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Konrad Adenauer Stiftung

Global Health Crisis in the Democratic World: Covid-19 and the Rule of Law

Dana Wolf, Nadav Dagan. and Ayala Yarkoney Sorek

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1. INTRODUCTION

Floods, wars, epidemics, and other dire events have challenged human societies since the beginning of time. Democratic legal systems are founded on specific logic and philosophy that distinguish them from other regimes. Modern societies are generally based on the rule of law as opposed to the unfettered and idiosyncratic rule of men. In times of emergency the swift or radical factual changes are usually followed by modifications in the pattern of governance that affect the legal landscape.

To provide a speedy and effective response to the crisis the balance of powers between the three branches of government: the legislature, the executive and the judiciary, is often shifted towards the executive. The ensuing executive dominance has serious effects on human rights. In particular, the Covid-19 Crisis has dramatically impacted human rights in many ways which may be deemed incompatible with the rule of law.

Even though similar measures such as lockdown, quarantine, and closures to prevent the spread of pandemic were taken in the past, the new world order and modern democracies have found them uniquely challenging. Unlike in the past, the Covid-19 catastrophe is happening all over the world simultaneously. This provides and motivates the basis for comparison between countries based on the measures chosen. Since some countries adopted similar measures and other democracies responded differently, it is worth investigating comparatively which measures were adopted by each country and if this choice relates to their rule of law framework.

In such research, the main axis is the domestic rule of law as understood in legal theory. Democratic legal systems revolve around the rule of law and reject the rule of men. In the public sphere, the rule of law demands, at a minimum, that any exercise of public power by state organs be authorised by law.[1] In general, the rule of law is a key concept to all democracies and a necessary condition for a free society.[2] Despite its undisputed centrality, various conceptions of the rule of law are present in the academic literature.[3] For the purposes of this general background, the different conceptions of the rule of law can be divided into two main categories.

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[1] See Victor V Ramraj, 'Introduction' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 4;

[2] See, for example, Nigel Simmonds, *Law as a Moral Idea* 99-104 & 141-143 (OUP, 2007).

[3] E.g. Guillermo O'donnell, 'The Quality of Democracy: Why the Rule of Law Matters' (2004) 15 Journal of Democracy 32.

The first category of conceptions of the rule of law can be defined as a narrow conception of the rule of law, and the second the wider conception of the rule of law. The former perceives law and the concept of the rule of law by a few characteristics of legal norms, such as the existence of rules, generality, publishment and intelligibility;[4] the latter incorporates, in addition, substantive values, most notably liberty and equality.[5] In this paper the latter conception is embraced. However, there is a general consensus (or almost consensus) that modern democracies are founded on the division of powers and fundamental rights – be they integral and inseparable parts of the rule of law or complementary elements of modern democracies.[6]

In this paper, we explore what are the elements which influence the way countries respond to the crisis in relation to the rule of law. Chapter 1 portrays the theoretical framework of emergency and the rule of law. The theoretical framework consists of two main parts: the normative question of lawfulness and the institutional question of division of powers.

Section 2 discusses the global landscape of the Covid-19 public-health crisis in the national and trans-national domains. The nature of the crisis is explored, and special features are examined. Some of those features are further discussed in section 3, which places milestones to evaluate to rule of law in the crisis originating from the outbreak of Covid-19. In this section the theoretical framework of emergency is applied to the crisis in question, and the path to proper evaluation of the rule of law in this crisis is marked.

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[4] See, for example, Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.

[5] See, for example, Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985); Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); TRS. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001); TRS. Allan, *Law Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP 1993).

[6] For more conceptions of the rule of law in common-law systems see: Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution*, (7th edn, OUP 2011); Lord Bingham, 'The Rule of Law' (2007) 66 CLJ 67; Lord Steyn, 'Democracy, the Rule of Law and the Role of Judges' [2006] European Human Rights Law Review 243; Paul P Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' [1997] PL 467; John Laws, 'Law and Democracy' [1995] PL 72; AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1968).

2. THEORY OF THE RULE OF LAW IN STATES OF EMERGENCY

The literature on law and emergency revolves around constitutional guarantees to the rule of law, including rights and democratic fundamentals. The constitutional guarantees can be divided into two main categories of questions: normative and institutional. The normative questions concern the validity and application of legal norms and the legal framework as a whole in states of emergency, while the institutional questions centre on the governmental bodies, predominantly the three branches of government, and the division of powers between those bodies. Those two categories of questions: normative and institutional, are the main indicators of the rule of law and its status at a specific juncture.

A pivotal background question for the academic discussion on law and emergency is one of definition. Both aspects of the analysis of the constitutional guarantees to the rule of law presuppose that one knows what emergency actually is. However, this presumption is hardly substantiated and far from a given. It is submitted that the importance of this background questions derives, among other reasons, from the different roles it plays in each of the main schools of thought that are present in the literature. The background question of definition is a fundamental and preliminary question for one school of thought, whereas the definitional question is only incidental for the other. Nevertheless, the question of definition, important as it may be, does not preclude evaluation of the rule of law in crises of the kind unfolded as a result of the Covid-19 outbreak.

A. EMERGENCY AND LAWFULNESS

In terms of both order and importance, the first question to be delved into in the context of states of emergency in democracies which are founded on the rule of law, is the existence of legal norms and their application. In fact, the main axis of any analysis of emergency regimes and the exercise of emergency powers, from an internal point of view, is the relation between emergency and the law.[7] This normative question is complemented by the constitutional division of powers between the state organs, which is itself based on legal theory and often considered an integral and essential part of the rule of law. Notwithstanding the close interconnection between these normative and institutional aspects of the rule of law, they are separated for the sake of discussion; the pure normative question will be explored in the current section, whereas the institutional aspects will be examined in the next section.

[7] On internal, compared with external, points of view, see HLA Hart, *The Concept of Law* (2nd edn, OUP 1994); TRS Allan, *The Sovereignty of Law* (OUP 2013).

The issue of the rule of law in states of emergency spurred a discussion in the literature, and a few different approaches have been developed. Academics have offered various typologies of emergency powers and their relationship with the law, which are largely reminiscent of ideas developed by prominent thinkers in the past.[8] For example, Posner and Vermeule juxtaposed two main views of law and emergency, i.e., accommodation and strict enforcement.[9] Accommodation, according to the authors' analysis, is based on the notion that the normative constitutional order should be suspended and replaced or, at least, relaxed in states of emergency, and powers should be concentrated in and shifted to the executive.[10] In contrast, the strict enforcement view is based on the binding and general nature of constitutions, which resists suspension or relaxation and requires the application of constitutional norms at all times.[11]

Gross proffered the following tripartite categorisation: the business-as-usual model; models of accommodation; and the model that he seeks to promote – extra-legal measures.[12] The business-as-usual model, as set out by Gross, negates changes in legal norms during states of emergency, and the law remains basically the same at all times.[13] In comparison, models of accommodation are based on extraordinary adaptations of the legal systems to meet the pressing needs created by severe crises.[14] The extra-legal measures model justifies actions that are outside the law and even in contravention of legal norms to respond to grave threats

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[8] For two influential theories, see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (first published 1922, trans George Schwab, University of Chicago Press 2006); John Locke, *Two Treatises of Government* (first published in 1690, Peter Laslett ed, CUP 1988).

[9] Eric A Posner and Adrian Vermeule, 'Accommodating Emergencies' (2003) 56 Stanford Law Review 605.

[10] Ibid 606-607. Therefore, strong versions of accommodation are often called 'Constitutional Dictatorship'. See Clinton L Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press 1948).

[11] Posner and Vermeule, 'Accommodating Emergencies' (n 9) 608-609.

