme Court held that a regulation, which limits the number of people who may attend a religious service in either a Catholic church or a Jewish synagogue to no more than 10 or 25 persons (depending on the risk assessment of the relevant zone), irrespective of the capacity of the church or synagogue, is unconstitutional.[55] Similarly, the German Federal Constitutional Court held that a regulation, which did not allow Friday prayers to be held in a mosque during the month of Ramadan, without allowing individual cases to be considered, is unconstitutional.[56]

Despite the importance of freedom of religion, COVID-19 limitations on the exercise of religion are unavoidable. In imposing such limitations, the Israeli government was sensitive to the importance of religious public rituals and the regulations allowed groups of at least ten men to attend outdoor services together throughout most of the pandemic.[57] The government further allowed for indoor services (with limited attendance) during the Jewish High Holidays.[58] Most religious congregations obeyed the regulations, shutting down the synagogues and *yeshivas* on the basis of the *pikuach nefesh* norm.[59] However, as mentioned above, some ultra-Orthodox sects sincerely believe that to abandon praying in synagogues and learning Torah in *yeshivas* is inconsistent with religious commandments, and therefore they have no choice but to refuse to comply with the regulations even at the cost of

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55   *Roman Catholic Diocese of Brooklyn v. Cuomo*, 582 U.S. (25 November 2020). For its discussion, see Javier Martínez-Torrón, 'COVID-19 and Religious Freedom: Some Comparative Perspectives', *Laws* 10, no. 39 (2021): 1, 11.

56   German Federal Constitutional Court, 1 BvQ 44/20 (29 April 2020), as discussed by Burkhard J. Berkmann, 'The covid-19 Crisis and Religious Freedom', *Journal of Law, Religion and State* 8 (2020): 179, 185.

57   Outdoor public services were banned on 1 April 2020 and reinstated on 19 April, see Itamar Eichner & Asaf Zagrigak, 'Allowances and Restrictions: Full List', *Calcalist*, 19 April 2020, retrieved from https://www.calcalist.co.il/local/articles/0,7340,L-3809051,00.html [Hebrew].

58   Ynet, 'What will be shut down and when, and what is still undecided? This is how the Second Lockdown will look during the Holidays'.

59   Channel 7, 'MK Moshe Gafni Protests: "Real Pikuach Nefesh"'.

risking lives. The question is whether the polity should tolerate such refusal and refrain from coercing the believers to act against their religious belief.[60]

Had those who preferred to continue both praying in a *minyan* in synagogues and studying Torah in *yeshivas* been risking solely their own lives and health, the issue would have involved paternalistic considerations. In legal systems that impose paternalistic duties in order to protect an individual from risking her own life and health,[61] religiously motivated refusal to comply with paternalistic duties may have justified non-enforcement.[62] A believer should not be coerced to act in violation of his religious beliefs for the sake of his own interest.[63] In such cases, the polity should accommodate the believers' preference to maintain their religious life despite the risks to their own lives or health.

However, COVID-19, like other pandemics, is highly infectious, and the regulations were aimed at restricting its spread. The ultra-Orthodox who refuse to comply with the regulations risk the lives and health of others. When they come home from the synagogues and *yeshivas*, they may infect their families. It could be argued that when the family members believe in the importance of praying in synagogues and studying Torah in *yeshivas*, and are therefore willing to accept the risk of being infected by COVID-19 for the sake of having the family's men uphold their religious way of life, the men's preference to maintain their religious way of life despite the risk to their families should be tolerated. Such a claim could be based on the view that 'a cultural defense should more readily be admitted when the crime is limited to persons capable of meaningful consent who belong to that culture and subscribe to its tenets'.[64] However, the vulnerable members of the family, both those at special risk (such as the elderly) and children, are owed special care. The willingness of the family's men to continue with their religious way of life should not override the special duty to protect the lives and health of vulnerable family members.[65]

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60   According to Joseph Raz, coercing an individual to act against her conscience (in our case religious belief) humiliates her, and infringes her autonomy to live a life according to her conscience. However, the right not to be coerced by law is not an absolute right. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 263, at 280-287.

61   See, *e.g.*, the discussion by L.O. Gostin and K.G. Gostin, 'A Broader Liberty: J.S. Mill, Paternalism and the Public's Health*', Public Health* 123 (2009): 214-221.

62   See, *e.g.*, *People v. Woody* 61 Cal 2d. 716 (1964), in which the California Supreme Court acknowledged the right of Native Americans to use peyote in their religious ceremonies despite it being a hallucinogenic drug whose use is legitimately forbidden by the state. For a general discussion of religious exemption for the use of forbidden drugs, see Renteln, *The Cultural Defence*, 78-84.

63   Raz, *The Authority of Law: Essays on Law and Morality*, 283, But see Itzhak Kugler, 'On the Possibility of a Criminal Law Defence for Conscientious Objection', *Canadian Journal of Law & Jurisprudence* 10 (1997): 387, at 415 (arguing that the right against being coerced to obey paternalistic laws ought not to be absolute).

64   Note, 'Cultural Defense in the Criminal Law', 1309. See also Clark, 'Guidelines for the Free Exercise Clause', *Harvard Law Review* 83 (1969): 327 at 361-362.

65   Parents, for example, cannot invoke their right to religious freedom to refuse life-sustaining treatment for a child.

Moreover, when those who have chosen to either pray in the synagogue or study in a *yeshiva* enter the public sphere, by going grocery shopping for example, they pose a risk to other members of their community using those services at the same time and to those who serve them. Some of the other members of the ultra-Orthodox sects do comply with the COVID-19 regulations, and they cannot be presumed to prefer to take the risk of being infected. Indeed, the impact of COVID-19 on the ultra-Orthodox sects was exceptionally high, up to five times more severe than its impact on the general population.[66] At one point, 70% of those with COVID-19 were members of the ultra-Orthodox community, despite the fact that they account for only 12.6% of the Israeli population.[67] In early 2021 the death toll among elderly ultra-Orthodox people was four times higher than that of their counterparts in the general public.[68]

The risk of being infected by the virus following the refusal of some within the ultra-Orthodox communities to comply with COVID-19 regulations is not limited to the ultra-Orthodox sects. As already mentioned, the ultra-Orthodox community is not isolated from the rest of the population. Members of the community use services outside the cities in which they reside, and are served by the general hospitals. Due to the interconnections between the ultra-Orthodox and the general population, those among the former who refuse to comply with the COVID-19 regulations are liable to both infect others who do not belong to their own community and have an impact on hospitals' capacity. The main aim of the COVID-19 regulations, particularly those imposing lockdowns, has been to flatten the epidemic curve and thus slow the spread of the epidemic so that the peak numbers of patients who need to be treated at hospitals at the same time are reduced, and the hospitals do not exceed their capacity. The number of ultra-Orthodox patients hospitalized with COVID-19 was much higher than their proportion in the population.[69] In April 2020, ultra-Orthodox patients accounted for 40-60% of hospitalized COVID-19 patients across Israel, and were similarly overrepresented in the intensive care units.[70] In January 2021, hospitals in Jerusalem, which is home to many of the large ultra-Orthodox sects, announced that they could no longer admit

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66   Roni Linder, 'In order to understand Israel's Covid-19 Story, you should know these three Charts', *The Marker*, 7 October 2020 (updated 9 October 2020), retrieved from https://www.themarker.com/coronavirus/.premium-1.9217121 [Hebrew].

67   Sami Peretz, 'Minister of Interior Deri Admitted that 70% of Covid-19 Infected are ultra-Orthodox: Will we shut ourselves at Home again in the next Round?', *The Marker*, 12 May 2020, retrieved from https://www.themarker.com/coronavirus/.premium-1.8840658 [Hebrew].

68   Doron Avigad, 'Ultra-Orthodox Adults died of Covid-19 four Times more than general Population', *Calcalist*, 10 February 2021, retrieved from https://www.calcalist.co.il/local/articles/0,7340,L-3892790,00.html [Hebrew].

69   See Gilad Malach and Lee Cahaner, *Statistical Report on ultra-Orthodox Society in Israel 2020* (The Israel Democracy Institute, 2020), 12, retrieved from https://www.idi.org.il/media/15500/haredi-2020.pdf [Hebrew].

70   Yoav Even & Keren Marciano, 'Here is the Data: How many ultra-Orthodox People are hospitalized with Covid-19', *N12*, 29 March 2020, retrieved from https://www.mako.co.il/news-israel/2020_q1/Article-c3a328f0d472171027.htm [Hebrew].

any more COVID-19 patients; all new cases had to be diverted to hospitals in other cities.[71]

For all these reasons, the Israeli polity ought not to tolerate the refusal among the ultra-Orthodox sects to comply with the COVID-19 regulations, by way of non-enforcement, even when the refusal is motivated by religious beliefs. By failing to enforce the regulations on the ultra-Orthodox sects, the polity failed to fulfil its obligation to reduce the spread of the pandemic in order to protect the lives and health of its entire population, and to guarantee that hospitals have enough capacity to provide adequate treatment for all.

The discussion in this section highlights the importance of adding a limit to the cultural defence. The traditional limits of the cultural defence relate to culturally motivated practices that infringe upon the polity's basic values, such as honour killing, which infringes on the right to life of vulnerable members of the cultural community (women, either as wives or as daughters) and sustains patriarchal practices.[72] Other limits relate to equality in the distribution of societal burdens, as in the Israeli case of the *de facto* exemption of ultra-Orthodox young men who study at the *yeshivas* from compulsory military service.[73] That exemption has been subject to ongoing political pressure for equality in the military draft.[74] An additional limit has surfaced during the COVID-19 pandemic: when the life and health of the entire population are at stake, the polity ought not to tolerate noncompliance even when motivated by religious beliefs, and despite the importance of freedom of religion.

Conclusion

The COVID-19 social distancing regulations considerably restricted both the personal freedom of individuals, who were required to dramatically change their way of life and stay home, and the religious freedom of various religious congregations,

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71 Roni Linder, 'Jerusalem has become Israel's sickest City. We've been transferring Patients to other Areas for the past two Weeks', *The Marker*, 21 January 2021, retrieved from https://www.themarker.com/coronavirus/.premium-1.9468608 [Hebrew].

72 For example, according to Sec. 301Aa(5) of the Israeli Penal Law, as amended by Israeli Penal Law (Amendment 137) 2019, honour killing is aggravated murder. For various techniques adopted in the past in order to accommodate to a certain extent honour killing, see Badi Hasisi & Deborah Bernstein, 'Multiple Voices and the Force of Custom on Punishment: Trial of "Family Honour Killings" in Mandate Palestine', *Law and History Review*, 34, no. 1 (2016): 115-154.

73 See Daphne Barak-Erez, 'The Military Service of Yeshiva Students: Between Citizenship and Justiciability', *Bar-Ilan Studies* 22, no. 2 (2006): 233-234 (2006) [Hebrew]; Asaf Malchi, 'The "People's Army"?', *Israel Democracy Inst*. (16 October 2018), retrieved from https://perma.cc/PH3B-48QH) [Hebrew].

74 Following such pressure, since 2002 the Knesset (the Israeli parliament) has passed several laws aimed at regulating draft deferment for limited periods of time for ultra-Orthodox men attending *yeshivas*; the laws were struck down (twice) by the High Court of Justice on the ground that they do not guarantee equality in compulsory military service, However, the government has been given an extension to draft a different law regulating the ultra-Orthodox exemption – an extension that is constantly extended. For the analysis of the Supreme Court's cases, see Malchi, 'The "People's Army"?'.

who were required to give up, at times, praying in a *minyan* in synagogues and studying Torah in *yeshivas*. Despite the drastic restrictions, and the special importance of freedom of religion, reducing the pandemic's spread called for awarding priority to solidarity over both personal and religious freedom, and the enforcement of social solidarity legal duties – the social distancing regulations – on all.

Dividing the Beds: A Risk Community under 'Code Black'?*

Tobias Arnoldussen

1. Introduction

During the second week of March, disturbing images from the North of Italy were broadcasted the world over. Patients were waiting in makeshift wards because of shortages of ventilators, beds and personnel. Nurses collapsed after working for ten hours straight and cried because they needed to take decisions of life and death and the mayor of one town complained that the very old could not receive treatment.[1] The images from Italy were a stark warning. The coronavirus could lead to the collapse of healthcare services, also those of well off 'western' nations.

The footage reached the Netherlands quickly, but initially people were more amazed than worried. Diederik Gommers, the chairman of the Dutch Association of Intensive Care (NVIC), mentioned the possibility that senior citizens of 80 and over might not receive treatment, if hospitals were to overflow. He still expected the COVID-19 pandemic to be mild though, and predicted a total of 8,000 cases of infection in the Netherlands.[2]

However, when the province of Brabant started to experience a surge of patients, the scenario that not everyone could receive treatment due to acute shortages became a real possibility. This scenario became known in the Netherlands as 'code black'. The choice doctors needed to make in deciding who was eligible for treatment and who was not in such a situation, became known as 'triage', a term from the field of military health care.[3]

It was a nightmare scenario for potential patients, but also for doctors as well as for politicians because it meant that the Dutch healthcare system could not cope with this crisis. The code black scenario also spawned an ethical debate on the pages of the newspapers among doctors, ethicists, politicians and many others voicing their opinion. If there was just one bed available for two new patients and if medically

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1   Jason Horrowitz, 'Italy's Health Care System Groans Under Coronavirus – a Warning to the World', *New York Times*, 14 March 2020.
2   Jop van Kempen, 'Meer dan 20.000 geïnfecteerden? Dan moeten artsen harde keuzes maken', *Het Parool*, 15 March 2020.
3   Michel Debacker, 'De ontwikkeling van triage sinds Napoleon', *Tijdschrift voor Geneeskunde* 59 (2003): 269-299.

the patients were in the same condition, what would be the criteria to determine who would receive treatment? Was age a fair criterion for selection or would a lottery be more fair? Code black became a matter of intergenerational tension.

In this article, I do not intend to discuss the ethical dilemma of triage per se. A lot has been written already on the dilemma from a perspective of health care ethics.[4] This article presents a discourse analysis of the public discussion of code black. The discourse is methodically analyzed using the concepts of political discourse analysis provided for by Maarten Hajer and interpreted using the framework of the sociologist of risk Ulrich Beck.

I have chosen Beck's framework because he provides one of the most comprehensive theories of how communities react to risk. Beck maintains that existential risks open up spaces to question existing institutions. Moreover, he hold that risks create new opportunities for community building. When the threat is sufficiently urgent, boundaries separating people, such as nationality, class and age, will become fluid. Beck envisions a new type of solidarity to emerge, which he calls 'cosmopolitan' and described as solidarity among strangers and 'un-equals' as opposed to a traditional form of solidarity, based around identity and nationality.[5] Currently authors try to rethink solidarity with the elderly in domains such as healthcare.[6] Such novel ways of thinking might receive an impetus by the shared experience of risk in the wake of COVID-19 and might be further informed by a Beckian analysis of solidarity and community building in the face of risk.

A second reason to use Beck is that the crisis presents a whole new constellation of risks, unimagined by Beck. It therefore provides an opportunity to test whether Beck's concepts hold up in different contexts from risks he did consider such as climate change or terrorism. The code black scenario is in this case particularly apt as a research object because it is a 'catastrophe that is still to come and that we have to anticipate and forestall in the present'.[7] Those situations are crucial for Beck's theory, because they could lead to new actor networks across class, nationality and ethnicity forming risk communities and 'breaking open' existing institutions.[8]

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4   See, for instance, Susanne Jöbges *et al*., 'Recommendations on COVID-19 triage: international comparison and ethical analysis', *Bioethics* 34 (2020): 948-959; Rauf Jaziri and Saleh Alnahdi, 'Choosing which COVID-19 patient to save? The ethical triage and rationing dilemma', *Ethics, Medicine and Public Health* 15 (2020). For a discussion among Dutch ethicists, see the blogpost, 'Bij Nader Inzien', https://bijnaderinzien.com/.

5   Ulrich Beck, 'The cosmopolitan perspective: sociology of the second age of modernity', *British Journal of Sociology* 51 (2000): 92-93.

6   Rob Houtepen and Ruud Ter Meulen, 'The Expectation(s) of Solidarity: Matters of Justice, Responsibility and Identity in the Reconstruction of the Health Care System', *Health Care Analysis* 8 (2000): 355-376; Chris Phillipson, 'The political economy of longevity', *The Sociological Quarterly* 56 (2015): 80-100; Bruce Jennings, 'Solidarity and Care Coming of Age: New Reasons in the Politics of Social Welfare Policy', in *Citizenship and Justice in Aging Societies* (Hastings Center Report 48, no.5, 2018), 19-24.

7   Ulrich Beck, *Risk, class, crisis, hazards and cosmopolitan solidarity/risk community – conceptual and methodological clarifications* (Paris: Fondation maison des sciences de l'homme 2013), 8.

8   Hartmut Rosa, *Social Acceleration* (West Sussex: Columbia University Press, 2013), 211.

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The question this article addresses is to what extent the discussion paved the way for the formation of a risk community among medical personnel, the mostly elderly patients and politicians. After having reviewed the discourse around code black, my claim is that it altered the regulation of this situation in a way that is more sensitive to the risk position of the elderly, displaying tentative signs of the formation of a risk community. However, eventually the discourse was transformed from an ethical one to a managerial one on how to avoid an acute shortage of beds. Afterwards, questions about the position of the elderly within the health care system and within society a large were not seriously raised anymore.

The Dutch case shows that Beck's consideration of responsibility in the risk society is one sided. He treats responsibility as obfuscated and diffused between many actors because he supposes nobody wants responsibility. However, the case of code black demonstrates that responsibility can be 'outsourced' to specific experts and professionals who do want it. Assuming responsibility allows for a degree of regulatory control and with it control over the allocation of risk positions.

The following sections discuss the theoretical framework, followed by the research methodology. Afterwards the discourse is thematically analyzed, followed by reflection and conclusion.

2. Risk solidarity and risk community

Beck's seminal work *The Risk Society* is well known. Beck advances the thesis that gradually industrial society evolves into a risk society, which means that the focus of social action is no longer primarily on increasing material welfare, but on reducing the large-scale risks that accompany it. Risk and danger are experienced in different ways than before, because the risks of current societies are considered the result of human action. The flooding of New Orleans caused by hurricane Katrina for instance is not considered an act of God, but a result of neglect of the dikes and water works. Likewise, we view the corona pandemic as the result of the way we handle animals, the frantic pace of our mobility and the encroachment of humanity on natural habitats. In the risk society, the production of risks starts to occupy a more prominent place in our consciousness than the benefits of industrial production.

The transition to the risk society entails that conflicts over risks become more important than other areas of conflict, such as class. Actors will try to occupy favourable 'risk positions', making them less susceptible to the effects of risk and therefore safer. The transition also creates social anxiety, because the institutions of the past, notably the (nation) state, science and the market,[9] have proven to be accomplices in the production of risks. As Anthony Giddens put it, risks have a

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9   Ulrich Beck, Anthony Giddens and Scott Lash, *Reflexive Modernization* (Stanford CA: Stanford University Press, 1994), 11.

'disembedding' effect. They uproot us from the comfort of our traditional institutions towards a new future.[10]

In his early work, Beck discusses how risks will affect our notions of solidarity. In a provocative section titled 'from solidarity of need to solidarity motivated by anxiety', Beck raises the question whether it is possible for communities to emerge based on shared fear rather than shared need.[11] While Beck does not give a definition of solidarity, he implicitly adopts a sociological definition, which I adopt in this article as well. Solidarity is defined as 'the feeling of reciprocal sympathy and responsibility among members of a group which promotes mutual support',[12] a definition that essentially goes back to Durkheim. However, Beck identifies two different bases for solidarity; solidarity based on shared need and solidarity based on shared risk, henceforth 'risk solidarity'. Both can lead to the formation of communities. A community held together by shared need tries to limit scarcity and does so by using instrumental rationality, which Beck associates with the state, the market and technology. Shared fear may also induce people to form communities, but he is unsure how exactly and sceptical of the chances of success.[13]

In his later work, Beck's interests shift. He turns to the inclusive potential of risk and becomes more optimistic. He proposes that risk solidarity can make a new form of community possible in which people bond together because they fear a common threat.[14] Risk solidarity is extended to people who do not partake in a shared history, ethnicity or identity, but with whom we share the same vulnerability. In order to confront the risks that threaten us, cultural, ethnic and class-based borders are lifted. Beck wrote: 'people will have to find meaning in their lives in exchange with others and not primarily with people like themselves'.[15] A community based on risk solidarity therefore pertains to a different way of associating with 'others' in our midst. In a risk community, the other will remain other, but will lose its character of 'enemy', in Schmittian terms. Instead, the other becomes a companion in a community based on mutual defence against risk.

In risk communities, people realize that risk is the product of our institutional organization and will therefore demand change. Reason loses its primarily instrumental character, and will become reflexive, incorporating notions such as pity, suffering, responsibility and self-awareness.[16] A risk community is based on a form

10   Anthony Giddens, *The Consequences of Modernity* (Cambridge: Polity Press, 1990), 21-29.
11   Ulrich Beck, *Risk Society, Towards a New Modernity* (London: Sage Publications, 1992), 49.
12   Lawrence Wilde, 'The concept of solidarity: Emerging from the theoretical shadows?', *The British Journal of Politics and International Relations* 9 (2007): 171-181.
13   Beck, *Risk Society*, 49.
14   In this paper, the term risk solidarity signifies the type of solidarity that is the result of experiencing the same risk. It should not be confused with the concept of risk solidarity used in social insurance literature.
15   Ulrich Beck, *De Wereldrisicomaatschappij, Op zoek naar verloren zekerheid* (Amsterdam: Wereldbibliotheek, 2015), 23.
16   Ulrich Beck, 'Critical Theory of World Risk Society: A Cosmopolitan Vision', *Constellations* 16 (2009): 12; Klaus Rasborg, '"(World) risk society" or "new rationalities of risk"?', *Thesis Eleven* 108 (2012): 16.

of empathy in the sense of a shared knowledge that we all suffer the same fate and on a common struggle to change old habits that produce risk.[17]

Beck uses the notion of a risk community mostly in relation to people of another nationality or ethnicity. However, risk communities can be formed with many kinds of 'others' and can be researched on a national level.[18] I consider the other to refer to the one traditionally 'excluded' by solidarity based on ethnic, national, religious, sexual or gendered identity. Giving meaning to our lives in exchange with others, implies recognizing others as partners without requiring them to assimilate. Beck describes it as a recognition of the other as both different and the same.[19] The overcoming of the either/or dichotomy entails changing institutions that either tend to assimilate the other, or absolutize its difference.

3.   Operationalization and methodology

To be of use in an interpretative analysis of data, the ideal typical notion of a risk community needs further unpacking. At the core of the concept lies the notion of risk solidarity, which means relating to the other as a companion. The other is a person worthy of autonomy, an end in itself to borrow the Kantian phrase, but also an ally with whom we stand side by side with in the face of risk. Granting autonomy is therefore not enough, showing concern for each other's fate is necessary as well. The solidarity of risk differs from the solidarity of need, which refers to groups forming around certain *a priori* identities that try to increase their total share of resources.

To further flesh out the type of relationships that make up a cosmopolitan risk community, we need to turn to three other thematic concepts in Beck's work, 'reflexivity', 'sub-politics' and 'organized irresponsibility'. Reflexivity refers to the realization that risks are consequences of our technological progress and cannot be controlled through instrumental rationality.[20] As Beck puts it, modernity has become a problem for itself.[21] This leads to the questioning of instrumental rationality and technocratic decision-making, but also to the realization that the risks that befall us are the consequences of modern society itself. A change towards a risk community entails questioning existing institutional structures and the way they allocate risk positions.

Sub-politics refers to the necessity to bring risk management into the political sphere in order to open up its practices to participation by a better-informed public

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17   Beck, *Risk, class, crisis, hazards and cosmopolitan solidarity/risk community*, 8/9; Joy Y. Zhang, 'Cosmopolitan risk community in a bowl: a case study of China's good food movement', *Journal of Risk Research* 21 (2018): 77.
18   Ulrich Beck, *Cosmopolitan Vision* (Cambridge: Polity Press 2006), 91; Zhang, *Cosmopolitan risk community in a bowl*, 69.
19   Beck, *Cosmopolitan Vision*, 58.
20   Magnus Boström, Rolf Lidskog and Ylva Uggla, 'A reflexive look at reflexivity', *Environmental Sociology* 3 (2017): 6-16.
21   Ulrich Beck, *World Risk Society* (Cambridge: Polity Press 1999), 20.

and socially aware firms.[22] Decision-making processes on risk that are usually considered as apolitical practices, become politically salient. Some examples include the internal auditing mechanisms of corporations, the covenants between polluters and the government or the guidelines used by doctors to allocate resources. In the scope of this article, sub-politicization refers to processes by which decision-making on risks becomes transparent and people subjected to those risks get to participate in them.

Characteristic of a risk community is the idea that people take responsibility for the shared fate of its members. This is what I take Beck to mean by a rationality based on empathy. The notion of responsibility is almost never treated positively in Beck's work. Instead, Beck coined the term 'institutional irresponsibility'.[23] This is the tendency of institutions to shirk their responsibility and obfuscate it when crises materialize. Through a variety of systemic loopholes, especially in legislation, institutions escape liability when they fail to protect us.[24] Through institutional irresponsibility, they manage to uphold the semblance of success by marginalizing their own role in risk production. In response to societal criticism and further democratization though, Institutions can learn and transcend this reflex to shift responsibility away. Beck calls this process 'institutional metamorphosis'.[25]

The four notions discussed above function as the interpretative framework to be used on the body of texts described below. For further clarification, I have constructed the ideal typical model of a risk community below and compared with the 'modern' model of community.

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22   Beck, *World Risk Society*, 108.
23   Beck, *De Wereldrisicomaatschappij*, 32.
24   Gabe Mythen, 'Thinking with Ulrich Beck: security, terrorism and transformation', *Journal of Risk Research* 21 (2018): 17-28; Anthony Giddens, 'Risk and Responsibility', *The Modern Law Review* 62 (1999): 1-10.
25   Ulrich Beck, *The Metamorphosis of the world* (Cambridge UK: Polity 2016), 76; Mythen, *Thinking with Ulrich Beck*, 25.

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Table 1

	Modern community	Risk community
Solidarity	Solidarity of need. Based on a shared history. Communities are formed on certain ethnic, national or class-based identities and they try to reach common goals and acquire common goods.	Solidarity of risk. Based on a shared future. Communities are not formed based on identity, but are based on a common struggle against shared risk and danger.
Reflexivity	Unreflexive: Risks will be overcome by technological rationality, state control and market relations	Reflexive: risks result from our institutionalized way of life. Technological rationality, state control and market relations cannot provide a solution. Calls for structural deliberative reform.
Politics	Parliamentary politics: deliberation on all levels of the administration, but within the boundaries of designated administrative circles	Sub-politics: politicization of and broad participation in decision-making procedures, especially regarding risk-producing activities.
Responsibility	Organized irresponsibility: risk producers shirk responsibility. Law and other structures of accountability abet it.	Institutional metamorphosis: institutions integrate responsibility and accountability into their operations

3.1 Research methodology and data selection

The social and regulatory reaction to the dilemma of code black has been examined in a qualitative content discourse analysis of Dutch newspaper articles and regulatory documents.[26] In an article of this scope, only a slice of the media landscape can be investigated. Newspaper articles have been chosen as the unit of analysis, because Ulrich Beck himself attributes a strong significance to the mass media for the dissemination of risk perceptions.[27] Newspapers are staffed by professionals, appear daily and serve a large audience. Different from for instance television shows, they also leave room for reflection and publish letters of readers. A number of periodicals has been included, because periodicals publish more investigative journalism. Newspapers lose ground to online publications; therefore, the newspaper websites have been included in the survey.

The corpus of texts is retrieved from the 'Lexis uni' database. The search terms used are 'triage' and 'code zwart', meaning 'code black' in Dutch. Different versions of the guidelines that govern triage in the case of code black are analyzed, in order to evaluate how the discourse around the issue affects the regulation. Articles that have appeared between the 1 March 2020 and the 17 March 2021 are included. This interval represented roughly a year of discussion. March 2020 is chosen because that month marks the start of the COVID-19 crisis within the Netherlands. The 17 March 2021 serves as a cut-off point because there was a general election in

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26   Uwe Flick, *An introduction to qualitative research* (London: Sage Publications, 2018), 501.
27   Rasborg, '"(World) risk society" or "new rationalities of risk"?', 15; Ulrich Beck, 'Cosmopolitanism as Imagined Communities of Global Risk', *American Behavioral Scientist* 55 (2011): 1349.

the Netherlands on that day, allowing us to evaluate whether code black played a role in the election campaign.

Articles published in the six biggest mainstream newspapers and in three periodicals have been included: *de Volkskrant*, *De Telegraaf*, *NRC Handelsblad*, *Het Parool*, *Algemeen Dagblad* and *Trouw*. The three periodicals examined are *Vrij Nederland*, *De Groene Amsterdammer* and *Elsevier's*. Together they cover most of the political spectrum, except for the extreme fringes. This operation yields a dataset of 734 results.

