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LAW IN THE AGE OF THE 4TH INDUSTRIAL REVOLUTION: BETWEEN THE IMPERSONAL TECHNOLOGY AND SHADOW ORDERS

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The time in which we live is not easy. On the one hand, the latest technological advances create an illusion of unprecedented progress. On the other hand, it appears that millions of people in the world are deprived from the opportunity to use these advances in their everyday lives. Moreover, it appears that these technological advances can cause more problems than they help to solve. This situation also applies to the legal sphere where the law is gradually turning into a neutral, depersonalized technique. Mostly restrictive, repressive and estranged from the will of individual social associations, such law (law as a mere technique) generates rather radical responses in the form of different "shadow" (unofficial) norms, institutions and practices. In this paper the problem of a possible clash of the official positive law with shadow social orders is analyzed. Trying to find the way out of the false dichotomy between the technologized official law and fundamentalist rules of some narrow communities, the author discusses the origins and weak spots of the contemporary legal order.

Keywords: crisis; legal order; law and technology; legal positivism; legal pluralism; social credit system; technological normativity; unofficial law.

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Introduction

What does it mean for law to be modern? To be advanced, progressive, effective? To take account of the latest social and technological changes and reflect these changes in the legislation? We want to think so and we used to think so. Life has become fast. We are accustomed to the finished products that circulate in the space of various contemporary markets, so almost everything in our eyes has turned into either a commodity for our consumption or a technical tool for the realization of our needs. We are used to thinking that things around us must change permanently. We are obsessed with new technologies. Technological achievements are seen by the majority of people today as something that will definitely improve their life.

Oddly enough, this mode of thinking also applies to the sphere of social relations, including the legal regulation of human behavior. Whereas the least changes in social relations bring with them certain changes in the written law, new technological devices based on computer algorithms and Big Data analytics gradually replace written law (and law in general?) in regulating human behavior. Law is being transformed in its core, and therefore our behavior and our everyday-lives are being transformed. May we consider these processes as revolutionary? In the time of the so-called *4th Industrial Revolution*[1] that might be a convincing explanation, however we should not forget the former legal history that made these transformations inevitable. Eventually, it may turn out, that the present technological shift in the legal regulation appears as a natural consequence of the previous development of

[1] *See* Klaus Schwab, *The Fourth Industrial Revolution* (2006); Luciano Floridi, *The Fourth Revolution: How the Infosphere Is Reshaping Human Reality* (2014).

law and jurisprudence. So, the understanding of today's "revolution" in the form of law and methods through which it constitutes the social order may require a careful examination of the type of legal thinking generally accepted over past centuries.

Looking at the contemporary law from this perspective, we can not only describe its present state, but also discover the inner contradictions of today's legal order. Along the way we can make a few interesting findings relating to the essence of law, social being and the modern crisis.

This paper has two aims. The first aim is to investigate what the present technological changes in the domain of legal regulation bring with them and how these changes are connected to the previous history of legal development (and, particularly, to legal positivism). The second aim is to examine the existing responses to the official positive, "technologized" law and to discover the possible threats that these responses imply. Achievement of these aims, in turn, leads to the question whether the way in which contemporary legal systems are developing is the only possible way, and if there are any alternatives to the dominant approaches to law, legal regulation and conflict resolution besides the shadow unofficial orders that already exist.

The outlined aims define the structure of the paper which is as follows. In § 1 the history and present significance of positivist legal thinking are briefly examined. Here I try to realize what legal positivism means today, in the age of state desovereigntization and the formation of global governance institutions. § 2 is devoted to the problem of the law's conversion into a mere technique and the emergence of the new, so-called "technological," normativity, which is tightly connected to the use of artificial intelligence (hereinafter "AI"). In § 3 a possible contest of unofficial norms and social orders with the norms and practices of the official positive, "technologized" law is discussed. The conclusion sums up the findings made in the paper and poses the question of the possibility of an alternative type of legal thinking.

Before addressing all these issues, it is necessary to clarify the theoretical framework within which this study has been made. I follow the institutional and, more broadly, sociological approach to law, so I do not understand the latter as merely a set of rules. As was convincingly argued by Santi Romano, law is equal to the legal order, and the legal order, in its part, should be seen as an entity "that partly moves according to the norms, but most of all moves the norms like pawns on a chessboard"[2] – in other words, norms serve as paraphernalia to the law, not as its sole or predominant content. From my point of view, the neglect of this truth historically led to the law's alienation from the interests and values of certain social associations and its conversion into a mere technique – the problem that gives rise to a number of difficulties for the contemporary social order.

Based upon the institutional approach to law and the Schmittian "concrete-order thinking,"[3] this research generally also follows the humanist approach. In my opinion,

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[2] Santi Romano, *The Legal Order* 7 (Mariano Croce trans., 2017) (1946).

[3] *See* Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph W. Bendersky trans., 2004) (1934).

it should be borne in mind that hitherto a *human* has stood in the center of any legal order, so the law (and, consequently, legal norms that form a part of it) in any case dealt with certain manifestations of human will, be it in the form of prescribing a model of behavior to a person,[4] in the form of mediating social relations,[5] or in the form of providing the framework for interpersonal communication.[6] In this very sense reference to Hegel's *Philosophy of Right*, contained in the paper and addressing the notion of "free human will," should be understood. Though today such references may be perceived as irrelevant due to their close ties with the liberal legal doctrine and political philosophy of the modern state, they nevertheless maintain their relevance and today they are probably as important as ever, since human will is being eliminated by advanced technological devices and mechanisms. To my mind, we cannot and must not detach the law from its human dimension, despite the growing popularity of legal approaches that try to pose the question of non-human legal personhood that belongs to animals, robots, or different material objects, such as rivers, seas, nature, etc.[7] Whereas such approaches are intended to broaden our epistemological horizons and grant a "legal voice" to the entities that are already participating in legal matters, it may emerge that alongside the weakening of its volitional moment the law will soon get rid of any subjectivity.

Many works based on the critical legal, feminist, and posthuman approaches to law have been published.[8] Often, they rightfully deconstruct the ideological, anthropocentric, patriarchal and capitalist fetishes of the legal theory of the 19th–20th centuries. However, aimed primarily on deconstruction, they risk "throwing the baby out with the bathwater." Critical to the technicism and instrumentalism of contemporary jurisprudence, this research follows Heideggerian insights relating to the essence of technique and to the place of a human in the structure of the Being (*das Sein*).[9]

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[4] This statement can be characterized as a part of traditional, normative understanding of law.

[5] … which may be specified as commodity relations. *See* Evgeny B. Pashukanis, *The General Theory of Law and Marxism* (Barbara Einhorn trans., 2003) (1929).

[6] *See* Mark Van Hoecke, *Law as Communication* (2002).

[7] *See, e.g.*, Dinah Shelton, *Nature as a Legal Person*, 22 VertigO – la revue électronique en sciences de l'environnement (2015); Gabriel Eckstein et al., *Conferring Legal Personality on the World's Rivers: A Brief Intellectual Assessment*, 44(6-7) Water Int. 804 (2019); Jan-Erik Schirmer, *Artificial Intelligence and Legal Personality: Introducing "Teilrechtsfähigkeit": A Partial Legal Status Made in Germany* in *Regulating Artificial Intelligence* 123 (Thomas Wischmeyer & Timo Rademacher eds., 2020).

[8] *See, e.g.*, Maneesha Deckha, *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm*, 50(4) Alta. L. Rev. 783 (2013); Ana Oliveira, *Subject (in) Trouble: Humans, Robots, and Legal Imagination*, 9(2) Laws 1 (2020).

[9] According to Heidegger, "the stone (material object) is *worldless*; the animal is *poor in world*; man is *world-forming*." Heidegger considered that human behavior in its proper sense is related to the specific manner of being which belongs to man and differs with the behavior of an animal, involving not behavior, but "*comporting oneself toward …*" *See* Martin Heidegger, *The Fundamental Concepts of Metaphysics: World, Finitude, Solitude* 177, 237 (William McNeill & Nicholas Walker trans., 2001) (1983).

1. Legal Positivism and its Aftermath

1.1. Legal Positivism as the Dominant Paradigm

The issue of understanding the law has always been the object of much controversy between jurists. This is really not an idle problem because ultimately the appearance of the whole social and legal order depends on the actual relationship between a legislative norm, a judicial discretion and a legal doctrine, on the recognition of the power of different state and non-state actors to set obligatory rules, and, finally, on the space where juridical conflicts of persons are resolved[10] (at least, until recently this statement has been correct).