[12] Oren Gross, 'Chaos and Rules: Should responses to Violent Crises Always Be Constitutional?' (2003) 112 Yale Law Journal 1011.

[13] Ibid 1043-1044.

[14] Ibid 1058-1068.

to the nation. This model aims to preserve the rule of law by deviating from it in states of emergency.[15]

For the purposes of this paper, a different typology that straightforwardly addresses the normative question is preferred. A fundamental distinction between two types of theories and conceptions is to be drawn.[16] Lawfulness is the dividing line between the two. The first type of theory is characterised by adherence to the rule of law across many varying contingencies; it adheres to the liberal-democratic legal system. This category does not renounce the monopoly of law as the authoritative normative system that determines whether actions, particularly governmental acts, are permissible or forbidden at all times and at all points. Therefore, this category will be called models of unbroken legality (below).

Conversely, the doctrines and theories that support a departure from the rule of law in emergencies are characterised by a willingness to abandon the liberal-democratic legal order, at least temporarily, as per the characteristic arguments.[17] These theories are based on a bifurcation or dualism between normality, which is the realm of law, and emergency, which is a kingdom of another type. Theories of this kind advocate infringements of the law or freedom from the rule of law in states of emergency, at least in some cases. It releases governments in states of emergency from the law and its dominion. Accordingly, these theories are named models of illicitness (below).

Interestingly, models of illicitness do not typically reject the foundations of democratic legal systems altogether or repudiate the rule of law as a general idea or as an ideal. In fact, it is widely agreed among scholars that states of emergency and the ensuing emergency powers are conservative in nature.[18] The goal of official states of emergency and of the ensuing

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[15] Ibid 1096-1102.

[16] On a possible shared commitment of the aforementioned models to the containment of threats within a certain legal and political order, see Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (CUP 2016) ch 1.

[17] See Karin Loevy, 'The Legal Politics of Time in Emergencies: Ticking-Time in the Israeli High Court of Justice' in Austin Sarat (ed), *Studies in law, politics, and society*, vol. 70 (Bingley 2016), 85, 89-90.

[18] John Ferejohn and Pasquale Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 International Journal of Constitutional Law 210, 210 and 217.

emergency powers is to address a crisis and then enable the return to normality;[19] they are designed to restore normality and reinstate the rule of law.

Furthermore, proponents of illicitness theories tend to ascribe sanctity to the law of the land. A prevalent argument of these proponents has been that temporary freedom from the rule of law or deviation from it during emergencies is justified or important in order to preserve the holiness of the law and long-term obedience to legal norms.[20] According to this argument, an exceptional departure from the law due to emergency allows for an effective response to major crises without desecrating the law that normally applies.[21]

Against this background, it becomes clear that eminent advocates of illicitness neither reject the law of the land nor deny the rule of law or the constitutional theory that undergirds specific legal systems. The main question that arises is whether the legal control of governmental actions should be theorised as a continuum of circumstances and eventualities that is subject in its entirety to the rule of law or as two disparate territories, namely, a territory that is subject to the rule of law and one territory that is not subject to the rule of law. Bifurcationists, who are advocates of emergency illicitness, embrace the perception of the separation and freedom of rulers from the rule of law.

For example, Gross's extra-legal measures model[22] aims to structure disobedience to legal norms by specifying when, why and how officials may – or even should – act outside the law and in contravention to the rule of law.[23] Although the law applies in emergencies,[24] officials may – perhaps should in some cases – ignore the relevant legal norms and do what they think is best. Similarly, according to some of these models that were dubbed 'models of accommodation', the law does not control governmental actions under circumstances that

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[19] E.g., Andrej Zwitter, 'The Rule of Law in Times of Crisis: A Legal Theory on State of Emergency in the Liberal Democracy' (2012) 98 Archives for Philosophy of Law and Social Philosophy 95, 99-100.

[20] E.g., Oren Gross, 'Extra-Legality and the Ethic of Political Responsibility' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 62; Oren Gross, 'The Prohibition on Torture and the Limits of Law' in Sanford Levinson (ed), *Torture: A Collection* (OUP 2004) 240.

[21] See Ferejohn and Pasquino, 'The Law of the Exception' (n 18) 234-235.

[22] On the inappropriateness of the term 'extra-legal' to describe illegal activity, see Terry Nardin, 'Emergency Logic: Prudence, Morality and the Rule of Law' in Victor V Ramraj (ed), *Emergencies and the Limits of Legality* (CUP 2008) 112-113.

[23] Gross, 'Chaos and Rules' (n 12); Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006).

[24] Gross, 'Extra-Legality' (n 20) 63-64.

constitute an emergency. According to these models, emergencies trigger or generate a special legal regime. This legal regime – the law of the exception –frees governments from actual legal regulation.[25]

As opposed to models of illicitness, doctrines and theories that adhere to the rule of law are classified as models of unbroken legality, even if they confer adequate powers – constitutional or statutory – to address large-scale crises in accordance with the law, as long as they 'speak the same language in war as in peace'.[26] Models of unbroken legality adhere to the rule of law and the underlying constitutional theory, which enshrines fundamental values such as liberty. These models do not accept other considerations and processes, such as a political process, as replacements for the law even in states of national emergency.[27]

That is not to say that models of unbroken legality negate significant response by the state to mitigate grave crises. However, these models are not contingent on a contention that emergency necessarily and automatically, by its very nature, causes a fundamental normative change or has the potential to justify a fundamental normative change. Although administrative decisions may well have different content in times of severe crisis and the outcome of litigation is expected to be different in many cases, the source of the change is the different circumstances. Specific legal norms may indeed be changed in times of emergency and in times of normality according to the manner prescribed by the state's constitution. For example, the legislature may enact, amend or repeal statutes, and authorised ministers may well issue new or revised regulations.

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[25] See, for example, Ferejohn and Pasquino, 'The Law of the Exception' (n 18) (particularly the discussion of the Roman dictatorship and neo-Roman models). See also Posner and Vermeule, 'Accommodating Emergencies' (n 9).

[26] *Liversidge v Anderson* [1942] 1 AC 206 (HL) 244. This famous British case from World War 2 was preceded by a Canadian case from World War 1 with strikingly similar observations. See Re Gray, 57 SCR 150. See, for example, 'The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody' (Justice Idington); 'The exercise of legislative functions such as those here in question by the Governor-in-council rather than by Parliament is no doubt something to be avoided as far as possible… A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered' (Justice Anglin). See also Andrej Zwitter, *The Rule of Law in Times of Crisis: A Legal Theory on State of Emergency in the Liberal Democracy* 98 Archives for Philosophy of Law and Social Philosophy 95, 109 (2012).

[27] See David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 Yale Law Journal 1753.

However, fundamental normative change, according to models of unbroken legality, is neither intrinsic to a state of emergency nor a necessary implication thereof. Legal norms are interpreted and applied consonant with the same constitutional theory within the framework of the rule of law in war as in peace.[28] Therefore, administrative decisions in general and emergency measures in particular must be lawful, that is, justified in law. Administrative decisions are characterised by a continuous adherence to the rule of law and provide sustained protection for liberty, which is not an all-or-nothing concept, even during severe crises.[29] Since the law ascribes differing importance to certain values according to the underlying constitutional theory and accords special protection to fundamental principles, there is no core difference between emergency and normality. The circumstances definitely change, and the correct balance between different considerations changes; but the constitutional order remains the same.[30]

The differences between these two schools of thought – two families of models – are undoubtedly significant. They deeply affect legal and theoretical analyses of emergency, governance and the rule of law in the democratic world. None the less, it is submitted that there is a sufficient common denominator between these schools of thought for evaluation of the rule of law in states of emergency. The common denominator emanates from the shared acceptance of the rule of law as a fundamental or, at the very least, ideal that should be aspired for.[31]

There seems to be almost a general consensus that the rule of law is infringed when legal norms lose their force or are not being obeyed. Proponents of emergency illicitness may deem certain infringements of the rule of law, as embodied in specific legal norms, tolerable or even necessary, but in principle, they do not deny the depletion or even (allegedly temporary)

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[28] E.g., *Liversidge v Anderson* [1942] 1 AC 206 (HL) 244. See also Zwitter, 'The Rule of Law' (n 26) 251.