Gradually the term 'triage' became used to refer to mundane situations such as being allowed to go to the hairdresser or to visit bars. Such articles are left out, as are the many 'doubles' – articles published multiple times. Eventually a dataset including 255 articles and four different versions of the guidelines is left to interpret, using the concepts described above.

3.2 Discourses, storylines and discourse coalitions

The aim of the analysis is to show whether the discussion led to the formation a risk community among medical personnel, the mostly elderly patients and politicians, as represented by their respective associations. The discourse analytic methodology construed by Dutch political scientist Maarten Hajer is employed in order to analyse the discussion with the above question in mind.

The term 'discourse' is an overarching concept, defined as: 'a specific ensemble of ideas, concepts, and categorisation that are produced, reproduced and transformed in a specific set of practices and through which meaning is given to social and physical realities'.[28] In this case the discourse – which includes the regulatory documents – on code black is the object of research.

In this analysis, I sometimes speak of 'doctors', 'the elderly' and 'politicians'. This is shorthand for the various organizations by which they are represented. The elderly are represented by organizations like the *Algemene Nederlandse Bond voor Ouderen* (General Dutch Association for the Elderly or ANBO) or the *Katholieke Bond voor Ouderen* (Catholic Union of the Elderly or KBO). Medical doctors have their organizations as well, such as the Dutch Association for Intensive Care (NVIC) or the Federation of Medical Specialists (FMG). The politicians are representatives in Parliament and members of the government.

Within a discourse, not every actor discusses the problem in the same way. Actors tell stories, narratives that give meaning to specific phenomena by supplying a more or less coherent explanation for them.[29] 'Storylines' are middle range concepts that ascribe meanings to certain phenomena, but often also articulate possible solutions to problems and who is responsible for solving them. Often they compete with each other, offering contrary solutions and assigning responsibility differently. Some storylines become dominant while others fade away.

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28 Maarten Hajer, *The Politics of Environmental Discourse* (Oxford: Oxford University Press, 1995), 44.
29 Hajer, *The Politics of Environmental Discourse*, 56.

The last organizing concept used is 'discourse coalition'. A discourse coalition occurs when different actors representing different groups start using the same storylines, presenting a united front. They share the perception of the problem, the ideal solution and the ascription of responsibility to certain actors. Discourse coalitions are important because they may cause one storyline to achieve a level of hegemony, becoming the only acceptable way to interpret a certain situation. Storylines are analytically neatly separable, but of course, in practice we will see elements of storylines interwoven with each other. Actors can draw on multiple storylines, even in the same argument. Analytically it is often useful to separate them though, because it makes clear how a discourse develops and which line of argument becomes dominant.

In the following subsections the analysis proper is offered. First, the initial regulation regarding code black is described and afterwards the discursive reaction is mapped.

4. The discourse analysis

4.1 The first guidelines for the first wave
When it became clear that the Netherlands might be severely hit by the COVID-19 pandemic, the Taskforce Infectious Threats of the Dutch Association for Intensive Care (NVIC) created guidelines on what to do in case of acute shortages. These guidelines only formulated a number of ethical maxims. They proclaimed that people would not be treated on a first come, first serve basis, but based on incremental probability of survival. People with the best chances of survival would receive treatment first. This notion was based on the idea 'to do good for as many patients as possible', understood in utilitarian fashion. When treatment was considered to have very little or no chance, ICUs should withhold it. A number of possible criteria for exclusion were listed. One of which was 'Very advanced age'.[30]

In April 2020, the NVIC released a new version of these guidelines. This document was more detailed. It would come into force after the government declared 'phase three', a situation later called 'code black'. In this situation, the ICUs would be so overwhelmed that they needed to make choices on which patients to treat. This phase itself was subdivided in three blocks. Among other criteria, the 'clinical frailty score' was used to determine from whom treatment would be withheld. In the least severe case, block 1, patients with a clinical frailty score of 7 to 9 would be excluded. That category included patients who were completely dependent on others for their survival, such as elderly patients who could not leave their beds anymore. They were, under normal circumstances, not in immediate risk of dying though.

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30   NVIC, *Draaiboek Pandemie Deel 1, versie 1.2* (Nederlandse Vereniging voor Intensive Care, March 2020), 6.

Block 2 would enter into force in case of even more pressure on ICUs. At that point, patients with a clinical frailty score of 5 or higher might not be eligible for a bed. The score of 5 indicated 'mildly frail', which was described as: in need of help to perform higher order activities, such as 'finances, transportation, heavy house-work or medications'. In such a situation, there was also an age limit listed: patients over 70 would not be eligible.[31]

The document did not yet include criteria for the third block. During this block, the shortages would be so severe that there were no medical selection criteria left. Criteria for this situation would be forthcoming. The code black scenario was considered a scenario of last resort. Everything should be done to prevent a situation where choices have to be made which patient to treat and who to leave behind.

The ethical maxim emphasized in these versions of the guidelines, 'to do good for as many patients as possible', indicated an approach according to the solidarity of need. The good – in this case health care – should be maximized in order to yield the most benefit for the most people. Questions of risk position were not raised, such as the risks run by mentally handicapped, or other people who could be considered frail solely based on their handicap. Neither was fairness towards the elderly as a group mentioned. The age limit especially became the nexus of an intense debate in the newspapers.

4.2 *The emerging of a public issue: three storylines*
The first mentioning that age might play a role in IC treatment was in mid-March. Diederik Gommers, the chairman of the NVIC, mentioned the possibility that senior citizens would not receive treatment. However, he still expected the COVID-19 pandemic to be mild.[32] When images of overcrowded hospitals from Italy reached the Netherlands, public concern rose. 'Code black' was mentioned for the first time on 12 March.[33]

From that date onwards, code black became a topic of concern. The problem was quickly cast in ethical terms, predominantly by medical ethicists and philosophers. On 19 March, two articles were published in two different newspapers. In the first one, ethicists Roland Pierik and Marcel Verweij defended the guidelines, because giving priority to the young would save the most lives. Moreover, they argued that it is a bigger loss for a patient in the early stages of life to die than it would be for someone in her or his last stage. They explicitly intended to provoke a public debate on the issue, because they felt criteria should have a broad societal backing.[34] Professor Ulli D'Oliveira also published an article the same day titled: 'Who should

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31   NVIC, *Draaiboek Pandemie Deel 1*, *versie* 1.4 (Nederlandse Vereniging voor Intensive Care, April 2020), 17.
32   Jop van Kempen, 'Meer dan 20.000 geïnfecteerden? Dan moeten artsen harde keuzes maken', *Het Parool*, 15 March 2020.
33   Peter Ullenbroeck, 'Nieuwe coronadode in Amphia, ziekenhuis waarschuwt: "Over een paar dagen ligt de ic vol"', *Algemeen Dagblad*, 12 March 2020.
34   Roland Pierik en Marcel Verweij, 'Geef Jong en fit voorrang op de intensive care', *de Volkskrant*, 19 March 2020.

be left to drown and why?' He criticized the rationale behind the rules and referred to the famous ethical dilemma of the lifeboat that can only rescue a limit number of drowning people.[35]

The ethical problem at stake was readily understandable and made it easy for people to take position. It quickly developed into a public issue.[36] Two key questions emerged. The first question was to whom should a bed on an ICU go if there is only one bed available for two patients? The second question was who has the authority to make this choice? This first question gave rise to two distinct storylines. According to the first, preference should be given to the young. Ethicist Guy van Widdershoven called this a matter of 'medical realism'.[37] Doctors needed to make choices and then it was fair to give preference to people with more chances of a longer life. This approach would save life years. The style of these contributions was often rational and analytical, drawing on a scientistic register.[38]

The storyline that emerged in response was visceral and personal in style and came down to a demand for equal treatment of the young and the old. The ethicists were accused of holding dark and pernicious views, willing to sacrifice the elderly and the weak.[39] Human dignity dictated a lottery when two patients are eligible for only one bed.[40] From the end of March to mid-April, many letters to newspapers rejected the age criterion. Newspaper *De Telegraaf* conducted an inquiry among its readers and published that 70% rejected it.[41] Papers reported that doctors discussed ICU treatment with their elderly patients over the phone before they were even ill. Parents of handicapped children sometimes received such a call as well.[42]

Both these storylines showed signs of reflexivity because they politicized the intra-institutional choices made by the health care associations and called for debate. A third, even more reflexive storyline emerged in April and May and was developed further in the summer of 2020. It was characterized by the realization that the attention for code black deflected attention from other dire situations, such as the plight of the elderly in nursing homes. An article in *Algemeen Dagblad* put it cyni-

35 Ulli D'Oliveira, 'Coronacrisis roept de vraag op, wie laat men verzuipen en waarom?', *Het Parool*, 19 March 2020.
36 For an argument on the importance of issue formation, see Noortje Marres, 'The Issues Deserve More Credit: Pragmatist Contributions to the Study of Public Involvement in Controversy', *Social Studies of Science* 37 (2007): 759-780.
37 Sander Becker, 'Wat als de ic's straks helemaal vol liggen?', *Trouw*, 23 March 2020.
38 For the importance of style in scientific reasoning, see Ian Hacking, 'Styles of Scientific Thinking or Reasoning: A New Analytical Tool for Historians and Philosophers of the Sciences', in *Trends in the Historiography of Science*, ed. Kostas Gavroglu *et al.* (Dordrecht: Springer, 2007), 31-48.
39 Ascha Ten Broeke, 'Achteloos ging de deur op een kier', *de Volkskrant*, 3 April 2020; Martin Sommer, 'Bestuurders durven burgers niet aan te spreken, uit angst voor staatspaternalisme', *de Volkskrant*, 27 March 2020; Nadia Ezzeroili, 'Ruziemaken met je partner gaat prima via WhatsApp', *de Volkskrant*, 5 April 2020.
40 Rien Eijzendoorn, 'Wie mag wel aan de beademing en wie niet? Pak de dobbelsteen maar', *Trouw*, 26 March 2020.
41 Sophie Zimmerman, 'Uitslag stelling: Zorgen om druk op IC's ', *De Telegraaf*, 4 April 2020.
42 Wout Woltz, 'Helaas mijnheer, het leven is nu op rantsoen', *NRC Handelsblad*, 11 April 2020. Nausicaa Marbe, 'Moreel leiderschap tegen code zwart', *De Telegraaf*, 3 April 2020.

cally: 'There is no triage because there is no treatment'.[43] Some commentators pointed out that there was a lot of talking of how 'we' were trying to save the elderly, but that their point of view was hardly heard; they were portrayed as people in need of our charity.[44] These commentators posed the question who should be making these life and death decisions. Decision-making in this crisis was a political matter and should be made transparent for all of society to discuss.[45]

The articles became more sensitive to the fact that the way the Dutch healthcare system was institutionalized over the last twenty years exacerbated the threat of code black. This third storyline presented code black as an institutional problem, instead of a problem of doctors or politicians.

This sentiment increased when more became known about how the Netherlands managed to ward off code black. The daily *NRC Handelsblad* published a long reconstruction of the early days of the pandemic and the periodical *De Groene Amsterdammer* outlined all the ethical considerations.[46] According to this periodical, the solidarity of the health care system based on equal access for all was at stake. At the end of the day, this healthcare crisis was caused by a lack of capacity, capacity that other countries did have. All of these articles contributed to a storyline about how the Dutch approach to health care was in need of reform.

This third storyline is considered the most reflexive, because it questioned the existing structures that the other storylines tacitly took for granted. It called for public participation and exposed existing institutional arrangements to criticism, potentially opening them up.

4.3 *The regulatory reaction: new guidelines*

The discussion about what to do in case of code black reached the political arena during parliamentary debates on 1 and 8 April 2020.[47] In response to the social discussion around code black, Parliament declared that age should never be a criterion. The NVCI, the Dutch Federation of Medical Specialist (FMS) and the Royal Society of Health Care (KNMG) started work on revising the guidelines. Initially, they worked under severe time constraints, but by mid-April, it became clear that the code black scenario would not emerge at present. Instead of releazing the new

43   Margreet Fogteloo, 'Wie krijgt dat schaarse ic-bed?', *De Groene Amsterdammer*, 9 April 2020; Hanneke van Houwelinge and Tonny van der Mee, 'De 'stille ramp' in het verpleeghuis', *Algemeen Dagblad*, 17 April 2020.

44   Wilma de Rek, '"We" moeten "ze" redden? Laat ouderen over hun eigen lot beschikken', *de Volkskrant*, 5 May 2020.

45   Inanthe Sahadat, 'Heiligt het doel de middelen? Filosoof Marli Huijer: "Ik weet eigenlijk niet wat het doel is"', *de Volkskrant*, 9 April 2020; Christa Kompas, 'Maak ethische keuzes rond corona transparant', *Algemeen Dagblad*, 3 April 2020; Ruben van den Bosch, 'De economie redt geen levens wij kunnen dat wel', *de Volkskrant*, 17 April 2020.

46   Derk Stokmans and Mark Lievisse Adriaanse, 'Corona in Nederland: hoe een overmoedig land razendsnel de controle verloor', *NRC Handelsblad*, 20 June 2020; Margreet Fogteloo, 'Intensieve ethiek; Corona: Zwartboek in de zorg', *De Groene Amsterdammer*, 25 June 2020.

47   Johan Legemaate and Maartje de Jong, 'Arts hoeft geen juridische straf te vrezen bij code zwart', *de Volkskrant*, 13 April 2020.

guidelines quickly, they opted to consult a variety of societal and medical organizations, but also organizations of the handicapped and the elderly.

Medical associations released the new set of guidelines on 15 June 2020.[48] In case of acute shortage, the rule remained that people with higher chances of survival received treatment first. However, the guidelines were reformed in many respects. Firstly, they granted a preferential position to medical personnel. Medical personnel in direct contact with patients would be treated first, in case of equal chances of survival. Secondly, the age criterion was still present, but would only come into play as a last resort. Hard cut offs in age were avoided and instead different 'generations' were bracketed. Generations were counted in intervals, so from 0-20, 20-40, 40-60 etc. If all medical conditions were equal, a person from a younger age group has preference.

The ethical assumptions in the guidelines changed substantially. The utilitarian line of argumentation in reference to age was discarded and instead the age criterion was justified on the basis of intergenerational solidarity[49] and the 'fair innings argument'. This argument entered the initial public discussion through articles by, among others, Marcel Verweij. It held that every person is entitled a chance to enjoy his or her fair share of life. The young, who enjoyed less of life than the old, should – provided that medical chances of survival are equal – have preference. The point of the argument was not to relegate the lives of the elderly to a status somehow less worthy of protection, but to justify preference for the young on the basis of fairness. Life was a boon that we should grant to people who did not have their fair share yet. The argument was not based on efficiency, but affirmed the dignity of life. Moreover, it was made explicit that preceding quality of life or disability should not play a part in the decision to provide care. This was important because on the basis of the old guidelines, this could theoretically be a factor.

The difference in argumentation displayed the impact of the discussion and the reflexive processes it triggered. The arguments in these guidelines were predominantly based on risk solidarity instead of a solidarity of need. The younger generations were at a greater risk of losing their fair share of life and, therefore, they deserved to be treated first in case of shortages. Additionally, the policy-making process displayed characteristics of sub-politiciszation and reflexivity. Associations of various social groups, first and foremost the elderly, were consulted and involved in the process.

In Beckian terms, the new guidelines and the way they were drafted could be considered indicative of the formation of a risk community. Different groups remained different, but they left antagonism behind in order to solve an imminent crisis and divided risk positions in a way that was based on fairness and not utility. However,

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48   FMG/KNMG, *Draaiboek Triage op basis van niet-medische overwegingen voor IC-opname ten tijde van fase 3 in de COVID-19 pandemie, versie 1.0* (Federatie Medisch Specialisten / Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst, June 2020).

49   FMG/KNMG, *Draaiboek Triage op basis van niet-medische overwegingen voor IC-opname ten tijde van fase 3 in de COVID-19 pandemie, versie 1.0*, 13.

it was a tentative community only, because as Jongepier noted it was still a document that was imposed 'top down', driven by medical organizations.[50]

At the time of their release in June 2020, the new guidelines could still be revised, depending on their social reception. The infection rate looked good and the main worry about code black receded into the background. Nonetheless, the new guidelines sparked new rounds of discussion and controversy between politicians and doctors. The politicians insisted on taking out any reference to age, but the doctors were intent on keeping it.

4.4 A new discourse coalition: the victory of medical men

The days after the release of the new guidelines, various ethicists and journalists weighed in. Ethicist Fleur Jongepier and influential commentator Sheila Sitalsing, for instance, argued that a lottery was the only fair principle.[51] They held on to the 'equal treatment' storyline. Medical associations immediately established a media presence as well and explained their choices.[52] Their main line of argument was the fair innings argument and they predicted that many of the elderly would understand why an age criterion as a last resort was fair. The ethicists avoided terms like 'medical realism' or other harsh expressions. In general, the ethical dilemma itself was discussed without the emotional appeals that characterized the early months of the crisis.

Politically, the matter became thornier. The Dutch government announced it would veto an age criterion. All mainstream newspapers mentioned that the Minister would like to see it removed. In a letter to Parliament the Minister of Health stated that the age criterion comes down to age discrimination. However, the government did not immediately push for regulation. It only asked medical associations to 'reconsider' the age criterion, in light of the unrest among the public.[53] The government appeared to be supported by the biggest association for the elderly, the ANBO, who also rejected the age criterion.[54]

Medical associations did not give in. Gradually the storyline of 'young first' gained more traction, especially because doctors voiced support for the guidelines and

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50 Fleur Jongepier, 'Voor de IC selecteren op leeftijd is en blijft ongegrond', *NRC Handelsblad*, 12 January 2021.

51 Fleur Jongepier, 'Jongeren voorrang geven op ic? Het draaiboek van "code zwart" rammelt aan alle kanten', *de Volkskrant*, 17 June 2020; Sheila Sitalsing, 'Is het "fair-inningsprincipe" niet gewoon een chique variant op "kap het dorre hout"?', *de Volkskrant*, 17 June 2020.

52 Mark Misérus, 'Draaiboek overvolle ic's: is hier draagvlak voor onder de bevolking?', *de Volkskrant*, 16 June 2020; Pim van den Dool, 'Artsen, geef jongeren voorrang bij extreem tekort aan IC-bedden', *NRC Handelsblad*, 17 June 2020.

53 Wilma Kieskamp, 'Kabinet hoopt dat artsen van mening veranderen', *Trouw*, 18 June 2020.

54 Arianne Mantel, '"Kwetsbare" senioren zijn het beu: "Aan ons ouderen wordt niets gevraagd"', *De Telegraaf*, 27 June 2020.

claimed that they would be left out in the cold without them.[55] The final version was published in November and the age criterion was not changed.[56]

This caused political problems for Tamara Van Ark, the responsible Secretary of State in the Dutch Cabinet. She stated that she did not want to react yet but that the guidelines seemed contrary to her political commitments.[57] In December 2020, infections were on the rise again and because non-corona health care was not scaled back this time, code black once again became a possibility. In January 2021, Van Ark made known her decision. She intended to prohibit the doctors from using any age criterion by law.[58] She proposed a lottery as the fairer, least discriminatory alternative.

The political winds had, however, changed. Parliament was reluctant to go against the wishes of medical professionals. Van Ark's plan for a lottery was both attacked and supported. Medical doctors generally saw nothing in a lottery, while especially the big daily newspaper *de Volkskrant* came out in favour. The united front of the elderly broke down when one of the stake holding associations, the KBO, stated that they stood side by side with medical organizations and that many of the elderly considered a lottery abhorrent.[59] This line was quickly picked up on by the associations of doctors in order to point out that even the elderly were on their side.[60] Even the ANBO seemed to have changed its position and now stated on its website that the decision on how to conduct triage should be up to the doctors.[61]

With support in Parliament crumbling, and growing opposition against a lottery, the Cabinet withdrew its plan to prohibit the age criterion. The political argument for this new position was that in this dark time politics should not get in the way of medical professionals. They needed support and it was inopportune to interfere.[62] This did not mean that they explicitly endorsed the solution proposed by medical organizations, *i.e.* a criterion of age based on 'fair innings'. The politicians did not take responsibility for the resolution of the ethical problem, but they ab-

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55   Niels Klaassen, 'Wie krijgt straks het laatste bed?', *Het Parool*, 17 June 2020; Frederiek Weeda, 'Mag leeftijd meetellen bij laatste IC-bed?', *NRC Handelsblad*, 5 January 2020.
56   FMG/KNMG, *Draaiboek Triage op basis van niet-medische overwegingen voor IC-opname ten tijde van fase 3 in de COVID-19 pandemie versie 2.0* (Federatie Medisch Specialisten/ Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst, November, 2020).
57   Niels Klaassen, 'Nieuw draaiboek bij ic-tekort: uiteindelijk gaan jongeren voor', *Algemeen Dagblad*, 1 December 2020.
58   Flori Hofman, 'Kabinet wil einde aan IC-triage op basis van leeftijd bij extreme schaarste', *NRC Handelsblad*, 4 January 2021. Raoul Du Pré, 'Kabinet houdt voet bij stuk: geen voorrang jongeren op de intensive care', *de Volkskrant*, 4 January 2021.
59   Vanda van der Kooi, 'Kabinet wil jong en oud laten loten als IC overstroomt; KBO Brabant vindt juist dat arts bij gelijke kansen wel jongere voorrang moet geven', *Algemeen Dagblad*, 5 January 2021.
60   Raymond Boere, 'Ouderen willen helemaal niet loten om laatste ic-bed', *Algemeen Dagblad*, 5 January 2021; Vanda van der Kooi, 'Code zwart bij overvolle IC: in geval van nood is het recht op een vol leven leidend', *Algemeen Dagblad*, 6 January 2021.
61   ANBO, 'ANBO Artsen aan zet bij Code Zwart', https://www.anbo.nl/nieuws/anbo-artsen-aan-zet-bij-code-zwart, last accessed 11 September 2021.
62   Niels Klaassen, 'Kabinet: jongeren gaan toch voor ouderen bij acuut tekort aan IC-bedden', *Algemeen Dagblad*, 11 January 2021.

solved themselves and passed it to the organizations of doctors. This concession ended the long political discussion on what to do when code black emerged. There were still commentators who declared the age criterion ill-advised, but the discussion of this aspect of code black died down.

In discourse analytic terms, a discourse coalition emerged in the winter of 2020 around the notion that doctors and their organizations have the responsibility for the code black situation and that it is up to them to solve it. Here, the fundamental ethical question was still unresolved but the matter was settled by a discursive agreement that it was up to the doctors how to deal with the situation. Even the elderly tended to agree with that sentiment.

Despite this development, in the period between January and March 2021 'code black' was mentioned in the articles even more often than before. Raising the spectre of code black became a crowbar to force other policies. This turn of events is described in the following section.

4.5 Doctor's marching orders, the breakdown of the tentative risk community

After the final version of the code black regulation was issued late November, the prospect of code black started to play a subtle, but significantly different role in the discourse. Especially in the hands of some medical experts and organizations, mentioning code black became part of arguments they used to force their favoured policies.

In both the storyline of equal treatment and the storyline of 'young first' code black was cast as an existential ethical dilemma. Both storylines provided different answers, but the part played by the threat of code black was the same. In the storyline of institutional change, it played the part of an existential threat as well. Its emergence displayed that Dutch society needed to re-examine the basic assumptions on which its healthcare system was based. In the first two storylines, the argument had the following form: 'when code black is upon us, we need to do X'. In the third storyline, the argument had this form: 'to avoid the possibility of code black in the future we need to do X'. At roughly the same time as the discussion on the age criterion was decided in favour of medical associations, the notion of code black started to be used in an instrumental fashion. The problem was cast as a contingent situation that should be avoided right now: 'to avoid code black now we need to do X now'. From an existential dilemma with implications for the future of health care, 'code black' became a situation that necessitated the right managerial choices *now*.

The first time that code black was used in this fashion occurred around New Year's Eve 2020. The Cabinet as well as medical experts urged the people to stay home because the hospitals were nearing their full capacity again.[63] Contrary to March and April of 2020, regular health care was not scaled down to such extent and per-

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63   NN, 'Ziekenhuis Assen dicht bij code zwart: "Nog tien bedden"', *Algemeen Dagblad*, 22 December 2020; Maud Effting and Willem Feenstra, 'Coronacijfers bieden experts weinig hoop: Kerst in lockdown lijkt onvermijdelijk', *de Volkskrant*, 13 December 2020.

sonnel in the hospitals became scarce. The government was sensitive to arguments that claimed code black was near and in order to avoid it, something had to be done. This became especially apparent when vaccines became available, just after New Year's. The vaccine discussion was the corollary of the code black discussion; the question was not who had to be left behind, but who should be aided first. There were good arguments for the view that the 'losers' of the code black policy should be the winners of the vaccination policy. The elderly were by far the people most at risk. Consequently, the government planned to vaccinate the elderly first.

On 31 December a lobby was started by Gommers and Kuipers, two of the most prominent medical faces in the Dutch media during the corona crisis. They claimed that in order to avoid code black, healthcare personnel had to be vaccinated first and vaccination had to start earlier than planned.[64] Other prominent intensive care practitioners echoed their plea.[65] Initially, the Cabinet intended to hold on to its own scenario, but here too the doctors won. On 2 January the Minister of Health announced that medical personnel would be vaccinated first. The fear of code black struck a sensitive nerve.[66] A week later, Kuipers reported to the newspapers that code black is not in sight.[67]

Experts were divided on whether it was a good idea to treat medical personnel first. The arguments in favour were not very convincing. There was increased absenteeism, but that was due to fatigue, not corona. Infection rates among hospital personnel were not significantly higher. The influential government advisory board, the Health Council, recommended vaccinating the elderly and the weak first.[68] Following in the footsteps of the intensive care practitioners, the general practitioners claimed they should be vaccinated as well.[69] The vaccination strategy became a lobby game over which the government lost control.[70]

Ulrich Beck predicted that in the risk society struggles would erupt over risk positions and the vaccination discussion in January 2021 followed his predictions. Medical associations came out on top in the discussions with the politicians and they managed to determine policy. In both situations, the risk positions of medical personnel improved. Doctors, nurses and others who worked in health care would receive preferential treatment in the case code black materialized and they were vaccinated first.

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64 NN, 'Gommers en Kuipers leggen bom onder kabinetsbeleid', *Algemeen Dagblad*, 30 December 2020.
65 Jop van Kempen, 'Ic-arts Amsterdam UMC: "Hopelijk kunnen we langs de rand van afgrond scheren"', *Het Parool*, 31 December 2020.
66 Dion Mebius, 'De Jonge gaat overstag: duizenden ziekenhuismedewerkers vervroegd gevaccineerd', *de Volkskrant*, 2 January 2021.
67 Sebastiaan Quekel, 'Ernst Kuipers: code zwart voorlopig niet aan de orde', *Algemeen Dagblad*, 11 January 2021.
68 Michiel van der Geest en Charlotte Huisman, 'Vaccins moeten nu écht naar de ouderen, vindt de Gezondheidsraad', *de Volkskrant*, 11 January 2012.
69 Hans van den Ham, 'Huisarts Carin verbijsterd over uitblijven vaccinaties: "Als wij omvallen is dat een rampscenario"', *Algemeen Dagblad*, 17 January 2021.
70 Belia Heilbron, Karlijn Kuijpers and Linda van der Pol, 'Ikke prikken – en de rest kan stikken', *De Groene Amsterdammer*, 19 May 2021.

Moreover, the change of code black from an ethical dilemma to a management problem took the sting out of the public discussion. As an ethical dilemma, it became palpable and elicited a political and social debate on the way we treat each other fairly. As a management problem, it became just one of the many risks to be solved by experts. Medical associations took charge and a broad risk community that was tentatively forming around healthcare policies broke down. The vaccination policy became a lobbying arena in which the groups that wielded the most power could secure the best risk position.

According to Ulrich Beck, organizsed irresponsibility stymies reflexivity. In this case, we see organized irresponsibility especially on the level of the state. The government gave away ownership of the problem and could not stand up to medical organizations, allowing them to determine policy to a large extent. Discursively, the problem was transformed from an ethical to a managerial problem. The solution by way of a technical fix became seen as satisfactory. The storyline emphasizing the need for structural changes gradually lost momentum.

In the election debates, code black did not feature prominently. There were debates on the future of health care, but none of the politicians vigorously expressed the need for a thorough revision. The three initial storylines gradually faded. Articles still appeared, arguing that the healthcare system and perhaps even our societal outlook is in need of change. Especially the role of the market in health care was questioned, which is in line with Beck's theory on reflexivity. However, the tone was rather despondent.[71]

5.   Conclusion and discussion

5.1   Risk solidarity gave way to solidarity of need
The possibility of code black was a confrontational moment for Dutch health care. The country had to relinquish the myth that its healthcare system was superior to that of the rest of the world. As the many letters to Dutch mainstream newspapers make clear, the fear that some people might not be cared for provoked outrage. When we compare the empirical findings with the ideal typical risk community described earlier, we may conclude a number of encouraging shifts towards risk solidarity and risk community between the elderly, medical professionals and politicians were initially realized.