As vividly shown in a range of studies,[11] since approximately the 19th century positivist legal thinking has been established as the dominant paradigm of understanding the law. This is undoubtedly connected to the successful development of the model of a sovereign territorial state. As precisely noted by Reginald Parker, nothing but legal norms originating from a state is law for the positivist jurisprudence.[12] There is a clear explanation of such an approach that may seem to be strange and even primitive if we compare it to the premodern types of legal thinking – types that bring to the fore supra-statutory natural fundamentals or the concrete social orders of the Church, a guild, a commune, etc. Legal positivism meant nothing more than the idea that a state is the supreme source of social power and social norms, and therefore only a state has the right to define what is the law and what is not the law. Territorial borders of states became the bounds of national legal regimes, and even in the sphere of international relations the will of the states turned into the base of legal regulation. For a long time, lawyers, especially practicing lawyers, have forgotten that there can be another law besides the positive law.

This state of things was absolutely normal and natural in the period of the rise of a sovereign territorial state, which is related to the age of modernity and industrial paradigm of social development. But by the 21st century a series of shifts in the condition of the sovereign territorial statehood has taken place. First of all, the sovereign state model faced grave challenges originating from the economy and the development of the latest information technologies: the globalization of production and commodity exchange, mass migration, real-time economic transactions, instant

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[10] The problem of *forum* where the justice is dispensed is thoroughly investigated in Paolo Prodi, *Una storia della giustizia: dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (2000). For an examination of the issue of legal spatiality from the postmodernist perspective *see* Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (2014).

[11] Harold J. Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2004); Prodi 2000; Hans Jörg Sandkühler, *Nach dem Unrecht: Plädoyer für einen neuen Rechtspositivismus* 142–183 (2015); Carl Schmitt, *The Plight of European Jurisprudence*, 83 Telos 35 (1990).

[12] Reginald Parker, *Legal Positivism*, 32(1) Notre Dame L. Rev. 31 (1956).

and decentralized dissemination of information, etc. With the globalization of economic processes new rule-making and administrative institutions were born. The state ceased to be the sole and universal unit of the international legal order. The new "transnational" (or "global") law, in which norms mainly have unconventional origin,[13] has replaced the classical international law descending from the inter-state conventions. As they are now less effective in the regulation and administration of economic processes, states also lost a part of their rights relating to domestic matters. Moreover, even the notion of sovereignty gained a new meaning, rather far from understanding it as a right.[14]

Does this mean that legal positivism is passing away? Unfortunately, no. Although for the last two centuries legal positivism meant that only a state can make obligatory rules considered as law and recognize customary social norms as legal norms, the significance of this doctrine lies not only in the assertion that law depends on a state apparatus. We should look the other way at legal positivism, then we will be able to realize that the main trait of this type of legal thinking is probably not its position on the sources of law and institutions creating law, but its attitude to understanding law as a *technique*.

1.2. Legal Positivism's True Significance

This is really the state's merit. While the sovereign nation-state affirmed its monopoly on the making of obligatory norms, it formatted the law to fit its needs turning it into a technical tool. "[Y]our jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class"[15] – the words addressed by young Karl Marx and Friedrich Engels to the German bourgeoisie are commonly understood as a reference to the class nature of any law.[16] However, they also and probably above all draw attention to the fact that law as a normative system serves as an obedient *instrument* acting according to the will of a certain social group. In my opinion, it is not coincidental that the instrumental essence of law is proclaimed in the text

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[13] Gianluigi Palombella, *The Rule of Law in Global Governance: Its Normative Construction, Function and Import* (2010) (Oct. 2, 2020), available at https://ssrn.com/abstract=1561289.

[14] *See* Francis M. Deng, *From "Sovereignty as Responsibility" to the "Responsibility to Protect,"* 2 Global Responsibility to Protect 353 (2010); Hannes Peltonen, *Sovereignty as Responsibility, Responsibility to Protect and International Order: On Responsibility, Communal Crime Prevention and International Law*, 7(28) Uluslararası İlişkiler 59 (2011); Vladimir Kirushev, *State Sovereignty and Intervention in the Age of Responsibility to Protect: Analysis of Libya and Syria*, MSc, MA Thesis, George Mason University, University of Malta (2013) (Oct. 2, 2020), available at http://mars.gmu.edu/jspui/bitstream/handle/1920/8718/Kirushev_thesis_2013.pdf; Roberta Cohen & Francis M. Deng, *Sovereignty as Responsibility: Building Block for R2P* in *The Oxford Handbook of the Responsibility to Protect* 74 (Alex J. Bellamy & Tim Dunne eds., 2016).

[15] Karl Marx & Friedrich Engels, *The Communist Manifesto* 58 (2008).

[16] *See, e.g.*, Hugh Collins, *Marxism and Law* 27 (1982); Andrew Vincent, *Marx and Law*, 20(4) J.L. & Soc. 371, 384 (1993).

addressed to the bourgeoisie, the class that climbed to the top of the social hierarchy in the epoch of the rising industry and industrial mastery of the world. The fact is that both capitalism and modern legal systems together with the type of legal thinking predominant today originate from the specific historical situation of the industrial revolution, so by the name of the bourgeois law we should recognize the law of the age of modernity in general, *modern law* in any sense of this word-combination. Marx and Engels were correct in the idea that bourgeois law is but the will of this class, however they probably did not realize themselves how right they were. It is precisely the modern law of the capitalist age that for the first time in history and in such an obvious form appears as a pliable means of dictating *any* will.

It is time to remember that medieval legal systems were never monistic, but were always characterized by the pluralism grounded on the coexistence of different social associations in the common social space.[17] As already noted by Paolo Grossi, law had its own autonomy and was generated from the bottom.[18] Thus, it differed from the law, to which we have got accustomed and which expresses a superior arbitrary will descending top-down. Legal norms stemmed from the relevant social orders which included the family, the professional guild, the estate, the manor, the Church and, finally, the state (kingdom) as the order of orders. These norms could not be arbitrary and were not established in a voluntarist way, because they were connected to these specific orders characterized by stability, continuity and multiple sources of will. The ancient legal systems of the slave-owning era, even those that idolized the rulers and provided them with absolute power, were still too tightly attached to the archaic pre-state tribal customs, so often it was rather difficult to use them as flexible tools of the imposition of the rulers' arbitrary will. Much of the ancient law applied by the courts was customary law, derived from timeless tradition,[19] so it had sacral meaning and could not be just a technical instrument in the hands of a king, priests or any collective body. And even law codes and king's legislation of the antiquity bore the imprint of the primary legal acts that constituted the grounds of legal being of a certain people.

Yet, all these statements do not relate to the modern law, which historically developed through its separation from morals.[20] It was shaped as a neutral technical instrument, the competence for the use of which belongs to a limited scope of actors, namely the state and those whom the state empowers. As Kieran Tranter

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17 *See* Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 9 (1983); Paolo Grossi, *A History of European Law* 34 (2010). The concept of social association was proposed and developed by Eugen Ehrlich. *See* Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* 39 (Walter L. Moll trans., 2001).

18 Grossi 2010, at 4–5.

19 Raymond Westbrook, *Introduction: The Character of Ancient Near Eastern Law* in 1 *A History of Ancient Near Eastern Law* 1, 14 (Raymond Westbrook ed., 2003).

20 *See* Prodi, *supra* note 10.

rightly points out, law was no longer law because of custom or nature, but rather because of a valid lawmaking act of the sovereign.[21] Such law in its essence had to be neutral and indifferent to any values, hence it could always be filled with any value content.

Today we rather often meet with the doctrinal statements according to which law appears as the domain of freedom, equality and justice.[22] The values of representative democracy, individual liberties and private property are usually associated with the rule of law doctrine,[23] so there is a strong temptation to regard them as meta-juridical values peculiar to the law in general or, at least, to the law as it should be. Though this approach may seem to be graceful, and the genealogy of the aforenamed values goes back to the same times from which the neutral law-technique originates, they have never been meta-juridical. It was always enough to pass several new statutes and repeal some old ones in order to abandon these values in favor of some others: collectivism, state ownership, so-called "democratic centralism," etc. This moment of legal philosophy always seemed to be rather seductive for the radical adversaries of the existing social order, who expected to take state power and fill the law with appropriate normative and ideological content.[24] In spite of the revolutionary tasks of the Marxist political movement and radical changes in the law's normative content the essence of law did not change. The law of Soviet Russia, Maoist China, Castroist Cuba and Chavist Venezuela remained the same *modern*, *bourgeois law*, which was the object of Marx's criticism – even if it denied private property and other bourgeois liberties. For liberals and conservatives, communists and capitalists the law long ago ceased to be something more than a technical tool.