[29] See David Dyzenhaus, 'The Permanence of the Temporary: Can Emergency Powers be Normalized' in Ronald J Daniels, Patrick Macklem and Kent Roach (eds), *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (University of Toronto Press 2001); Dyzenhaus, *The Constitution of Law*. See also TRS Allan, 'Principle, Practice, and Precedent: Vindicating Justice, According to Law' (2018) 77 CLJ 269; Allan, *The Sovereignty of Law* (n 7); TRS. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001).

[30] For a model of unbroken legality that is based on the same theoretical underpinning but offers a different structure from the structure offered by Dyzenhaus, see Ariel L Bendor, 'Emergencies' in Keren Azulai, Ittai Bar-Siman-Tov, Aharon Barak and Shahar Lifshitz (eds), *Dorit Beinisch Book* (Ramat Gan 2017) 447.

[31] On law as a moral ideal that ought to be pursued see Nigel Simmonds, *Law as a Moral Idea* (2007).

neglection thereof. Furthermore, upholders of unbroken legality, detect those infringements, identify them as renunciation of the rule of law, and hence repudiate them.

Thus, most scholars in both schools of thought have agreed on the importance of rights and the legal protection of them. Likewise, there seems to be a wide agreement on the centrality of constitutional division of powers, including functional separation of the legislative, executive and judicial authorities.

B. EMERGENCY AND THE BRANCHES OF GOVERNMENT

Legal norms neither create themselves by themselves nor execute themselves. They are dependent on institutions. In particular, a long line of legal and political theory puts the three branches of government at the centre of discussion. In spite of constant interactions, often even friction, between those branches, they are distinct, and each one of them concentrates on performance of its own main function.

The legislature is in charge of setting primary arrangements and producing official legal norms at high levels of generality. In many countries parliaments are even involved in amendments of codified constitutions, i.e. the supreme written legal norm in specific territories.[32] However, the main role of the legislature is to enact primary legal norms in the form of statutes.

The executive is in charge, first and foremost, of execution. It carries out policies and decisions using its vast resources and manpower. In most countries the executive is taking part, to varying extents and degrees, in legislation, typically secondary legislation that is subject to the primary legislative norms enacted by the legislature.[33] Nevertheless, the essence of the executive has been to execute, that is, to put laws into effect and implement them in practice.

The judiciary is in charge of legal interpretation and resolution of legal disputes. Courts are the authorised interpreters of the law. Since the law delimits the range of permissible policy choices and the courts are in charge of interpretation and regularly stating the law, policy choices are naturally delimited by judicial decisions.[34] All other authorities are bounded by the authoritative interpretation of norms by the judiciary. However, policy is set to promote the collective goals

[32] E.g. Basic Law for the Federal Republic of Germany, art. 79; Constitution of the Italian Republic, art. 138.

[33] However, in some democracies the executive carries a formal power to block or influence primary legislation. See, for example, the veto power granted to the US president: Constitution of the United States, art. 1.

[34] E.g., *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

of a certain political community.[35] Policy making is a quintessential function of the political branches – the legislature and the executive – and is a role that is assigned to them by the constitution. The function that policy makers perform and their basis of legitimacy are fundamentally different from the function and basis of legitimacy of the judiciary.[36] This is true in both normality and emergency.

There are many variations of constitutional division of powers. Each legal system presents its own version of division of powers. Thus, in some countries the legislature has a complete monopoly on primary legislation, and the executive is unreservedly subject to its legislation without formal legal power to block legislation; in other legal systems the executive has somewhat greater involvement in primary legislation with a limited capacity to interfere with legislation passed in the legislature. However, the essence of constitutional division of power is generally agreed upon. Distinct functions are assigned to distinct organs of state. The rule of law entails that each and every act by state authorities be in compliance with the law and justified by the law.[37] In the institutional aspect it means that each branch of government performs its own function in the legal order.

Constitutional division of powers is a necessary condition for democracy that is founded on the rule of law. It is essential to fulfil fundamental values that undergird the rule of law, such as liberty and equality, which are the most common justification for the rule of law or considered its underlying values.[38] It is undoubtedly pivotal for the legal protection of rights. Hence, democracies that are founded on the rule of law, respect fundamental rights, and strive to carry liberty and equality through.

In similarity with the debate on emergency and lawfulness, the differences between models of emergency illicitness and models of unbroken legality are certainly conspicuous in regard to the constitutional division of power. While models of unbroken legality adhere to a constitutional division of powers that epitomises the rule of law and protects rights as well as core underlying values, models of emergency illicitness tend to stray – to varying degrees –

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[35] See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82-83 (1977).

[36] See Allan, *The Sovereignty of Law* (n 7), e.g., 108; TRS Allan, 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) 8 OJLS 266, 270-271.

[37] See Dyzenhaus, Also David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP 2006); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986); Dworkin, *Taking Rights Seriously* (n 35).

[38] See, for example: TRS Allan, *The Sovereignty of Law* (n 7); Allan, *Constitutional Justice* (n 29); TRS. Allan, *Law Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP 1993); Friedrich A Hayek, *The Constitution of Liberty* (Routledge 1960).

away from the accepted division of powers. Proponents of illicitness tend to free the executive from the shackles of statutes enacted by the legislature and interpreted by the judiciary, which is entrusted also with authoritative resolution of dispute, including giving relief to individuals unlawfully harmed by the government.

On a purely imagined level, the rejection of the rule of law and of specific legal norms in states of emergency does not necessitate transference of powers solely or necessarily to the executive. On the purely theoretical level, a supreme court judge or the court itself as an institution may well take over the response to a devastating earthquake, and a legislator or parliament as a whole may run a total war against mighty enemies. However, in the real world the executive is the most powerful branch of government that naturally seize powers. It is the executive that has the manpower and also holds the sword or the vaccine and writes checks in practice. Those characteristics do not only make the executive the only realistic candidate to seize power, but also make it the most suitable candidate to mitigate the relevant crisis. Therefore, those who accept the renunciation of the constitutional division of powers do not suggest giving the judiciary or the legislature extra-powers and to free them from the law and the restraint of the other branches. They do offer extra-powers to the executive.

It is submitted that the differences between those two families of models: models of unbroken legality and models of emergency illicitness, do not prevent evaluation of the rule of law in times of emergency. There seems to be a solid agreement that deviation from an established division of powers, particularly transference of powers to the executive and its freedom from following the law as shaped by the legislature and interpreted by the judiciary, infringes the rule of law. Models of unbroken legality repudiate the idea of departing from due constitutional division of powers in times of emergency and condemn this opportunity as incongruous with the rule of law hence inappropriate and illegitimate. In contradistinction, models of emergency illicitness justify such a deviation from due constitutional division of powers – in general or in some cases – as a necessity or the lesser evil and with a general goal to preserve the rule of law in the long run.[39]

C. DEFINITION OF EMERGENCY

A key preliminary question in regard to the interconnected normative and institutional issues discussed above is what the term emergency actually means. The definitional question is fundamental, since the differences between models of unbroken legality and models of illicitness arise in states of emergency as opposed to normality, where both families of models agree, in principle, on the rule of law. This question of definition may well be relevant to models

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[39] Gross “Chaos and Rules”, supra, at 1096-1102.

of unbroken legality, especially as an interpretative question when a need for meaning-giving to constitutional or statutory provisions arises.