While the first guidelines proceeded in utilitarian fashion, largely disregarding considerations of fairness, ageism or ableism, they changed significantly with the publication of the revised guidelines proposed in June and as eventually accepted by Parliament in January 2021. There was still an age criterion but no hard cut off point. Arguments that belonged to the solidarity of need were downplayed. Arguments that fit with risk solidarity on the other hand, such as giving preferential

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71   Raoul du Pré, 'Een jaar later: bevrijding uit de lockdown lonkt, mits we nog even volhouden', *de Volkskrant* 26 February 2021; Niels Klaasen, 'Na corona wil iedereen "minder markt" in de zorg. Maar hoe dan?', *Het Parool*, 8 March 2021.

treatment to medical workers at the front line and to the young, based on fairness were emphasized. The younger generation ran a bigger risk of losing their fair share of life and, therefore, deserved to be treated first. There was concern for handicapped people and other weaker groups, concerns that were not mentioned in the first version. Even though the result was similar, *i.e.* there was still an age criterion, the basis for it shifted, from concerns of utility to concerns of fairness and risk.

In many respects the conclusion can be drawn that, seen from a Beckian perspective, the crisis created opportunities to increase solidarity between 'others'. The discussions in the first months displayed concern over the fate of the elderly. A reflexive storyline emerged in the public discussion, questioning the state of Dutch health care and pointing to the detrimental effects of an approach to health care grounded too much in efficiency. The guidelines drafted by healthcare providers became an object of political and participatory discussion, a sign of sub-politicization. The elderly themselves participated and played a decisive political role by supporting the age criterion in the end, showing solidarity with younger generations and medical organizations.

Nonetheless, a risk community between the various actors did not emerge. Medical organizations did not reciprocate by supporting the elderly, but pushed early vaccination for medical personnel, contrary to government policy and the advice of the Health Council. The impact of the ethical dilemma regarding code black was blunted after the political dust settled. The possibility of code black did not have much traction in the end as a sign that different approaches to health care were needed. That is remarkable for a situation that constituted the gravest healthcare crisis post-WW2. Despite the changes in the argumentative structure of the regulations, risk solidarity was not emphasized in the later stages of the discussion. Code black became a management problem, to be solved through efficient use of resources, an approach grounded in the solidarity of need.

5.2 *Outsourcing responsibility*
I consider that the key to understanding the rapid social inoculation against the existential doubt imposed by the dilemma lies in the fact that responsibility for the situation was outsourced to medical associations. They provided an alternative to the state as an institution to put one's faith in. The elderly themselves and politicians eventually ascribed to a discourse coalition around the storyline that 'the doctor knows best'. The storyline made the healthcare system itself impervious to critique, because their representatives were called upon to find a way out. Medical associations assumed all responsibility and with it significant control over policy-making.

What I call outsourced responsibility,[72] is the corollary to Beck's 'organized irresponsibility', instead of institutional metamorphosis. Beck theorizes about responsibility only in a negative way. In modern society, institutions will obfuscate responsibility, because they do not want to be seen as failing. Beck assumes that corporations and governments have mechanisms that deflect reflexive criticism on their policies and risk producing behaviour. Through law and other strategies, they shield themselves from public concern. However, Beck's one-sided treatment causes him to miss that in the risk society it may also be very beneficial to assume responsibility. Traditional institutions deflect responsibility, but it does land somewhere else. It is outsourced to groups for whom responsibility may be advantageous to have. The assumption of responsibility allows for a big say in setting the agenda. Through organized irresponsibility the public loses sight of the true loci of risk production, but outsourced responsibility provides for a figure head in the eyes of the public that will solve the issue of risk currently at hand.

The discussion on code black displayed this dynamic. The government tried to retake control in view of public concern, but were in the end all too happy to leave responsibility with medical associations, such as the FMG and the NVIC. This became especially apparent in the reaction of Parliament to the guidelines. Parliament did not state whether it endorsed the recommendations in their final version, but instead that it did not want to get in the way of medical professionals. That is a strange argument when a dilemma is at stake that has such broad social, ethical and political overtones.

The organized irresponsibility of Parliament allowed medical organizations to assume responsibility. Throughout the discourse, the position of medical expert organizations strengthened and the government's position became weaker. Gradually these professional organizations 'won' control over the code black discourse and used the fear of code black as an argument to obtain a better risk position for medical personnel.

It would be a mistake to consider this dynamic as a conscious strategy by medical organizations or individual doctors, as if there was some sort of conspiracy to make sure vaccines landed with healthcare personnel. There was no such conscious strategy. Such a dynamic is inherent in the logic of the risk society itself. Just as social conflict over class positions is a perennial feature of social organization in modern society, so is conflict over risk positions in the risk society. According to Beck's later work, risks will give birth to risk communities, because everyone is susceptible to the negative effects of global risks. However, that notion is problematic. Risks do not affect people evenly. Risks are not democratic, as Beck holds them to be. They discriminate just as much as class does and people hold unequal risk positions. In the case at hand, the risk position *vis-à-vis* COVID-19 can be improved by

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72   The term 'outsourcing' is borrowed from Pauline Westerman. According to Westerman, the legislator 'outsources' law making to subordinate organizations. Similarly, the government outsourced responsibility to medical organizations. Pauline Westerman, *Outsourcing the Law* (Cheltenham: Edward Elgar, 2018).

a vaccine. In such a situation, conflict over vaccine distribution occurs naturally and taking responsibility when responsibility is outsourced is a key move in this conflict. With responsibilities come rewards in the form of being able to determine the risk positions of oneself and others.

At the end of his life, Beck embraced an optimistic view of risk and the possible emergence of risk communities. One may wonder, however, whether his theory is not at its most useful as a theory of conflict over risk. The theory of Beck is more apt to explain why risk communities do *not* emerge, namely because of the enduring struggle over risk positions. According to Beck, institutions diffuse responsibility, leading to criticism and, eventually, a transformation. This view may be too optimistic. In the code black discussion, other institutions seized responsibility, which allowed them to obtain a stronger position in the debate and to determine policy. This dynamic did not lead to the opening up of institutions or the establishment of a risk community.

What Solidarity?

A Look Behind the Veil of Solidarity in 'Corona Times' Contractual Relations*

Candida Leone

Introduction

This article aims to present a critical look at solidarity and contractual relations during the first months and years of the coronavirus pandemic, using examples from the Dutch experience to problematize the relationship between contractual and social solidarity. In particular, this article is written with (a resurgent literature on) Durkheim's ideal types of mechanical and organic solidarity in mind.[1] Very much in short, according to Durkheim's theory social solidarity – an institution crucial to maintaining societies in balance and preventing anomy – displays different forms in primitive and advanced societies. Primitive communities in this account are characterized by *mechanical solidarity*: a mechanism based on identity (= sameness) and which works through *punishment* as the main legal technique. Through punishment, law is tasked not so much with correcting the individual as with reaffirming the values of the community.[2] In advanced societies, in contrast, social solidarity is *organic:* social cohesion stems from the acknowledgement that *different* groups in society need each other in order to thrive. Relations between such different groups, and hence solidarity, are typically mediated and regulated by contract. In contrast to the punitive emphasis of law in primitive societies, the logic of cooperation and – when necessary – restitution prevails. Social cohesion is then upheld by civil law through guaranteeing contractual reciprocity, not by punishing breaches.[3] In this way, organic solidarity embraces individualism while accepting interdependence as a necessary corollary of modern division of labour.[4]

1   On mechanical and organic solidarity as ideal types: Jon Hendricks and C. Breckinridge Peters, 'The Ideal Type and Sociological Theory', *Acta Sociologica* 16, no. 1 (1973): 31-40. For an early application of Durkheimian insights to the pandemic: Chinmayee Mishra and Navaneeta Rath, 'Social Solidarity During a Pandemic: Through and Beyond Durkheimian Lens', *Social Sciences & Humanities Open* 2, no. 1 (1 January 2020), 100079.
2   Emile Durkheim, *The Division of Labor in Society* (Glencoe: Free Press, 1960).
3   Durkheim, *The Division of Labor in Society*.
4   Durkheim, *The Division of Labor in Society*; Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship', *European Law Review* 32 (2007), 787-818; Kenneth Veitch, 'Social Solidarity and the Power of Contract', *Journal of Law and Society* 38, no. 2 (2011): 189-214.

Several voices have maintained that the prevalence of division of labour and organic solidarity in modern societies is not incompatible with an enduring significance of mechanical solidarity:[5] some, in particular, have done so in sympathy,[6] whereas others have focussed on the dark side of the mechanism, emphasizing the punitive logic that comes attached to contract (and contract breach) in the context of neoliberal governance.[7] As the article takes contractual relations and law as its object of inquiry, focussing on the *legal mechanisms* of solidarity seems appropriate. This requires some translation, as solidarity in Durkheimer is a social fact rather than a norm – and certainly not a norm of contract law. After having thus paid attention to the legal significance and possible articulations of solidarity, with a specific emphasis on contract law, the analysis will focus on the specific juxtaposition between compensatory/restitutory logic and 'punitive' legal intervention by looking, on the one hand, at the *recipients* of solidarity in contractual context and, on the other hand, at the framing of solidarity obligations.

The article considers three instances in which solidarity has been invoked – directly or indirectly – to interfere with contractual obligations in the context of the current pandemic, with effects partially similar to the ones just described. First, a number of decisions will be discussed which concern commercial rentals. In some of these cases, the rules on change of circumstances were relied upon in order to temporarily reduce the agreed rental price, often 'splitting' the tenant's loss of income between the parties. Second, I will discuss the case of vouchers in lieu of reimbursement which rose to prominence in 2020 consumer contracts across Europe, including in The Netherlands. Third and final focus point will be the *loonoffer* (wage sacrifice) asked of KLM employees as a condition for the concession of state aid in the summer of 2020. All these examples point to a version of *solidarity* – what version, and in particular towards whom and with what significance will be the specific angle of the short inquiry that follows.

Distinguishing 'solidarities' in law

From a broader legal perspective, it is tempting if perhaps problematic to identify solidarity with *mutualization*, that is, the idea that certain members of society 'subsidize' entitlements for other members. This understanding, however, is difficult to translate to contract law for at least two reasons. The first reason is the difference between voluntary and involuntary relations: in EU law, for instance, solidarity has been characterized as 'the inherently uncommercial act of involuntary subsidization of one group by another'.[8] This definition would cover, for instance, collective

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5   Herbert Hart, 'Social Solidarity and the Enforcement of Morality', *The University of Chicago Law Review* 35, no. 1 (1967): 1-13.
6   David Courpasson, Dima Younes and Michael Reed, 'Durkheim in the Neoliberal Organization: Taking Resistance and Solidarity Seriously', *Organization Theory* 2, no. 1 (2021): 1-24; Mishra and Rath, 'Social Solidarity During a Pandemic'.
7   Veitch, 'Social Solidarity and the Power of Contract'.
8   *Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v. Regione Lombardia* [1997] ECR I-3395, AG's Opinion para. 29.

health or social security insurance schemes, education and other benefits arranged through taxation or compulsory insurance. The definition's emphasis on the *involuntary* nature of legally arranged solidarity outlines the tension between this 'public law' model of solidarity and contract law, where the voluntary nature of relationships is a core postulate. Even when doing away with coercion, legal institutions of solidarity seem to point to a group sharing in both the risks and *benefits* of cooperation:[9] in contract law, in contrast, risk *allocation* is an important feature of the contract itself, and benefits are typically regarded from an individual perspective in line with the principle of private autonomy. A transposition, therefore, seems to require some work.

Possibly not by coincidence, 'solidarity' and *solidarism* are keywords through which in particular some French contract lawyers[10] have expressly articulated the twentieth century developments which questioned the reach of 'voluntarism'. Solidarity, or good faith, can require that a party abstains from exercising some rights, or it can lead to certain elements of the contract being declared invalid (think of an unfair limitation of liability). It can require a judge to interpret a contract in a certain way rather than one that would lead to a harsher outcome for the burdened party. As a result, in specific occasions, it can require that one party performs an obligation that it had not expressly committed to.

Within (Europe-oriented) English-language literature, some authors have expressed unease about the fit between solidarity language and contract law, preferring other nomers such as 'altruism' and 'regard',[11] whereas others have vindicated the analytical expediency of mapping contract law rules on a continuum between

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9   Andrea Sangiovanni, 'Solidarity in the European Union', *Oxford Journal of Legal Studies* 33, no. 2 (2013): 213-41.

10   See *e.g.* Christophe Jamin, 'Plaidoyer Pour Le Solidarisme Contractuel', *Le Contrat Au Début Du XXIème Siècle*, 2001, 441; Denis Mazeaud, 'Loyauté, Solidarité, Fraternité: La Nouvelle Devise Contractuelle?', in *Mélanges Terré* (Paris: Dalloz, 1999), 603-634; Ruth Sefton-Green, 'A Vision of Social Justice in French Private Law: Paternalism and Solidarity', in *The Many Concepts of Social Justice in European Private Law*, ed. Hans-Micklitz (Cheltenham: Edward Elgar Publishing, 2011), 237-246.

11   See Brigitta Lurger, 'The "Social" Side of Contract Law and the New Principle of Regard and Fairness', Arthur S. Hartkamp and Carla Joustra*, Towards a European Civil Code* (Den Haag: Kluwer Law International, 2004), 275. About the duty to consider the other party's interest, Lurger writes: 'This obligation shows traces of "altruism" and "solidarity", but is not a fully-fledged form of these. [...] The term "solidarity" is closely associated with certain phenomena in ethics, sociology and public law. If applied to contract law, the term "solidarity" could mislead the reader to expect that such kind of contract law would deal with transfers of assets from richer to poorer parties, with sacrifices of groups of society made in support of other groups, or it could evoke the false impression that "contractual solidarity" is the same as a communitarian view of private law. The traditional term of "solidarity" has already so many established meanings and connotations that do not really or not completely coincide with the role and functioning of customer protection in contract law. It is therefore not advisable to use this old pre-defined term for a rather recently established principle of contract law.' Kennedy uses 'individualism and altruism' instead of autonomy and solidarity, but also refers to solidarity in explaining what altruism entails, see Duncan Kennedy, 'Form and Substance in Private Law Adjudication', *Harvard Law Review* 89 (1975): 1685.

(and continuous balancing of) autonomy and solidarity.[12] By and large, both sets of authors have in mind (acknowledging the shortcuts that the translation entails) rules, principles and concerns not very different to what continental lawyers learn to be encompassed by 'objective' good faith: in essence, a duty to consider the other party's interests when asserting one's own. Compliance with such duty entails an act of balancing entrusted, in principle, to a private party – even though by its nature it will mostly end up in the hands of a judge entrusted with adjudicating a dispute, who will decide on somewhat 'objective' standards.

The dispute among contract lawyers as to whether developments in private law are to be characterized as 'altruism' or 'solidarity' rests on the extent to which each terminology foregrounds corrective or distributive justice concerns. While duties to care for the other party are often placed on the comparatively stronger contracting partner, this is not a requirement in classic contract law. Kennedy famously referred to rules on unilateral mistake, where a degree of selflessness may be required even among *ex ante* 'equal' parties. Thus 'altruism' could be a better term to catch the moral expectation that sometimes attaches to contractual relations.[13] As observed by Mak, much of this distinction lies in the eyes of the beholder – one can see 'socialization of contract law' where others see respect for equal autonomy, and hence see solidarity as emerging principle where others see altruism.[14] However, it does not seem unlikely that the presence of a clearly weaker party shapes the form 'altruism' takes in concrete cases, so for instance Mak herself opted for solidarity as a viable concept to study the influence of fundamental rights on contractual relationships. At the same time, to the extent that one uses the word solidarity in contract law discussions, its meaning seems different than what we have quickly sketched above for 'public' law: emphasis on good faith or duties of care means that avoiding (excessive) unliateral advantage-taking, rather than *sharing* of benefit or risks, seems to be the relevant standard. Not much pooling is required beyond what the parties have established in the agreement. If contract, per Durkheim, is the form in which relations are articulated in a society which accepts division of

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12 Martijn Hesselink, *The New European Private Law* (Den Haag: Kluwer Law International, 2002); Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Den Haag: Kluwer Law International, 2008). The latter also frequently refers to Jan Smits using the same language in the Dutch debate. In the same context, see also Nick J.H. Huls, 'Al het privaatrecht moet sociaal zijn!', *WPNR* 6564 (2004): 101 and Ton Hartlief, 'Autonomie en solidariteit. Beweging in het verbintenissenrecht', *WPNR* 6564 (2004): 106.
13 See Kennedy, 'Form and Substance in Private Law Adjudication'.
14 Contrasting Hesselink's and Du Perron's views on duties of care: Mak, *Fundamental Rights in European Contract Law*, 184.

labour and interdependence, such interdependence is not expressly acknowledged in solidarity-qua-good faith discourse.[15]

The short overview above allows us to look at cases involving contract and solidarity with three analytical pillars: an internal view on contract law solidarity between parties, a view of organic social solidarity among distinct interdependent groups as mediated by contracts and normatively characterized by restitutory discourse and, finally, mechanical solidarity, based on group identity and normatively associated with punishment.[16] These pillars will hold together the analysis of the three cases discussed in the next part of the article.

Case 1: Sharing the pain of lockdown in commercial leases

On and off over the past two years, lockdowns have entailed massive disruptions of on-premise commercial activities, with a particularly remarkable impact on retail, hospitality and of course sports and personal care facilities. In contrast with the approach taken in other countries, in the Netherlands no specific rules have been passed to specifically govern the effects of the lockdowns on contracts in general – possibly also due to the soft law approach followed in the first ('intelligent') lockdowns. It is perhaps then no surprise that disputes ended up arising between tenants of commercial premises and their landlords concerning the consequences of the pandemic for their respective contractual rights and duties. In the cities, in particular, courts showed a degree of sympathy towards the claims of tenants who had been confronted with almost erased cash flows in the face of considerable (pre-corona) costs.[17] While the performance of the main obligation is still possible – the premises are still available to the tenant – the performance is deprived of any utility, whereas the monetary counter-performance has not been affected.

Dutch tenancy contract rules allow for a price reduction when the premises cannot be exploited as expected due to a 'defect',[18] which has been interpreted broadly to also cover circumstances external to the object to the contract. When the applica-

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15   In contrast with, *e.g.*, Catholic social doctrine: '[…] new relationships of interdependence between individuals and peoples, which are de facto forms of solidarity, have to be transformed into relationships tending towards genuine ethical-social solidarity.' https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html#Solidarity%20as%20a%20social%20principle%20and%20a%20moral%20virtue, paras. 192 ff. Closer to this sensitivity are, however, some contemporary strands in Anglo-American contract theory, see *e.g.* the notion of justice based on contract as cooperation in Dagan, Hanoch and Dorfman, Avihay, 'Justice in Contracts' (17 May 2021), *American Journal of Jurisprudence* 67 (forthcoming 2022), available at SSRN: https://ssrn.com/abstract=3847845 or http://dx.doi.org/10.2139/ssrn.3847845.

16   The distinction, furthermore, may be clear for classical doctrines of contract law such as relief for unilateral mistake, but almost untenable for modern mandatory contract rules such as minimum wages, price controls, minimum quality.

17   See e.g. Rechtbank Amsterdam 9 March 2021, ECLI:NL:RBAMS:2021:937, 8701992 for the case of a hotel close to the city centre, but also Rechtbank Den Haag 21 January 2021, ECLI:NL:RBDHA:2021:461, 8616735 / 20-11418, concerning hospitality activities.

18   See Art. 7:204 section 2 Dutch Civil Code.

tion of the price reduction rule, which is non-mandatory, is excluded, parties can still invoke a *change of circumstances*.[19] For a successful claim, the tenant will then have to demonstrate that, due to unforeseen circumstances, upholding the contract in its original form would give rise to an unacceptable hardship, against the requirements of *redelijkheid en billijkheid* (often translated as good faith or reasonableness). Courts have so far generally held that the coronavirus pandemic, and the consequent restrictions upon commercial activities, represent relevant unforeseen circumstances in the context of many types of commercial lease.[20] Tenants of commercial space will further need to show that their income has decreased as a result of the pandemic, but this fact alone is not enough to show that upholding the contractually agreed rent would be unreasonable.[21] In this respect, relevant circumstances have to be considered: whether the tenant is in a position to weather a difficult period, whether the landlord depends on the rental for their subsistence, and so on.[22] In other words, whereas the specific provision on lease contracts may be seen to impose a degree of altruism on the landlord with a view to preserving the contract's original balance, the unforeseen circumstances test is applied in a way that seems closer to actually considering the parties' social circumstances and needs.[23] In one way or another, while the pandemic makes for a rather imposing background,[24] the solidarity element is entirely consumed in-between the parties – landlords are, in other words, not expected to help keep shops or restaurants afloat so that their customers can still enjoy them.

Case 2: Give them vouchers?

The situation above is different from the case of consumer vouchers, offered when the main object of the contract had become impossible or extremely difficult to

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19 Art. 6:258 Dutch Civil Code.
20 See Rechtbank Amsterdam 15 December 2020, ECLI:NL:RBAMS:2020:6951, 8559471 CV EXPL 20-9916 conspicuously referring to other court decisions having come to the same conclusion: 'In verschillende huurrechtelijke kort gedingen is reeds geoordeeld dat de beperkende overheidsmaatregelen als gevolg van de coronacrisis onvoorziene omstandigheden in de zin van artikel 6:258 BW opleveren (zie onder meer (…) gerechtshof te Amsterdam van 14 september 2020, ECLI:NL:GHAMS: 2020:2604).'
21 See *e.g.* Rechtbank Gelderland 17 February 2021, ECLI:NL:RBGEL:2021:782, 8849231, noticing that the tenants had been able to terminate the contract early in the pandemic but failed to do so and additionally did not produce reliable proof of their pandemic-related losses. In contrast, in Rechtbank Amsterdam 9 March 2021, ECLI:NL:RBAMS:2021:937, 8701992 the tenant's income had fallen by 75% during the crisis and the link to the pandemic was uncontested.
22 See Rechtbank Amsterdam 11 June 2020 ECLI:NL:RBAMS:2020:2914, 8453358 KK EXPL 20-245 'In beginsel zou als redelijk richtsnoer kunnen worden aangenomen dat de tegenvaller gelijkelijk over beide partijen wordt verdeeld, zij het dat bij de beoordeling daarvan alle omstandigheden van het geval betrokken dienen te worden, zoals de maatschappelijke positie en onderlinge verhoudingen van partijen, alsmede de aard en ernst van de betrokken belangen van beide partijen.'
23 In his conclusions on a case pending before the Dutch Supreme Court, Advocate General Wissink suggests *redelijkheid en billijkheid* should also be considered in applying the specific rules on rent reduction: Hoge Raad 30 September 2021, ECLI:NL:PHR:2021:902.
24 Even in technical terms: for instance, different courts disagree on whether and how to consider government subsidies in calculating losses suffered by the tenant, see Gerechtshof Amsterdam 14 September 2021, ECLI:NL:GHAMS:2021:2728, 200.290.265.

perform due to the pandemic: think of cancelled flights, package holidays etc. – but also, in some countries, concerts, museum visits and other events.[25] Cancelled flights were a particular issue throughout Europe, with the Commission set on a collision course with the Member States on the required degree of consumer protection.[26] As is by now widely known, in Europe, private travellers are entitled to a reimbursement when their flights are cancelled. During 2020, however, several Member States expressly adopted policies tolerating the issuing of vouchers in lieu of reimbursement, with a view to preserving the airlines' cash-flows from being (further) affected. These policies were not in line with repeated recommendations by the European Commission, according to which travellers should always be able to *choose* between immediate reimbursement and acceptance of a voucher, leaving it to providers (and Member States) to make the voucher option attractive.[27]

In essence, allowing vouchers as the only option turned consumers into 'lenders of first resort', leaving the airlines free to keep the cash, use it as they deemed appropriate and set the conditions for redeeming it. Contrary to the case of leases, the contract in these cases is terminated, so in fact both parties are *ex lege* liberated from their obligations. There is, in fact, no legal reason for the airlines to hold the ticket money beyond the time necessary to make the transfer. The consumer's right to reimbursement is not challenged. There is, essentially, no basis for contractual solidarity. On what basis, then, are consumers required to be altruistic or even act solidary, and – importantly – to whom?

The Dutch government suggested that solidarity was due to companies that were going through hard times,[28] whereas the European Commission seemed to think that a rush to reimbursements by some consumers would ultimately harm *other consumers*, who would end up unprotected if the affected companies declared bankruptcy.[29] Some companies, meanwhile, conceded that consumers may also be occasionally experiencing hardship, in which case their claim should take precedence over the company's cash-flow management strategy.[30] While ostensibly implying solidarity with one's former contractual partner, this case shows various forms of social solidarity part converging, part competing: if the Commission seems to hint

25   See *e.g.* the German 'voucher law', amending the introductory provisions to the German civil code to make vouchers instead of reimbursement the standard reaction to cancellations during the corona pandemic: https://www.bundesregierung.de/breg-de/aktuelles/gutscheinloesung-kulturbranche-1740010.

26   https://euobserver.com/coronavirus/148219.

27   See Commission Recommendation of 13.5.2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic, (2020) 3125 final.

28   Mark Rutte, May 2020, mentioning his own small collection of cancelled tickets and ensuing voucher claims: 'Ik vind dat we dan ook een beetje solidair moeten zijn met de bedrijven die het moeilijk hebben' (source: NOS).

29   https://ec.europa.eu/info/sites/default/files/recommendation_vouchers_en.pdf, para 14.

30   Thus Corendon's director: 'Van der Heijden erkent dat consumentenrecht belangrijk is en dat mensen, zeker in sommige gevallen, hun geld moeten kunnen terugkrijgen. "Een paar honderd klanten die anders zelf in geldproblemen kwamen, hebben we hun geld teruggegeven. Daar maken we wel uitzonderingen voor".' See https://nos.nl/artikel/2333765-geldteruggarantie-teleurstelling-voor-reisbranche-maar-fijn-voor-consumenten.

at a sort of in-group (mechanical) solidarity among consumers, solidarity with companies seems to resonate with an acknowledgement of interdependence between social groups (here, consumers and service-providers), while both play in the broadly community-based rhetoric of unity deployed by many governments during the early stages of the pandemic. The *mechanism* of involuntary lending, however, is ultimately based on deferred exchange and does not deviate from the paradigm of organic solidarity.

Case 3: State support and broad shoulders

This rhetoric, however, takes rather more combative tones in the last of the three examples discussed in this short article, namely the case of the conditional state aid to Dutch airline KLM. As widely known, in the summer of 2020 the Dutch government (contentiously) decided to grant state aid to KLM, in the form of a direct loan amounting to roughly 1 billion euros and public guarantee on ca. 2 billion more in bank loans. The government was clear, however, that the loan did not come without strings attached: KLM was expected to cut its costs by 15% in order to secure its long-term competitiveness, and this result was to a large extent to be attained through a restructuring – hence, savings on personnel costs.[31] In particular, the company and Dutch trade unions had to make sure that the highest earners (*i.e.* those receiving more than three times the country's modal salary)[32] would take a cut of at least 20%, 'so that the broadest shoulders carry the heaviest burden',[33] whereas workers on a lower salary could be expected to stay closer to their old remuneration levels.[34] The call for wage and cost reduction was not just a matter of pandemic-induced cash-flow shortage.[35] The company's reorganization, according to January 2021 estimates, has led to a downsizing of ca. 6,000 jobs throughout KLM's global operations.[36] Just before the reorganization plans had to be submitted in the fall of 2020, the usual holdouts had to be addressed: the generalist union claimed that too much had been cut into the lower salaries (up to 1,5 the modal salary), while the pilot union was not enthusiastic about the way in which the 'broader shoulders' had been singled out and the plan to make them carry the heaviest burden implemented. But why did the State require this 15% cost reduction in the first place?

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31 https://www.rijksoverheid.nl/onderwerpen/staatsdeelnemingen/vraag-en-antwoord/financiele-steun-aan-klm.

32 That amounts, one must say, to a considerable reference figure: the modal salary for 2020 was calculated at 35,000 euros per year.

33 In original: 'zodat de sterkste schouders de zwaarste lasten dragen' – see https://www.rijksoverheid.nl/onderwerpen/staatsdeelnemingen/nieuws/2020/06/26/kabinet-biedt-financiele-steun-aan-klm-als-gevolg-van-de-coronacrisis.

34 https://www.rijksoverheid.nl/onderwerpen/staatsdeelnemingen/nieuws/2020/06/26/kabinet-biedt-financiele-steun-aan-klm-als-gevolg-van-de-coronacrisis.