The isolation from the interests and needs of any stable communities, except for the state apparatus, was compensated for a long time by the fact that the state represented itself in the public discourse as almost the only value and aim. The statutory law, inasmuch as it always acted as an expression of the state's will, was conceptualized as one of the most important elements in the etatist axiology. Following the state's orders, finalized in the form of a statute or a judicial precedent, has always been asserted as one of the main social benefits both in the everyday

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21 Kieran Tranter, *Nomology, Ontology, and Phenomenology of Law and Technology*, 8(2) Minn. J.L. Sci. & Tech. 449, 457 (2007).

22 *See, e.g.*, Gustav Radbruch, *Rechtsphilosophie: Studienausgabe* 35 (2003); Valery D. Zorkin, *The Essence of Law: Lecture Before the Participants of the VII Saint-Petersburg International Legal Forum on 18 May 2017* (Oct. 2, 2020), available at http://www.ksrf.ru/en/News/Documents/V.D.Zorkin_The%20Essence%20of%20Law_Lecture_2017-05-18.pdf; *Зорькин В.Д.* Справедливость – императив цивилизации права // Вопросы философии. 2019. № 1. С. 5–14 [Valery D. Zorkin, *Justice is an Imperative of the Civilization of Law*, 1 Voprosy Filosofii 5 (2019)].

23 Anthony Valcke, *The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)* (2012) (Oct. 2, 2020), available at https://ssrn.com/abstract=2042336.

24 *See, e.g.*, Vladimir I. Lenin, *The State and Revolution* (Robert Service trans., 2009).

political discourse and in the speeches, proclaimed from the university rostrums. Of course, lawyers often criticized this or that law; in such cases the attention was usually paid to the defects of certain legislation provisions, to their corruptive nature, to procedural violations, etc. University professors might even stigmatize certain statutory acts as unlawful or contradictory to the constitutional norms and the rule of law principle. But almost nobody paid attention to the fact that positive law, having suppressed and made marginal any other systems of social regulation, became the only (and therefore useless) criterion in relation to itself. Even rare natural law maxims which are popular among university scholars (e.g. references to the inalienable rights, that anyway required state guarantees, and to the subjection of the statutory laws to the ideal realm of the perpetual principles, the interpretation of which was still the state bodies' prerogative) couldn't change this situation.

With the weakening of the nation-state model and the decay of state-centered ideology the inner emptiness of modern law is becoming more and more evident. Positive law originating from the state proclaims the same etatist values as before. But the state, ceasing to be the expression of the *universal* (*die Allgemeinheit*), if using the concept of Hegel,[25] and being deeply transformed by the processes of the global crisis,[26] more and more often has to act by means of direct coercion. It is becoming increasingly difficult for the state to convince its citizens of the significance of rules it produces. If we look at the peculiarities of the present national legal systems from this point of view, the causes of the so-called excessive regulation[27] and the increase of draconian exceptional rules in the form of ordinary legislation[28] will become clear. The state facing a deep global crisis has no other support except for the *law as a technique*, and *law as a police truncheon*. The irony, however, is that even outside the sphere of competence of the state, at the supranational level, in cross-border relations, law is no more than such a truncheon, a nonchalant means for any purpose.

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[25] Georg W.F. Hegel, *Philosophy of Right* (1978), § 260, 270.

[26] For a good observation of the crisis processes that affect the contemporary international legal order *see* Bill Bowring, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (2008); Mette Eilstrup-Sangiovanni & Stepanie C. Hofmann, *Of the Contemporary Global Order, Crisis, and Change*, 27(7) J. Eur. Public Policy 1077 (2020). For a broader examination of the contemporary global crisis *see also* Andreas Bieler & Adam D. Morton, *Global Capitalism, Global War, Global Crisis* (2018); Ramón F. Durán, *The Breakdown of Global Capitalism: 2000–2030* (2012).

[27] *See, e.g.*, Thomas Fischer, *Unsinn im Strafgesetzbuch*, Zeit Online, 25 March 2015 (Oct. 2, 2020), available at https://www.zeit.de/gesellschaft/zeitgeschehen/2015-03/strafgesetzbuch-misslungene-gesetzgebung/seite-4; Michael D. Tanner, *Too Many Laws, Too Much Regulation*, Cato Institute, 2 March 2016 (Oct. 2, 2020), available at https://www.cato.org/publications/commentary/too-many-laws-too-much-regulation.

[28] *See* Giorgio Agamben, *State of Exception* 2, 26 (Kevin Attell trans., 2005); Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* 320–321 (2006).

2. Law as a Mere Technique, Technique as a Substitute of Law

2.1. The Motorized Legal System

In the 1930s the German philosopher Friedrich Georg Jünger wrote:

> The technician … tries to define natural law in technical terms, by substituting a technical norm for the juridical norm, by attacking the specifically judicial quality of natural law, and by transforming both the *lex ferenda*, that is, the law in the making, and the *lex lata*, or the established law, according to his technical normative frame of reference. He destroys mechanically the opinio necessitatis, the feeling of rightness; the superseding power of common law grown from the customs of the people; the vital force of the law. <…>
>
> The technician pushes the subject matter of the law into the foreground everywhere, and in the place of statutory law he puts technical regulations. This is the explanation for the boundless flood of legislative matter, for the machinelike production of laws and regulations that are characterized by their technical, normative nature. <…>
>
> To the technician, law is that which serves a technical purpose. Wherever he intrudes into the legal organization, be it in its legislative, its juridical, or its administrative branches, he either supplants the law by technical rules and regulations, or adapts it to his end by means of interpretation.[29]

Apparently, the keen eye of the philosopher found the beginnings of what has risen to its full height already in our time. The present-day law is a combination of well- or poorly concerted voluntarist regulations, determined by the current situation, in the mass of which purely technical rules are gaining more and more weight. It regulates human behavior in the same way as it operates things.

To prove this statement, I will try to point out several observations that may be appraised in different ways, but which to my mind should not be ignored.

The first observation may seem to be quite trivial, especially if we consider it as separate from other shifts in the appearance and nature of the contemporary law. This thesis may be formulated as follows: the present law of any relatively developed country, as well as today's global (transnational) law, contains a large body of specialized norms which are directed primarily towards the regulation not of human relationships but of the interactions between humans and different material objects, technologies, information environments, etc.

The increasing complexity of human society required the specialization of legal regulation in many areas of public life. For each of these areas a significant number

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[29] Friedrich G. Juenger, *The Failure of Technology: Perfection Without Purpose* 78–81 (F.D. Wieck trans., 1956) (1946).

of legal acts has been adopted by the competent authorities. Much of these acts are by-laws, that regulate human behavior in detail. If we look at the legal acts governing activities in the financial markets, in fields of information technology, industry, construction, housing and communal services, we will encounter a huge array of prescriptions that imperatively and thoroughly describe the proper behavior of the entities involved in these areas. These prescriptions can hardly be distinguished from the technical norms. Add to this a significant number of technical norms *stricto sensu*, operating in these areas (e.g. technical regulations, engineering and sanitary standards, building specifications), and the extent to which the normative content of law is neutralized and depersonalized becomes clear.

In 1950 Carl Schmitt published a brief pamphlet,[30] in which he criticized the phenomenon of the so-called *motorized laws*. By this notion and by the notion of the *motorized legislator* Schmitt designated the shifts made in the field of legal regulation after the two world wars.

These shifts appeared in the form of runaway legislation and the replacement of laws by decrees. With all of this going on, Schmitt noted, that

> the motorization of law into mere decree was not yet the culmination of simplifications and accelerations … Whereas the decree was called a "motorized law," the directive became a "motorized decree.[31]

Today we may say that the situation has only been exacerbated. The number of by-laws is growing even more amazingly than the number of laws passed. Provisions that make up the content of these acts are largely aimed at measuring, calculating, and determining the exact order of operations by participants in the relevant relations. Thus, legal norms today are increasingly inclined to regulate impersonal processes and technical operations, rather than human actions determined by free will.

2.2. Dehumanization of Law

It is well known that, according to Hegel, the territory of right is in general the spiritual, and its more definite place and origin is the will, which is free.[32] Now it looks like this statement has lost its actuality, and this is the second observation that I would like to discuss in this article. Of course, in certain types of legal relations, including civil-law matters, family and marital relations, the free declaration of will plays a rather important role as before. Yet, even in this, private-law field, we may observe gradual irreversible changes that one way or another lead to the elimination of the volitional moment from the mechanisms of legal regulation and law-enforcement. A wide

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30 Schmitt 1990.

31 *Id.* at 53.