For example, the pertinent constitutional provision in Israel reads: "Should the Knesset ascertain that the State is in a state of emergency, it may, of its own initiative or, pursuant to a Government proposal, declare that a state of emergency exists".[40] A declaration of state of emergency may well be followed by enactment of far-reaching preater legem and contra legem emergency regulations, including suspension of primary legislation, alterations of laws and levy of taxes and compulsory payments.[41] Each branch of government, especially the legislature and the judiciary, ought to define emergency in order to know what it is exactly that the Knesset is required to ascertain and authorised to do.

However, this question is crucial for models of emergency illicitness that are based on normative bifurcation of normality as disparate from emergency. The approach of these models, the abandonment of the rule of law in harsh circumstances, is radical. Models of this sort purport to justify this radical approach by giving satisfactory reasons for the deviation from the rule of law and the renunciation of the legal theory that underlies liberal democracy, which they themselves accept as right for times of peace, i.e., for all states apart from emergency. To justify a deviation from the rule of law, which bifurcationists themselves acknowledge is the foundation of the normative system but only in a distinct and unique category of cases, bifurcationists should, at the very least, be able to define this category and explain what constitutes it as a category.

Therefore, a solid, defensible and accurate definition of emergency is *the sine qua non* of models of illicitness. A definition of this type is the foundation that underpins the entire structure of bifurcation. Without such an impeccable definition, the entire edifice collapses. In the absence of definitional clarity, one cannot understand the distinct nature of each realm, and bifurcationists are doomed to fall short of providing a valid justification for the existence of an alternate, parallel or additional realm, for the abandonment of a right and well-established legal system and for the leaps between the two realms. In truth, it is doubtful whether the rule of law, which requires a monopoly of the normative regulation of governmental acts, exists at all in any meaningful sense where there is an open, undefined and seemingly discretionary realm that is free from legal norms and legal control.

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[40] See Basic Law: The Government, sec. 38.

[41] See Basic Law: The Government, sec. 38. English translation is available at <www.knesset.gov.il/laws/special/eng/basic14_eng.htm>.

Nonetheless, bifurcationists have not developed such a definition.[42] Thus, Gross and Ni Aolain admit that a bright-line distinction is not possible and that it is difficult to defend the simplistic perception that normality and exception occupy 'alternate, mutually exclusive, time-frames'.[43] Actually, the authors concede that 'no clear definition of "emergencies" is readily available'.[44] Gross and Ni Aolain even cast doubt on whether a definition of emergency is desirable or even possible.[45] The legal-academic literature does indeed lack good-enough general definitions for emergency.

Despite its importance, this paper does not elaborate on the definitional questions. First, it accepts the prevalent rulings of international bodies and the general approach taken by democratic countries, which deemed the crisis resulted from the outbreak of Covid-19 as a state of emergency. Although one may well cast doubts on whether the present public-health crisis actually meet a conservative view of emergency as a situation that endangers the life of a nation or, at the very least, the nature of its democratic form of government, it can be assumed the global public-health crisis does constitute a state of emergency.

Second, more importantly, against the background of a wide common denominator, it is maintained that the rule of law can and should be evaluated head-on independently from the question of definition. In essence, both schools of thought consider the rule of law ideal. Furthermore, models of unbroken legality as well as models of emergency illicitness understand that unlawfulness and transference of practically untrammelled or unsupervised powers to the executive harms the rule of law. Therefore, their differences of analyses and their opposite conclusions concerning the legitimacy or justifiableness of infringements (or suspension) of the rule of law, can be put aside for the purposes of this paper.

[42] E.g., Zwitter, 'The Rule of Law' (n 26) 95. See also Thomas Poole, 'Constitutional Reason of State' (2015) 16/2015 LSE Law, Society and Economic Working Papers 1, 2.

[43] Ibid 174.

[44] Ibid 156.

[45] Ibid 5-6.

3. THE COVID-19 PANDEMIC: NEW GLOBAL CRISIS IN THE NATIONAL DOMAINS

As we write, the Covid-19 has been a global pandemic for over a year. Over 80,808,913 cases have been confirmed worldwide in 222 countries, and over 1,766,796 people have died from the Covid-19 virus. The U.S. Food and Drug Administration (FDA) and other medical bodies have so far approved two types of vaccines, more are in the pipeline, and citizens in various countries, especially western countries, have started to be vaccinated.[46] The number of reported cases and deaths grows hourly and daily despite global efforts to limit and control the spread of the virus. In this respect, the crisis is ongoing and reoccurring since the first cases were reported in Wuhan, China.

How should we define the Covid-19 pandemic? A crisis? A global emergency? Is there indeed a difference between the two definitions or is it just semantics, a different name for the same situation? Is the Covid-19 pandemic a health crisis? Or is it also a global economic and social crisis? Different terms and definitions are being used to describe the pandemic. In this chapter, we will attempt to characterize the pandemic and analyze its nature.

A. CRISIS? EMERGENCY? CHALLENGE? WHAT IS THE COVID-19 PANDEMIC?

On January 30, 2020 the General Director of the World Health Organization (WHO) declared the outbreak of Covid-19 to be a Public Health Emergency of International Concern (PHEIC). On March 23rd, 2020 Secretary-General Antonio Guterres issued an urgent appeal for a global ceasefire in all corners of the world to focus together on the true fight – defeating Covid-19.[47] In his letter, the secretary general refers to the Covid-19 pandemic as a global health crisis that spreads human suffering and upturns the global economy. In his words, "This is above all a human crisis, with multifaceted threats." On April 2, 2020 the United Nations General Assembly adopted resolution 74/270 on global solidarity to fight the corona disease. The general assembly refers to the Covid-19 pandemic as a "crisis" which is a threat to human health, life, safety, and well-being. It recognized the unprecedented scale of effects of the pandemic, including severe disruption of societies, economies, global travel and commerce,

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[46] World Health Organization website, available at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019?gclid=CjwKCAiA25v_BRBNEiwAZb4-ZTz2Ocvr6qGTUSRIKunZpzf3D6ql9_cbA4wNjeGCRD3IyJ7aoNFfqxoCa70QAvD_BwE

[47] 23 March 2020 - Letter from the Secretary-General to all the members of the G-20, *available at*: https://www.un.org/sites/un2.un.org/files/230320_sg_letter_g20_covid-19.pdf

and its devastating impact on the livelihood of people.[48] On July 1, 2020, the U.N. Security Council adopted resolution 2532 in which no definitions were attached to the Covid-19 pandemic. The council just used the words "Covid-19 pandemic" to describe the situation.[49] The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz for example relates to the Covid-19 pandemic as an unprecedented global challenge that has exacerbated inequalities prevalent in all regions of the world.[50]

Crisis is a popular and 'hot' term that is being used frequently.[51] However, a common interpretation is lacking.[52] But when the term crisis is used to describe an extreme situation it usually means that the intention is to look at it either from the operational perspectives that concentrate on the management of the crisis itself or from the political-symbolic perspective that map out how crisis managers and the rest of the people make sense of the crisis. Herman's classic definition of crisis is: "A crisis is a situation that threatens high-priority goals of the decision-making unit, restricts the amount of time available for response before the decision is transformed and surprises the members of the decision-making unit by its occurrence".[53] Rosenthal, Hart and Charles suggest that crisis is: ". . . a serious threat to the basic structures or the fundamental values and norms of a social system, which-under time pressure and highly uncertain circumstances-necessitates making critical decisions."[54] The term "crisis" is typically used as a catchall concept encompassing a variety of unwanted, unexpected, unprecedented and almost unmanageable events that can cause widespread disbelief and uncertainty.[55] With the variety of "crisis" options comes the lack of common interpretation or unified definition.[56] Boin adds to the traditional definitions of crisis the subjective element. In his view, if we say

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[48] U.N. GA 74/270, A/RES/74/270 (April 2, 2020)

[49] U.N. S.C. 2532, A/RES/2532 (July 1, 2020)

[50] United Nations General Assembly, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, Seventy-fifth Session A/75/258 (July 28, 2020), para 1-8, 9-15, 19-21, 35-37, and 38.