35 In fact, KLM has been one of the largest recipients of wage support measures, or the 'NOW' (*Noodmaatregel Overbrugging Werkgelegenheid*) moneys, see https://www.consultancy.nl/nieuws/29984/deze-20-bedrijven-krijgen-de-meeste-now-subsidie; https://www.taxence.nl/nieuws/register-met-ontvangers-derde-aanvraagperiode-now-online/.

36 The lay-offs represent roughly one-sixth of KLM's workforce at 2019 levels.

While the Dutch state holds roughly 14% of the shares in KLM, the company is a private company operating under rules of labour law; a generalized salary reduction would not have been really conceivable outside of a restructuring plan. For a similar demand to be acceptable in an individual context, in fact, courts consider numerous factors: importantly, the wage reduction needs to be *temporary* and it needs to be in practice bearable for the *individually affected worker*.[37] In contrast to the Dutch government's wholesale 'broader shoulders' image, a *contextual* assessment has to be made to decide whether a loss of income is bearable for the employee (and, where relevant, their family). Arguably, a reorganization would in any case have been the outcome of the coronavirus crisis – but now the government has effectively established the terms of any negotiations between KLM and the involved trade unions:[38] not only must the costs be reduced, this needs to *anyway* include a cut in the wage levels. A number of other financially relevant constraints included in the package – promises as to the prospects of Schiphol, use of cleaner fuels and so on – further reduced the margins of negotiation in respect of wages. In demanding to push down costs,[39] the Dutch-state-qua-lender was to a large extent effectively furthering the interests of the Dutch-state-qua-shareholder, who however as such could not have triggered a reorganization.

This push for KLM competitiveness, however, was not announced in a boardroom meeting but in a press conference held by ministers standing in front of a banner detailing 'only together we keep Corona under control', evoking language of public morality: 'the broadest shoulders' need to pay a toll for the state support to be awarded. One reading is that this is just about (the display of) typical protestant ethic, requiring austerity in return for support. In the context, however, and considering the way in which the cuts were presented, this interference with individual contracts and collective autonomy is most likely meant to be understood as requiring solidarity: of the highest-paid employees with those earning less, but also of all employees taking a cut – with whom, though?

The most prominent recipient of such 'broad shoulders' solidarity seems to be the Dutch taxpayer,[40] or even to 'the economy' broadly intended.[41] Contractual solidarity, towards KLM as an employer, seems hardly involved: the prohibition to distribute profits and dividends, which was also included in the conditions, does not seem

37   Nuna Zekić, 'Loonoffers in Tijden van Corona', *Tijdschrift Voor Arbeidsrecht in Context* 2020, no. 3 (2020), 1-11.
38   Which in fact presented an official complaint to the European Commission against this interference with their right of collective negotiation: https://www.fnv.nl/nieuwsbericht/sectornieuws/luchtvaart/2020/07/klacht-over-voorwaarden-steunverlening-klm, see https://fd.nl/opinie/1352686/nederlandse-staat-kan-niet-zomaar-loonoffer-eisen-in-ruil-voor-staatssteun-klm.
39   With reference to other conditions – the reduction of night flights, some laid-back sustainability requirements – the public interest was obvious.
40   'Het gaat om belastinggeld', zei minister Hoekstra toen. 'Het is redelijk dat de sterkste schouders ook de zwaarste lasten dragen.' Source: NOS, https://nos.nl/artikel/2338545-klm-krijgt-steunpakket-van-3-4-miljard-euro-later-persconferentie.
41   The government explains that KLM is not only an important employer and a national champion but also (in particular because of Schiphol airport) a strategically important actor which directly supports the 'open economy' of the Netherlands.

to represent a comparable 'sacrifice' that could be put in a direct relationship to the contribution required of employees. Furthermore, given the salary cuts' inaptness to prevent other workers' layoffs, intra-group solidarity also seems a weak explanation. This becomes even more obvious by looking at the way in which cuts were implemented in the October 2020 plan. For instance, bonuses were partially turned into extended holiday leaves, so to distribute the remaining work shifts among the available employees in the face of many flights having been cut from the company's planning. Such an approach clearly displays elements of group solidarity. The strategy, however, was not a direct result of the government's demands but rather a way to partially *circumvent* such demands. In truth, by reducing its (personnel and) wages, KLM may have absorbed less resources in the form of outright corona subsidies, which could be seen as an indirect contribution to the support of other hardly hit sectors. The last observation points in fact to a form of Durkhemian *organic solidarity*, highlighting interdependence between different areas of the economy. At the same time, however, the requirement that cost reduction must in any case include pay cuts subtly suggests that KLM employees, with their obviously too lush employment conditions, are in fact to blame for the company's predicament and thus it is just normal that they are now expected to chip in.[42] This punitive component resonates rather with accounts of mechanical solidarity, much in line with the invocation of moralising language and references to 'taxpayers' money'.

A continuum?

Of course, the three cases above do not return a complete picture of how pandemic-induced pain has been shared in and through contractual relationships. They are idiosyncratically chosen rather than particularly representative. However, taken together, they give an interesting portrait of how individual and group responsibilities were articulated, with implicit or explicit appeals to solidarity, in contractual contexts which have been – uncharacteristically, for contracts as such – quite prominent in public conversations and news reporting.

Starting with the example of commercial leases, we have seen quite traditional contractual solidarity or altruism at play. This happened in relatively acontextual manners where the specific rules on price reduction in rental contracts had to be applied and with more societal embedment where rules on unforeseen circumstanced were of direct relevance. In this case, the parties were expected to share the pain brought about by the lockdowns in a way that took account of their relative positions, ability to bear the loss, reliance on the contract and so on. Perhaps the most relevant issue to be noticed here is in the background – while courts had been very reluctant, not to say straightaway unwilling, to consider the 2008 financial crisis as capable of triggering the unforeseen circumstances rule, it was quickly established that the pandemic fulfils the requirements for doing so.

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42   This framing is, of course, particularly relatable: few people will instinctively commiserate high-earning pilots who are called to take a cut, somewhat overshadowing the fact that the vast majority of airline employees are of course not pilots.

Looking at the second example – the consumer vouchers – we saw how the party generally considered as weaker and protected as such was being invited to show 'solidarity' and act as first instance lender to their counterpart. Contractually, we have seen, this was a very different situation than the first case: as upon termination each party goes back to the *status quo ante*, there is no obvious 'loss' to be shared, except for the provider's cash flow. The call for consumers to show solidarity with their (former) contractual counterpart, or eventually with other consumers in similar predicaments, had nothing to do with the individual position of consumers and providers. Consumers *as a group* are asked to show solidarity, as it is only the cumulative effect of this forced lending that can provide the necessary lifeline. This solidarity displays traits of mechanical (among consumers) and organic (between consumers and traders) solidarity, but the legal response and language remain compensatory, in line with 'civil law' mechanisms.

The ambiguity takes darker tones in the KLM 'sacrifices' case. In essence, the government in this case was able to use the granting of state aid to set the terms of an unavoidable reorganization, suggesting that KLM employees, simply put, had too good terms of employment for the company to stay competitive in the post-corona scenario. To the extent that the concerned workers were asked to 'take one for the team', the team was most likely the Dutch economy at large. While there was some hinting at individual positions – the much-repeated reference to 'broader shoulders' having to carry the heaviest burden – ultimately this was little more than a formula. The degree of autonomy that was preserved for collective actors leaves some space for agency and responsibility, but it is hard not to notice a punitive element creeping through the language: the perceived direct beneficiaries of the rescue must also suffer. This punitive element seems to bring us back to forms of mechanical solidarity, whereby the sacrifice required of the parties here would serve more to assert the values – competitiveness and, to an extent, thriftiness – of the community than to restore or compensate.

The overview resonates with previous observations that elements of 'primitive' and more modernized solidarity persist in contemporary social and legal systems,[43] and perhaps it is not by chance that the fullest reflection of mechanic solidarity in this purview is to be found in the domain of labor and social policies. What is remarkable, however, is how these forms of involuntary solidarity take place not so much directly in the relationship between citizens and public powers or citizens and community, but are *mediated* by the contractual form. With some qualification on Durkheim's claims in this respect, it is still quite obvious that such contractual form ultimately has the effect of depoliticising the underlying dynamics.[44] 'Private law' common-sense-by-association attaches to what are ultimately political choices; appeals to individual solidarity and responsibility ultimately trade matters of 'taxpayer money' as private relations. Dispelling the rhetorics of solidarity here, then,

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43   See Courpasson, Younes and Reed, 'Durkheim in the Neoliberal Organization: Taking Resistance and Solidarity Seriously'; Mishra and Rath, 'Social Solidarity during a Pandemic'; Veitch, 'Social Solidarity and the Power of Contract'.
44   Veitch, 'Social Solidarity and the Power of Contract'.

Candida Leone

can be seen as a timid attempt by the author to help in keeping open urgent questions about the economic order that will come after the pandemic.

The Exceptionality of Solidarity*

Amalia Amaya Navarro

I.   Introduction

In the pandemic – as is typically the case in times of crisis – we have witnessed admirable expressions of solidarity. In Australia, a couple running an Albanian restaurant provide up to 500 free meals a day to those affected by the health crisis.[1] In India, The Caravan of Radical Love helps migrant workers left without work in the pandemic.[2] In Spain, citizens clap from their balconies to thank health workers. Students, retired nurses, and doctors volunteer to support their national health systems. 'Mutual aid groups' across the UK support vulnerable people in their communities.[3] Indeed, it goes without saying that our society would be better if solidarity were not saved for times of crisis but constituted a feature of our social life in times of normalcy. Furthermore, it could be argued (although I will not attempt to do so here) that living up to the demands of solidarity not only makes a better society but is a necessary condition for a just society. More radically, it could even be argued that solidarity is a necessary condition for a society – just or otherwise – to exist at all.[4] Given the relevance of solidarity to societal well-being, it may be worth enquiring into what prevents solidarity from becoming the norm rather than the exception.[5] What conditions obtain in exceptional times, but seem to be absent in normalcy, that enable solidarity? What would be needed for solidarity to last beyond times of crisis? The current pandemic, I would argue, provides a window into the conditions that make solidarity possible. It also reveals the extent to which solidarity is an inclusionary and global normative ideal – in addition to being an unremittent one. Last, it alerts us to some risks inherent in the attempt to implement the ideal of solidarity as well. Thus, the analysis of solidarity and its exceptionality helps illuminate important aspects of the conditions, nature, and dynamics of solidarity.

1   https://www.theguardian.com/australia-news/2021/aug/31/shepparton-couple-donating-up-to-500-free-meals-a-day-amid-covid-outbreak.
2   Kathryn Liban and Prakash Kashwan, 'Solidarity in Times of Crisis', *Journal of Human Rights* 19 (2020): 542.
3   'Solidarity in a Time of Crisis: The Role of Mutual Aid and the Covid-19 Pandemic ', Yunus Centre Report, February 2021.
4   For a discussion of the so-called 'disintegration thesis', *i.e.*, see H.L.A. Hart, 'Social Solidarity and the Enforcement of Morality', *The University of Chicago Law Review* 35 (1987).
5   Solidarity has, as Crowe nicely puts it, a 'mercurial' quality. It is an 'unstable phenomenon that oscillates between periods of relative quiescence and of intense expressions during events such as strikes, revolutions and religious ceremonies', as well as – we may add – crises such as the current pandemic. See Graham Crow, 'Social Solidarities', *Sociology Compass* 4 (2010): 58.

Before I try to argue for these claims, a methodological worry should be addressed. One could be suspicious about the possibility of drawing any lesson about the concept of solidarity by examining its expressions in times of crisis. Whatever features it may have in times of crisis, it does not seem justifiable to assume that they should characterize it in ordinary times as well. An analysis of solidarity that is apt for times of crisis – it may be argued – is unlikely to help us make any progress with the study of solidarity as an ideal fit for normal times. There is a grain of truth in this line of criticism. While the examination of hard cases in law does help us better understand the process of adjudication, it would certainly be inappropriate to conclude that features that are distinctive of hard cases are also central characteristics of the practice of adjudication across the board. Likewise, whereas it is useful to examine cases involving moral dilemmas, when developing a moral theory, one should be wary of explaining ordinary moral life in terms of the kinds of severe normative conflict that are characteristic of moral dilemmas. And even though extreme conditions gives science important insights into the structure of the empirical world, their results can hardly be generalized to provide the foundation of our basic scientific theories. Similarly, I would argue, we may learn a great deal about the nature of solidarity by examining its inner workings in times of crisis, but we should be cautious about expecting that solidarity behaves equally in normal times. In fact, as I will argue, an important asymmetry between times of crisis and times of normalcy brings to light the extent to which solidarity is a normative ideal that – just like freedom or equality – depends for its sustainment on strong institutions and a vigorous citizenry.

II.   Transient solidarity

Expressions of solidarity abound in times of crisis. It is striking that we should be so much readier to help in times of crisis than in normalcy.[6] Here are some examples that illustrate the contrast between solidarity during a crisis and solidarity (or its lack thereof) in normal circumstances:

a   Neighbours shop for groceries for the elderly who cannot because of COVID, even though, for many of them, the regular provision of groceries is also difficult in normal times.

b   Migrant workers are given food and shelter in COVID lockdown, which they also need, but are much less likely to obtain, in normal times.

In these two cases, the same people faced with the same need, get relief when their need is related to COVID reasons, in contrast to times of normalcy. Here are three, more startling, cases:

c   In the aftermath of Mexico's 2017 earthquake, people donated food and commodities, *e.g.*, diapers and clothes, for families that were affected by the earthquake, next to which there were families in need, who did not receive any help.

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6   See Barbara Pransiak, 'Solidarity in Times of Pandemic', *Democratic Theory* 7 (2020) (arguing that pandemics do not automatically increase solidarity).

d   In Ireland, the weekly pay rate of those out of work because of COVID-19 is significantly higher than the standard weekly unemployment rate.[7]
e   A 9-year-old child, who works in the streets in Mexico, receives toys for the first time in his life, which were sent by an unknown person upon learning of his plight in COVID times.[8]

In these cases, there is an important asymmetry between expressions of solidarity in times of crisis and its lack thereof in normalcy. In (c) and (d), people who are in need for crisis-related reasons are helped, whereas other people who have the same need for reasons unrelated to the crisis either are not (in (c)) or are helped to a lesser degree (in (d)). In (e), a child is the recipient of solidary action in times of crisis but not in normalcy, even though his need is utterly unrelated to the crisis. These cases are more extreme because they illustrate a differential treatment between people (in (c) and (d), in contrast to (a) and (b)), which stands in need of justification, and a differential treatment towards the same people (in (e)) even if the need at stake (unlike in (a) and (b)) cannot even be traced back to any reason connected to the on-going crisis.

These cases give rise to some questions. Why is it different, for the purposes of getting help, to be unable to shop for groceries because of a crisis than to be unable to do so because of old age? What makes it the case that one assists the migrant, but only in pandemic times? How could we justify the unequal treatment between families who are in need because of a crisis and families who are permanently in need? Or between a person unemployed due to COVID and someone who has been facing unemployment long before COVID hit? How could we explain to a street kid that he may receive a present if there is a crisis, but none when times go back to normal? It may be instructive to inquire into what differences there might be between times of crisis and times of normalcy, which make it more likely that solidarity is put in motion in a crisis but not in regular times. Here are some possible differences:

a   The first, obvious, difference is the time span. Whereas I may be able, given other commitments, to help for a limited period of time, such as a crisis, it may turn out to be too heavy a burden to sustain practices of solidarity over time.
b   In times of crisis, we understand that there are extraordinary, unforeseen, demands that surpass the capacities of the state, and thus we feel compelled to take responsibility, whereas in times of normalcy, such responsibility is not viewed as one's own.
c   In times of crisis, the situation of need is attributed to natural causes (*e.g.*, a virus, an earthquake…) which are beyond our control, whereas in normalcy those in need are likely to be held responsible for their own situation.
d   In times of crisis, we identify with those who are in need because it could have been me who was incapacitated from going shopping, or who lost their job or

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7   Ryan Nolan, 'We are all in this together! COVID-19 and the lie of solidarity', *Irish Journal of Sociology* 29 (2021): 103.
8   https://www.excelsior.com.mx/nacional/fraternidad-en-tiempo-de-covid-ciudadano-lleva-regalos-a-pequeno-bolero/1379909.

property, whereas in normal times social divisions militate against such mutual identification.[9]

A careful analysis of the contrast between crisis and normalcy, however, reveals that there are fewer differences between times of crisis and times of normalcy than it may seem.

a   Temporality. Indeed, this is indisputably a distinguishing factor, which makes it necessary, as I will argue below, to set up institutional mechanisms that can secure practices of solidarity over time.

b   Responsibility. Our duties of solidarity are not suspended or conveniently transferred to the state in times of normalcy. What we owe to each other is not an obligation that can be intermittently discharged or relinquished.[10] In crisis, as in normalcy, we are responsible for setting up and monitoring a state that can sustain solidarity over time.[11]

c   Causality. There is an important symmetry between social causes and natural causes. The attribution of a responsibility for need to those who are socially disadvantaged ignores the extent to which their situation is the product of factors, *i.e.*, structural injustice, which are also outside their control.

d   Identification. In crisis, as in normal times, what brings us together is much more than what tears us apart. We are all vulnerable to illness, sudden disgrace, and death. In crisis, as in normal times, however, we have vastly different resources to fight them. Social fracture, which is as much as work in crisis as in normalcy, impedes our mutual recognition as equals.

There are not, then, substantial differences between crisis and normalcy which may justify derelictions of solidarity in normal times or constrain its demands to exceptional times. 'Transient' conceptions of solidarity, which link solidarity to situations of crisis, to the provision of help in times of emergency, need or misfortune, fail to capture the unrelenting persistence of solidarity's claims.[12] The analysis of the admirable expressions of solidarity that we are capable of in extraordinary times helps identify some ways in which we may be able to go beyond solidarity as a response to crisis and build up a society that is characteristically solidary.[13] First, it brings to light the need for a strong state that can secure solidarity over time and

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9   This mutual identification is absent in case (d), which may be best explained, interestingly, as a case in which empathy and a disposition to help triggered by a crisis expands beyond those affected by the crisis and is transferred to other groups. In times of crisis, we seem to be more alert to necessities and more ready to perceive needs, which may go unnoticed in normal times.

10 Solidarity, as is well known, has its roots in Roman Law, in which an obligation *in solidum* was an obligation in which each party was liable for the debts of all. See Hauke Brunkhorst, *Solidarity* (Cambridge MA: MIT Press, 2005), 1-2.

11 As I will explain later, both formal, state-led, forms of solidarity and informal, citizen-led, forms of solidarity are needed to live up to the demands of solidarity. See notes 32-35 and accompanying text.

12 On solidarity as a response triggered by crisis and its insufficiency, see Irina Cornel and Malcolm G. Ross, 'Solidarity in Europe: from Crisis to Policy?', *Acta Politica* 56 (2021).

13 Of course, this does not detract in the slightest from the exceedingly valuable practices of solidarity that are triggered by crisis: crises call for exceptional solidarity action, which should nonetheless be enshrined as a permanent feature of our institutional arrangements.

our responsibility to work to bring it about. Second, it reveals the need for an egalitarian ethos, which is hindered by blindness to structural inequalities and social divisions, for solidarity to exist. Thus, an examination of the contrast between solidary action in crisis and in normal times shows that the demands of solidarity cannot be limited to an informal sphere: solidarity has to be 'solidified' in formal, legal, structures. It cannot be pursued in an exclusionary way, but has to be established across the whole social spectrum. In the next two sections, I will examine, in light of experiences of solidarity in the ongoing pandemic (and other crises), the way in which informal and sectarian conceptions of solidarity fail to live up to the demands of solidarity.

III. Sectarian solidarity

Co-existent with outstanding expressions of solidarity, which bring us together as a community, pandemics (and other crisis) are marked by deep inequalities that tear us apart. Times of crisis reveal pre-existing inequalities, *e.g.*, the unequal access to health services in a pandemic or to adequate housing in an earthquake. They also intensify pre-existing inequalities, *e.g.*, during the COVID-19 pandemic, people with less access to health services are also at more risk, as they are more likely to have underlying health conditions, lockdown measures have increased domestic violence, and the closure of schools has deepened gender inequalities. Crises create new inequalities as well, such as social exclusion of health workers or recovered COVID-19 patients,[14] and further forms of stigmatization of certain social groups, *e.g.*, Latinos during the N1H1 pandemic, or Asians and Indian Muslims during the COVID-19 pandemic.[15] The social fractures revealed, exacerbated, and generated in times of crisis erode the grounds of solidarity in that they are an obstacle to our mutual recognition as equals. Jan-Werner Miller wrote, in the midst of the on-going pandemic, which has, allegedly, brought us all together, '[r]ather than all of us being in the same boat, it turned out that some quickly drowned, some have been rowing frantically just to stay alive, and some were never in the boat to begin with; instead, we watched them sail off on their luxury yachts'.[16]

Moreover, the situation of need faced by many is not independent, as is well known, of the situation of privilege of advantaged social groups. In April 2017, in the Usumacinta river – the border between Mexico and Guatemala – one yacht passed at a very high speed close to small boats in which poor families were spending a refreshing Sunday outing; the yacht made one of them sink. The young, rich owners

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14   See Chimnayee Mishra and Navaneeta Rath, 'Social Solidarity during a Pandemic: Through and Beyond Durkheimian Lens', *Social Sciences and Humanities* 2 (2020): 2.

15   For an extremely useful overview of the inequalities in the pandemic and the way in which they pose a challenge to solidarity, see F. Marijn Stok *et al.*, 'Social Inequality and Solidarity in Times of COVID-19', *International Journal of Environmental Research and Public Health*, 18 (2021). See also Esmé Berkhout *et al.*, 'The Inequality Virus', OXFAM briefing paper, January 2021.

16   See Jan-Werner Müller, 'Did the pandemic draw us closer together – or pull us further apart?', at https://www.theguardian.com/commentisfree/2021/aug/08/did-the-pandemic-draw-us-closer-together-or-pull-us-further-apart.

of the yacht did not even notice; the members of the family, including a baby, were unable to swim and cried desperate for help. Nowhere was the state to be seen – either to stop the yacht or to help the family, which was lucky enough to be rescued by a little boat that was just passing at this critical moment. In a crisis, as in the Usumacinta, it becomes evident not only that we are not in the same boat, but that, furthermore, the aggrandizement of some is made (as much in crisis as in normal times) at the expense of dispensable others. The unequal global distribution of COVID vaccines, or the multiplication of the fortunes of a few during the course of the pandemic, tell us that much.[17]

Deep inequalities, however, are compatible with other types of solidarity, to which they are, furthermore, serviceable. In crises, alongside solidary acts towards those in need and expressions of this 'collective effervescence', as Durkheim put it, which were exemplarily at work in the collective clapping in gratitude for health workers in this pandemic or in the minutes of silence kept across the Republic for the victims of earthquakes in Mexico City,[18] people have also clustered in exclusionary ways around my country, my kin, or my generation. Sectarian solidarities have emerged which stand in opposition to communal feeling and action. In India, cast-based forms of solidarity are deployed during the pandemic to exacerbate the exclusion of some casts by identifying their members as carriers of the coronavirus;[19] anti-vaccine movements appeal to generation-based solidarity to pitch the young against older generations,[20] and national solidarity is invoked to question international aid policies.[21] There seems to be a logic of inclusion-exclusion in discourses of solidarity, which are meant to clearly delineate those who belong from those who do not, and to clearly circumscribe the potential recipients of solidary action.[22]

Such exclusionary, sectarian versions of solidarity deprive solidarity of its moral legitimacy. This is not to say that the only legitimate form of solidarity is a cosmopolitan one. There are indeed morally valuable forms of solidarity among social movements, comrades, clans, members of cultural minorities, religious groups, and citizens. Rather than a logic of inclusion-exclusion, the plurality of solidarities may perhaps be best described in terms of a concentric logic, in which inner circles, *i.e.*, partial solidarities, are inscribable within larger ones. Partial forms of solidar-

17 See Gordon Brown's discussion of a 'neocolonial approach to global health', in 'The world is making billions of Covid vaccine doses, so why is Africa not getting them?', at https://www.theguardian.com/commentisfree/2021/aug/16/world-billions-covid-vaccine-doses-africa-unprotected. On the increase of billionaire's' wealth during the pandemic, see Berkhout, 'The Inequality Virus', 10-11.
18 See Chinmayee Mishra and Navaneeta Rath, 'Social Solidarity during a Pandemic: Through and Beyond Durkheimian Lens', *Social Sciences and Humanities Open* 2 (2020): 4-5.
19 See Awanish Kumar, 'Reading Ambedkar in the Time of COVID-19', *Economic and Political Review* 16 (2020): 37.
20 On the intergenerational divide and agism in the current pandemic, see Liat Ayalon *et al*., 'Aging in Times of the COVID-19 Pandemic: Avoiding Ageism and Fostering Intergenerational Solidarity', *Journals of Gerontology: Psychological Science* 76 (2021).
21 Lawrence Gostin *et al*., 'Reimagining Global Health Governance in the Age of COVID-19', *American Journal of Public H*ealth 110 (2020).
22 Maria Xosé Agra Romero, 'Fraternidad. (Un concepto político a debate)', *Revista Internacional de Filosofía Política* 3 (1994): 152.

ity are morally valuable provided their justification would not be defeated by expanding the relevant circle, in other words, if they could be supported by reasons that are universalizable.[23] What gives some exclusionary forms of solidarity their purchase is, I would suggest, a (liberal) conception of solidarity that ties it to forms of cooperation that are created for the purpose of advancing self-interest.[24] There is a need, however, to replace a perspective of solidarity based on self-interested cooperation or expected reciprocity by a perspective based on acknowledgment of our common humanity. Practices of solidarity should be inserted within the broader project of constructing a genuine fraternal community, in which we all recognize each other as equal, are bound by bonds of mutual care and concern, and are disposed to mutual aid.[25] Solidarity is a practical attitude, which issues in action, *i.e.*, the furthering of a common cause or the provision of help, especially, to those vulnerable and in need.[26] Rather than being driven by partisan interests (or watered-down charitable impulses), solidary action should be grounded on the ideal of bringing about a community of equals bound by affective ties.[27] From this perspective, solidarity is, ultimately, a global, inclusionary ideal. Local forms of solidarity provide focal points for developing, and advancing, a fraternal community, rather than exclusionary solidarities that are realized at other groups' cost.

23   For example, Ku Klux Klan solidarity is deprived of moral value as it is grounded on reasons that would be defeated as soon as one expands the relevant circle. In other words, it is based on reasons that others could reasonably reject. Solidarity is thus a normatively dependent concept, the moral value of which depends on the way in which the relevant group, and its concerns, are identified. See Simon Derpmann, 'The *Solidum* in Solidarity', *on_education*, 10 (2021) and Rainer Frost, 'Solidarity: Concept, Conceptions, and Contexts', Normative Orders Working Paper, 02/2021. On universality as a criterion that partial solidarities should satisfy to be morally valuable, see L. Dillinger, *The Empty Demand of Solidarity*, *on_education* 4 (2021): 2.

24   For a critique of this liberal conception of solidarity, see Ruud ter Meulen and Rob Houtepen, 'Solidarity', in *Encyclopedia of Applied Ethics*, ed. Ruth Chadwick (London: Academic Press, 2012).

25   Thus, fraternity has a cognitive element, an affective element, and a practical one. Consequently, it cannot be translated into solidarity, which is first and foremost a practical commitment, without an important loss of meaning. Two further differences between solidarity and fraternity should be noted. First, solidarity may obtain in highly asymmetrical relationships, *e.g.*, between donors and victims of a natural disaster, whereas fraternity is a matter of horizontal relations of mutual recognition. Second, the emotions motivating solidary action are characteristically negative emotions, such as anger and pain at the suffering of others, in contrast to the affective component of fraternity, which includes the kind of positive emotions that are associated with affective ties of mutual care and concern. Indeed, it would be surprising if both concepts could be used interchangeably, given that they have a different origin and history and pertain to diverse traditions of political thought. An analysis of the important synergies, but also the key differences, between the two notions is, however, beyond the scope of this paper. On negative emotions as a trigger of solidarity, see Francesco Tava, 'Justice, emotions and solidarity', *Critical Review of International Social and Political Philosophy* (2021). For a development of the conception of fraternity outlined in the main text and a discussion of its differences with solidarity, see Amalia Amaya, 'La relevancia de la fraternidad', *Las formas de la fraternidad*, ed. Sergio Leroux ((Mexico: Coyoacán, 2016).

26   On solidarity as a practical attitude, see Frost, 'Solidarity: Concept, Conceptions, and Contexts'. See also Andrea Sangiovanni, 'Solidarity as Joint Action*Journal of Applied Philosophy* 32 (2015).

27   On the need for solidarity to work *in tandem* with fraternity, see Angel Puyol, *Political Fraternity: Democracy Beyond Freedom and Equality* (London: Routledge, 2019), 39-48.