32 Hegel 1978, at § 4.

dissemination of *clickwrap contracts* (alongside an increase in *qualified consent* rules) in the contemporary digital economy is one of the evidences: when we are going to use an online-service, download or install a certain internet-content, store our personal data, we are being asked to manifest assent to the terms and conditions of these services by checking a box or clicking a button; it goes without saying that rather often in such cases we act automatically, without any reflection, not quite consciously.[33]

In the field of public-law matters the space left for free will is even less. On the one hand, we can see more and more detailed regulation of the most seemingly insignificant areas of human life, so the law is gradually turning into an extensive and ramified catalog of abstract statutory decrees for all kinds of situations. Legislation is tending to be truly omnipresent, and a technical rule becomes the ideal of a legal norm, so the lawyers' craft is reduced mainly to the juggling with the numerous articles and paragraphs of different statutes.

On the other hand, we should pay heed to the process of objectivization of a subject of law.[34] This tendency is particularly expressed in the gradual change-over to the doctrine of *strict liability* in the public (criminal and, especially, administrative) law and, correspondingly, in the expanding of such juristic concepts, as *legal liability*, *crime*, and *offence*.

There is a whole range of examples that show to what extent the volitional moment has been squeezed out from the legal regulation in recent decades. Thus, in France, Russia and some other countries a gradual move towards the implementation of the strict liability doctrine is expressed in the increasing number of convictions for the so-called *iatrogenic crimes*, i.e. injuries, hurt or damage generated by an institutional medical practice, which is often connected with reasonable risk and may be guiltless.[35] It seems like the behavior of a subject of law is rated as a machine functioning, which by the very its definition must be accurate and faultless.

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[33] For a detailed examination of this issue and problems related to it *see, e.g.*, Dan Jerker B. Svantesson, *Private International Law and the Internet* (3rd ed. 2016); Jean-Philippe Moiny, *Cloud Based Social Network Sites: Under Whose Control?* in *Investigating Cyber Law and Cyber Ethics: Issues, Impacts and Practices* 147 (Alfreda Dudley et al. eds., 2012).

[34] Problematization of the *subject of law* and the *subject* in general has formed a rather influential academic discourse in recent years. At that, the emphasis is often made on the equal ontological footing of the subject and the object, their equality and even desirability of replacement of the former by the latter. *See, e.g.*, Graham Harman, *The Quadruple Object* (2011); Oliveira 2020.

[35] On this issue *see* Isabelle Garcia Ducros, *Responsabilité pénale et faute non-intentionnelle du praticien medical*, Ph.D. dissertation, Université Montpellier (2016), at 55–59 (Oct. 2, 2020), available at https://tel.archives-ouvertes.fr/tel-01526681/document; Yu.D. Sergeyev & S.V. Erofeev, *Forensic Medicine and Medical Law in Modern Russia* in *Legal and Forensic Medicine* 553 (Roy G. Beran ed., 2013); *Кузнецов С.В.* Ятрогенные преступления, совершаемые в сфере здравоохранения, и особый подход к судебно-медицинским экспертным исследованиям // Вестник Санкт-Петербургского университета. Медицина. 2018. Т. 3. Вып. 4. С. 419–429 [Semyon V. Kuznetsov, *Iatrogenic Crimes Committed in the Field of Health Care, and a Special Approach to the Production of Forensic Medical Expert Research*, 13(4) Bulletin of Saint Petersburg University. Medicine 419 (2018)].

Probably the most vivid and interesting expression of this "machinization" of subjects of law and the changeover to the strict liability doctrine is the introduction of advanced surveillance mechanisms such as the Chinese "*Social Credit System*" (hereinafter "the SCS") to the practice of public administration.

The SCS is not a sole and unified system, but rather a wide platform (or a project),[36] within which Chinese central and local authorities experiment with various regulative and control mechanisms. At present, this platform comprises:

[1] the joint system of punishments and rewards on the basis of blacklists for "trust breakers" and, correspondingly, redlists for the particularly "trustworthy" persons;

[2] pilot projects of subjects' behavior assessment whereby citizens and organizations are subject to points systems (such projects stem from the credit reporting and scoring tools, but expand their application beyond the financial matters[37]).

Being a tool of social control, the SCS is tightly connected to the advanced technologies of surveillance and data collection, such as facial recognition CCTV systems, public and corporate databases, mobile apps, etc.

While the detailed analysis of the SCS lays beyond the scope of this study,[38] two distinct features of this Chinese innovation must be noted. First, actually the SCS makes possible the administrative punishment beyond the offences (e.g. in case of the low rating in a points system) or in addition to the punishment for the offences done (e.g. inclusion in a blacklist after a wrongdoing) and thereby separates legal liability off the *mens rea*.[39] This is particularly noteworthy because the subject of law ceases to be a figure whose legal status is predominantly conditioned on their conscious deeds. It comes out that even a minor violation in one field of social relations (e.g. in the field of tourism) may cause severe restrictions in a wide field of matters, rather far from the field where the violation was committed.[40] Moreover,

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[36] *See* Genia Kostka & Lukas Antoine, *Fostering Model Citizenship: Behavioral Responses to China's Emerging Social Credit Systems*, 12(3) P&I 256 (2019).

[37] On the applicability of mechanisms of the Social Credit System to neighborhood, labor and family relations *see* Xin Dai, *Enforcing Law and Norms for Good Citizens: One View of China's Social Credit System Project*, 63(1) Development 38 (2020).

[38] For a perfect comprehensive observation of the SCS *see* Rogier Creemers, *China's Social Credit System: An Evolving Practice of Control* (2018) (Oct. 2, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175792.

[39] This trait of the Chinese Social Credit System leads to the question of this system's compatibility to the principle "*Nullum crimen, nulla poena sine lege*." This issue has already been discussed in Marianne von Blomberg, *The Social Credit System and China's Rule of Law*, 2 Mapping China J. 77 (2018).

[40] On 20 January 2016 a group of the PRC's state agencies and party bodies including the Supreme People's Court, the Supreme People's Procuratorate and the People's Bank of China signed the Memorandum, according to which information relating to "dishonest" persons is shared by the Memorandum's participants; at that, such persons are subject to a wide specter of restrictions in various areas, e.g. in the consumption of luxury goods, flying, buying some types of train tickets, etc. *See* Guanyu dui shixin bei zhixing ren shishi lianhe chengjie de hezuo beiwanglu (关于对失信被执行人实施联合惩戒的合作备忘录) [Memorandum of Understanding on Taking Joint Disciplinary Actions

restrictions may be imposed on a person who did not commit any violations at all, but whose everyday habits and style of life (e.g. late credit payments, excessive video gaming, watching pornography too much,[41] visiting mosques too frequently,[42] etc.) were assessed by a points system as insufficiently "trustworthy." Here we come to the second remarkable feature of the SCS. This feature is that the SCS, at least partially, entrusts computer AI-based algorithms with the roles of a judge and an executioner, so no one knows how their social rating is counted and what is to blame. According to the SCS's logic, human's conscious lawful deeds must be gradually replaced by ritualized behavior, within which deeds are rather automatic than conscious. Like a machine, a human is being programmed – by the social designers who develop such systems of control, but this time also by these algorithmic systems themselves.

2.3. Technological Artifacts instead of Legal Norms

The "technologization" of legal systems are greatly facilitated by the use of the latest information technologies in legal regulation and law-enforcement. The changes which have taken place made it possible to speak about the phenomenon of *technological normativity* and regulation of social relations through computer code.[43]

Technological normativity implies the regulation of human behavior through certain technological artifacts, i.e. the technologies' capability of allowing or suspending human actions in the automatic regime. These technological artifacts do not prescribe anything to a person, but act immediately as means that allow or limit the behavior of one kind or another. Such normativity does not appeal to a person's will, but directly defines their actions. As Mireille Hildebrandt notes, technological normativity does not depend on coercive authority but on the socio-technic arrangements that constitute or regulate specific practices like consuming electricity, driving a car, etc.[44]

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against Dishonest Persons Subject to Enforcement] (promulgated by National Development and Reform Commission et al., Jan. 20, 2016, effective Jan. 20, 2016), CLI.4.268723(EN) (Lawinfochina).

41 *See* Felix Lee, *Die AAA-Bürger*, Zeit Online, 30 November 2017 (Oct. 2, 2020), available at https://www.zeit.de/digital/datenschutz/2017-11/china-social-credit-system-buergerbewertung.