[51] Arjen Boin, Lessons from Crisis Research, 6 Int'l Stud. Rev. 165, 166 (2004);

[52] Arjen Boin, Lessons from Crisis Research, 6 Int'l Stud. Rev. 165, 166 (2004);

[53] Hermann, Charles F., ed. 1972 International Crises: Insights From Behavioral Research. New York: Free Press, 13` .

[54] Rosenthal, Uriel; 't Hart, Paul; and Charles, Michael T. 1989 "The World of Crises and Crisis Management." In Rosenthal, Charles, and 't Hart, eds, p. 10.

[55] Arjen Boin, Lessons from Crisis Research, 6 Int'l Stud. Rev. 165, 167 (2004); Hewitt, Kenneth, ed. 1983 Interpretations of Calamity: From the Viewpoint of Human Ecology. London: Allen and Unwin;
[56] Arjen Boin, Lessons from Crisis Research, 6 Int'l Stud. Rev. 165, 166 (2004);

that individuals or groups must perceive a situation to involve the so-called crisis characteristics (threat, urgency, uncertainty) to be classified as such, it automatically means that we will miss certain events or processes that many of us might consider a crisis simply because the authorities did not recognize the situation as a crisis.[57] As long as the authorities in question remain oblivious, analysts cannot treat the situation as a crisis. Therefore, Boin suggests that we should define crisis as a state of flux during which the institutional structures in a social system become uprooted. In such a definition, he believes the main currency of crisis is legitimacy. A crisis occurs when the institutional structure of a social system experiences a relatively strong decline in legitimacy as its central functions are impaired or suffer from overload. [58]

Emergency is another term that is used to describe the Covid-19 pandemic usually from a more legal perspective.[59] As mentioned above, the Covid-19 pandemic was declared a “public health emergency of international concern”. According to article 1 to the World Health Regulation (2005) “public health emergency of international concern” means an extraordinary event which is determined, as provided in these Regulations: (i) to constitute a public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.[60] This declaration serves as a criterion call to the international community to provide political, financial, and technical support to a public health emergency. In addition, the WHO Director-General declared a Temporary Recommendation which, although binding, seeks to provide public health guidance and counteract unnecessary restrictions on international trade and travel.

The term state of emergency in the international context, is a term that is associated in general with the challenge to protect International Human Rights Law (IHRL). However, the international jurisprudence on states of emergency is inconsistent and divergent, and what is now deemed a public emergency is ubiquitous.[61] The International Covenant on Civil and Political Rights in article 4 states that times of public emergency are times which threaten the

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[57] Arjen Boin, Lessons from Crisis Research, 6 Int'l Stud. Rev. 165, 167 (2004);

[58] Arjen Boin, Lessons from Crisis Research, 6 Int'l Stud. Rev. 165, 167-8 (2004);

[59] See Section 1.C

[60] International Healt(h Regulations (2005, Third Edition)

[61] Scott P. Sheeran, Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics, 34 MICH. J. INT'L L. 491 (2013). Available at: https://repository.law.umich.edu/mjil/vol34/iss3/1

life of the nation and the existence of which is officially proclaimed.[62] While states do not deny that human rights should continue to apply during an emergency, article 4 regulates the derogation regime under IHRL. The conceptual rationale for states of emergency is rooted in the nature of the exceptional. In such times, government must temporarily change something to some degree to overcome the peril and restore normality.[63] Overall, IHRL has very little to say regarding defining crisis situations, which constitute a state of emergency, and contains only limited restrictions on the means. Consequently, this means national governments are able to decide unilaterally if the Covid-19 pandemic or any other health, environmental or national security matter constitutes a threat to the nation requiring emergency government powers and exceptional means.[64]

Crisis v. emergency, the difference usually comes from the perspective in which the term is being used. Crisis is usually discussed from the management of the crisis perspective or from the political perspective of how decision makers deal with crisis. The term state of emergency is usually used as part of legal discussions regardless of whether a state of emergency has been officially declared or not. Be that as it may, whether the Covid-19 pandemic is a crisis, a challenge or an emergency, it is widely agreed that it is a situation which globally is perceived as an extreme threat, highly time urgent and a surprise. It is also perceived as requiring change in the national balance of the separation of powers and human rights limitations in order to control, defeat and survive it at both the national and international level.

[62] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 26 December 2020]

[63] Scott P. Sheeran, Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics, 34 MICH. J. INT'L L. 491, 499 (2013). Available at: https://repository.law.umich.edu/mjil/vol34/iss3/1

[64] Emmons, Cassandra: *International Human Rights Law and COVID-19 States of Emergency, VerfBlog,* 2020/4/25, https://verfassungsblog.de/international-human-rights-law-and-covid-19-states-of-emergency/, DOI: 10.17176/20200425-164920-0.

B. COVID-19 PANDEMIC IS A GLOBAL TRANSBOUNDARY EVENT

Above all, the Covid-19 pandemic is a global event, which contains not just health threats but also economic and socially unprecedented implications that are commonly deemed crisis and emergency. It is being described as the worst global crisis since World War II.[65] The global nature of the pandemic is underlined by the declaration of the WHO recognizing it as a “public health emergency of international concern”. The U.N. General Assembly described the Covid-19 pandemic as threat to human health that continues to spread globally. It recognized the unprecedented effects of the pandemic, including the severe disruption of societies and economies, as well as global travel and commerce, and the devastating impact on the livelihood of people all over the world. It calls upon the U.N. leadership to mobilize coordinated global response to the pandemic and its adverse social, economic and financial impact on all societies.[66]

The U.N.’s independent expert on protection against violence and discrimination Victor Madrigal-Borloz, describes the global nature of the Covid-19 pandemic: “it has become clear that the entire human population, including persons affected by violence and discrimination based on sexual orientation or gender identity, will be impacted by matters ranging from life-threatening disease, domestic violence during lockdown, mental health concerns created by isolation and stress, and the ever-present concern of financial ruin and its potential impact on access to life-critical sectors such as health, education, employment and housing."[67]

The Covid-19 pandemic is also a transboundary crisis. It exceeds geographical, political, cultural, public-private and legal boundaries that normally enable public managers to classify, contain, and manage a crisis.[68] It escalates rapidly and mutates constantly, creating confusion

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[65] UN CHIEF SAYS COVID-19 IS WORST CRISIS SINCE WORLD WAR II, *U.N. SECRETARY-GENERAL ANTONIO GUTERRES WARNING THAT THE WORLD FACES THE MOST CHALLENGING CRISIS SINCE WORLD WAR II*

https://abcnews.go.com/US/wireStory/chief-covid-19-worst-crisis-world-war-ii-69905340 (31 March, 2020); OECD (2020), *OECD Economic Outlook, Interim Report September 2020*, OECD Publishing, Paris, https://dx.doi.org/10.1787/34ffc900-en.

[66] U.N. GA 74/270, A/RES/74/270, preamble, art. 9 (April 2, 2020)

[67] United Nations General Assembly, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, Seventy-fifth Session A/75/258 (July 28, 2020), para 1-8, 9-15, 19-21, 35-37, and 38.