The expansion of solidarity across social groups does not end within national borders but reaches further to the global community.[28] Social divisions which systematically benefit some to the detriment of others both within and beyond the state are an impediment to the realization of the demands of solidarity. National solidarity, as much as any other local form of solidarity, has to be pursued in ways that promote, rather than erode, larger solidarities. As Frost has put it, national solidarity 'must not be realized at the price of a lack of solidarity with others who are exploited and dominated'.[29] This pandemic has heightened – in a way in which other crises may not have – an acute awareness of our shared vulnerability as a species, and showed the need to build transnational solidarities to counteract potential dangers to its survival. Once an interest-based view of solidarity is displaced by a conception that anchors it to the recognition of the other as an equal member of humankind, national solidarities – like other in-group solidarities – may come to be viewed as important avenues for reaching a global solidarity, rather than as a way of reinforcing social inequalities within and across states that are inimical to solidarity.

Solidarity, understood as an ideal that is ultimately grounded in an acknowledgment of our common humanity, requires for its implementation, as crises such as the pandemic have vividly brought to light, decisive state action and a developed institutional structure. If sectarian solidarities limit the reach of solidarity's demands by restricting the relevant group and dwarfing the relevant commonalities, some versions of solidarity circumscribe its demands to the informal sphere, placing it outside the legal domain. I turn now to examine the way in which crises, like the current pandemic, show that there is an important institutional dimension to solidarity, which is neglected by informal conceptions of solidarity.

IV.   Informal solidarity

An important asymmetry, as noticed above, between solidarity in crisis and solidarity in normalcy is the time span, which makes it necessary to create institutions that can sustain practices of solidarity over time. Even if it cannot be reasonably expected that we sustain a level of solidary commitment through normalcy as in crisis, this does not relieve us of our responsibilities for seeing that our duties of solidarity are properly discharged. A strong state, with the resources and capabilities to engage in solidary action, is needed, and it is our responsibility as citizens to

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28   For a defense of a cosmopolitan view of solidarity, see Lawrence Wilde, *Global Solidarity* (Edinburgh: Edinburgh University Press, 2013). On the need for global solidarity in the context of the pandemic, see Göran Tomson *et al*., 'Solidarity and Universal Preparedness for Health after Covid-19', *The BMJ* 59 (2021) and Sebastian H. Schneider *et al*., 'Does the COVID-19 pandemic threaten global solidarity? Evidence from Germany', *World Development* 140 (2021). On solidarity beyond the state in times of crisis in an European context, see C. Lahusen *et al*. *Transnational Solidarity in Times of Crisis* (Cham: Palgrave MacMillan Cham, 2021).

29   Frost, 'Solidarity: Concept, Conceptions, and Contexts', 12.

bring it about.[30] This renders views that minimize the role of the state in implementing solidarity, deny the feasibility of harnessing it through legal measures, or locate it squarely in the realm of ethics rather than law, unfit to secure the realization of solidarity.[31] Furthermore, a conception of solidarity that precludes its solidification by law is, arguably, somewhat incoherent. If we do have a moral obligation to be solidary, which cannot give rise to legal obligations, but we do not seem to be able to engage in solidary action to the level required in a consistent way, then it seems that either a) we are obliged to do what we cannot do, in violation of the 'ought implies can' constraint; or b) our obligations of solidarity are so dependent on contingent means and opportunities as to be deprived of any normative content, as they may, as it were, be switched on or off at will.

It is thus imperative that solidarity be solidified into formal forms of solidarity.[32] Indeed, the demands of solidarity have been institutionalized to some extent, as is well known, by the welfare state. The current pandemic has shown how necessary it is, even in crisis, when citizens are ready to help in extraordinary ways, to have a well-functioning and adequately provisioned welfare state. The pandemic has also shown the need for such a state to engage firmly in solidary action at a transnational level, and thus the need for institutional forms of transnational solidarity. Again, there are already important institutions that aim at advancing a genuine 'fraternity of peoples'. However, as the current health crisis has made evident, they are far from sufficient. The retrenchment of the welfare state and the timid advancement of transnational forms of solidarity have produced a severely limited level of institutionalization. Solidarity, from the local to the global level, requires for its sustainment an appropriate legal structure, which we have so far failed to thoroughly establish. A great deal of institutional imagination (and, needless to say, political will) is required to envision ways in which solidarity can be implemented within and beyond the state. Importantly, the institutionalization of solidarity can hardly be limited to the incorporation of social and economic rights into (national and international) human rights systems. Solidarity – like fraternity – goes beyond what may be effectively captured in the language of rights. Moreover, as Ross has argued in the context of the European Union, solidarity does 'not fit comfortably into the structures of established institutions, legal competences and policy frameworks.'[33] Thus, the legal implementation of solidarity requires rethinking and revising our current institutional arrangements and coming up with innovative

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30   Elected officials would have, in both normalcy and crisis, additional duties of solidarity. See P. West-Oram, 'Solidarity is for Other People: Identifying Derelictions of Solidarity in Responses to COVID-19', *Journal of Medical Ethics* 47 (2021).
31   See Andreas Wildt, 'Solidarity: Its History and Contemporary Definition', *Solidarity*, ed. K. Bayertz (Springer: 1999). See also Frost, 'Solidarity: Concept, Conceptions, and Contexts', 8. For a critical discussion of views that take solidarity to be a value that cannot be legally implemented in the context of the EU, see Malcolm Ross, 'Transnational solidarity: a transformative narrative for the EU and its citizens?', *Acta Politica* 56 (2021).
32   On the importance of institutional solidarity, as revealed by the COVID-19 pandemic, see Barbara Prainsack, 'Solidarity in Times of Pandemic', *Democratic Theory* 7 (2020): 129-130.
33   See Ross, 'Transnational solidarity: a transformative narrative for the EU and its citizens?', 234.

strategies for advancing the ideal of solidarity (and fraternity) thorough legal means.

The vindication of institutionalized forms of solidarity does not, however, imply that solidarity is in normal times a matter only for the state, *i.e.*, that one can conveniently delegate one's obligations of solidarity to the state, so that the fulfilment of such obligations is secured by supporting a state that appropriately implements solidarity. Just as equality and liberty require not only that they be legally protected, but also that citizens do not behave in the myriad of ways in which social relationships can constrain freedom and damage equality without breaking the law, a society does not live up to the ideal of solidarity unless both the state and the citizens actively promote it. In addition, the vitality of organized forms of citizen solidarity with different degrees of formalization is central to building a solidary society. In between a macro-level of solidarity, linked to the state and the micro-, individual, level, there is also a critical, intermediate level, in which solidary action is led by civil society organizations.[34] Hybrid forms of solidarity, which involve collaborations between both state and non-state actors, as empirical evidence suggests, have important social benefits as well.[35] Thus, informal and formal forms of solidarity are neither sharply distinct nor isolated from one another, but rather interconnected in complex ways. Critically, the law may promote, channel, sustain, but also hinder, social practices of solidarity at both the micro- and the meso-level.[36] Thus, the realization of solidarity requires a concerted effort at all three levels, which should also be appropriately related to each other.

Now, if a variety of informal alongside formal forms of solidarity are necessary, then venues for promoting a solidary society cannot be brought about purely by legal reform, but education becomes a critical tool for advancing the ideal of solidarity. There is a need for education to promote the egalitarian commitments that are inherent to fraternity and the practical mindset that compels solidary action.[37] Moreover, education and legal institutional design are mutually reinforcing avenues for realizing the ideal of solidarity. On the one hand, as empirical studies have shown, support for state-led solidary action at a global level during the pandemic is principally correlated with cosmopolitan values.[38] Thus, education that aims at instilling these values will foster a citizenry that is ready to support the appropriate legal rules and institutions necessary to realize the ideal of solidarity. On the other hand, given the impact that law has on shaping citizens' normative views,

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34 On the relevance of the meso-level of solidarity, see Cironei and Ross, *op. cit.*, 213-214 and Lahusen et al., *op. cit.*, 4-5. For an exploration of the interrelation between 'soft' solidarity and 'hard law' in the context of the EU, see Ross, 'Transnational solidarity: a transformative narrative for the EU and its citizens?'.

35 See Nikos Kourachanis, Varvara Lalioti and Dimitris Venieris, 'Social Policies and Solidarity during the Greek Crisis', *Social Policy and Administration* 53 (2019).

36 For an exploration of the interrelation between 'soft' solidarity and 'hard law' in the context of the EU, see Ross, 'Transnational solidarity: a transformative narrative for the EU and its citizens?'.

37 On education for solidarity, see Lisa Dillinger, 'The Empty Demand of Solidarity', *on_education* 4 (2021).

38 See Monika Bauhr and Nicholas Charron, 'Stand together or alone? Public Support for European Economic Solidarity during the COVID-19 Pandemic', *European Societies* 23 (2021).

the implementation of solidarity as a legal value, *i.e*., its enshrinement in legal structures, is also an important way of promoting solidarity within the citizenry.

V.   The dynamics of solidarity

Thus far I have argued that to transit from the occasional expression of solidarity to a society that lives up to the ideal of solidarity, it is necessary to build a fraternal community, one in which members regard each other as equal, are connected through affective bonds and have a disposition to help each other, as well as citizens who are ready to take up responsibility in bringing about and supporting the appropriate institutional legal structures at both the national and the supranational level. Critically, the two avenues for transitioning from a punctuated, crisis bound, type to solidarity to a durable, stable, type of solidarity, *i.e*., the embedment of practices of solidarity in a fraternal community and their solidification by law, are importantly interlocked and nurture each other. Thus, community and state are to work in tandem to establish solidarity as a regular feature, not an exceptional one, of our social life.

Now, the experience of solidarity in the current crisis also shows the extent to which both avenues of solidarity-building, *i.e*., the state and civil society, harbour important risks. In the COVID-19 pandemic, there was an initial moment of mutual diffidence and distrust, in which people feared each other. This is, I think, a core feature that distinguishes pandemics from other types of crises, such as natural disasters, in that the source of danger is not external to us. Nonetheless, the difference is one of degree: in crises caused by natural disasters, the unrest and chaos generate additional sources of danger, and generate mutual distrust and fear, as the looting of damaged and evacuated buildings in Mexico City brought to light. From a moment of fearing each other, we moved to a moment of caring for each other in the current pandemic: in addition to exceptional solidary action, social distancing measures and isolation were no longer practised out of fear, but were perceived as expressions of mutual care. This, however, was followed by a moment of oppression, in which compliance with rules enacted to prevent the spread of the virus was meticulously watched over by some sectors of the population and secured by shockingly authoritarian exercises of state power. The affection and concern for the well-being of others, which is a core feature of a fraternal society, was displaced in some sectors of the population by 'hatred' against those who fail to abide by the rules.[39]

A pernicious cycle was thus set in motion from fear and distrust, to care and affection, to hate and oppression. The community bonds of mutual aid and concern, created to help overcome a situation of shared vulnerability, were also at work in the establishment of social relations of vigilance and antagonism which erode the

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39   See Ruth Chadwick, 'COVID-19 and the Possibility of Solidarity', *Bioethics* 34 (2020). On the discursive construction of exclusionary solidarity against rule-breakers as out-group members, see Martina Berrocal *et al*., 'Constructing Collective Identities and Solidarity in Premiers' Early Speeches on COVID-10: A Global Perspective', *Humanities and social Sciences Communications* 8 (2020).

very basis of the community. Similarly, the state's mode of caring for its citizens quicky transformed in some places into authoritarianism. The risks inherent to community building are well known from historical episodes in which fraternity was deployed to justify brutal oppression and terror. Less extremely, solidarity has been associated with coercion, forced unity, social vigilantism, and pressures to conform.[40] If solidarity is to obtain in a non-exceptional way we must, as we have seen, acknowledge our responsibility to build a fraternal society and a strong state capable of sustaining it. However, the pandemic brings to light the extent to which we also have a responsibility to take a critical attitude towards the way in which citizens and the state bring forward a community project, and to vigorously oppose forms of oppression, civil and statal, that distort, and ultimately, destroy, the prospects of building up a genuine fraternal community.

VI. Conclusions

The expressions of solidarity in times of crisis, in contrast to normalcy, reveal the extent to which solidarity's demands are unremittent, global, and in need of institutionalization. Curtailing its demands to times of crisis, to those who are my kin or belong to my nation, and to the moral domain, not only restricts its reach, but amounts to disregarding the ideal altogether. For solidarity to become the rule, rather than the exception, we need to generate, in a critical way, a genuinely fraternal community – in which we recognize each other as equal, are linked by bonds of mutual concern and affect, and have a disposition for mutual help – as well as to establish strong institutions which can sustain it over time within and beyond the state. Ultimately, the realization of solidarity requires forging a global fraternal political community. This is, indeed, a revolutionary ideal, but we are in revolutionary times. Revolutions are moments of great creativity and provide precious opportunities to reimagine our social world.[41] I hope that this crisis, which has taken away so many and so much, allows us to see that a different, better, society is necessary and possible, and can prompt us to think up imaginatively ways in which we may be able to bring it about.

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40 See Crow, 'Social Solidarities', 56-57.
41 On the revolutionary aspects of pandemic times and the extent to which creativity is a mark of revolutions, see Rebecca L. Spang's lucid and thought-provoking essay 'The Revolution Is Under Way Already', at https://theatlatic.com/ideas/archive/2020/04/revolution-only-getting-started/609463.

Justice and Coercion in the Pandemic*

Matt Matravers

1. Introduction

The purpose of this short article is to highlight two issues in contemporary political philosophy that are not as often discussed as they should be, and that the pandemic has once again brought to light. The article begins by considering the way in which citizens' motivations are modelled in discussions of justice, and their relation to both solidarity and coercion. The first important question that arises is when and in what ways a solidaristic commitment to living together with others on just terms can be undermined. The second is how and in what ways people can be unreasonable and what the consequences of that are for public policy.

2. Justice, solidarity, and the place of coercion

For the last thirty or more years, a – if not the – dominant question in Anglophone political philosophy has been the one set by Rawls in *Political Liberalism*:

> How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines?[1]

Put more pithily by Brian Barry, 'how are we to live together, given that we have different ideas about how live'.[2]

The concept of solidarity plays very little role in the answers provided to that question and more generally in contemporary political philosophy (particularly when compared to its companions, 'liberty' and 'equality').[3] This is in part because in its central uses, 'solidarity' tends to be associated with social movements and political struggles.[4] Rather, the answers come in (very roughly) two forms. One – *modus vivendi* or justice as mutual advantage – holds that stability can be achieved if each

1   John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 18. The issue, of course, goes back at least as far as the seventeenth century and the problem of toleration.
2   Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), 77.
3   Rawls briefly discusses 'fraternity' in *A Theory of Justice*, but as Samuel Freeman comments, it 'is not a value that receives much attention in democratic capitalist societies'. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 105-106; Samuel Freeman, *Rawls* (London: Routledge, 2007), 197.
4   See, for example, Tommie Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Cambridge, Mass: Harvard University Press, 2007).

person advances his or her own self-interest through co-operation when compared with a non-co-operative baseline.[5] A second answer to which Rawls's political liberalism adheres – justice as impartiality or liberal neutrality – holds that stability depends on the state not advancing any particular comprehensive conception of the good, but rather providing a 'neutral' set of rules that enable each person to live in accordance with their preferred conception.[6] It is with this second type of approach that this article is mainly concerned.

Whereas justice as mutual advantage deploys motives of self-interest, for the impartialist solution to work people must be motivated by justice; they must wish to live together with others on fair terms. And this, while perhaps not the standard use, can be captured by the term solidarity. As Sally Scholz puts it in an excellent overview of the concept, 'individuals are motivated by justice to act in solidarity or to ensure just social relations'.[7] In Rawlsian parlance, which the article adopts, people must be 'reasonable'.[8]

Reasonableness has two key components. First, reasonable people accept that there are different conceptions of the good and that human reason is indeterminate with respect to any ranking of these.[9] In short, reasonable people 'accept that no conception of the good can justifiably be held with a degree of certainty that warrants its imposition on those who reject it'.[10] Second, as already noted, reasonable people are motivated to co-operate on terms that all can accept in recognition of the status of all as 'free and equal'.

For the most part, Rawls writes in ideal theory mode, which means that he assumes full compliance. However, at moments – particularly in *A Theory of Justice* – he does remark on the role of criminal law. In its most benign role, criminal law has an 'assurance' function just as justice as impartiality has the structure of an 'assurance game'.[11] For example, although I might be motivated to pay my fair (and legally mandated) share of tax, my motivation depends on being assured that others are paying their fair share too, and criminal law (and enforcement) can help with that assurance.[12]

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5   See, for example, David Gauthier, *Morals by Agreement* (Oxford: Clarendon, 1986).
6   See, for example, Barry, *Justice as Impartiality*; Will Kymlicka, 'Liberal Individuality and Liberal Neutrality', *Ethics* 99, no. 4 (1989).
7   Sally J. Scholz, 'Solidarity', in *International Encyclopedia of Ethics*, ed. Hugh LaFollette (Wiley, 2019).
8   Rawls, *Political Liberalism*, 50ff.
9   That is, they accept 'the burdens of judgment'. See Rawls, *Political Liberalism*, 56-57.
10   Barry, *Justice as Impartiality*, 169.
11   Barry contrasts justice as mutual advantage, which he argues has the structure of a prisoner's dilemma, with justice as impartiality, which has the structure of an assurance game: 'if I am motivated by a desire to behave fairly, I will want to do what the rules mandated by justice and impartiality require so long as enough other people are doing the same.' Barry, *Justice as Impartiality*, 51. For an excellent – and different – account of the structures of modern social contract theory, see Albert Weale, *Modern Social Contract Theory* (Oxford: Oxford University Press, 2020).
12   Rawls makes this point explicitly, Rawls, *A Theory of Justice*, 240. For discussion, see Matt Matravers, *Justice and Punishment: The Rationale of Coercion* (Oxford: Oxford University Press, 2000), 144f.

What of a less benign role? Rawls – together with Rawlsians and others writing in Anglophone political philosophy – tend not to say a great deal about what to do with the '*un*reasonable'.[13] In *A Theory of Justice*, Rawls briefly comments that, 'it can even happen that there are many who do not find a sense of justice for their good; but if so, the forces making for stability are weaker. Under such conditions penal devices will play a much larger role in the social system'.[14] More generally, the thought common to liberal impartialists seems to be that if people are unreasonable, then there is little that can be done but to oppose and (try to) control them. This is implicit in Barry's choice of a detail from Goya's 'Fight with Cudgels' as the cover of his book. At the extreme, the message is that the choice is between reasonableness and violent conflict. It is more explicit in the later Rawls where stability is contrasted with 'endless and destructive civil strife',[15] and those who hold unreasonable views such that they 'reject one or more democratic freedoms', and who would impose those views on others, confront us with what Rawls describes as 'the practical task of containing them – like war and disease – so that they do not overturn political justice'.[16]

Thus, coercion plays two roles in maintaining a just impartial liberal regime. It contributes to the assurance needed by those whose co-operation stems from their motivation to live together with others on fair terms, as long as others are similarly motivated, and it 'polices' the boundaries of the community in order to tackle those who are unreasonable.

The COVID-19 pandemic has understandably strained almost every aspect of life and governance. This includes, I believe, the fundamental building blocks of liberal impartialism and it is to this that the next two sections turn.

3.   'Assurance' in the pandemic

One largely neglected issue in contemporary political philosophy is at what point social relations become such as to make it irrational for at least some citizens to continue to co-operate. Interestingly, this issue is pertinent to both traditions of theorizing identified above. For those who propound justice as mutual advantage,

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13   Noticeable early exceptions were Marilyn Friedman, 'John Rawls and the Political Coercion of Unreasonable People', in *The Idea of a Political Liberalism: Essays on Rawls*, ed. Victoria Davion and Clark Wolf (Lanham, MD: Rowman & Littlefield Publishers, 2000), Erin Kelly and Lionel McPherson, 'On Tolerating the Unreasonable', *Journal of Political Philosophy* 9, no. 1 (2001), and Jonathan Quong, 'The Rights of Unreasonable Citizens', *Journal of Political Philosophy* 12, no. 3 (2004).

14   Rawls, *A Theory of Justice*, 576.

15   Rawls, *Political Liberalism*, 159.

16   Rawls, *Political Liberalism*, 64n. It is interesting to note the comparative absence of commentary on this footnote when compared to the outrage expressed by many liberal commentators at Günther Jacobs's suggestion of an 'enemy criminal law'; Günther Jacobs, 'On the Theory of Enemy Criminal Law', in *Foundational Texts in Modern Criminal Law*, ed. Markus D. Dubber (Oxford: Oxford University Press, 2014). More generally, and with thanks to Antony Duff for discussion of this point, Rawls's claim here seems rather too quick. It is important that the unreasonable – those who reject democratic freedoms – threaten others in practical ways, and if they are to be treated like 'war and disease', that they are impervious to reason.

the answer is at least clear in principle: it is irrational to continue to co-operate when co-operation is less advantageous than non-co-operation. However, identifying that point is not easy given the counterfactual (what would my life be like were I to defect?).

Hobbes, of course, thought that life would be so terrible – 'solitary, poor, nasty brutish, and short'[17] – in the absence of co-operation that any conditions up to violent death were advantageous, but this account seems too extreme, which is one reason why liberal impartialists regard justice as mutual advantage as inherently unstable.[18] People motivated solely by self-interest will defect from co-operative agreements as soon as it is to their advantage to do so. However, while liberal impartialists are quick to identify this as a flaw in the position of their opponents, they are mostly silent about the point at which conditions of injustice render it irrational for citizens to continue to act on their sense of justice, yet there must be such a point.

This issue raises profound questions about degrees of inequality, poverty, and inequality of opportunity, that go well beyond the scope of this article. Here I merely want to point out two ways in which the pandemic has contributed to the urgency of at least beginning to address the issue. First, the pandemic exacerbated existing inequalities in myriad ways, both nationally and internationally. The lived experience of lockdowns, for example, was very different for those with certain types of jobs and accommodation. Appeals to 'solidarity' – to the claim that 'we are all in this together' – whilst commonly heard from those in power could not disguise the obvious fact that some were a great deal more comfortable than others for reasons that, as Rawls puts it, 'cannot possibly be justified by an appeal to the notions of merit or desert'.[19] Of course, such inequalities are, and always have been, pervasive, but their arbitrariness comes into focus in the face of a natural disaster such a COVID-19.

Internationally, the situation is more complex not least because it is unclear that the international order can be modelled on the primarily domestic theory of liberal neutrality.[20] That said, if anything the imbalance in vaccine provision is likely to exacerbate the sense that the international order is not based on principles of equality between nations. Indeed, the argument for providing vaccines across the globe has less of a solidaristic air and more of the feel of justice as mutual advantage, in that what is motivating richer countries is the proposition that it is not in their self-interest to have regions of the world conducive to the creation of new variants.

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17 Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1668* (Indianapolis: Hackett, 1994), 76.
18 On instability as a flaw in justice as mutual advantage, see Barry, *Justice as Impartiality*.
19 Rawls, *A Theory of Justice*, 7.
20 Rawls, of course, thought that it could not (at least in any straightforward sense). See *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

Second, at least in the UK, the appeal to solidarity was undermined by the conduct of some of those in power, leading to a widespread sense that there was 'one rule for us [the governed] and another for them [those in power]'. The most notorious, but not the only, case was of the Prime Minister's special adviser, Dominic Cummings, who whilst infected with COVID-19 travelled from London to his parents-in-law's property in Northern England and then whilst there travelled with his family to a nearby town for a sight-seeing outing, in at least apparent breach of the regulations in force at the time.[21]

I do not want to suggest that inequalities, or the actions of one, or even several, politicians in breaking lockdown rules should lead others to conclude that their continued co-operation on just terms is irrational, but rather to make two points. First, although we can model justice as impartiality as an assurance game, it is of course not a 'one-shot' game. The motivation to live together with others on just terms needs to extend over time and is thus liable to slow erosion. Only time will tell, but perhaps COVID-19 will prove to have done significant damage to the case for acting on one's sense of justice. Second, my purpose is mainly just to raise the question. If the theory of political liberal regimes depends on positing a *shared* motivation to act justly[22] – and it does – then it matters greatly whether that condition holds and that is surely something that contemporary political philosophers should address.

4. Unreasonableness in the pandemic

Rawls's reference (quoted above) to those who 'reject one or more democratic freedoms', and Barry's invocation of imposing (or not) one's own conception of the good on others, provide clues to a clear sense of 'the unreasonable'. To take a contemporary example, consider the Taliban in Afghanistan: certain in the rightness of their beliefs, they impose them on others. Confronted by such persons within its boundaries, a liberal society may have little choice but to opt, perhaps not for fighting with cudgels, but for 'containment'.[23]

However, unreasonableness may not manifest only in such extreme examples – in people who appeal 'to religious truth or claims to racial, gender or ethnic superiority in political argument'.[24] Such appeals are ruled out because they fail to respect others and violate the demands that flow from accepting the limits of human rea-

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21 For an overview of the story, see https://www.theguardian.com/world/2020/may/29/from-evasion-to-evisceration-how-the-dominic-cummings-lockdown-story-unfolded-durham.
22 This condition can take stronger and weaker forms. At its strongest, we might say that each person is motivated to act justly *if and only if* sufficient others are so motivated. A weaker form, a version of which I defend in *Justice and Punishment*, depends on the assumption that others are motivated by justice not being undermined or shown to be irrational.
23 Quong, 'The Rights of Unreasonable Citizens'.
24 Quong, 'The Rights of Unreasonable Citizens', 315. For an interesting attempt to distinguish 'the unreasonable' from 'the partially reasonable' and 'the non-reasonable', see Benedetta Giovanola and Roberta Sala, 'The Reasons of the Unreasonable: Is Political Liberalism Still an Option?', *Philosophy & Social Criticism* (2021).

son (the burdens of judgment) and the lack of certainty when it comes to conceptions of the good. But there must a 'flip side' to the argument from the burdens of judgment that applies when human reason *is* sufficient, if not for 'certainty' than for justifiably acting on its demands.

Consider, for example, vaccination. The argument for vaccination against COVID-19 rests on the weight of scientific evidence for its safety and efficacy and on the evidence of the effects of the virus on unvaccinated populations. Generally, propositions that express the consensus of scientific opinion are uncontroversial and orthogonal to the concerns of political liberals. However, this is clearly not the case in relation to the pandemic and vaccination.

We can distinguish between two factions of those who reject vaccination. On the one hand, there are those who reject the scientific evidence perhaps on the basis of some conspiracy theory such as that the virus does not exist and that governments are using vaccinations to inject computer chips into their citizens. On the other, there are those who accept the existence of the virus and the efficacy of the vaccination but think that it is not the proper role of Government to require vaccinations. What makes the case interesting is that vaccination is both an instance of 'healthcare', for which informed voluntary consent is usually a touchstone, and an 'other-regarding' action given that vaccination reduces the chances of spreading the virus.

Are those who believe the conspiracy theory and who refuse to be vaccinated unreasonable? In one sense, it is difficult to say. The standard ways of understanding unreasonableness tend to focus on accepting the burdens of judgment and the 'fact of reasonable pluralism'. Even those who believe in the conspiracy theory *might* accept that others reasonably disagree. However, such a conclusion would hollow out political liberalism, given how much of public policy depends on scientific evidence. If citizens can reasonably reject, for example, the science behind policies aimed at public health or at reversing the effects of climate change, then political liberal states would be paralyzed. As noted above, there must be a 'flip side' to accepting the burdens of judgment, which is accepting when they do not apply. Of course, accepting that leads to further complex questions about the degree to which we can clearly demarcate matters that are subject to scientific consensus and matters that are subject to reasonable disagreement, and I suspect that line is both more important and less discussed than it should be.

A finding that conspiracy theory 'anti-vaxxers' are unreasonable does not necessarily mean that such people can be forced to be vaccinated, but before turning to that consider the second group. This group rejects vaccination by appeal to some account of limited government. They are not obviously unreasonable as long as their conception of limited government is capacious enough to encompass the demands of justice.[25] However, it does not follow that their refusal to be vaccinated must

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25   On this important caveat, see Samuel Freeman, 'Illiberal Libertarians: Why Libertarianism Is Not a Liberal View', *Philosophy & Public Affairs* 30, no. 2 (2001).

necessarily be respected any more than that it would follow that the state could not enforce the wearing of seat belts in cars because some people believe that to do so is to go beyond its proper remit.

The differences with respect to reasonableness, then, may have little or no policy significance, although it will matter to political deliberation. A policy of mandatory vaccination, or one of voluntary vaccination but 'vaccine passports' being required for access to certain places or events, will need to be justified in the usual ways by reference to what is practicable and has the best outcomes. This article has nothing to add to that issue. However, in deliberating over what to do, the second group has a say in that its members can engage with other citizens about what is within the scope of legitimate government. The first does not, as a refusal to accept the scientific consensus is unreasonable, although there will surely be reasons to foster what Giovanola and Sala call 'inclusion through engagement' both to demonstrate respect for persons, if not for their views, and to try to convince them of the scientific consensus.