42 *See* Bernard Zand, *A Surveillance State Unlike Any the World Has Ever Seen*, Spiegel International, 26 July 2018 (Oct. 2, 2020), available at https://www.spiegel.de/international/world/china-s-xinjiang-province-a-surveillance-state-unlike-any-the-world-has-ever-seen-a-1220174.html; Christina Larson, *Who Needs Democracy When You Have Data?*, MIT Technology Review, 20 August 2018 (Oct. 2, 2020), available at https://www.technologyreview.com/2018/08/20/240293/who-needs-democracy-when-you-have-data/; Darren Byler, *China's Hi-Tech War on its Muslim Minority*, The Guardian, 11 April 2019 (Oct. 2, 2020), available at https://www.theguardian.com/news/2019/apr/11/china-hi-tech-war-on-muslim-minority-xinjiang-uighurs-surveillance-face-recognition.

43 Mireille Hildebrandt, *Legal and Technological Normativity: More (and Less) than Twin Sisters*, 12(3) Techné: Research in Philosophy and Technology 169 (2008); Mireille Hildebrandt, *Smart Technologies and the End(s) of Law* 218 (2015); Lawrence Lessig, *Code: Version 2.0* (2006); Ignas Kalpokas, *Algorithmic Governance: Politics and Law in the Post-Human Era* 24–47 (2019).

44 Hildebrandt 2008, at 174.

As distinct from written rules that prescribe a driver a certain type of behavior, but which are unable to practically prevent them from taking the wheel when they are drunk or tired, technological artifacts like smart cars make de facto situations where a violation of law becomes impossible.

Mireille Hildebrandt is right when she says that traditional law is losing ground against market forces and modern technologies. The latest systems of citizens' behavior monitoring, such as the abovementioned SCS in China and the Aadhaar biometric system in India, presuppose the creation of an integrated social environment, in which lawful deeds of individuals will be determined less by statutory regulations than by the expectations of other market participants (financial institutions, commercial companies, state bodies and individual persons). Whereas the division of law to written (*jus scriptum*) and unwritten (*jus non scriptum*)[45] lost its practical meaning long ago because of the decline of customary law, today the tension between *jus scriptum*, articulated in the official documents, and *jus technicum*, expressed via different technological interfaces, is, probably, being put on the agenda.

This tension, however, may scarcely be characterized as significant. The written law tends to be more depersonalized and is becoming a mere technique. The conversion of *jus scriptum* norms into something similar to the technical rules and the increasing prominence of the subject matter (i.e. the material side) of law, to which Friedrich Georg Jünger payed attention, leads to greater encouragement of the new technological normativity. Thus, legislation provisions that have become similar to technical rules to the point of confusion and regulate meticulously even the least significant operations become fertile ground for the development and use of different legal templates, "robot lawyers" like DoNotPay[46] and software for spotting crime patterns and defining suspects.[47] Of course, the substance of such a law is artificial and false. False, because it is based largely on simplification and averaging. Such a law does not propose taking into account any local customs or norms of particular communities. Despite the end of the state's supremacy in many social matters, it is imposed top-down, as the state's positive law always was. So, it is not natural, but, on the contrary, absolutely *unnatural*. However, many jurists regard this, expressed in the templates, law for the computer bots as true evidence

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[45] This division traces back to the jurisprudence of ancient Rome. *See The Institutes of Justinian* 4–6 (J.B. Moyle trans., 4th ed. 1911).

[46] Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70(1) Hastings L.J. 173, 175–180 (2018); Milan Markovic, *Rise of the Robot Lawyers?*, 61(2) Ariz. L. Rev. 325, 347 (2019).

[47] *See, e.g.*, Michael R. Sisak, *Modern Policing: Algorithm Helps NYPD Spot Crime Patterns*, AP News, 10 March 2019 (Oct. 2, 2020), available at https://apnews.com/84fb03384368458db3d85763b5bf5b94; Micha-Manuel Bues & Emilio Matthaei, *LegalTech on the Rise: Technology Changes Legal Work Behaviours, But Does Not Replace its Profession* in *Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry* 89, 97–98 (Kai Jacob et al. eds., 2017).

of the significant progress reached by modern civilization.[48] Indeed, there is a strong temptation to declare the inevitability of transition to some standards of legal technique[49] as though universal for the whole world, as well as using a technique in its narrowest sense instead of the essentially juridical means of social regulation. In fact, however, this is rather the way of successful societies that still retain strong state institutions, but not of the world as a whole.

Overwhelmed by the latest technological advances applicable to legal issues and being imprisoned by the flat optimism about the expected progress, most of us have lost sight of the existence of alternative systems of social regulation and conflict resolution. These systems are actually in the shadows and many of them have been for a long time. But – an amusing paradox! – it is exactly now that the necessary conditions for their development are taking shape.

3. The Power of the Shadow Order

3.1. Law from the Shadow

It is generally known that a significant proportion of the worldwide population has to live under the circumstances of fragile, collapsed or even failed statehood.[50] The space of such fragile statehood is broadening out. So, latest technological advances remain alien and extremely far for the countries that face deep crisis processes, including the delegitimization and destruction of state institutions. Modern technological interfaces regulating human behavior require a sufficiently developed infrastructure. Such infrastructure does not necessarily have to be built by the state, but necessarily presumes a relative social stability allowing the developing companies to function properly. For the deployment of a system similar to the Chinese SCS or even to its reduced Ecuador analogue, ECU 911,[51] the considerable resources and enough strong state power are required. As cited above, the technological normativity does not depend on coercive authority. But the coercive authority is none the less necessary, firstly, to prevent the plundering of money allocated for

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[48] *See, e.g.*, Rainer Markfort, *Legal Advisor–Service Provider–Business Partner: Shifting the Mindset of Corporate Lawyers* in *Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry* 47, 51–52 (Kai Jacob et al. eds., 2017); Bues & Matthaei 2017.

[49] On the meaning of this notion *see* Rudolf von Jhering, 2 *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* 334–59 (1858); Hans Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant* 17–24 (1939).

[50] *See* The Fund for Peace, Fragile States Index Annual Report (2019) (Oct. 2, 2020), available at http://fundforpeace.org/wp-content/uploads/2019/04/9511904-fragilestatesindex.pdf; Jean-Germain Gros, *Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti*, 17(3) Third World Q. 455 (1996); Robert I. Rotberg, *The Failure and Collapse of Nation-States: Breakdown, Prevention and Repair* in *When States Fail: Causes and Consequences* 1 (Robert I. Rotberg ed., 2004).

[51] About this system *see* Danilo Corral-de-Witt et al., *From E-911 to NG-911: Overview and Challenges in Ecuador* 6 IEEE Access 42578 (2018).

the deployment of the relevant techno-juridical system and, secondly, to guarantee the efficacy of decisions and actions made by such a system. Hence, technological innovations in the legal sphere that were examined in § 2 are not intended for the societies which found themselves at the forefront of the global crisis.

It would, however, be thoughtless to believe that in countries, for which the latest legal and social design technologies are not suitable, everything should remain unchanged in the legal sphere. On the contrary, changes here are not only likely, but almost inevitable. However, these changes are changes of a completely different kind. I take the liberty of asserting that the legal future of countries with undermined or decaying state institutions is connected neither with the further positivation and technicalization of law, nor with the preservation of the familiar written positive law, but lays in the field of development of legal pluralism from below.

Such legal pluralism may be possible only as a product of various forms of the *shadow law* that exist alongside the official positive law, and which are not recognized by the latter.

The concept of *shadow law* was introduced by the contemporary Russian scholar, Dr. Vladimir Baranov. According to Baranov, shadow law is "an antipode of the official (state) system of normative and individual legal regulation," "a code of antisocial rules," a generally dangerous phenomenon that certain segments of society may perceive as a guide for action.[52] Intentionally or not, the concept of shadow law recalls the theoretical insights of Santi Romano who recognized some unlawful (according to the norms of the state) institutionally organized entities as legal orders.[53]

The concept of shadow law is almost never used outside Russia and a few countries of the ex-USSR. Authors outside the ex-USSR prefer to use the more neutral term, *unofficial law*, or to address to Romano's theoretical framework. However, to my mind, the conceptualization of *shadow law* has several advantages.

For better or for worse, contemporary Russian legal scholars, for the most part, adopt not just the position of positivist legal thinking but also a rather strong etatist position.[54] So, by pointing out the dark, shadow nature of some kinds of social norms they try to cast a negative light onto the corresponding forms of regulation. The shadow law is even characterized as "wrong," "anti-law," etc. More important, however, and completely correct is the indication of the deep antagonism of such "shadow" norms

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[52] *Баранов В.М.* О теневом праве // Новая правовая мысль. 2002. № 1. С. 13–20 [Vladimir M. Baranov, *On the Shadow Law*, 1 Novaia Pravovaia Mysl 13 (2002)].

[53] Romano 2017, at 58–60. *Cf.*, especially: "*It is well known that, under the threat of state law, many associations live in the shadows, whose organization can be said to be almost analogous to that of the state, though on a smaller scale*."