[68] Boin A., The Transboundary Crisis: Why we are unprepared and the road ahead. J. *Contingencies and Crisis Management*. 2019:27:94-99, 94 available at: https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-5973.12241

about causes and possible consequences. It ends up on many normative tables, but it is not obvious which of those tables is or should be "in the lead".[69]

Being a transboundary global crisis, the Covid-19 pandemic has an internal crisis aspect when nations need to contend with the crisis on their own, internally, while the external nature of the crisis affects each nation similarly and simultaneously. In other words, although the global nature of the crisis is dominant, nations still fight the spread of the virus at the internal level within their own borders. Nations manage the crisis within their own territory while at the same time controlling their borders to try to prevent the pandemic entering and spreading. The management of the crisis at the international level has already highlighted the lack of a powerful global unified leadership and what little coordination and consensus there is mostly based on the recommendations of the WHO.

C. COVID-19 PANDEMIC IS RECOGNIZED BY THE U.N. SECURITY COUNCIL AS AN EVENT THAT THREATENS INTERNATIONAL PEACE AND SECURITY

Not only is the pandemic characterized as a global event, the U.N. Security Council in Resolution 2532 considers that the unprecedented extent of the Covid-19 pandemic is likely to endanger the maintenance of international peace and order.[70] Therefore, it demanded the general and immediate cessation of hostilities in all situations on its agenda. It also calls upon all parties to armed conflicts to engage immediately in immediate cessation of hostilities and humanitarian pause for at least 90 consecutive days.

The Security Council is continuing the practice of addressing transnational health crises as threats to international peace and security, which emerged in 2012 in response to the HIV/AIDS epidemic (Resolution 1983) and developed further in response to Ebola outbreaks in West Africa in 2014 (Resolution 2177) and in the DRC in 2018 (Resolution 2439).[71] However,

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[69] Boin A., The Transboundary Crisis: Why we are unprepared and the road ahead. J. *Contingencies and Crisis Management*. 2019:27:94-99, 94 available at: https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-5973.12241

[70] U.N. S.C. Res. 2532, S/RES/2532 (July 1st, 2020)

[71] U.N. Security Council Res. 1983, S/RES/1983 Adopted by the Security Council at its 6547th meeting, on 7 June 2011 (2011); U.N. Security Council Res. 2177, S/RES/2177 (2014) Adopted by the Security Council at its 7268th meeting, on 18 September 2014; U.N. Security Council Res. 2439, S/RES/2439 (2018) Adopted by the Security Council at its 8385th meeting, on 30 October 2018.

this is the first time that the Security Council has called for a general ceasefire and humanitarian pause in armed conflicts across the globe.[72]

U.N. Security Council Resolution 2352 is a continuation of the trend towards "securitization" of global health in the United Nations system and as a continuation of the Council's generally broadened understanding of international peace and security. The Security Council sees the Covid-19 pandemic as a public health problem that has grown into a multifaceted threat to the stability and development prospects of affected countries and to the international community as a whole.[73] Nations and the international community are more used to dealing with security issues rather than health issues and so the legal and administrative systems are better prepared for security threats than health threats. "Securitizing" health threats is aimed at transforming authorities that the international community has for dealing with security to fit other situations such as pandemic.

D. COVID-19 PANDEMIC IS A SIMULTANEAL CONTINUOUS EVENT WITH THE SAME MEASURES BEING IMPOSED NATIONALLY TO MITIGATE ITS SPREAD

One of the most interesting features of the Covid-19 pandemic is that it spreads simultaneously across the world and as a result, nations impose the same sort of limitations to mitigate the spread of the pandemic. In addition, the spread of the virus has continued for over a year across the globe and in that respect it is an ongoing continuous event. In an attempt to flatten the curve and slow Covid-19 transmission, national governments around the world have suspended people's freedom of movement, placed restrictions on privacy, the freedom of information, closed schools, businesses and places of worship all in the name of public safety.[74]

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[72] Erin Pobjie, COVID-19 as a threat to international peace and security: The Role of the U.N. Security Council in addressing the pandemic, available at: https://www.ejiltalk.org/covid-19-as-a-threat-to-international-peace-and-security-the-role-of-the-un-security-council-in-addressing-the-pandemic/

[73] Gian Luca Burci & Jakob Quirin, *Ebola, WHO, and the United Nations Convergence of Global Public Health and International Peace and Security*, 18 ASIL (2014), available at https://www.asil.org/insights/volume/18/issue/25/ebola-who-and-united-nations-convergence-global-public-health-and

[74] Emmons, Cassandra: International Human Rights Law and COVID-19 States of Emergency, VerfBlog, 2020/4/25, https://verfassungsblog.de/international-human-rights-law-and-covid-19-states-ofemergency/, DOI: 10.17176/20200425-164920-0.

In some – but crucially not all – countries, these changes have been contained within national states of emergency which provide their governments the necessary flexibility to impose measures that may violate fundamental human rights in the aim of protecting the nation. These measures are a practical and necessary method to stop virus transmission, prevent health-care services becoming overwhelmed, and thus save lives. Their impact however on jobs, livelihoods, access to services, including health care, food, water, education and social services, safety at home, adequate standards of living and family life can be severe. While international law permits certain derogation from international human rights for reasons of security and national emergency like health emergencies, still, it is assumed that such restrictions should be strictly necessary for that purpose, proportionate and non-discriminatory.[75]

Imagine the world map painted green and red. Green signals routine and red signals state of emergency. Normally, we see the odd red spot or island in a carpet of green. During 2020, the Covid-19 pandemic turned the world map red almost completely. This is a rare and historical occasion happening at the same time all over the globe. It is a fertile and rare opportunity for global comparative research to speculate how the world will look like in the aftermath. The magnitude and speed of collapse and different activities that have followed are unlike anything experienced in our lifetime.[76] The Covid-19 pandemic is already being considered as one of the turning points in history with it impacting and shuffling of social and economic norms as we know them and triggering a new human era.[77] With social, economic, and health systems on

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[75] The United Nations. (1948). Universal Declaration of Human Rights; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, article 4(1) available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 26 December 2020]; American Convention on Human Rights." *Treaty Series, No. 36*, Organization of American States, article 27(1) 1969; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, article 15 (1) available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 27 December 2020]; Council of Europe, European Social Charter, 18 October 1961, ETS 35, available at: https://www.refworld.org/docid/3ae6b3784.html, article F 1 [accessed 17 December 2020].

[76] Gopinath, G. 2020. "The Great Lockdown: Worst Economic Downturn since the Great Depression." *IMFBlog*, April 14. https://blogs.imf.org/2020/04/14/the-great-lockdown-worsteconomic-downturn-since-the-great-depression/

[77] Khalil M. Dirani , Mehrangiz Abadi , Amin Alizadeh , Bhagyashree Barhate , Rosemary Capuchino Garza , Noeline Gunasekara , Ghassan Ibrahim & Zachery Majzun (2020) Leadership competencies and the essential role of human resource development in times of crisis: a response to Covid-19 pandemic, Human Resource Development International, 23:4, 380-394,

the verge of collapsing, it is impossible to know what the new world order will look like, but its shape will depend on the decisions leaders make today. The focus of our research is on the rule of law and democracy backsliding during this exceptional and unprecedented global health crisis.

4. EVALUATING THE RULE OF LAW IN TIMES OF CORONAVIRUS: MAIN TOUCHSTONES

In more common and prevalent situations of emergency in the modern era, such as wars, terrorism, natural disasters, technical failure and so on, fundamental basic rights are being interfered with on behalf of the immediate need to respond to the situation in a way that will remove the immediate threat to the life or stability of a nation. The Covid-19 pandemic is an exceptional global emergency situation in relation to better-known emergency situations.