5. Conclusion

In various ways, the pandemic has brought to the fore issues that have been with us for a very long time. Most contemporary democratic states are marked by inequalities in wealth, income, and opportunities. In many, political discourse is not characterized by reasonableness, but by unreasonable forms of populism and conspiracy theories. The point of this article has not been to resolve how we should deal with these issues, but to highlight the ways in which they pose a challenge to one (and, I think, the dominant) mode of Anglophone liberal theorizing. Inequalities undermine solidarity in practice, but also strike at the foundational premise of liberalism: that each person is motivated to live together with others on fair terms on the condition that others are so motivated. Similarly, unreasonableness and conspiracies undermine public reason, but also pose a theoretical challenge in demarcating the limits of the reasonable.[26]

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26   Matej Cíbik and Pavol Hardoš, 'Conspiracy Theories and Reasonable Pluralism', *European Journal of Political Theory* (2020).

Populism, the Kingdom of Shadows, and the Challenge to Liberal Democracy*

Massimo La Torre

I.

In a previous article, I have defined populism as an intractable, unmanageable notion. This is so – I believe – because populism as a notion is often called to cover phenomena that are loosely connected, and also because it is generously used as a polemical label in political fights and parlance. There is a further reason for its intractability, and this has to do with the different levels of discourse where the notion is employed. There are basically two ways in which populism is used as a notion in literature and academic debates. There is a more or less descriptive use of the term, but there is also 'populism' as a political theory or, in a few versions, as a 'true' political philosophy. The two levels, however, are not congruent and do not really have a common referent.

What Yves Mény and Chantal Mouffe, two of the most prominent scholars in the field, say about populism is developed at two distant 'tables' of discourse. One of them is where the term 'populism' is adopted to understand what is going on in recent politics, especially in the post-1989 political landscape. The other is rather a prescriptive doctrine of how a political programme of redistributive justice could once more have a chance to get hegemony over society. The former deals with 'is', the latter with 'ought'.

Professor Mény is mostly interested in explaining what is happening to liberal democracies, once these lose their grip on civil society, no longer being channeled through traditional representative government and its art of keeping separate and independent distinct political roles and functions. Professor Mouffe's attention instead is directed to a possible new mode of doing politics in an age where class conflicts are blurred and seem to become obsolete because of de-industrialization, of a society increasingly mediatized through images and screens and because of consumerism. Labour as a source of identity is now replaced by the enjoyment of oneself and one's own pictures and feelings are projected as special.

Chantal Mouffe tries to envisage and propose a theoretical scheme to enable the use of images and feelings as political arguments. These affections might be instrumental to revive class struggle and give it a chance again to move and offer success to people's subversive aspirations. This way the people would not be assembled through class functions and class identity, but rather through an investment of images and iconic ideals, elaborated by an impending and decisionist political

actor. Such an actor should be attempting to become an object of desire and enjoyment for citizens, and thus to offer them an identity through a reflected, aggrandized and socialized picture of himself.

There is indeed very little room for an overlapping of these two distinct perspectives. We may thus be forced to choose which of these two 'tables' we would like and consider to be most enriching in order to play our intellectual or scholarly game and approach populism as a relevant topic of discussion. We might pursue an 'ought' approach, and then a 'populist' normative theory might be of some help to correct several deficiencies of political liberalism and its emotional abstinence. 'Populism' of this sort would support a republican agenda, giving it a more robust scheme of existential motivation. We will thus be following in Professor Mouffe's steps.

But we may also assume the other, alternative, perspective, taking side with Professor Mény, and try to assess whether it might be true what many commentators claim, that we are facing the emergence of a new, not yet clearly understood political phenomenon, 'populism' as a distinct ideal-type of approach to power, which can be defined by specific descriptive properties. Atpresent, I believe that it is this second approach that looks more promising for research and for a contribution to the understanding of our world. This is in particular confirmed by the new unexpected social situation we are currently confronted with because of the present pandemic.

It is of course difficult to assess what the pandemic is and means while we are severely hit by this plague. In a nutshell, we could summarize our present predicament in the following way. Confronted as we are with the extreme danger of infection brought about by physical contact with other people, and with the categorical imperative of *noli me tangere'* (do not touch me) we are radically eschewing such contacts; we avoid human vicinity. For several months we have been living in a secluded, isolated situation, locked down. To enable us to somehow enjoy a more or less normal work day, electronic devices have been introduced on a massive scale and these presently occupy our everyday life. Our isolation is somehow filled through the Internet and computers.

On the one hand, our body, our material life, has been further abstracted through a radicalized use of online devices and screens, electronic means by which our contact with people and reality is mediated by images and technical representation. But on the other hand, our body increasingly gets unbound from this 'kingdom of shadows' (the representative materiality taking place on screens) through the illness, the pain and sufferance brought about by it. *Noli me tangere* seems the ground rule of our life in these months afflicted by the pandemic, at the same time producing an acute awareness of our existence, rooted in our and others' bodies. We are not touching other people, because we are dangerous to them and reciprocally others might endanger our health. We approach and 'touch' them in a surreptitious way through online devises, through screens, images, by shadows.

However, the illness or itsthreat puts our body, and the feeling of it, once again in the centre of our existence. The reality of the illness cannot be mediated. We feel bad because our body is hit by the virus. It is not an electronic virus endangering our lives, but unfortunately a 'real' one, a living entity, attacking our immunity systems. There is no screen available for this. We are directly exposed to it. The 'shadow', the image, becomes a brute fact, and eventually the brutest possible fact, death. The pandemic thus has a double and ambiguous effect on what we are used to call 'populism'. On one side, it exacerbates it, since the mediation of our public space is made extreme through the *noli me tangere* ground rule. But on the other side, since our body becomes again a central part that is basic for our life and our survival; mediation and images are much less important. We need *care*, and what is central to care cannot be mediated through screens. Care is not fully amenable to representation. Care is a direct action, and a democracy of care should necessarily continue to refer to a sort of direct, not representative democracy, at least at its core.

The previous argument is based on the presupposition that 'populism' is a specific way of performing in the political arena, a phenomenon strongly rooted in the 'kingdom of shadows', *Heimat der Schatten*; a term and an idea actually firstly coined in Joseph Roth's visionary essay *Der Antichrist* (1934). One could try to explain the rooting of populism in such a 'kingdom' by deploying ideas and arguments elaborated especially in the work of three authors, firstly the already mentioned Joseph Roth, secondly Günther Anders (see his thesis of the 'phantom and its matrix'), and finally Guy Debord (see his seminal pamphlet *La société du spectacle*).

My basic idea is that 'populism' is a way of doing politics that is congruent with a society mainly taking place in the form of a 'shadow', of iconic representation and visual mediation. It is not theatre; we are not dealing with 'theatrocracy' here. This is an expression coined by Plato in his last work, the *Laws*, *Nomoi* (III, 693A ff.).[1] There he criticizes music and tragedy as perverting the taste of people by giving them a chance of expressing their preferences. In this way, taste is democratized. Ordinary people decide about the merits of a piece of music or a play performed at the theatre. Theatrocracy means that the audience decides, not the stage. The rule givers are ordinary people, consumers of music and tragedy, not the competent musicians and playwrights. Thus, the rule of theatre audience reflects and symbolizes the rule of the people in a democracy, and for Plato this is an object of criticism and rejection.[2]

Theatre is fiction, and the audience, though it is given the power and the competence to evaluate the merits of the piece represented before them, is moved by the stage. The relationship remains asymmetrical, top-down. An audience enjoys what

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1   A recent interpretation and discussion around this issue is the one proposed by A. Greppi, *Teatro-cracia. Apología de la representación* (Madrid: Trotta, 2016). See also *Contro la democrazia. Platone*, a cura di F. Ferrari (Milano: Rizzoli, 2019), 97 ff.

2   For a suggestive and sympathetic literary elaboration of democracy as theatrocracy, H. Mann, *Die kleine Stadt* (Leipzig: Insel Verlag, 1909) makes good reading.

is done and said on the stage, but it does not have the chance, the power, to direct the event taking place on the stage. The destiny of the figures and the fictional lives that actors impersonate remain outside the scope of intervention from below. The script has already been written and the action is only rehearsed just one more time.

Nonetheless, theatre is direct experience; it is direct action. Images in theatre have a material referent. True, theatre is a represented event, but not in the sense of mediated through icons. Representation here means 'presented before' an audience. As a matter of fact, actions that are performed in drama are real enough, though they are representative. But they are such without being iconic and based on screens and their brightness. Theatre is almost a face-to-face relationship; the fiction is openly exposed and reshaped and offered as a real physical conduct. The stage is part of a common space where the audience finds its proper place. The dramatic situation is not thought of as an entirely fake experience. The experience of the drama performed by actors is real and lively, and this is the reason why it can help us rethink our own role of actors in real life, to find a catharsis, a moment of purification, of a collective, emotive reflexivity in which we together with others understand what we really are, and grasp our sins and guilt as actors in factual life.

Quite distinct is the case of what we receive and 'enjoy' by watching a movie or a TV show, or, at present, more and more often a clip or image on a computer or smartphone. Figures' faces projected on the screen are 'made up', but here the entire action is a fabrication. Pictures are manipulated, staged, taken and then cut, re-coloured and reproduced from a certain angle. Words are pronounced but then dubbed by a different voice. In such an enterprise we ourselves are not part of the show production and space. We are and remain distant; we do not have eye contact with the actors and the showmen on the screen. We do not really see what they are doing. But, paradoxically, such made up reality of show and images transmitted by the screen as experienced by consumers is received with a force of persuasion that can render true what would otherwise be evidently false. What is true becomes a part of what is fake, and is assumed to be a component of this, but will thus be reinterpreted in a way that is no longer falsifiable. To quote Guy Debord: 'Dans le monde réellement bouleversé, le vrai est un moment du faux' (*La société du spectacle*, I, 9). The reality projected through icons is a kind of post-truth, but nonetheless truer than truth itself. What is here consumed by our eyes before the icons in which we are immersed, assumes the character of a strict positivity that is not open to contestation: 'Le spectacle', says Debord, 'se présente comme une énorme positivité indiscutable et inaccessible' (*La société du spectacle*, I, 12). The audience does not really decide here: what matters, the image, the 'idea' and the message projected, is already decided. In the fictional, iconic, digital society people do not rule; the show and the showman rule them.

A movie or a show on a screen is a mode of production taking place entirely in the mode of fiction, of a fake reality, in an imaginary dimension. Even when backstage pictures or videos of what has 'really' happened are released, what is absent is the sense of a direct, lived experience. The represented reality in any case assumes the quality of a show and is no longer responsive to moral judgement. Indeed, this

centrality of the show in our perception of what is real is, I believe, the main source of what political scientists now call 'populism'. This, in fact, is politics by a people that is not a real people, but an imaginary one, a phantasy. The people of populism are a political phantom. And of such phantom the matrix remains hidden to our eyes and minds, and thus to our possible scrutiny.

At present, such phenomenology of a political phantom is radicalized by the pandemic. It pushes the political phantom to the extremes of its possible realization and once again 'unbinds' the body politic, cancels its internal mediations and separations, and exacerbates the phantom's feelings and dreams of sovereignty. While our physical body is locked down and increasingly bound by this pest and its state of exception, while our private spaces are minimized, that same exceptional state aggrandizes politics as a phantom with a hidden matrix, by giving up the argumentative public space and transforming it in a visual experience, by monopolizing and confining publicity into the tiny space of a screen. Politics is reduced to a phantom by transforming it in a practice of a distant, made up performance passively enjoyed by spectators, and, consequently, by cancelling political institutions' internal mediation based on intersubjective conversation and discourse, offering pictures instead of reasons.

II.

The main subject of this article is more general and deals with the challenge and dangers posed by populism to liberal democracy. Let us start with a few preliminary remarks about liberal democracy. This is a political regime produced by modernity, a society in which the community for its management is referred to the supposed agreement and certification of all individual citizens. Modern individuals intend to take control of their lives by conceiving collective rules and government as directly or indirectly produced by their own decision.

In the modern human condition law is constrained by citizens' agreement and in addition by a system of separation of powers. Liberalism is an art of separation, first of all between the community and the individual citizens, then between government and civil society, and finally between distinct powers and competences. A democracy is a self-managed legal system, and a liberal democracy is an example of such a regime, with the addition of an internal, somehow disconnected rule of law system, guaranteed by a separation of powers. Liberal democracy, therefore, is a somewhat dysfunctional political regime. Decisions are taken by all through representation. To achieve this, these decisions need to be based on arguments and discussions and approved by a formal vote of consent. This is a process that needs time and space. It needs mediating bodies, bargaining, conflicts, compromise. The 'general will' of democracy is necessarily plural and divided. The law that is the outcome of this self-reflective exercise is then processed by agencies which are distinct in competence and constitution from the lawmaking bodies. There is a judiciary, but this institution also needs attorneys, advocates and a large number of other legal and non-legal professionals to operate, and then it must rely on the

support of countless executive bodies. Administrative agencies implement the government's policies but they also depend on special monitoring moments and supervisory bodies.

The liberal democratic state machine does not run by itself. If it does, it has a problem. Not that much is needed to induce the collapse of the art of separation that gives it its liberal character. A liberal democracy cannot tolerate and resist 'too much people' (to use an expression by Professor Mény and the title of his latest book)[3], that is, a people that is too big with regard to its members aggregately considered. Once the people is referred to as a collective un-differentiated social actor, there is an actual risk that individuals are taken into account only as aggregated molecules of this big overwhelming entity, and as a consequence their singular specificity and importance might be lost.

A 'too much' people as such can hardly take any direction and decision; it is too heavy to move, since it has – metaphorically – 'eaten' its own elements: the individual citizens as single persons. They have all been digested by the 'too much peopleps' too fat body without leaving traces of their particular autonomy and will. But a direction should be taken, the fat body should be moved, and only individuals can do that. The 'too much people' will then need to embrace a special individual that might be considered equally fat, a 'too much individual' indeed, to show the way and push the 'too much people' forward. The 'too much people' requires a soul, a 'too much leader'. Superman shall then be equated with everyman.

A people that is 'too much people' is the fully imaginary matrix of the phantom leader purporting to be a direct emanation from the people itself and showing its same omnipotency and overarching identity. In such case there is, alas, no room for opposition or contradiction. This is due to at least two reasons.

i   First, everything that is relevant for politics is taking place on a stage that is made up, a fake experience, not open to be contrasted with real truth and argumentative discourse. This is due to the new general addiction populations in many countries are currently victims of: *iconomania*, *Bildsucht* – to use terms of Günther Anders[4] – a deep dependence on images and screens. The show or the iconic spectacle we permanently consume on our multiple screens is opaque to any discursive demand. To repeat Debord's words: 'il est le contraire du dialogue' (*La société du spectacle*, I, 18).

ii   Second, the phantom is considered to impersonate the entire people, which does not allow for a disaggregation of identities, since individuals are just considered in terms of organic parts of the big fat body of that 'too much' that is people. To quote Debord once more: 'L'agent du spectacle mis en scène comme vedette est le contraire de l'individu' (*La société du spectacle*, III, 60).

The liberal character that protects democracy from its own demons, in order to be further empowered, appeals to individuals to act as fragments of a sovereign, as

3   Y. Mény, *Popolo, ma non troppo. Il malinteso democratico* (Bologna: Il Mulino, 2019).
4   G. Anders, 'Über prometheische Scham', in *Das Günther Anders Lesebuch*, ed. B. Lassahn (Zürich: Diogenes, 1984), 16.

sovereigns in miniature and in a conflictual concert. And this is done by making them holders of legal rights, sometimes of substantial fundamental rights, and these are further developed in judiciable legal titles. Through fundamental rights democracy as an expressive manifestation of will by the people is checked and reaffirmed at the same time in its liberal core, especially when those rights are reassessed and operationalized within the process of judicial review of legislation.

Now, all this – liberal democracies' core – is well known, and it is part of the legal culture of our constitutional democratic regimes. It is a normative scheme, and as such consigned to a high degree of ideality. Reality can contradict such an ambitious ideal dimension: there are liberal democracies that do not fulfill their promises of rule of law and human rights. An unresolved problem in such regimes is the permanent tension between the rationale of the public, common good and the rationale of private property and the free market. A 'terrible right' (*il diritto terribile*) is the qualification the famous Italian enlightened political thinker Cesare Beccaria, used to give to private property. There is indeed a permanent gap between the claim of private property on the one hand and the claim of a common good that is necessarily projected into plans of redistribution of common resources on the other. Not to speak of the somehow anti-democratic content of *dominium*, of absolute control, enjoyment and possible disruption, *jus utendi ac abutendi*, right of use and abuse, that property claims to offer to its holders.

On the other side, a free market operates through profit in terms of egocentric preferences, of riches and private enjoyment, and through competition, that is, the struggle to knock out the other in terms of capacity of occupying sectors of the market. In a free market competition – this was once forcibly underlined by George Orwell reviewing a book by Von Hayek – unfortunately there are losers and winners, and winners are deemed to be somehow morally superior. If you are a loser, it might mean that you were not good enough. More than a century ago, Max Weber rightly identified the connection between puritanism and capitalism. Competitions may indeed sometimes be based on the equality of opportunities; in any case they are not constructed and used according to the principle of equal concern. In this arena, what is mine concerns me much more than the entitlements of others. Right or wrong, my business.

We should not therefore forget the basic tension between democracy, and indeed liberal democracy on the one hand and capitalism on the other. We cannot, and should not, be so blue-eyed to ignore the deficiencies, problems and tensions originating from a permanent inadequacy deriving from this tension. There was perhaps a time when one still could believe that liberal democracy was compatible with capitalism, but the recent emergence of illiberal and antidemocratic capitalisms, paradigmatically the Chinese model, not to speak of the Russian oligarchy, does not allow for such an optimistic assumption any more. We should sadly conclude that there is no necessary connection between liberal democracy and capitalism. This is, I believe, a proven fact, which in turn makes populism and its presence in our societies especially dangerous.

Capitalism could re-emerge after a long period of stress and public state control, during the *Trente Glorieuses*, the period of strong economic recovery of western countries following the end of the WWII in 1945 up until 1973. It strengthened further in the 1980s and 1990s, not only because of a specific internal development of western liberal societies, but also because of the evident, and somehow dramatic failure of the so-called 'real socialism' in Eastern Europe. The fall of the Berlin Wall in 1989 certified that bankruptcy in a definitive way. Such failure was immediately interpreted as giving new force to capitalism and to a form of liberalism based not so much on rule of law and democracy as rather on private property and the free market (private enterprise led economies). The clocks of history then were somehow put back to the time of Manchesterian capitalism. This time however the state was meant not just to act as a night watchman, to use Adam Smith's well-known words, but as a pro-active agency in the protection and promotion of a free market. This was the agenda of a new kind of political economy and ideology, neo-liberalism, a free market doctrine where property and competition are designed to take place under the umbrella of state management and supervision. This appeal to the state as a regulator of free markets is one of the reasons for the success of this new ideology, since neo-liberalism could easily be coupled with managerialism and the bureaucratic spirit of the age.

There are two main versions of neoliberalism. One is based on law as monitoring the competitive structure of the market, known as the continental European, mostly German ordo-liberalism. And then there is a somehow more radical and more political version. This is the Anglo-American one, which reshapes the state as an occasionally decisionist agency, catering to the needs of the market in its restructuring and deregulating strategies. Law in this second version is much less useful and central as a device to deplo. What is mostly needed is politics, translated into direct governmental and punctual measures.

In both versions of neoliberalism the market is supported by a myriad of state interventions which are somehow preemptive with regard to democracy. In the European continental model this is done by referring decision-making with regard to political economy to administrative bodies which legally operate at a distance from the main seats of democratic deliberation. In the other, Anglo-American version it is politics itself which is disconnected from citizenship and its public deliberation in the form of political activism within the executive branch of government. Here, political leadership is reshaped in terms of strong charismatic power, which pretends to be able to circumvent any parliamentary perplexity and opposition. Populism, as described above, is the political phenomenon that aligns itself perfectly with this second version of neoliberal hegemony. The amalgam between strong leadership and personal charisma is made possible by recent transformations of modern societies in which traditional public medias and discourse have been vampirized, first by television and subsequently by digital machines and gadgets.

Populism is the political regime and the political movement that is congruent with *la société du spectacle*, intelligently thematized by Guy Debord, anticipated by the so-called 'kingdom of shadows', depicted by Joseph Roth, and identified as the

'Matrix phantom' by Günther Anders. Populism is a form of theatrocracy ruled by one great imagined actor. What characterizes the show society, the kingdom of shadows and screens, is the complete absence of contact to any physical, real truth. Fiction is everywhere. What we watch is fake, 'made up', constructed and designed to fill our eyes with images, inviting us to believe to be enjoying something special and fully ours. The image we see on the screen becomes our life and lived reality, which in this way also acquires the character of a show: 'La réalité vécue est matériellement envahie par la contemplation du spectacle, et reprend en elle-même l'ordre spectaculaire en lui donnant une adhésion positive' (*La société du spectacle*, I, 8). We can identify ourselves with it without the need of special justification and without giving it explicit assent. We just desperately want to be like that image. We reshape our preferences and lifestyle to be as similar as possible to the screened image. We even try to remodel our bodies accordingly. In short, the phantom, the showman, the big man or big woman, is us. Indeed, he or eventually she, is not just a representation of us, but what we by desire want to be and actually become.

It might even be the case that we are before an anthropological mutation. From the human being as *animal rationale* (as hatched and nurtured by the classical philosophical tradition) we may now be mutating into a new, different kind of living being, the *homo videns*, to accept a suggestion by Giovanni Sartori, a distinguished Italian political scientist.[5] *Homo videns* is a human being that approaches the world and seeks to get information about it only by a visual, passive practice, without elaborating its sense data (the pictures enjoyed) in a synthetic act of understanding by interpretation and analysis. Reasoning and understanding are yet fully absorbed by watching.

Bio-politics, a politics that invests our bodies and transforms them, appears to be driven by such an anthropological mutation, for it is fed by the many pictures that fill our imagination in the 'kingdom of shadows' of which we are subjects. We transform society by artificially readjusting our physical image and being. The making up that is the action on the screen, the fashionable but empty Very Important Persons we are watching in a reality show, are inscribed on our bodies. Tattooing is just one widespread way of turning our bodies into *loci* for screens and icons. Once we are not given the chance to change the world, what we can do is change our haircut, purchase body parts via plastic surgery, or to adorn and paint our skins through tattooing or piercing.

A populist politics is produced on the screen by icons. By means of simplification and an appeal to our feelings and affections the projected image claims an absolute legitimacy, the legitimacy of being a Very Important Person in the eyes of virtually everyone. No arguments, no substantive virtues are needed for such a pretension to legitimacy and its connected messages and injunctions. Nor could one claim any rights against such image, since the phantom pretends to be the embodiment of all our possible goods and rights. Rights are projected as objects of enjoyment in the shadow of the screen. This is currently the real matrix of what we are and such a

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5   See Giovanni Sartori, *Homo videns* (Roma-Bari: Laterza, 2000).

projected picture is the present source of our dignity. Populism is radically fed by the present phenomenology of our visual experience.

III.

What are the current dangers of populism for liberal democracy? I believe we can identify at least five problems or issues that liberal democracy is traditionally confronted with.

i   There is the question of identity. Liberal democracy tends to be based on a *thin* common identity of its citizens. Here, patriotism is mostly understood in terms of loyalty to the constitution and to laws more generally. Further allegiances and memberships do not seem to be especially relevant. But – we may ask – can a people, or more precisely the class of citizens that are called to abide by the law, acquire a common identity through the mere acknowledgment of the rule of law and the constitution? One could reply that yes they can, because they have commonly agreed so. But why would that particular class of people gather and submit themselves to a common scheme of law in which they mutually recognize each other as equals under the rules? It would seem that this class of people is a group that is necessarily preexistent to the social compact giving rise to the constitution, and whose particular identity is to be found outside that constitution.

ii   Another possibly dangerous issue is related to the question of power. The art of separation typical of liberalism, introducing a myriad of mediating and monitoring agencies and multiplying the levels of competences, seems to relegate the single citizen in a too empty and powerless space. Peter Mair, an Irish political scientist, believes that empty politics produces as collateral damage the marginalization of people who are not given centrality in the political agenda. Colin Crouch, a British scholar, speaks of 'post-democracy' in this regard.[6]

iii   A related serious problem is the issue of redistribution of scarce resources. Could this responsibility be left to the solitary game of stock exchange operators and free markets? This game has been intensified in recent decades as a consequence of globalization. Global, practically boundless markets are well equipped to escape state control. In such a situation the citizen will once more have an accrued sense of his or her own impotence. The national public sphere, the traditional arena of politics, seems to have lost all relevance. Markets and its big players, the multinational companies, operate as globalists, cosmopolitans, not as members of a national community. And then they have – as already shown by Karl Polanyi – a proclivity to commit suicide, and to force upon society – see what has happened in our world after the 2008 financial crisis – the cost of rescuing 'them' (mostly banks), as proven once and again.

iv   However, citizens need myths and images, examples to follow, icons as models and as points of orientation for their private and public conduct. A grey liberal democracy operating just by law and a separation of competences, based on a

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6   See P. Mayr, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso Books, 2013) and C. Crouch, *Post-Democracy* (London: Polity Press, 2004).

thin 'overlapping consensus' (to use John Rawls' notion for political liberalism), does not seem able to fulfill these needs and desires.

v   Finally, what kind of character does liberal democracy produce? Is there sufficient attention to the formation, the *Bildung*, of good citizens, of people with specific character traits and appropriate virtues in such a regime? Could liberal democracy survive without producing individuals endowed with public virtues required for the felicitous running of such a regime? Can we do without virtuous persons? Could a society in general survive without being able to mobilize virtues that support it? Could citizens live peacefully together without mutually offering and recognizing one and another's virtues? Civic republicanism needs republicans.

Now, in a sense, these five relating problems are the negative result or downside of the very essence of liberal democracy, its epistemic and moral abstinence with regard to the citizens' good life. Liberal democracy leaves the care of this essential human dimension to the individual's decisions and deliberations, and rightly so, we could add. Otherwise, it would turn the people into a 'too much' entity where real, individual persons will count for very little. But is this done wisely?

Populism seems to somehow solve all the five issues here listed. The looked after identity is offered by the body of the leader and the phantom evocation of an imaginary thick people. Through this phantom the citizen is 'restored' in a fictitious idea of wielding immediate and direct power, insofar as he or she has a non-mediated identification, an emotive and visual convergence with the person of the leader and the collective phantom that is looming behind this brilliant big figure. Distribution of resources is guaranteed by the riches that the leader and his phantom are able to evoke and make believe they dispose to the greatest satisfaction of the greatest number. Sense is offered by the permanent representation of a common show and the attached icons and conduct models. Indeed, plenty of sense seems to be offered by the affluence of exemplary pictures which are projected on the screens. And the virtuous character is the one that is preached and exemplified by the leadership and its phantom, its imaginary virtues. In this way populism fills all the gaps left open by liberal democracy. The inevitable turbulence connected with these issues is replaced by the turbulence and the outcry of that acclamation required by the projected phantom.

In conclusion, the danger that populism poses for liberal democracy is the realization of its unfulfilled promises by making it collapse into an entirely fictional people's compact with a phantom leader. While liberal democracy risks to offer not much more than politics without a people, populism's efforts tend to implement a people without politics.

Global Solidarity and Collective Intelligence in Times of Pandemics*

José Luis Martí

1. Introduction: the time of pandemics

The COVID-19 pandemic is teaching us many lessons, whether we are learning them or not.[1] After almost two years from the first outbreak in China and around five million officially registered deaths – which could actually be tenmillion – the pandemic is undoubtedly a major global threat that all humankind must face united. It is a gigantic challenge that calls for unprecedented global solidarity – for instance, in the production and distribution of vaccines – and requires our best efforts and highest collective intelligence to be overcome.

We face many other global challenges and threats, of course; some of which are new, and some others are rather old. World poverty and hunger, global inequalities of income and wealth, other forms of global health, the maintenance of peace, protection against international terrorism, nuclear security, the fight against tax havens, the preservation of ecosystems and endangered species, and, of course, climate change and climate emergency. All these challenges, and many others, are global in the sense that they threaten or affect, in one way or another, all human beings in the world. But some such challenges, including the COVID-19 pandemic, are also global in a different sense: because the only way for any country to fix them, to deal effectively with them, or to be safe from them, is by joining efforts and coordinating responses with the other countries in the world.

Severe poverty, for instance, is a global problem only in the first sense. There currently are pockets of severe poverty in all countries, including the richest ones. But this does not need to be the case. Some countries might completely eradicate such severe forms of poverty from their own soil by implementing truly ambitious social policies. That would fix the problem of severe poverty *for them*, even if it would continue affecting other countries. This kind of *individual* solution is, however, not possible for certain global challenges, like climate change or most of those related to global health. In regard to them, no country will be entirely safe until the others are safe too. Thus, certain global challenges and threats are global not only because they constitute a global *problem*, but also because their *solution* can only be global

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1   It might well be the case that human beings need a reiterated shock before being able to learn lessons from catastrophes or terrible experiences in life. But if we have not learned yet about global health crises, it is not because COVID-19 can be seen as the first shock or as a totally unexpected threat. See David Heymann, 'SARS and Emerging Infectious Diseases: A Challenge to Place Global Solidarity above National Sovereignty', *Annals Academy of Medicine* 35 (2006): 350-353.