[54] This state of things may be explained as a legacy of the Soviet, post-Pashukanis era. For an examination that can shed some light on this issue *see* Rett R. Ludwikowski, *Socialist Legal Theory in the Post-Pashukanis Era*, 10(2) B.C. Int'l & Comp. L. Rev. 323 (1987); Eugene Huskey, *A Framework for the Analysis of Soviet Law*, 50(1) Russ. Rev. 53 (1991).

and practices towards the official positive law. From my point of view, this antagonism does not depend on whether the official law originates from the state rule-making bodies, from institutions of global regulation, or from interstate agreements.

The shadow law exists alongside the official law. At that, these two systems of regulation are not indifferent to each other. Unlike some forms of unofficial law that can peacefully coexist with the official law and are recognized by the latter within certain limits,[55] the shadow law always opposes the official legal order. It regulates social relations and resolves disputes in a different way than the official law. The shadow order uses the official law's weak spots to take the place and the authority of the latter. Such weak spots of the official law are, e.g., the overextended and complicated dispute resolution process, contradictions between the official legal norms and the values of certain communities, etc. The shadow law competes with the official order not only by offering its own norms instead of the official, but also by the creation of institutions running in parallel with the state ones: the parallel courts, rule-making and law-enforcement bodies, and legal liability procedures. Needless to say, at some point these shadow institutions begin to claim to be the only legitimate ones displacing the official institutions and procedural mechanisms into a marginal field.

In regions with declining statehood where official institutions have been delegitimized, shadow law appears to be an authoritative and effective means to put everyday human relations in order. It is effective insofar as official norms, procedures and institutions lose their effectiveness. Bright illustrations of such a replacement of the official law by the shadow law we may observe in war-torn Somalia, Libya and Syria, which at the same time serve as dramatic examples of failed states.

In the areas of Syria and Iraq that fell under the control of the so-called *Islamic State of Iraq and Sham* (*ISIS*) strictly interpreted sharia norms and cruel punishments for its militants had a certain constructive effect in the sense that these legal tools fought the looting and allowed the prevention of uncontrolled violence against civilians under the circumstances of the governmental institutions collapse.[56] The system of sharia courts in Somalia in the hard times of the mid 1990s – early 2000s was in fact the only social force that maintained public order and tried to slow down the country's fragmentation.[57] Draconian rules and law-enforcement measures legitimized by such regulatory systems that stepped out from the shadow, though

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[55] *See, e.g.*, Gabriela Farinha, *Legal Pluralism: Interactions Between Official and Unofficial Laws: The Case Study of a Multi-ethnic Community Farm*, 5(5) Oñati Socio-Leg. Ser. 1181 (2015).

[56] On the issue of the ISIS legal order *see* Daniel Byman, *Understanding the Islamic State – A Review Essay*, 40(4) Int. Secur. 127 (2016); Andrew F. March & Mara Revkin, *Caliphate of Law: ISIS' Ground Rules*, Foreign Affairs, 15 April 2015 (Oct. 2, 2020), available at https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law; Mara Revkin, *The Legal Foundations of the Islamic State*, The Brookings Project on U.S. Relations with the Islamic World, Analysis Paper No. 23 (July 2016) (Oct. 2, 2020), available at https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web.pdf.

[57] *See* Cedric Barnes & Harun Hassan, *The Rise and Fall of Mogadishu's Islamic Courts*, 1(2) J. East. Afr. Stud. 151 (2007).

contradictory to any official legal order, allowed to end the chaos and provide at least a minimum of social predictability.

3.2. The Inevitable Clash of Legal Orders

Indeed, shadow law rears its ugly head first of all there, where official positive law has decayed together with the social and political order that it constitutes. It is wrong, however, to assume that shadow norms and dispute resolution procedures have chances only in fragile states. A grievous paradox of our times is that the rise of shadow law is highly probable in countries with a rather strong state authority and a developed legislation. Moreover, the more state legislation becomes excessive and restrictive, estranged for a person and distinct stable communities, the more shadow norms and institutions become attractive for the broad masses. In other words, the more law merges with the depersonalized, neutral technique, the more different social groups tend to replace it with their own rules, procedures and institutions.

The aforecited statement has a clear explanation. Over the past decades legal systems of many countries have transformed to the sets of omnipresent legislation rules that try to regulate almost everything, down to the issues of family upbringing,[58] sports competitions[59] and "the religious feelings of believers."[60] The motorized legislator from Schmitt's essay has degenerated to the so-called *mad printer*, to use a colloquialism of the Russian opposition addressed to the State Duma of the

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[58] Legislations of the majority of developed countries in our times provide for the forced removal of children from their families. Unfortunately, sometimes broadly interpreted norms relating to the parental duties allow the official bodies to separate the families under the fallacious pretenses (e.g. low income of the family, certain political or religious beliefs of parents, and other reasons). On this issue *see, e.g.*, Ray Jones, *Private Firms are Making Big Money out of Children's Social Services*, The Guardian, 5 December 2018 (Oct. 2, 2020), available at https://www.theguardian.com/society/2018/dec/05/private-firms-making-big-money-childrens-social-services; Denise Wall et al., *Finnish Child Welfare: Child Protection or "For Profit" Foster Care?*, YLE, 8 March 2016 (Oct. 2, 2020), available at https://yle.fi/uutiset/osasto/news/finnish_child_welfare_child_protection_or_for_profit_foster_care/8725326; *Киселева П.* У бедных отбирают детей // Известия. 01.04.2011 [Polina Kiseleva, *Children Are Taken Away From the Poor People*, Izvestiia, 1 April 2011] (Oct. 2, 2020), available at https://iz.ru/news/373153.

[59] It is generally known, that sport today is not something connected with physical culture, but just another market, in which big money and, often, interests of large-scale political entities circulate. Therefore, it comes as no surprise that economic and political significance of sports competitions brings into being a separate system of positive legal regulation both on the national and supranational level. *See* Matthew J. Mitten & Hayden Opie, *"Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution* in *Lex Sportiva: What Is Sports Law?* 173 (Robert C.R. Siekmann & Janwillem Soek eds., 2012).

[60] *Cf.* Федеральный закон от 29 июня 2013 г. № 136-ФЗ «О внесении изменений в статью 148 Уголовного кодекса Российской Федерации и отдельные законодательные акты Российской Федерации в целях противодействия оскорблению религиозных убеждений и чувств граждан» // Собрание законодательства РФ. 2013. № 26. Ст. 3209 [Federal Law No. 136-FZ of 29 June 2013. On Amending the Article 148 of the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation in an Effort to Counteract the Insulting of the Religious Believers' Convictions and Feelings, Legislation Bulletin of the Russian Federation, 2013, No. 26, Art. 3209].

Russian Federation.[61] The latest technological interfaces, through which human behavior is regulated, may already be used to control our social connections, even friendship, as well as everyday acts that previously were not considered as matters of law. Totalitarian nightmares, which writers and artists of the previous century used to scare the public, have become a reality, and, although only a few have clearly realized this, more and more ordinary people are beginning to understand that this legal order is increasingly oppressive and useless for them.

Official legal norms and state institutions impose tough restrictions and prohibitions on an ordinary man and, at the same time, make the realization of his needs and interests more and more problematic (because of the procedural difficulty or norms' ambiguity). The consequences of this state of things are the inflation of official rules and the increasing aspiration of people for the alternative normative mechanisms. Let us suppose, for example, that a judicial procedure of the violated rights' protection requires much time and significant costs, but ultimately does not guarantee any positive result; in this situation it would be quite logical for a man to appeal to some other, extra-legal methods, e.g., to agents of the criminal world.[62] Apparently, this is exactly what the American lawyer Mark A. Cohen had in mind when he wrote:

> Millions lack legal recourse for fear that to seek it might result in legal proceedings, deportation, or retribution from criminals. Human trafficking has reached alarming levels, and a significant segment of the population live in a sub-society outside the rule of law. This deprives millions of basic human rights, emboldens criminals who prey on them, and creates a growing shadow society that is detached from the mainstream. This erodes the rule of law for all and poses multiple threats to society.[63]

However, Dr. Cohen sees the danger to the rule of law and the existing social order only in the legal services'"sky-high prices"[64] and does not want to acknowledge that the "advances in technology," which, in his opinion, help to fix existing problems are also a part of the problem. Expensive judicial procedures and people's inability to defend their rights guaranteed by the positive law are only one of the weaknesses of the official

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61 The sad fact is that not only Russian State Duma became such a "mad printer" that passes hasty laws on any possible matters, but probably the majority of parliaments in the world are now nothing else than technical tools, extremely far from the people's will.