The Covid-19 pandemic presented the world with an ongoing simultaneous cross-border health threat, which developed into a grave, perhaps unprecedented, economic and social threat. Nations deal with the threat internally attempting to mitigate the spread of the virus within their territories but since the virus does not stop at borders, nations face the challenge of fighting the virus in relation to the rest of the world. During the ongoing actions to mitigate the spread of the virus, nations began limiting fundamental human rights in far-reaching ways compared to other emergency situations, presumably because of the nature of the threat.

In spite of the special attributes of the particular public-health crisis in question, the same theoretical framework relating to the rule of law during time of emergency applies. In the Covid-19 crisis, no less than in other types of emergency, governments need to respond rapidly to an immediate threat in an efficient way with ongoing uncertainty and lack of information. The tug-of-war between law and constitutional order on one side and complete freedom to act swiftly and decisively at will on the other applies to the crisis in question, and so does the legal theory that examines the fundamental characteristics of emergency.

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The characteristics of Covid-19 are indeed not identical to other serious crises that befell modern democracies in the last century. In addition, modern democracies that are founded on the rule of law are a fundamentally different form of government compared with other regimes in history, including the Roman empire. It is argued that those two types of dissimilarities should be distinguished. Since modern democracies have indeed their own distinct logic and nature, the conclusions that can be drawn from the response of non-democratic regimes to severe crisis are limited within the context of the rule of law. In contrast, the theoretical foundations of the status of the rule of law in states of emergency are the basis for evaluation of the rule of law in the time of Covid-19 as explained above.

As explicated in the first section, there are two main elements to any assessment of the rule of law: legal norms and the institutions involved. The force and application of legal norms in states of emergency is a question of jurisprudence and legal theory (and some scholars would add political theory as well). The most evident embodiment of legal norms in times of emergency are rights. Fundamental rights are the most important and nuclear derivatives of liberty, which is considered, often together with equality, the underlying justification for the rule of law.[78] In times of crises fundamental rights may be particularly vulnerable, and democratic societies have to decide if rights remain principles that should be observed, as far as possible, during emergencies.

In the global crisis originating from the outbreak of Covid-19 rights were harmed in practically all affected jurisdictions, including the democratic world. Although rights, according to the dominant view, are not absolute,[79] and receding in the level of rights' fulfilment does not necessarily indicate renunciation of rights as legal norms,[80] one cannot ignore the immense interference with human rights during the global Covid-19 crisis.

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[78] See, for example: Allan, *The Sovereignty of Law* (n 7); Allan, *Constitutional Justice* (n 29); TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP 2013); Dworkin, *Taking Rights Seriously* (n 35); Dworkin, *Law's Empire* (n 37); Simmonds (n 31); Hayek (n 38).

[79] E.g. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers Trans., 2002).

[80] Part of the normative framework in modern democracies that are founded on the rule of law is concepts, i.e. norms of different sort, that determine whether limitations on rights are permissible. Two

It seems that the measures taken by governments around the democratic world during the public-health crisis of Covid-19, allegedly to mitigate the crisis, are particularly offensive against several rights and freedoms. In particular, the following fundamental rights have been seriously injured by states during the crisis: freedom of movement; freedom of expression, including political expression and protest; freedom of vocation and property rights; privacy. The extent of interference is demonstrated below by specific injuries to those rights in democratic states.

Freedom of movement was seriously injured in many democracies that grappled with this grave public-health crisis. In attempts to contain the pandemic, reduce its spreading or keep specific areas relatively safe, most states forbid or impose limitation on the freedom of citizens and others to pass thorough different areas at will. Those limitation included not only restrictions on movement from the country to external territories or entrance to the country, but also restrictions on movement between districts, cities, neighbourhoods, streets and buildings. Moreover, in some countries stay-at-home orders amount to injury to one's personal liberty and are not far from house arrest; even powers of mandatory isolation in designated sites were granted in some countries.

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prime examples for norms of this sort are reasonableness, particularly in the common-law world, and proportionality. Space precludes elaboration on those norms in the present paper.

On reasonableness see, for example: Paul Craig, *The Nature of Reasonableness Review*, 66 CURRENT LEGAL PROBS. 131 (2013); Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 604-605 (2010); Andrew Le Sueur, *The Rise and Ruin of Unreasonableness?*, 10 JUD. REV. 32 (2005); T.R. Hickman, *The Reasonableness Principle: Reassessing Its Place in the Public Sphere*, 63 CAMBRIDGE L. J. 166 (2004); Sir John Laws, *Wednesbury*, in The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade 185 (C. Forsyth and I. Hare eds., 1998).

On Proportionality see, for example: *Proportionality and the Rule of Law: Rights. Justification, Reasoning* (Grant Huscroft, Bradley W. Miller & Gregoire Webber eds., 2014););AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir Trans., 2012); David Beatty, *The Ultimate Rule of Law* (2004); Paul Craig, *Unreasonableness and Proportionality in United Kingdom Law, in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 85 (Evelyn Ellis ed., 1999); Itzhak Zamir *Unreasonableness, Balance of Interests and Proportionality,* 11 TEL AVIV U. STUD. L. 131 (1992).

For example, in the United States (US) there has been two layers of travel restrictions. The first layer is a federal ban on entry from specified countries to the US. This ban was imposed by presidential proclamations and applied to non-citizens.[81] On top of this layer further restrictions at the state level were placed. Thus, the state of New York restricted entry from the outside, including other states in the US, and conditioned entry on quarantine.[82]

In the United Kingdom (UK) the authorities were empowered to order people to remain in places for screening and assessments or confine potentially infectious persons to their home or other place or facility.[83] Further, the authorities ordered a general lockdown, which included severe restrictions on the freedom of movement to an extent that may also deem infringement of the right to personal liberty, i.e. the freedom from detention and incarceration.[84]

The freedom of expression is a fundamental right which is recognised in all democratic legal systems that are founded on the rule of law. Freedom of assembly and freedom of political speech are necessary conditions for the very existence of democracy. However, during the Covid-19 period most democracies imposed significant restrictions on political expression, including bans or limitations on protests and demonstrations.

Some countries did not address political assemblies specifically, but general restrictions on gatherings prevented or limited political events. In many countries a ban on gathering was imposed as a part of general lockdown. One of the first countries to prohibit assemblies was

[81] E.g. Proclamation on Suspension of Entry as Immigrants and Non-immigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (Jan 31, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/; Proclamation – Suspension of Entry as Immigrants and Non-immigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus (Mar. 11, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/.

[82] E.g. Executive Order No. 25 – Quarantine Restrictions on Travellers Arriving in New York (Jun. 24, 2020), https://www.governor.ny.gov/news/no-205-quarantine-restrictions-travelers-arriving-new-york.

[83] See Coronavirus Act, (2020) Schedule 21.

[84] For the first lockdown regulation in England see Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

Italy.[85] However, restrictions on gatherings were imposed for longer periods and remained in force even when there was no general lockdown.

Property rights and freedom of vocation also sustained serious injuries during the crisis originating from the outbreak of Covid-19. Restrictions were, of course, imposed on potentially infectious people that were confined to their homes or to special facilities. However, the harm to those rights was much wider and was not necessarily linked to individual risks of infection. Democracies around the world ordered general or wide business closures, often for long periods of time. Even Germany, one of the most cautious countries with regards to interference with private rights and interests, foisted mandatory closure on businesses throughout the country. The mandatory closure applied to all non-essential businesses, such as most shops (excluding deliveries), restaurants, bars, clubs, museums, galleries and theatres. The policy was agreed upon between the lander and the federal government and the decisions were carried out by the lander.[86]

Similarly, the right to privacy has not escaped massive governmental interferences during the period the followed the Covid-19 outbreak. In the effort to collect information and isolate potentially infectious people, governments took measures that infringe the right to privacy. In is noteworthy that different countries took different measures, and the harm to privacy significantly varies from one democracy to another. Thus, one should distinguish voluntary installation of mobile applications from mandatory disclosure of information in an official questioning.