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as well. Let me call this subtype of global challenges 'twofold global challenges'. We can only overcome those challenges by taking globally coordinated action, something that will require high levels of global solidarity and global collective intelligence. And, in fact, most of the threats mentioned above fall into this category.

As I said, the COVID-19 pandemic is one of these twofold global threats. This means that we will only find a solution or can fight it effectively if we join efforts and coordinate action at a global level out of global solidarity, since no country can be really safe unless the other countries are safe too.[2] Take the example of vaccines. All vaccines that have proven to be effective are being produced, sold, and distributed, under an intellectual and industrial property regime. They are all copyrighted. As it happens, rich countries are buying and accumulating most of them, creating a terrible global inequity. At the moment of writing, in October 2021, 6.3 billion vaccine doses have been administered in the world, 80% of them in the rich countries. Compare that number with the 311 million doses that have been administered through COVAX, the Access to COVID-19 Tools Accelerator (ACT), the global system of vaccine solidarity articulated by the World Health Organization (WHO), CEPI and GAVI.[3] Only 5% of the total number of vaccines administered in the world has been distributed through such globally centralized systems of vaccine solidarity, even if such a system was initially intended by the WHO to articulate and be the vehicle for most of the international vaccine distribution. It is important to notice that it was not originally conceived to be the beneficence system that it has become, but a truly global system for coordinated and equitable action in response to the pandemic.[4]

It is obvious to everyone that the reason why COVAX turned into a beneficence system and only works at a marginal level is a combination of two powerful interests: the interest of states, especially the richest and most powerful ones, to keep the power of making their own decisions regarding the vaccination of their populations and to protect such populations even at the cost of the population of other countries, and the interest of the relevant pharmaceutical firms to keep the demand side divided to secure their bargaining power and, ultimately secure their very high profits. For that reason, you might think that vaccines make the COVID-19 crisis a global challenge just of the first kind, a onefold global challenge. If a country buys enough vaccines for its entire population, it will be safe from the pandemic, even if the virus keeps affecting the other countries. But, as we have

2   Takuma Kayo, 'Global Solidarity is Necessary to End the COVID-19 Pandemic', *Asia-Pacific Review* 27 (2020): 45-56; and A. Ho and I. Dascalu, 'Global Disparity and Solidarity in a Pandemic', *Hastings Center Report* 50 (2020): 65-67; Tanja Müller and Róisín Read, 'Humanity and Solidarity: Editors' Introduction', *Journal of Humanitarian Affairs* 3 (2021).
3   See https://www.gavi.org/COVAX-vaccine-roll-out.
4   See Reuters, 'Exclusive: WHO sweetens terms to join struggling global COVAX vaccine facility – documents', available at: https://www.reuters.com/article/us-health-coronavirus-who-offer-exclusividUSKBN25O1L5; Peter Figueroa *et al.*, 'Achieving global equity for COVID-19 vaccines: Stronger international partnerships and greater advocacy and solidarity are needed', *PLoS Med* 18 (2021); and Armin von Bogdandy and Pedro Villareal, 'The Role of International Law in Vaccinating Against COVID-19: Appraising the COVAX Initiative', *Heidelberg Journal of International Law* 81 (2021): 89-116.

seen in the last months, that is not the case. First, no vaccine provides 100% immunity against the virus. Second, no country can afford to close borders and self-isolate from the rest of the world. And finally, since the virus keeps infecting and replicating itself out there, it will surely mutate, and it is just a matter of time before one of these mutations or variants affects the vaccinated population of that country. Protecting the oldest and most vulnerable social groups through vaccination is a onefold global problem similar to that of severe poverty. But fighting effectively against COVID-19, with the aim of eradicating it or keeping it to a minimal tolerable level, remains a twofold global challenge. And a very complex one.

If we attend to the response given so far to the pandemic by countries and international institutions, our assessment cannot be very positive. It is true that some countries have done much better than others.[5] Compare, for instance, the policies and the current pandemic situation of New Zealand, Taiwan or even Australia with that of Brazil, Russia or United States. But regardless of the current situation of those countries, we all remain subject to this terrible global threat, and no one will be really safe until everyone has gotten rid of the virus, or until the virus reduces its lethality or its infectiousness and becomes a more tractable problem. Given that the pandemic is a twofold global threat, the focus should not be on how the states individually deal with it, but on how they are doing in terms of coordinating their policies and actions. And here the record is globally very poor.

It is to fight pandemics like this that United Nations and the international community founded the WHO in 1948 in Geneva. The WHO has actually worked very well in facing other global health challenges in the past, but it is clearly failing to fulfill its mission in the current one. It has not even been able to provide a common standard to count deaths in the same way in all countries, let alone prevent the disease from becoming a pandemic, or assess the different reactions and policies of governments throughout the crisis to provide some useful guidance, or effectively investigate the potential non-zoonotic origins of the virus in China, or, most importantly, grant an effective vaccine to everyone in the world in an equitable way. I am not blaming the people who run or work at the WHO. The organization has been systematically deprived of the resources it needs, and its powers have been increasingly limited by its member states, especially in the last few years.[6] Considering that, the WHO may have achieved all that it was reasonable to expect from it. It is a failure of the whole international institutional system and its design that we are experiencing right now.

States have not done much better in joining efforts. Even the EU member states have not been able to coordinate their policies, apart from the collective purchase

5   See Scott L. Greer, Elizabeth J. King, Elize Massard da Fonseca andand Andre Peralta-Santos, 'The comparative politics of COVID-19: The need to understand government responses', *Global Public Health*, 15 (2020): 1413-1416.
6   See Lawrence O. Gostin, 'COVID-19 Reveals Urgent Need to Strengthen the World Health Organization', *JAMA Forum*, 30 April 2020; and Eric Ip, 'The constitutional economics of the World Health Organization', *Health Economics, Policy and Law*, 16 (2021): 325-339.

of vaccines and the recent adoption of the EU Digital COVID Certificate.[7] Countries like Russia and China have been selling their own vaccines to developing countries, but have done this out of other, long-term, geostrategic interests, rather than out of solidarity or a sense of justice. This is proven by the fact that they have preferred to do that on an individual, bilateral basis, rather than using COVAX as a vehicle of their 'aid'. COVAX was specifically designed to channel global aid and solidarity under objective criteria and in a way that makes it impossible for donors to require any set-off or compensation from the receivers.[8] All these examples, as well as the initial commercial war among countries for respirators and ventilators, among other supplies, or the imposition of hard travelling restrictions, are elements that have led many to consider that the COVID-19 pandemic has fueled the reinvigoration of a statist, multilateral world order, to the detriment of a strong system of global governance. Such failure of a scheme of global solidarity has also helped the arguments of those who believe that solidarity can only truly exist at a national level, apart from some exceptional and marginal efforts of genuine international altruism.[9]

Despite this pessimistic assessment, I will show in this article that global solidarity is urgently needed in order to address what I called twofold global threats, including the COVID-19 pandemic. And I will claim that such global solidarity is not only possible, but also relatively easy to create if we succeed in articulating global forms of collective intelligence. This must be understood as an early approximation to the ideal of global democracy. And even if we may be very far from attaining such ideal, it still provides a nice horizon to walk towards.

2. National vs. global solidarity

Since the time, at least, of Ancient Greece, the idea that we should be solidary with our fellow citizens has been an important theme in political philosophy. It was seen as a way of keeping political communities cohesive and as a requirement of social justice. In the *Nicomachean Ethics*, Aristotle famously claimed that

> 'as friendship appears to be the bond of the state; and lawgivers seem to set more store by it than they do by justice, for to promote concord, which seems akin to friendship, is their chief aim, while faction, which is enmity, is what they are most anxious to banish. And if men are friends, there is no need of

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7 See Scott Greer, 'National, European and Global Solidarity: COVID-19, public health and vaccines', *Eurohealth* 26 (2020): 104-108.

8 See Ann Danaiya Usher, 'A beautiful idea: how COVAX has fallen short', *The Lancet* 397 (2021): 2322-2325.

9 For a comment and criticism of that position, see Nchangwi Syntia Munung, Samuel J. Ujewe and Muhammed O. Afolabi, 'Priorities for global access to life-saving interventions during public health emergencies: Crisis nationalism, solidarity or charity?', *Global Public Health* 2021, online publication. See also Sebastian Schneider *et al.*, 'Does the COVID-19 pandemic threaten global solidarity? Evidence from Germany', *World Development* 140 (2021): 105356.

justice between them; whereas merely to be just is not enough – a feeling of friendship also is necessary'.[10]

This fragment seems to suggest that justice and the Aristotelian notion of civic friendship are different or even mutually exclusive. But that reading would be a mistake. In the same passage, Aristotle added '[i]ndeed the highest form of justice seems to have an element of friendly feeling in it', and he said later that '[t]he objects and the personal relationships with which friendship is concerned appear, as was said at the outset, to be the same as those which are the sphere of justice'. According to the Greek philosopher, both justice and civic friendship emerge as a need whenever there is some 'common business' among people, as happens with political associations.[11] However, as he also highlighted, different forms of political association require different types of civic friendship. And any virtuous form of government that relies at some point on the majority of the people, even if as part of a mixed regime, requires a type of civic friendship that is similar to 'friendship among brothers'. Such a republican ideal of democracy requires fraternal friendship or, in short, fraternity. This is the form of civic friendship that is based, according to Aristotle, in the equality of status among citizens, in an equal concern with the common good, and in an 'equal share of power'.[12]

As is widely known, fraternity was indeed the third value in Revolutionary French republicanism of the eighteenth century, after liberty and equality. And the republican tradition of political thought, in all its manifestations throughout history, has always emphasized the importance of developing some forms of civic duty, solidarity, or mutual concern, as essential for a well-functioning democracy. They were regarded as necessary both for social justice and for the legitimacy and stability of democratic government. In the end, as Aristotle foresaw, only if we as citizens commit to the common good out of a mutual concern and regard for each others as equals, will we be able to achieve meaningful self-government.[13] The terms 'civic friendship' and 'fraternity' are much less fashionable today, but the idea of solidarity is overwhelmingly present in both academic and practical or

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10   Aristotle, *Nicomachean Ethics* (Perseus Digital Library, ed. H. Rackham, online edition at www. perseus.tufts.edu), Book VIII, Ch. 1, 1155a. See also D.S. Hutchinson, 'Ethics', in *The Cambridge Companion to Aristotle*, ed. Jonathan Barnes (Cambridge: Cambridge University Press, 1995), 228-232; and C.C.W. Taylor, 'Politics', in *The Cambridge Companion to Aristotle*, ed. Jonathan Barnes (Cambridge: Cambridge University Press, 1995), 256-257.
11   Aristotle, *Nicomachean Ethics*, Book VIII, Ch. 9, 1159b.
12   Aristotle, *Nicomachean Ethics*, Book VIII, Ch. 11, 1161a.
13   Republicanism nowadays is a very popular and even fashionable political theory. Its most influential version is the one developed by Philip Pettit. See Philip Pettit, *Republicanism* (Cambridge: Cambridge University Press, 1997), and *On the People's Terms* (Cambridge: Cambridge University Press, 2012); Frank Lovett, 'Republicanism' in *Stanford Encyclopedia of Philosophy*, 19 June 2006 (revised 4 June 2018). For some panoramic collections of essays, see Cécile Laborde and John Maynor, eds., *Republicanism and Political Theory* (Oxford: Willey-Blackwell, 2008), and Samantha Besson and José Luis Martí, eds., *Legal Republicanism* (Oxford: Oxford University Press, 2009). For a view focused on the importance of civic duties, see Richard Dagger, *Civic Virtues* (Oxford: Oxford University Press, 1997).

political discussions. Paradoxically, it is quite undertheorized, especially in comparison to the concepts of freedom and equality.[14]

Since the time of Aristotle, most students of solidarity have assumed or taken for granted that even if there might exist some exceptional forms of transnational or global solidarity, the natural scope for solidary ties to emerge is drawn by the boundaries of the nation state or the political community.[15] It is within such national boundaries that people may be inclined, as a matter of fact, to show mutual concern and be solidary with each other.[16] In the ancient world, and for much of our history, the idea that one might have duties of solidarity regarding citizens of other political communities was simply unthinkable. Ultimately, solidarity was regarded as a necessary civic virtue to keep one's own political community cohesive, and more concretely to make internal distributive justice possible, not for dissolving or merging such a political community with others. In the modern world, divided into nations, solidarity was simply assumed to be national solidarity. It was seen as a domestic virtue, not a cosmopolitan one.

14 There are some remarkable exceptions. See, for instance, Jürgen Habermas, 'Justice and solidarity', in *Studies in contemporary German social thought. The moral domain: Essays in the ongoing discussion between philosophy and the social sciences*, ed. T.E. Wren (Cambridge: MIT Press, 1990), 224-251; David Kahane, Daniel Weinstock, and Alison M. Jaggar, 'Symposium: Diversity and Civic Solidarity', *Journal of Political Philosophy* 7 (1999); Steven Lukes, 'Solidarity and citizenship', in *Solidarity*, ed. K. Bayertz (New York: Palgrave Macmillan, 1999): 273-279; Arash Abizadeh, 'Does Collective Identity Presuppose an Other? On the Alleged Incoherence of Global Solidarity', *American Political Science Review* 49 (2005): 45-60; Jean Harvey, 'Moral Solidarity and Empathetic Understanding: The Moral Value and Scope of the Relationship', *Journal of Social Philosophy* 28 (2007): 22-37; Sally Scholz, *Political Solidarity* (Philadelphia: Pennsylvania State University Press, 2008), 'Seeking Solidarity', *Philosophy Compass* 10 (2015): 725-735, and 'Solidarity', *International Encyclopedia of Ethics*, 29 June 2019; Jeff Spinner-Halev, 'Democracy, Solidarity and Postnationalism', *Political Studies* 56 (2008): 604-628; Patti Tamara Lenard, Christine Straehle and Lea Ypi, 'Global Solidarity', *Contemporary Political Theory* 9 (2010): 99-130; Andrea Sangiovanni, 'Solidarity in the European Union', *Oxford Journal of Legal Studies* 33 (2013): 213-241; and 'Solidarity as Joint Action', *Journal of Applied Ethics* 32 (2015): 340-359; Lawrence Wilde, *Global Solidarity* (Edinburgh: Edinburgh University Press, 2013); Christian Smith and Katherine Sorrell, 'On Social Solidarity', in *The Palgrave Handbook of Altruism, Morality, and Social Solidarity*, ed. Vincent Jeffries (New York: Palgrave Macmillan, 2014): 219-247; and Avery Kolers, *A Moral Theory of Solidarity* (Oxford: Oxford University Press, 2016).

15 The work of David Miller is paradigmatic of this view, see *Citizenship and National Identity* (Cambridge: Polity Press, 2000).

16 Some exceptions to that popular view may be found in Habermas, 'Justice and solidarity; Ulrich K. Preuss, 'National, Supranational, and International Solidarity', in *Solidarity*, ed. Kurt Bayertz (Dordrecht: Springer, 1999); Carol Gould, *Globalizing Democracy and Human Rights* (New York: Cambridge University Press, 2004), and 'Transnational Solidarities', *Journal of Social Philosophy* 38 (2007): 148-164; Spinner-Halev, 'Democracy, Solidarity and Postnationalism'; Christine Straehle, 'National and Cosmopolitan Solidarity', *Contemporary Political Theory* 9 (2010): 110-120; Lea Ypi, 'Politically constructed solidarity: the idea of a cosmopolitan avant-garde', *Contemporary Political Theory* 9 (2010): 120-130, and *Global Justice and Avant-Garde Political Agency* (Oxford: Oxford University Press, 2012); Sangiovanni, 'Solidarity in the European Union'. Unlike in the philosophical literature, in the fields of medicine, global health and international relations the idea of global solidarity is seen as a central principle. See, for instance, Munung, Ujewe and Afolabi, 'Priorities for global access to life-saving interventions during public health emergencies: Crisis nationalism, solidarity or charity?'.

David Hume famously stated in the *Treatise of Human Nature* that sympathy, which he took to be the basis of our moral evaluation and of the capacity to take an interest in the public good, which was regarded in turn as the condition of solidarity, is stronger, as a matter of fact, for those with whom we share some similarities, such as a common language, a common culture, or a common citizenship.[17] Many have used this Humean idea of sympathy to define solidarity as an attitude of mutual concern, or as actions that we may take out of such mutual concern, regarding only the members of our own national political community, and have refused the possibility of developing global solidarity or global justice.[18] Others have used it to support the view that democracy cannot emerge beyond national borders, even in transnational integration projects, such as the European Union,[19] let alone at a global level.

However, it is important to notice, first, that in the *Treatise* Hume was simply making a descriptive claim about a general human psychological trait or inclination, which has many exceptions, is contingent, and should have no implications for our normative obligations (at risk of violating the so-called Hume's Law, according to which norms or obligations cannot simply derive from facts). In effect, it is one thing to explain at a psychological level how individuals usually find the right motivation to act in compliance with their duties, but quite a different thing to answer the normative question of what duties they have, regarding whom. It is true that if our duties are very demanding, we may face a motivational problem.[20] But it is also true that the theory of justice has always found an easy way out from such motivational problem. When people are not willing to cooperate or be solidary on a voluntary basis, as with paying taxes, the theory of justice may justify the use of legal coercion under some circumstances in order to make such cooperation or solidarity compulsory. All that you need, at a more pragmatic level, is a sufficient number of people convinced of the justice of such duties of solidarity who could lead a social

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17 David Hume, *A Treatise of Human Nature*, eds. David F. Norton and Mary J. Norton (Oxford: Clarendon Press, 2007 [1739-1740]): 3.3.1.9 and 2.1.11.5.
18 See, again, Miller, *Citizenship and National Identity*.
19 See Dieter Grimm, 'Does Europe Need a Constitution?', *European Law Journal*, 1 (1995): 282-302; Wolfgang Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?', *European Law Journal*, 1 (1995): 31-59; Fritz Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford: Oxford University Press, 1999); David Miller, 'Republicanism, national identity and Europe', in *Republicanism and Political Theory*, eds. C. Laborde and J. Maynor (Oxford: Blackwell, 2008): 133-58, and 'Democracy's domain', *Philosophy and Public Affairs*, 37 (2009): 201-228; and Richard Bellamy, 'An Ever Closer Union Among the Peoples of Europe: Republican Intergovernmentalism and Democratic Representation within the EU', *Journal of European Integration* 35 (2013): 499-516.
20 For an appeal to this argument of the motivation problem as a way of opposing global solidarity, see Patti Tamara Lenard, 'What's solidaristic about global solidarity?' *Contemporary Political Theory* 8 (2009).

and political movement that might succeed in legally implementing such obligations.[21]

In addition to that, Hume was explicit in pointing out that this sympathy builds upon some similarities or commonalities, but not necessarily national ones. It is true that he mentions sharing citizenship as one potential example, but that is not necessarily the clearest or strongest basis for solidarity. Other commonalities might provide stronger support, such as family ties, friendship or neighbourhood in the same municipality, among others. In fact, if we examine how inclined we are to be solidary in general with our fellow citizens, we can find that our inclination is rather small, and that there exist significant differences across countries and, perhaps more significantly, across generations, which proves how contingent this Humean psychological observation is. It is for this reason that, in fact, most instances of national solidarity are not left to voluntary cooperation but legally imposed, as in the case, again, of paying taxes. On the other hand, it is also obvious that many people have attitudes of solidarity and take solidary action towards people beyond their borders, citizens of other countries. It happens all the time.[22] Global solidarity, as a matter of fact, already exists. And if it does not exist to a larger degree that is in part due to the lack of adequate means and institutions to channel it.

As I mentioned above, the fact that we may feel stronger sympathy for some individuals than for others does not imply that we should have stronger duties of solidarity or justice towards those individuals, since contingent facts cannot justify duties or norms. But such disparities in our sympathies do not even correlate with our own actions. The countries that have donated more vaccines or money to COVAX are not those that feel more sympathy for other countries, or those that share some commonalities with them, such as a common language, a common culture, or a common history. In addition to that, Hume himself made a different analysis in his other major work, the *Enquiry Concerning the Principles of Morals*, where he rarely mentions sympathy and prefers to speak about the principle of humanity, which emerges from the realization that human beings recognize each other as equals and feel concern for each other's well-being on a more universal basis.[23]

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21 This is what Lea Ypi, with the case of global solidarity in mind, calls 'a cosmopolitan avant-garde', which might be integrated by social organizations and movements, NGOs, intellectuals and individual citizens. See Ypi, 'Politically constructed solidarity: the idea of a cosmopolitan avant-garde'and *Global Justice and Avant-Garde Political Agency*. For a similar response in the case for the democratization of the European Union, despite the absence of a thick pan-European common identity, see José Luis Martí, 'European Democracy and the No-Demos Thesis', in *A New Narrative for a New Europe*, eds. Daniel Innerarity, Jonathan White, Cristina Astier and Ander Errasti (Rowman and Littlefield, 2018): 49-70.

22 See Kevin Watkins, 'Human Development Report 2007-2008: Fighting Climate Change: Human Solidarity in a Divided World' (New York: United Nations Development Program, 2007); and Ulrich K. Preuss, 'National, Supranational, and International Solidarity', in *Solidarity*, ed. Kurt Bayertz (Dordrecht: Springer, 1999).

23 David Hume, *An Enquiry Concerning the Principles of Morals* (Oxford: Clarendon Press, 1998 [1751], 5.39.

Despite the classic view that has conceived civic friendship, fraternity, or solidarity, as circumscribed by the boundaries of political community, whether the polis or a nation state, there is no reason to deny, at least on a conceptual basis, the possibility of global solidarity. If the basis of our solidarity is some mutual recognition as equals deserving equal concern, there is no normative reason either not to recognize any other human being as an equal moral agent. Advocates of national solidarity, such as David Miller or Richard Bellamy, argue that we do not – and ought not to – accord the same concern to foreigners as to our fellow citizens.[24] They might be right about this, but it still does not prove that there should be no global solidarity. The same argument they make when they compare our fellow citizens with foreigners might be applied to the comparison between our relatives or friends and our fellow citizens. Whilst we should of course recognize our fellow citizens as equals, we do not – and ought no to – accord them exactly the same concern as we accord our relatives and friends; we do not – and should not – think that they deserve just the same concern *from us* as do our relatives and friends. We may certainly have some special duties regarding the latter than we do not have regarding other fellow citizens. As a result of that, it is very plausible to believe – and actually hard to deny – that we have stronger duties of solidarity regarding our relatives and friends than regarding our fellow citizens. For the same reason, we may have stronger duties of solidarity towards our fellow citizens than towards the other human beings on the planet. In any case, the disparities in the strength or scope of our duties of solidarity do not prove that we do not have global duties of solidarity towards all human beings in the world.

Now we come to the central question of this section: do we have global duties of solidarity? I believe so, and at two different levels that mirror the distinction between onefold and twofold global challenges that I drew in the previous section. Let me start with the most basic moral duties. Remember that, according to the philosophical tradition that has theorized the concepts of civic friendship, fraternity, and solidarity since the time of Aristotle, all that is needed in order to justify the existence of a duty of solidarity is the mutual recognition between agents as equals to whom we owe some equal concern. I take to be obvious that at a very basic moral level all human beings are to be regarded as equal agents to whom we owe equal concern, regardless of their nationality or vicinity.

The arbitrary fact that someone is born in Zimbabwe, Argentina, or Spain should not make any difference in our most basic moral duties regarding others. As in Peter Singer's famous example of the drowning child, if a child is drowning before us, we are the only ones who can save her, and if we can do it at no significant cost or risk for ourselves, it is obvious that we have a duty to be solidary and save the child, quite regardless of the color of the child's passport.[25] Similarly, if there is an

24 See David Miller, 'Cosmopolitanism', in *The Cosmopolitanism Reader*, ed. Garrett W. Brown and David Held (London: Polity Press, 2010): 377-392.
25 See Peter Singer, 'Famine, Affluence and Morality', *Philosophy and Public Affairs* 1 (1972): 229-243, *One World. The Ethics of Globalization* (New Haven: Yale University Press, 2002), and *The Life You Can Save* (New York: Random House, 2009).

earthquake in Haiti destroying a good part of the capital, killing thousands of people, we all have a duty to be solidary and send assistance and help. It is irrelevant where such an earthquake takes place. We must show such basic equal concern for all human beings, since we can recognize each other as equal moral agents in this basic fundamental sense.

Remember now the example of severe poverty that I gave to illustrate the category of onefold global challenges. If other human beings are deeply suffering because they are in a situation of severe poverty and hunger, we have a moral duty to show solidarity and help them to thrive regardless of their nationality. If you are not convinced, just consider the most extreme case, that of child destitution in certain areas of Africa, of children dying from malnourishment. As I explained in the introduction, onefold global threats are global in one sense, because they are a common problem all over the world, but not necessarily in the other sense that the solution to that problem must be globally coordinated as well. However, the fact that there are people in situations of extreme poverty and destitution is a problem for all human beings: severe poverty in a distant land might not, as a matter of empirical fact, threaten the well-being of those living in wealthier countries, but it affects all human beings in the sense that it must concern us all simply in virtue of our common humanity, and we all have a duty to show moral concern for their deep suffering and help them try to save their lives. Therefore, it is not only the problem of the people who are hungry or of the states where these people live. It is a global problem, at least a onefold problem. And, therefore, it triggers global duties of solidarity, more particularly *moral* global duties of solidarity, even if such duties do not necessarily require coordinated action to be fulfilled.

It is clear that we also have moral global duties of solidarity in regard to the situation of countries suffering an uncontrolled outbreak of COVID-19. When India experienced its giant second wave of COVID-19 and its hospitals rapidly collapsed, running short of ventilators and oxygen, many countries showed concern and started sending supplies, assistance, and help. Similar examples arose in other countries, including Peru, Namibia and Indonesia. The mere fact that a particular country or a more specific group of people in that country face some deep suffering or serious harm immediately raises our moral concern and triggers our *moral* global duties of solidarity.

However, as I argued in the introduction, COVID-19 is a global threat of a special kind that I called a twofold global challenge. That means that it is global in *two* different and cumulative ways. It is global because it is *a common problem* for the entire world. Additionally, it is global because the only *solution* for that problem must come from joining efforts and coordinating a *global response*. And this means that the kind of global solidarity that it triggers cannot be exclusively moral. When a relatively large group of people has a common problem that requires some joint or coordinated action in order to be dealt with, we can affirm, following Jeremy

Waldron, that the circumstances of politics have emerged.[26] If we need to vaccinate all adults on the planet against COVID-19 because that is the only way to deal effectively with the pandemic and because we will be safe from it only when everyone is safe from it, then we have not only a moral global duty of solidarity (and a self-interested reason to discharge that duty, since our own interests are also affected), but also a *political* one. This duty is political in the sense that discharging it will require joint, coordinated action.[27] Thus, we may argue that onefold global challenges trigger moral global duties of solidarity, while twofold global challenges trigger, by definition, moral as well as political global duties of solidarity.

One might think that if some personal interests are also involved, then we are not facing a case of pure solidarity. In my opinion, that would be a mistake. If personal interests are involved in a particular action, such action may not be motivated by pure altruism. There still can be some dose of altruism in it, but it is not purely altruistic anymore. However, altruism and solidarity are two different things. This is, in fact, the claim that is more consistent with the classic tradition of civic friendship and fraternity, from which solidarity emanated. Remember that for that tradition, looking back to Aristotle, or Hume, or Jefferson, or Rousseau, the duty of solidarity – or civic friendship – emerges from the fact that the agents share some 'common business', or 'common good', or 'public good', or 'general interest'. And this is exactly what transforms the duty into a political one. It is the fact that the interests of those who need help are intertwined with the interests of those who must help them in some form of public or common good that makes their relationship not only moral, but political. In sum, in twofold global challenges like the COVID-19 pandemic – but also climate change, the preservation of species, or nuclear security, and many others – political, as well as moral, global solidarity is needed.

In this section, I have shown that global solidarity is not only conceptually possible, but actually required to deal with global challenges, of both the onefold and the twofold kind. It is important to notice that the type of such global duties is different depending on the kind of challenge that we face. Whilst onefold challenges can be addressed, without international coordination, by groups or countries acting out of moral solidarity, twofold global challenges can be effectively tackled only

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26 Waldron actually identifies two circumstances of politics: the perceived need for a common framework, choice, or action and the existence of disagreements or conflicts about what such a choice or action should be. See Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), 99-103. As I have argued elsewhere, it seems pretty clear that Waldron's idea of circumstances of politics is fully applicable to the global context, making it possible to speak about global politics in a genuine and strict sense. See José Luis Martí, 'Política y bien común global', *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 16 (2012): 17-38; José Luis Martí, 'A Global Republic to Prevent Global Domination', *Revista Diacrítica*, 24 (2010): 31-72; and José Luis Martí, 'Republican Freedom, Nondomination, and Global Constitutionalism', in ed. Renata Uitz, *Freedom and Its Enemies. The Tragedy of Liberty* (The Hague: Eleven, 2015): 57-78.