62 In Russian criminal slang there is a special term for such agents. They are called "*reshalshchiki*" (*the solvers*), because they help to solve disputes between other criminals or even between businessmen on the basis of unofficial, shadow norms. It goes without saying, that "the solvers" request certain payments for their services.

63 Mark A. Cohen, *The All-Out Assault on the Rule of Law*, Forbes, 20 February 2017 (Oct. 2, 2020), available at https://www.forbes.com/sites/markcohen1/2017/02/20/the-all-out-assault-on-the-rule-of-law/.

64 *Id.*

order. The other significant weaknesses of the official order are its value neutrality and the de facto taboo on a holistic worldview peculiar to the modern constitutionalism. These causes together make radical anti-government and fundamentalist doctrines rather attractive.

The impersonal monistic set of rules emanating from the institutions of façade democracy gradually ceases to suit those who are convinced of the importance of certain values, who have a holistic worldview and are ready to stand up for it. The believers' communes and cohesive ethnic communities, the convinced supporters of certain political movements, and local associations united by the common domicile and problems jointly resolved – all of them are able to develop their own systems of regulation pitted against the official order. Religious and ethnic communities are, probably, ready for it better than others. The former develop complicated codes of rules on the basis of certain religious doctrines, apply these rules to the marital, commercial, political, intra- and inter-confessional relations, and use special procedures of dispute resolution. The latter act according to their customs and also prefer to resolve disputes and punish the rule-breakers through the institutions that are not recognized within the official order.

It is noteworthy that in the official state discourse there are almost no mentions of such parallel (and adversarial to the official order) mechanisms of social regulation. The official discourse is usually blind to the facts of the functioning of shadow rules; rare cases of recognition of the existence of these rules and social practices are accompanied by such marks as "terrorism," "extremist community," and "criminal organization." For years and years, police officials reported on the activities aimed to strengthen the rule of law and defend the constitutional order. These reports must indicate positive rates, without which the purport of functioning of this service is placed into question. Contrary to these reports, however, here and there facts of blood feud,[65] bride kidnapping[66] and child marriage,[67] female infanticide,[68] and

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[65] *See, e.g.*, Office of the Commissioner General for Refugees and Stateless Persons, Albania: Blood Feuds in Contemporary Albania: Characterisation, Prevalence and Response by the State, 29 June 2017 (Oct. 2, 2020), available at https://www.cgra.be/sites/default/files/rapporten/blood_feuds_in_contemporary_albania._characterisation_prevalence_and_response_by_the_state.pdf; Blood Feud – How They Kill Now in the Caucasus, The Caucasian Knot, 26 December 2017 (Oct. 2, 2020), available at https://www.eng.kavkaz-uzel.eu/articles/41995/; Blood Feud Version Voiced Out After Eldjarkiev's Murder, The Caucasian Knot, 4 November 2019 (Oct. 2, 2020), available at https://www.eng.kavkaz-uzel.eu/articles/48981/.

[66] *See* Charles M. Becker et al., *Forced Marriage and Birth Outcomes*, 54(4) Demography 1401 (2017).

[67] *See, e.g.*, Gabrielle Tétrault-Farber, *Chechen Teenager "Forced" to Marry Police Chief Amid Growing Row in Russia*, The Guardian, 18 May 2015 (Oct. 2, 2020), available at https://www.theguardian.com/world/2015/may/18/chechen-teenager-forced-marriage-russia.

[68] *See* Asian Center for Human Rights, Female Infanticide Worldwide: The Case for Action by the UN Human Rights Council (2016) (Oct. 2, 2020), available at http://www.indiaenvironmentportal.org.in/files/file/Femalefoeticideworldwide.pdf.

other adherence to archaic customs come up. Though we used to think that such customary practices belong to the past, in fact they may be quite tenacious. What is more, some of them should not be understood as archaic, because they are emerging right now as a reaction to official institutions, which do not take into account the interests and needs of individual communities.

In most developed countries, the clash between positive law and the rules of certain communities has a more benign and, at the same time, more open nature. Legal orders of such countries are stable enough to integrate some elements of unofficial institutions. The logic of this integration implies that it is easier to control legalized grassroots institutions of certain communities, than to fight institutions being in the shadows. It is also presumed that unofficial norms will operate in so far as they do not contradict norms of the official law, and therefore they will not sanction acts prohibited by the official positive law. Thus, for example, the *de jure* or *de facto* legalization of certain elements of sharia in non-Islamic European countries has taken place: Muslim marriages are recognized in Finland,[69] sharia councils de facto have tried some kinds of judicial cases in England and Wales,[70] finally, the Islamic *sukuk* obligations were issued in several states and regions (Saxonia-Anhalt, the United Kingdom, and Luxembourg). These steps are being taken, inter alia, to bring, at least partly, the religious rules out of the shadows and to signal to the believers that there is also a place for them within the official legal order.

The problem of collision between official and unofficial norms is being smoothed over, but is scarcely being abolished. On the contrary, enjoying partial legalization within the official order, communities can build up the strength and gradually expand the power of their institutions and norms to the whole society. This is the very what European Islamophobes are afraid of; in their nightmares they cannot get rid of the obsessive vision that the Islamists have seized the power in their countries, and sharia in its most radical interpretations acts everywhere. Alas, these Islamophobes, many of whom consider themselves to be Christians, rarely ask themselves whether there is anything else in the legislation of their countries that truly expresses *their* cultural and axiological needs, and whether what they protect against the "coming sharia" is an empty technique, *a signifier without signified*.[71]

It seems like we are standing on the verge of a lengthy conflict between the techno-positivism of official law and a value-filled pluralism of the shadow social order. It is obvious that the further official law develops in an unchanged direction, the more

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[69] Sanna Mustasaari & Mulki Al-Sharmani, *Between "Official" and "Unofficial": Discourses and Practices of Muslim Marriage Conclusion in Finland*, 7(3) Oxford J. Law Relig. 455 (2018).

[70] Mona Siddiqui et al., *The Independent Review into the Application of Sharia Law in England and Wales* (February 2018) (Oct. 2, 2020), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/678478/6.4152_HO_CPFG_Report_into_Sharia_Law_in_the_UK_WEB.pdf.

[71] *See* Slavoj Žižek, *The Sublime Object of Ideology* 103 (1989).

authority will be gained by various forms of shadow law. All this will be, probably, supplemented by the degradation of state institutions in the most vulnerable countries of the world, on the one hand, and by the growth of the marketized *surveillance state*,[72] on the other. So far, looking around, we may not notice how shadow institutions and norms raise their heads, step out of the shadows, and contrast themselves with the official legal order. Many of these institutions remain too marginal to pose a real danger to it. The *Reichsbürger* movement in Germany[73] and the similar *Back home, to the USSR!* movement in Russia,[74] appealing to the legislation of already non-existent German Reich and the Soviet Union, look funny, but only until they become numerous and begin to impose their rules by force. Today, ISIS supporters in the West act mainly through the doomed to die loners, but in Syria and Iraq they have already demonstrated how serious their plans are and what social order they are trying to build. Under certain conditions, which are determined by the dynamics of the global crisis, ideas, values and norms of the Islamists may become attractive not only for the Arab masses, but also for the native Europeans and, e.g., Christian-born citizens of the American countries. Increasing crisis processes and deep emptiness of the contemporary legal order may also bring to life other similar organizations and communities. Ultimately, ISIS may become a kind of institutional pattern that will be adopted by the followers of some "Christian State" or "Judaic State."[75] The present national legal orders and, probably, also the international legal order will collapse.

Conclusion: Is There Any Way Out of the Deadlock?

It seems like we live in some kind of "post-era," the time of such strange phenomena as the "post-truth"[76] and the "post-humanity," which announces the coming of

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[72] For a deep and perfect analysis of the shift towards the model of surveillance state made by the modern civilization *see* Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019). *See also* Xiao Qiang, *The Road to Digital Unfreedom: President Xi's Surveillance State*, 30(1) J. of Democracy 53 (2019).

[73] *See* Linda Schlegel, *"Germany does not exist!": Analyzing the Reichsbürger Movement,* European Eye on Radicalization, 17 May 2019 (Oct. 2, 2020), available at https://eeradicalization.com/germany-does-not-exist-analyzing-the-reichsburger-movement/.

[74] Ilya Zhegulyov, *Thousands of Russians Have Joined Something Called the "Union SSR" Trade Union, Calling Themselves Soviet Citizens and Refusing to Pay Their Bills*, Meduza, 15 January 2019 (Oct. 2, 2020), available at https://meduza.io/en/feature/2019/01/15/thousands-of-russians-have-joined-something-called-the-union-ssr-trade-union-calling-themselves-soviet-citizens-and-refusing-to-pay-their-bills.