Notwithstanding the variety, one should pay attention to the serious injuries sustained by the right to privacy in many democracies. A manifest infringement of privacy took place in Israel. The Israeli government empowered the Israeli Security Agency to monitor and surveil to detect

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[85] For the general decree of curfew issued by the president see Decreto del Presidante del Consiglio dei Ministri 10 aprile 2020, no. 97. Also see Decreto del Presidante del Consiglio dei Ministri 27 aprile 2020, no. 108.

[86] Meeting of the Federal Chancellor with the Heads of Government of the Lander, Die Bundesrregierung (Mar. 22, 2020), https://www.bundesregierung.de/breg-de/themen/coronavirus/besprechung-der-bundeskanzlerin-mit-den-regierungschefinnen-und-regierungschefs-der-laender-1733248.

possible contacts between individuals and potentially infectious people.[87] At the beginning the surveillance lacked parliamentary approval or reasonable supervision, and the Supreme Court issued an interim order to limit the use of surveillance by the ISA.[88]

All of these invasive interferences with fundamental rights may indicate a tendency to relinquish core legal norms in states of emergency. However, this is by no means a necessary or correct conclusion. Limitations on rights are ineluctable. They are unavoidable in the normal state of affairs as in states of emergency. Moreover, a large-scale crisis at the national level may well warrant governmental acts that are inappropriate in the absence of a crisis. Therefore, the outcomes of legal proceedings – court orders – in emergencies are expected to differ from the outcomes in other situations in congruence with the factual distinctness.[89] This proposition is not in contest between models of illicitness and models of unbroken legality. Degeneration in the level of rights and the ability to perform them is indeed undesirable and affect the evaluation of the rule of law, but it does not necessarily mean abandonment of the rule of law.

Therefore, evaluation of the rule of law requires a thorough examination of how and under what conditions rights are being interfered with. It requires investigation into the division of powers between the branches of government. In particular, one has to explore whether each branch continues to perform its basic function, i.e. whether the legislative body is the one who issues general legal norms, the judiciary authoritatively resolves disputes and interprets the law, and the executive implements policies and decisions in accordance with the general norms as set by the parliament and interpreted by the executive.

Admittedly, specific legal norms may be changed in times of emergency and in times of normality, but to be compliant with the rule of law changes have to be made in the manner prescribed by the state's constitution. For example, the legislature may enact, amend or repeal

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[87] See Emergency Regulations (Authorisation for the Israel Security Agency to Assist in the National Endeavour to Reduce the Spreading of the Novel Coronavirus), 2020-5780, KT 982.

[88] See HCJ 2109/20 Ben-Meir v. Prime Minister, Nevo Legal Database (Apr. 26, 2020); HCJ 2109/20 Ben-Meir v. Prime Minister, Nevo Legal Database (Mar. 19, 2020)

[89] E.g., Mark Tushnet, 'Defending Korematsu: Reflections on Civil Liberties in Wartime' (2003) Wisconsin Law Review 273, 281.

statutes, and authorised ministers may well issue new or revised regulations. However, fundamental normative change is neither intrinsic to a state of emergency nor a necessary implication thereof. Legal norms should be interpreted and applied consonant with the same constitutional theory within the framework of the rule of law in war as in peace.[90]

Proponents of unbroken legality typically stress that this compliance is both possible and normatively requisite since the rule of law in liberal democracies is required and capable of regulating all sorts of governmental actions, including responses to national emergencies; both schools of thought agree that the conformity of legislative alterations and legal interpretations of norms with the state constitution is important for the evaluation of the rule of law. Models of emergency illicitness may argue that deviation from the constitutional division of powers is necessary or justified under some conditions, but they seem to recognise that this deviation distance the deviating country from the rule of law.

During the Covid-19 public-health crisis some democracies deviated from their constitutional division of powers and transferred great governmental powers to the executive. This phenomenon is evident in all main forms of democratic government: parliamentary and presidential, federal and unitary, common-law and civil law. However, this phenomenon does not seem to be universal, and different countries display different ways of addressing the crisis within the rule-of-law framework, which is reliant on the constitutional division of powers.

One example of a change in the function of the legislature comes from New Zealand. The response of New Zealand to the crisis was swift and decisive. The country went early into a national lockdown. As part of the decisive measures Parliament was shut down for the duration of nearly 5 weeks. However, New Zealand also constitutes an example of controlled and careful change. The decision to suspend Parliament was backed by cross-party support, and a cross-party parliamentary committee maintained a continuous parliamentary supervision on the executive.[91] This was not the case in all democracies.

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[90] E.g., *Liversidge v Anderson* [1942] 1 AC 206 (HL) 244. See also Zwitter, 'The Rule of Law' (n 19) 251.

[91] See Charlie Dreaver, Special Committee Set Up As Parliament is Adjourned, RNZ (Mar. 24. 2020), https://www.rnz.co.nz/news/political/412520/special-committee-set-up-as-parliament-is-adjourned;

In Israel the government issued an unprecedented amount of emergency regulations. Those regulations were executive legislation that set primary arrangements, changed some statutes and suspended others, and dramatically injured rights. Among other uses of emergency regulations were the granting of enforcement and surveillance powers to law enforcement bodies and the Security Agency as well as general lockdown.[92] This unprecedented use of executive emergency regulation, which had been designed to be a legislative instrument of last resort only when the legislature is paralysed due to the emergency, was seemingly incompatible with Israeli case law.[93]

Those examples demonstrate that both rights and constitutional fundamentals at the institutional level were breached. The interrelation between those two subsets of constitutional guarantees has yet to be explored. Further research of the interrelation between the interference with fundamental rights and the institutional question of due the division of powers is of utmost importance for the evaluation of the rule of law in the Covid-19 crisis.

What Was the Epidemic Response Committee, New Zealand Parliament (Mar. 1, 2020), https://www.parliament.nz/en/visit-and-learn/history-and-buildings/special-topics/epidemic-response-committee-covid-19-2020/what-was-the-epidemic-response-committee/.

[92] E.g. Emergency Regulations (Novel Coronavirus – Restriction of Activity) 5780-2020, KT 812; E.g. Emergency Regulations (Location Data) 5780-2020, KT 772; Emergency Regulations (Authorisation for the Israeli Security Agency to Take Part in the National Endeavour to Reduce the Spread of the Novel Coronavirus) 5780-2020, KT 782.

[93] E.g. HCJ 6971/98 Paritzki v. Government of Israel, PD 53(1) 763 (1999).

5. CONCLUSION

Emergencies pose significant challenges to the rule of law. The global crisis originating from the outbreak of the Covid-19 pandemic demonstrates special characteristics, which are different from typical cases of national emergencies. This crisis is global in a new and highly connected world, trans-boundary, continuous, and simultaneous. The effects of measures governments take to address this public-health crisis in the contemporary world may well be intensified in comparison with other past emergency measures in general, and particularly compared with other pandemics in other times. The harm to fundamental rights is exceptionally extensive. The patterns of government have significantly changed in many countries.

One may think that the infringements of rights as well as the institutional changes derive from the unique nature of this global crisis. This paper indicates that the theory of emergency and constitutional arrangements are not insignificant. The evaluation of the rule of law should be made according to established theory, and it is argued that constitutional guarantees are of great importance; constitutional guarantees exert significant influence on the nature of government and particularly on the level of protected rights during crises of this type. The arguments made in this paper also suggests that further research into to the interrelationship between the division of powers and the protection of fundamental rights in crises of this kind is would be valuable for the evaluation of the rule of law. It will also contribute to a better understanding of the influence of acute changes in circumstances juxtaposed with the influence of constitutional guarantees.