27 For a similar view of the political dimension of global solidarity, see Ypi, 'Politically constructed solidarity: the idea of a cosmopolitan avant-garde', and *Global Justice and Avant-Garde Political Agency*. For the notion of political, as opposed to moral, solidarity, even if still conceived as working mainly at a domestic level, see Scholz, *Political Solidarity*.

through global joint, coordinated, solidary actions. And for that reason the kind of global solidarity they require is not just moral, but political. The question is now whether such global political solidarity is empirically possible, and how we could arrange things to make it possible and effective. To this question I turn briefly in the next section.

3.   Global collective intelligence for twofold global threats

Is global solidarity possible? As I argued in the previous section, as a matter of fact it already exists. However, the example of COVID-19, and more particularly the example of vaccine solidarity, paradigmatically shows that the level at which such solidarity exists is still clearly insufficient. This, I would say, is not surprising, given that, despite the fact that the kind of global solidarity that is needed is a political one, we lack adequate global political institutions that may effectively channel such solidarity when it emerges voluntarily, and that are able to legally impose further levels of global solidarity when voluntary cooperation is not enough.

A well-known position in the debate about global justice is the so-called 'institutionalist critique', which rejects the idea of global justice merely on the grounds that, as a matter of fact, we lack an adequate global institutional system that might carry the burden of imposing or enforcing such global justice.[28] However, just as with the motivational problem, even if the lack of an appropriate institutional system clearly poses some pragmatic obstacles to the implementation of a truly political scheme of global solidarity (just think, again, of the current limited powers of the WHO and its fruitless efforts to generalize the use of COVAX), this institutional deficit does not cancel our global duties of solidarity. More importantly, it triggers the additional obligation to create such an adequate institutional system in the first place. If the only equitable and genuinely effective way to fight the pandemic consists in joining efforts and coordinating our health policies, particularly in the distribution of vaccines, then states should agree to grant the WHO the appropriate powers to enact and impose a really effective COVAX global programme, one able to transcend the current 5% of share of the global distribution of vaccines and achieve a much higher share of it. I am aware of the tremendous difficulty of that challenge. But this is at least what social organizations and activists, intellectuals, and individual citizens who care about global justice and global solidarity, what Lea Ypi calls the 'cosmopolitan avant-garde', should be claiming and fighting for.[29]

In the introduction I claimed that we are under the pressure of gigantic global threats, many of which are existential, and many of which are of a type that I identified as twofold global. In the previous section I argued that these twofold global challenges, in contrast to the onefold global ones, require not merely moral, but

28   See, for all, Michael Blake, 'International Distributive Justice', *Stanford Encyclopedia of Philosophy*, 24 October 2013, revised in 4 May 2020.
29   See Ypi, 'Politically constructed solidarity: the idea of a cosmopolitan avant-garde', and *Global Justice and Avant-Garde Political Agency*.

political global solidarity. The kind of global institutional system that is needed in order to deal effectively with such existential threats, such as the COVID-19 pandemic, climate emergency, nuclear security or the preservation of ecosystems, is certainly so thick, complex, and powerful, that it is very far from our current reach. The only way of dealing with these problems effectively and in a legitimate way is ultimately through some kind of global democracy with some level of integration of powers.[30] And we do not seem to be very close to that scenario, even if the global threats are very serious and pressing.

However, global democracy will not emerge or be constituted in a day, and the fact that we may still fall very short of making real progress in approximating it does not prevent us from taking decisive steps towards such a normative horizon. The view of global solidarity I am defending here is idealistic enough to be immune to the so-called realist view, to objections such as those based on the Humean motivational problem or to the institutionalist critique, but at the same time is pragmatic enough to accept that global solidarity, even of the political kind that I have argued is needed, might grow progressively but continuously, and all that we need to ensure is that it does so in the right direction, that is, the direction of global political legitimacy on the way towards global democracy, even with some level of trial and error and experimentation.[31]

The political global solidarity that is necessary to deal effectively with global threats such as the pandemic basically requires two components. First, we need thicker and more empowered global institutions. Second, we need more democratic forms of global decision-making within those institutions that may keep them accountable and legitimate.[32] We need a more powerful global order and we need to democ-

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30 For a more complete justification of such claim, see Martí, 'A Global Republic'. For some central defenses of the idea of global democracy, see David Held, *Democracy and the Global Order* (Stanford: Stanford University Press, 1995), and *Cosmopolitanism: Ideals, Realities, and Deficits* (Cambridge: Polity Press, 2010); Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005); Joshua Cohen and Charles Sabel, 'Global Democracy?', *New York University Journal of International Law and Politics*, 37 (2006): 763-797; James Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (Cambridge, MA: MIT Press, 2007); Terry Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (Oxford: Oxford University Press, 2008); Daniele Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy* (Princeton: Princeton University Press, 2008); Robert Goodin, 'Global democracy: in the beginning', *International Theory*, 2 (2010): 175-209; Daniele Archibugi, Mathias Koenig-Archibugi, and Marchetti, Raffaele, eds., *Global Democracy: Normative and Empirical Perspectives* (Cambridge: Cambridge University Press, 2012).
31 See, for instance, Grainne de Búrca, Robert Keohane and Charles Sabel, 'Global Experimentalis Governance', *British Journal of Political Science* 44 (2014): 477-486.
32 For a more comprehensive account of such democratic legitimacy at the international level, see José Luis Martí, 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law', in *The Oxford Handbook on the Sources of International Law*, eds. S. Besson and J. D'Aspremont (Oxford: Oxford University Press, 2017): 724-745. See also Samantha Besson and José Luis Martí, 'Legitimate Actors of International Lawmaking', *Jurisprudence* 9 (2018): 504-540, and 'Cities as Democratic Representatives in International Law-Making', in *Research Handbook on International Law and Cities*, eds. Janne Nijman and Helmut Aust (Cheltenham: Edward Elgar, 2021).

ratize it, even if following a gradual, step-by-step strategy.[33] We need a more powerful and economically well-funded WHO and a constellation of other powerful international organizations collaborating with it, and we need them to be more accountable and democratic. If the WHO in recent years has not only not grown more powerful, but has actually significantly weakened, it is obviously because many powerful states were not interested in letting it grow and limit to some extent their national sovereignty. But it is also because citizens around the world do not perceive the WHO as a trustworthy and legitimate institution to which we should delegate our power to fight against pandemics, and consequently they have not put enough pressure on their respective governments to empower such global institutions.

Part of the problem with the current international system is that it is perceived as distant, mostly technocratic, unaccountable, and suspected of falling prisoner to international lobbies and other powerful private actors. This is, actually, the case of the European Union, a system that has a Parliament democratically elected with co-decision power, mechanisms of citizen participation and engagement, supervising independent courts, and oversight bodies.[34] If despite all these forms of democratic engagement and accountability the EU is perceived as distant and technocratic, how will the global order, with no elected parliament, no courts vested with controlling power, and virtually no mechanism of public accountability, be perceived?[35] Just remember, for instance, what happened with the WHO management of the 2009 H1N1 crisis. Whether the public accusations of manipulation, collusion and favouritism were true or not, it is clear that the WHO lacks proper mechanisms to be held accountable by the citizens of the world.[36] How can it claim, then, to be trusted by such citizens or expect them to push their governments to further empower the institution?

There is certainly a case to be made for technocracy. All the major global threats that I mentioned in the introduction are very complex challenges, problems that interact with each other, that require interdisciplinary work from different experts

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33   For advocates of similar strategies, see Eva Erman and Anders Uhlin, eds., *Legitimacy Beyond the State: Re-examining the Democratic Credentials of Transnational Actors* (New York: Springer, 2010); John Dryzek, *Deliberative Global Politics. Discourse and Democracy in a Divided World* (London: Polity Press, 2006); John Dryzek and John Pickering, *The Politics of the Anthropocene* (Oxford: Oxford University Press, 2019); John Dryzek and A. Tanasoca, *Democratizing Global Justice: Deliberating Global Goals* (Cambridge: Cambridge University Press, 2021).

34   See, for all, Ignacio Sánchez Cuenca, 'From a Deficit of Democracy to a Technocratic Order: The Potscrisis Debate in Europe', *Annual Review of Political Science* 20 (2017): 351-369. See also Martí, 'European democracy and the no-demos thesis'.

35   A *locus classicus* in the justification of such a technocratic approach to international organizations is Robert Dahl, 'Can international organizations be democratic? A skeptic's view', in *Democracy's Edges*, eds. Ian Shapiro and Casiano Hacker-Cordón (Cambridge: Cambridge University Press, 1999), 19-36. See also Andrew Moravcsik, 'Is there a "democratic deficit" in world politics? A framework for analysis', *Government and Opposition* 39 (2004): 336-363.

36   See Shawn Smallman, 'Whom Do You Trust? Doubt and Conspiracy Theories in the 2009 Influenza Pandemic', *Journal of International and Global Studies* 6 (2015): 1-24.

in order to be tackled effectively.[37] In addition to that, these problems are extremely pressing, and do not seem to leave enough time for a more open, participatory, bottom-up, and deliberative management. But it would be a mistake to identify the need for experts in public decision-making, including crisis management, with technocracy. Similarly, more democratic forms of decision-making open to citizen engagement are not necessarily conducive to less correct, efficacious or efficient decisions. The emerging field of collective intelligence studies is showing with evidence and persuasive arguments that, under the right conditions, larger and more diverse groups of people open to citizen collaboration may prove to be smarter decision-makers than small and homogenous groups of experts.[38]

Collective intelligence is signalling the way to go. We can make our global institutions more open and accountable, more democratic, more legitimate, and at the same time allow them to make better decisions. Digital technology may be extremely helpful here. As the concept of CrowdLaw has captured well, 'parliaments, governments and public institutions work better when they boost citizen engagement, leveraging new technologies to tap into diverse sources of information, judgments and expertise at each stage of the law and policymaking cycle to improve the quality as well as the legitimacy of the resulting laws and policies'.[39] Citizens possess distributed knowledge, with different perspectives and approaches, and they have the potential to bring in new and fresh ideas. They do not possess technical expertise. But they have the capacity to interact with experts, learn from them, and together make better decisions that might be more effective in dealing with the existential global problems that we face. And contrary to what one might expect,

37 For the interconnectedness of such global challenges and the need for interdisciplinary work, see Josep Maria Antó *et al.*, 'The Planetary Wellbeing Initiative: Pursuing the Sustainable Development Goals in Higher Education', *Sustainability* 13 (2021): 3372.

38 For some important contributions to the field of collective intelligence, see Howard Rheingold, *Smart Mobs. The Next Social Revolution* (Cambridge: Basic Books, 2002) and *Net Smart. How to Thrive Online* (Cambridge: MIT Press, 2012); James Surowiecki, *The Wisdom of Crowds* (New York: Little Brown, 2004); Cass Sunstein, *Infotopia. How Many Minds Produce Knowledge* (Oxford: Oxford University Press, 2006); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006), and *The Penguin and the Leviathan. How Cooperation Triumphs over Self-Interest* (New York: Crown Business, 2011); Scott Page, *The difference. How the Power of Diversity Creates Better Groups, Firms, Schools* (Princeton: Princeton University Press, 2007); Beth Noveck, *Wikigovernment, How Technology Can Make the Government Better, Democracy Stronger and Citizens More Powerful* (New York: Brookings Institution, 2009) and *Smart citizens, smarter state: The technologies of expertise and the future of governing* (Cambridge: Harvard University Press, 2015); Hëlène Landemore, *Democratic Reason. Politics, Collective Intelligence, and the Rule of the Many* (Princeton: Princeton University Press, 2012); Cass Sunstein and Reid Hastie, *Wiser. Getting Beyond Grougthink to Make Groups Smarter* (Cambridge: Harvard Business Review Press, 2014); Thomas Malone, ed., *Handbook of Collective Intelligence* (Cambridge: MIT Press, 2015), and *Superminds. The Surprising Power of People and Computers Thinking Together* (New York: Little Brown, 2018); and Geoff Mulgan, *Big Mind: How Collective Intelligence Can Change the World* (Princeton: Princeton University Press, 2017).

39 Victoria Alsina and José Luis Martí, 'The Birth of the CrowdLaw Movement: Tech-Based Citizen Participation, Legitimacy and the Quality of Lawmaking', *Analyse und Kritik*, 40 (2018): 337-358, at 338. See also Beth Noveck, 'CrowdLaw: Collective Intelligence and Lawmaking', *Analyse und Kritik*, 40 (2018): 359-380, and *Solving Public Problems. A Practical Guide to Fix Our Government and Change Our World* (New Haven: Yale University Press, 2021). See also https://crowd.law/.

they can also do this in circumstances of crisis or emergency.[40] Collective intelligence of the right kind does not emerge in all circumstances, but under very strict conditions, which we do not entirely know in detail yet, even if the idea of 'the wisdom of crowds' has been present in political philosophy since the time of Ancient Greece, and Aristotle himself was one of its strongest advocates.[41] For that reason, a high degree of experimentalism and an ambitious and interdisciplinary research agenda are needed.

Let me turn back to the initial point of this article as a way of summarizing my argument. We are facing gigantic global challenges and existential threats. Some of them, like the COVID-19 pandemic, are twofold global challenges, and that means that they are not only global common *problems* for the entire humanity, but also that any plausible *solution* or effective management of them will require joining efforts and coordinating action at a planetary level. They require high levels of global solidarity of a kind that we have never seen before. This leads us inevitably to the issue of global politics, since the only way of articulating effective global responses that can be effective, equitable, and legitimate at the same time, will require a deeper empowerment of the global institutional system but also its democratization. The most promising way to do this is by relying on collective intelligence mechanisms, such as those of CrowdLaw, that is, processes of decision-making in which citizens may engage with politicians, experts, and civil servants in order to find the most adequate solutions, mostly through the use of emergent digital technologies, such as data analytics and artificial intelligence. These are new unexplored avenues that, again, will still require important doses of experimentalism and research. But, as the pandemic is clearly proving, the statist, Westphalian international order will not be able to respond adequately to these categorically new problems.

Take, again, the example of COVAX and global vaccine distribution. The current distribution of vaccines has been inequitable, inefficient and also technically wrong from a medical, epidemiological point of view. COVAX, as a centralized system of vaccine distribution, has largely fallen short of its original aspirations and its ideal mission of coordinating global solidarity. State governments have eluded COVAX

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40   See, for instance, Adriana Vivaqua and Marcos Borges, 'Collective Intelligence for the Design of Emergency Response', *The 2010 14th International Conference on Computer Supported Cooperative Work in Design* (2010): 623-628, and 'Taking Advantage of Collective Knowledge in Emergency Response Systems', *Journal of Network and Computer Applications* 35 (2012): 189-198; Monika Büscher *et al.*, 'Collective Intelligence in Crisis', in *Social Collective Intelligence. Computational Social Sciences*, eds. D. Miorandi, V. Maltese, M. Rovatsos, A. Nijholt, J. Stewart (New York: Springer 2017); Juliane Kramer *et al.*, 'The Potential of Collective Intelligence in Emergency Medicine', *Medical Decision Making* 37 (2017): 715-724; Gianluca Elia and Alessandro Margherita, 'Can we solve wicked problems? A conceptual framework and a collective intelligence system to support problem analysis and solution design for complex social issues', *Technological Forecasting and Social Change* 133 (2018): 279-286; and Victoria Alsina, José Luis Martí and Beth Noveck, eds., 'Special Issue. CrowdLaw and Collective Emergency Intelligence on the Ground', *Digital Government: Research and Practice*, forthcoming. See also the modules to the course 'Collective Crisis Intelligence' in https://covidcourse.thegovlab.org/.

41   See José Luis Martí, 'Aristóteles y la sabiduría de la multitud', *Teoria Politica* 8 (2018): 139-166.

partly under the excuse that they have a mandate to protect their own respective populations. As a result, COVAX has become a mere instrument of international beneficence, able to channel some marginal moral solidarity, but far from having the political dimension it should have had. Part of the reason for such failure derives from the fact that world citizens do not trust – or do not even know about – the international institutional system in general, and the WHO in particular, so they have not put any pressure on their governments to take a different approach through COVAX, which would have enabled a more equitable and efficient system. However, for COVAX to be a success and to centralize a good share of the global distribution of vaccines, we would have required much better mechanisms of political control and accountability, better forms of citizen engagement and participation, and more legitimate international institutions.

If we can learn anything from our own mistakes, with a view to not repeat them in the future, if we can get better prepared for tackling the next pandemic as well as for dealing better with the other global existential threats, it is time to carefully reflect on all these issues and work hard to trigger a stronger global solidarity through a better collective intelligence.

SUMMARIES

Solidarity and COVID-19: A Foucauldian Analysis
Marli Huijer
In response to the COVID-19 pandemic, most governments in Europe have imposed disciplinary and controlling mechanisms on their populations. In the name of solidarity, citizens are pressed to submit to lockdowns, social distancing or corona apps. Building on the historical-philosophical studies of Michel Foucault, this article shows that these mechanisms are spin-offs of health regimes that have evolved since the seventeenth century. In case of COVID-19, these regimes decreased the infection, morbidity and mortality rates. But, as a side-effect, they limited the opportunities to act together and practice solidarity. This negatively affected the social cohesion and public sphere in already highly individualistic societies. To prevent the further disappearing of solidarity – understood as something that is enacted rather than as a moral value or political principle – governments and citizens need to invest in the restoral of the social conditions that enable and facilitate the practicing of solidarity after the epidemic.

Solidarity and Community: From the Politics of the Clan to Constituent Power
Luigi Corrias
What is at stake in invoking solidarity in legal-political contexts? The guiding hypothesis of this article is that solidarity is always and necessarily linked to the concept of community. A plea for solidarity will, in other words, directly lead one to the question: solidarity with whom? On the one hand, solidarity may be understood as extending only to those who belong to the same community as us. In this reading, solidarity builds upon an already existing community and applies to members only. On the other hand, invoked by those who aim to question the *status quo*, solidarity also plays a key role in practices of contestation. In these contexts, it focuses on collective action and the reimagination of political community. The article ends by articulating how this second interpretation of solidarity might prove helpful in making sense of our current predicament of a global pandemic.

Sick and Blamed: Criminal Law in the Chilean Response to COVID-19
Rocío Lorca
The Chilean government called upon ideas of social solidarity to fight the pandemic of SARS-CoV-2 and it relied heavily on the criminal law in order to secure compliance with sanitary restrictions. However, because restrictions and prosecutorial policy did not take into account social background and people's ability to comply with the law, prosecutions soon created groups of people who were being both over-exposed to disease and death, and over-exposed to control, blame and punishment. The configuration of this overpoliced and underprotected group became so visibly unjust that appealing to social solidarity to justify the criminal enforcement of sanitary restrictions became almost insulting. This forced the *Fiscal Nacional* to develop a 'socially sensitive' prosecutorial strategy, something that we have not often seen despite Chile's inequalities. The changes in policy by the *Fiscal Nacional* suggest that perhaps, at times, penal institutions can be made accountable for acting in ways that create estrangement rather than cohesion.

Welcoming the Other in a Pandemic Society
Thomas Jacobus de Jong & Carina van de Wetering

This contribution explores the meaning and scope of solidarity with the emergence of the coronavirus discourse as formulated by politicians in order to make sense of the virus. It offers a poststructuralist account drawing on discourse theory together with insights from Levinas and Derrida. This leads to a critical reflection on the prevailing view of solidarity as secondary and derivative to corona policies, because solidarity is often subjugated to hegemonic meanings of efficiency. Instead, the argument is made that solidarity refers to the unique responsibility to which the other as wholly other commands me. This appeal for responsibility, that is presented in the face of the other, is to be assumed in the distance between the rules and the singularity of the situation. Accordingly, solidarity is described as a paradox of dependence (calculability) and independence (beyond calculation), that appears in a moment of undecidability, for it can never be overcome.

Living with Others in Pandemics. The State's Duty to Protect, Individual Responsibility and Solidarity
Konstantinos A Papageorgiou

The article discusses a range of important normative questions raised by anti-COVID-19 measures and policies. Do governments have the right to impose such severe restrictions on individual freedom and furthermore do citizens have obligations vis-à-vis the state, others and themselves to accept such restrictions? I will argue that a democratic state may legitimately enforce publicly discussed, properly enacted and constitutionally tested laws and policies in order to protect its citizens from risks to life and limb. Even so, there is a natural limit, factual and normative, to what the state or a government can do in this respect. Citizens will also need to take it upon themselves not to harm and to protect others and in the context of a pandemic this means that endorsement of restrictions or other mandatory measures, notably vaccination, is not to be seen as a matter of personal preference concerning the supposedly inviolable sovereignty of one's own body.

Suffering from Vulnerability. On the Relation Between Law, Contingency and Solidarity
Benno Zabel

The COVID-19 crisis has produced or amplified disruptive processes in societies. This article wants to argue for the fact that we understand the meaning of the COVID-19 crisis only if we relate it to the fundamental vulnerability of modern life and the awareness of vulnerability of whole societies. Vulnerability in modernity are expressions of a reality of freedom that is to some extent considered contingent and therefore unsecured. It is true that law is understood today as the protective power of freedom. The thesis of the article, however, boils down to the fact that the COVID-19 crisis has resulted in a new way of thinking about the protection of freedom. This also means that the principle of solidarity must be assigned a new social role. Individual and societal vulnerability refer thereafter to an interconnectedness, dependency, and a future perspective of freedom margins that, in addition to the moral one, can also indicate a need for legal

protection. In this respect, law has not only a function of delimitation, but also one of inclusion.

Solidarity, Religious Freedom and COVID-19: The Case of the Ultra-Orthodox Sects in Israel
Miriam Gur-Arye & Sharon Shakargy
The article discusses the tension between social solidarity and religious freedom as demonstrated by the refusal of the ultra-Orthodox sects in Israel to comply with COVID-19 regulations. The article provides a detailed description of the refusal to comply with the regulations restricting mass prayer services in synagogues and studying Torah in the *yeshivas*, thus interfering with the ultra-Orthodox religious life. The article suggests possible explanations for that refusal, based on either religious beliefs or a socio-political claim to autonomy, and discusses whether the polity should be willing to tolerate such a refusal on the basis of the cultural defence. The article concludes that despite the drastic restrictions on religious life caused by the social distancing regulations, and the special importance of freedom of religion, reducing the pandemic's spread called for awarding priority to solidarity over religious freedom, and the enforcement of social solidarity legal duties – the social distancing regulations – on all.

Dividing the Beds: A Risk Community under 'Code Black'?
Tobias Arnoldussen
During the COVID-19 crisis a risk of 'code black' emerged in the Netherlands. Doctors mentioned that in case of code black, very senior citizens might not receive intensive care treatment for COVID-19 due to shortages. Sociologist Ulrich Beck

argued that palpable risks lead to the creation of new networks of solidarity. In this article this assumption is investigated by analyzing the different storylines prevalent in the public discussion about 'code black'. Initially, storylines showing sympathy with the plight of the elderly came to the fore. However, storylines brought forward by medical organizations eventually dominated, giving them the opportunity to determine health care policy to a large extent. Their sway over policy-making led to a distribution scheme of vaccines that was favourable for medical personnel, but unfavourable for the elderly. The discursive process on code black taken as a whole displayed a struggle over favourable risk positions, instead of the formation of risk solidarity.

What Solidarity? A Look Behind the Veil of Solidarity in 'Corona Times' Contractual Relations
Candida Leone
The article uses three prominent examples from the Dutch context to problematize the relationship between contractual and social solidarity during the coronavirus crisis. The social science ideal types of 'mechanical' and 'organic' solidarity, and their typified correspondence with legal modes of punishment and compensation, are used to illuminate the way in which solidarity language in private relationships can convey and normalize assumptions about the public interest and economic order.

The Exceptionality of Solidarity
Amalia Amaya Navarro
In times of crisis, we witness exceptional expressions of solidarity. Why does solidarity spring in times of crisis when it wanes in normal times? An

inquiry into what may explain the differences between the expression of solidarity in crisis vs. normalcy provides, as I will argue in this article, important insights into the conditions and nature of solidarity. Solidarity requires, I will contend, an egalitarian ethos and state action within and beyond the state. It is neither a momentary political ideal, nor an exclusionary one, which depends for its sustainment on formal, legal, structures. Transient, sectarian, and informal conceptions of solidarity unduly curtail the demands of solidarity by restricting its reach to times of crisis, to in-group recipients, and to the social rather than the legal sphere. The article concludes by discussing some aspects of the dynamics of solidarity and its inherent risks that the analysis of the exceptionality of solidarity helps bring into focus.

Justice and Coercion in the Pandemic
Matt Matravers
Coercion plays two essential roles in theories of justice. First, in *assuring* those who comply with the demands of justice that they are not being exploited by others who do not do so. Second, in responding to, and managing, those who are *unreasonable*. With respect to the first, responses to the pandemic have potentially undermined this assurance. This is true in the distributions of vaccines internationally, and in some domestic contexts in which the rich and powerful have avoided public health guidance not to travel, to isolate, and so on. With respect to the second, the article considers whether those who refuse to be vaccinated are unreasonable, and if so, what follows for how they ought to be treated.

Populism, the Kingdom of Shadows, and the Challenge to Liberal Democracy
Massimo La Torre
Populism is a somehow intractable notion, since its reference is much too wide, comprising phenomena that are indeed in conflict between them, and moreover blurred, by being often used in an instrumental, polemical way. Such intractability is then radicalized through the two alternative approaches to populism, one that is more or less neutral, rooting in the political science tradition, and a second one, fully normative, though fed by political realism, founding as it does on a specific political theory and project. In the article an alternative view is proposed, that of populism as the politics that is congruent with the increasing role played by 'screens', icons, and images in social relationships and indeed in political representation. In this way populism is approached as the specific way politics is done within the context of a digitalized *société du spectacle*.

Global Solidarity and Collective Intelligence in Times of Pandemics
José Luis Martí
Some of the existential threats we currently face are global in the sense that they affect us all, and thus matter of global concern and trigger duties of moral global solidarity. But some of these global threats, such as the COVID-19 pandemic, are global in a second, additional, sense: discharging them requires joint, coordinated global action. For that reason, these twofold global threats trigger political – not merely moral – duties of global solidarity. This article explores the contrast between these two types of global threats with the purpose of clarifying the distinction between

moral and political duties of global
solidarity. And, in the absence of a
fully developed global democratic
institutional system, the article also
explores some promising ways to fulfill
our global political duties, especially
those based on mechanisms of
collective intelligence such as Crowd-
Law, which might provide effective
solutions to these global threats while
enhancing the democratic legitimacy
of public decision-making.

ABOUT THE AUTHORS

Tobias Arnoldussen is Assistant Professor of Jurisprudence at Tilburg Law School.

Lukas van den Berge is Assistant Professor of Legal Theory at Utrecht University.

Luigi Corrias is Assistant Professor of Legal Philosophy, Vrije Universiteit Amsterdam.

Antony Duff is Emeritus Professor of Philosophy at the University of Stirling and Emeritus Professor of Law at the University of Minnesota.

Miriam Gur-Arye is the Judge Basil Wunsh Professor of Criminal Law, Faculty of Law, The Hebrew University of Jerusalem.

Marli Huijer is Emeritus Professor of Public Philosophy at Erasmus University Rotterdam.

Thomas Jacobus de Jong is senior parketsecretaris at the Netherlands Public Prosecution Service (OM).

Massimo La Torre is Professor of Philosophy of Law, 'Magna Graecia' University of Catanzaro, Italy, and Visiting Professor of European Law, University of Tallinn, Estonia.

Candida Leone is Assistant Professor at the, Amsterdam Centre for Transformative Private Law.

Rocío Lorca is Assistant Professor at *Universidad de Chile*'s School of Law.

José Luis Martí is Associate Professor of Legal and Political Philosophy, Department of Law, Pompeu Fabra University of Barcelona.

Matt Matravers is Professor of Law, University of York, York, UK.

Amalia Amaya Navarro is British Academy Global Professor of Legal Philosophy at the University of Edinburgh.

Konstantinos A Papageorgiou is Professor of the Philosophy of Law at the National and Kapodistrian University of Athens, School of Law.

Sharon Shakargy is a Senior Lecturer at the Faculty of Law, The Hebrew University of Jerusalem.

Wouter Veraart is Professor of Legal Philosophy at the Vrije Universiteit Amsterdam.

Carina van de Wetering is Lecturer in International Relations at the Institute of Political Science at Leiden University.

Benno Zabel is Professor of Criminal Law and Philosophy of Law at the University of Bonn.