[75] The idea of a halachic state in the West Bank of the Jordan River (aka "the State of Judea"), opposed to the State of Israel, is promoted by the far-right Orthodox settlers that live in the disputed lands of Judea, Samaria and Gaza. *See* more in Danny Rubinstein, *The State of Judea*, Haaretz, 22 January 2007 (Oct. 2, 2020), available at https://www.haaretz.com/1.4952860.

[76] Simona Modreanu, *The Post-Truth Era?*, 6(3) Human and Social Studies 7 (2017).

a "posthuman,"[77] "posthuman knowledge"[78] and "posthumanist jurisprudence."[79] This era, that quite long ago got the name of the postmodernity age, is characterized already by some of the researchers as the time of "post-postmodernity."[80] And this is also the time of what could be called as *post-law*.

What is *post-law* and why should we use this term? *Post-law* may be described as a result of a prolonged development of contemporary legal systems in the direction of legal positivism, technicalization and instrumentalization, that at the same time means the law's estrangement from the bottom forms of social communication and the interests of social associations. This is the law that has become a kind of depersonalized technique (and, at least partially, a technique working on nonhuman registers) and that serves to express any will of the power institutions. We are used to thinking that changes in the world around us must be reflected in the legal system, and first of all in the legislation. We consider such a reflection as evidence of an exorable march of social progress. So, we allowed the law to become so modern that it has almost lost its ties with the ontological grounds of society. And *post-law* means the type of law, which as a matter of principle has ceased to be an expression of the Hegel's *universal*.

Without going into detail, it is possible to conclude that this condition of the legal system manifests the deep crisis of the *modern*, industrial civilization (along with its *post-modern* extensions), so it may be considered as a symptom of a much broader social disease. This condition of legal system cannot be stable, because, as demonstrated above, the technicalized official law generates rather radical responses to itself in the form of different shadow norms, institutions and practices. But, it appears that these shadow norms and institutions have no opportunity to replace today's official norms and institutions in the foreseeable future. They are too different and are directed to express interests and beliefs of too narrow social groups that quite often feud with each other.

Post-law is an alternation of the super-modern and the archaic, the unpersonal and appealing to certain deep-seated values. There cannot be any stability or certainty in following the existing rules. Here, only the permanent collision of different short-term interpretations of the rights and duties of persons becomes possible. From a means of resolving and smoothing out the social conflicts, the law may turn into a source and space of constant competition between the various applicants for

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77 *See* Rosi Braidotti, *The Posthuman* (2013); Luca Valera, *Posthumanism: Beyond Humanism?*, XXV(3ª) Cuadernos de Bioética 481 (2014).

78 Rosi Braidotti, *Posthuman Knowledge* (2019).

79 *See, e.g.*, Jannice Käll, *Converging Human and Digital Bodies: Posthumanism, Property, Law*, LL.D. Thesis, University of Gothenburg (2017) (Oct. 2, 2020), available at https://gupea.ub.gu.se/bitstream/2077/52295/1/gupea_2077_52295_1.pdf.

80 Eric B. Watkins, *The Drama of Preaching: Participating with God in the History of Redemption* 185 (2016).

social power, an area of constant reaffirmation of the loyalty of certain entities to the competing social forces.

Post-law (or, as we understand, simply the contemporary law) has feet of clay. It is grandiose in its size and is able to inspire fear, but it is also too unstable and fragile. The suppression of free human will is its *modus operandi*, and it does not matter whether this suppression is realized through the imposition of new legal restrictions, duties and prohibitions or through the replacement of the conscious acts of human behavior by the normative logic integrated in the certain technological interfaces. This *law* (if it is still possible to use this word in relation to the technique in the hands of global and national establishments[81]) looks like it was intentionally created to rebel against it. In fact, however, the alternatives to the post-law that negate it are also a part of it, because they are embedded into the post-law's regime of alternation and even more evidently rest upon the suppression of will, upon the physical and psychic violence.

So, does all that mean that in the brave new world which we inhabit there are no suitable alternatives to the present-day crisis legal order? Before answering this question, it is worth noting that this condition of legal systems results from the certain historical epoch and the worldview peculiar to it. As was already mentioned, this epoch may be described as the industrial age, or the age of modernity. It is precisely in this time that the unprecedented scientific and technological leap changed the way people came to think about many things. This leap made possible the development of capitalist enterprises, in which financial capital of merchants and usurers joined with the production. Permanent accumulation of capital, production volume increase and the striving for persistent profit maximization became the driving forces and imperatives of the new society and new paradigm of social development.[82] Positivist thinking seized the commanding heights in the field of philosophy and jurisprudence. The material matter of any activity, any phenomenon came to the fore. Martin Heidegger neatly called this approach *Enframing* (*das Gestell*). According to his views, enframing as a technological mode of thinking becomes apparent in a human's attitude to the surrounding things as standing-reserve.[83] Now we are reaping the fruits of this mode of thinking, and although the industrial paradigm faces the blind alley of its existence in the form of global economic crisis, new wars, destruction of states, etc., the endeavors to go beyond it are either invisible or too marginal.

But, to my mind, it is principally possible to go beyond the present order. According to Heidegger,

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[81] The issue of understanding the law as a special capitalist technique is thoroughly discussed in Alastair Hudson, *Law as Capitalist Technique*, 29(1) King's L.J. 58 (2018).

[82] *See* Alain de Benoist, *Décroissances* 47–49 (2007); Karl Marx, 1 *Capital: A Critique of Political Economy* 253 (1992) (1867); Immanuel Wallerstein, *World-Systems Analysis: An Introduction* 24 (2004).

[83] Martin Heidegger, *The Question Concerning Technology* in Martin Heidegger, *The Question Concerning Technology and Other Essays* 3 (William Lovitt trans., 1977).

> it is precisely in Enframing, which … thrusts man into the danger of the surrender of his free essence – it is precisely in this extreme danger that the innermost indestructible belongingness of man within granting may come to light, provided that we, for our part, begin to pay heed to the coming to presence of technology.[84]

This statement may serve as a key to the problem. An alternative can arise only from the awareness of a critical situation, from a clear understanding of its structure and development trends. If we begin to pay heed to the essence of technology and stop considering law as only a technical tool, if we pay attention to the existence of multiple communities and social associations with their own values and interests, then, probably, we will be able to imagine *the other* legal system. The way to resolve the present crisis is likely to be connected with the disavowal of positivist (and techno-optimistic) legal thinking and a more critical attitude to the technological interfaces that are used to regulate human behavior. Ultimately, a human being is one who possesses free will and is able to decide independently how to act. I suppose that we should not forget this truth.

It would likely be useful to heed the words of Bruno Leoni, according to that

> we should … reject the resort to legislation *whenever it is used merely as a means of subjecting minorities in order to treat them as losers in the field*; … we should reject the legislative process *whenever it is possible for the individuals involved to attain their objectives without depending upon the decision of a group and without actually constraining other people to do what they would never do without constraint*.[85]

The contemporary legal order has to be changed. And it is already changing. Possibly, there is still an opportunity to prevent the worst consequences of the present legal and political development. In the 20th century a principle dilemma of the social order was expressed by Rosa Luxemburg: "*Socialism or barbarism?*"[86] It seems to me that we are now standing between the barbarism and the barbarism, but the first barbarism cloak itself in the clothes of progressive technologies, while the second one looks like an attempt to return to the Dark Ages, if not to the war of all against all. These two barbarisms are just about to clash with each other, so our absolute priority is to resist both the techno-positivist legal framework of the contemporary market society and the fundamentalist approaches trying to bend everybody in the will of narrow social associations.

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84 *Id.* at 32.

85 Bruno Leoni, *Freedom and the Law* 13 (1972).

86 Rosa Luxemburg, *The Junius Pamphlet: The Crisis of German Social Democracy* (1915) (Oct. 2, 2020), available at https://www.marxists.org/archive/luxemburg/1915/junius/index.htm.

Undoubtedly, the way out of the deadlock lays in the direction of legal and political pluralism. As previously mentioned, in some countries legal orders of certain narrow communities are already recognized, but this state of things may become a problem when these communities feel their strength and begin to impose their rules on the whole society. However, to my mind, there is a solution to this problem. If not only distinct minorities have their own norms, institutions and procedures, but almost everyone is included in the different social associations and local legal orders, then the state's legal order will become *the order of orders*, and will be constructed from the grassroots. This means a radical shift in our contemporary thinking, and it is, indeed, a very difficult task. But do we have any other choice?

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