

International Law and the Rule of Law under Extreme Conditions

An Economic Perspective

Contributions to the XIVth Travemünde Symposium
on the Economic Analysis of Law
(March 27–29, 2014)

Edited by

Thomas Eger, Stefan Oeter,
and Stefan Voigt



Mohr Siebeck

e-offprint of the author with publisher's permission

Thomas Eger is a professor of Law and Economics at the University of Hamburg, Faculty of Law, and director of the Institute of Law and Economics.

Stefan Oeter is a professor of Public Law and International Law and director of the Institute for International Affairs at the University of Hamburg as well as chairman of the Historical Commission of International Society for Military Law and the Laws of War and member of the Permanent Court of Arbitration, Den Haag.

Stefan Voigt is a professor at the University of Hamburg and director of the Institute for Law and Economics at the University of Hamburg, fellow of the CESifo in Munich and connected to the International Centre for Economic Research (ICER) in Turin.

ISBN 978-3-16-153567-3

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available on the Internet at <http://dnb.dnb.de>.

© 2017 by Mohr Siebeck Tübingen. www.mohr.de

This book may not be reproduced, in whole or in part, in any form (beyond that permitted by copyright law) without the publisher's written permission. This applies particularly to reproductions, translations, microfilms and storage and processing in electronic systems.

The book was printed by Gulde Druck in Tübingen on non-aging paper and bound by Gulde-Druck in Tübingen.

Printed in Germany.

e-offprint of the author with publisher's permission

Table of Contents

<i>Eli M. Salzberger</i> The Rule of Law Under Extreme Conditions and International Law: Introductory Notes	1
<i>Hans-Joachim Heintze</i> Sovereignty and the “Protection of Persons in the Event of Disasters”	49
<i>Wolfgang Weigel</i> Comment on Hans-Joachim Heintze	69
<i>Bulbul Khaitan</i> Discussion on Hans-Joachim Heintze	75
<i>Peter Lewisch</i> International Catastrophes – an Obligation to Cooperate?	77
<i>Matthias Lemke</i> Comment on Peter Lewisch	105
<i>Katharina Pfaff</i> Discussion on Peter Lewisch	113
<i>Hans-Heinrich Trute</i> How to Deal with Pandemics	115
<i>Andreas Nicklisch</i> Comment on Hans-Heinrich Trute	161
<i>Felix Hadwiger / Ines Reith</i> Discussion on Hans-Heinrich Trute	165
<i>Thilo Marauhn</i> An Analysis of International Law Applicable to the Use of Drones.....	167

<i>Amnon Reichman</i> Comment on Thilo Marauhn	185
<i>Agnes Strauß</i> Discussion on Thilo Marauhn	191
<i>Heike Krieger</i> Conceptualizing Cyberwar: Changing the Law by Imagining Extreme Conditions?	195
<i>Jerg Gutmann</i> Comment on Heike Krieger	213
<i>Mariia Parubets / Junjie Zheng</i> Discussion on Heike Krieger	219
<i>Tim Krieger / Daniel Meierrieks</i> How to Deal with International Terrorism	223
<i>Stefan Oeter</i> Comment on Tim Krieger and Daniel Meierrieks	249
<i>Marek Endrich</i> Discussion on Tim Krieger and Daniel Meierrieks	265
<i>Martina Caroni</i> Legitimate, but Illegal? From Humanitarian Intervention to Responsibility to Protect and Beyond	267
<i>Gad Barzilai</i> Comment on Martina Caroni	283
<i>Bulbul Khaitan</i> Discussion on Martina Caroni	289
<i>Roland Vaubel</i> The Breakdown of the Rule of Law in the Euro-Crisis: Implications for the Reform of the Court of Justice of the European Union	291

<i>Martin Nettesheim</i>	
Comment on Roland Vaubel	309
<i>Michael Fehling</i>	
Comment on Roland Vaubel	315
<i>Kevin Dünisch</i>	
Discussion on Roland Vaubel	325
<i>August Reinisch</i>	
Rules for an Orderly Insolvency of States?	327
<i>Hans-Bernd Schäfer</i>	
Comment on August Reinisch	347
<i>Felix Hadwiger / Ines Reith</i>	
Discussion on August Reinisch.....	351
Short Biographies	355
Index	361

The Rule of Law Under Extreme Conditions and International Law: Introductory Notes

by

Eli M. Salzberger

The ‘rule of law’ has attracted a lot of scholarly writing as well as political and public rhetoric in recent years. On the one hand, scholars found that adherence to the rule of law can be regarded as the most significant explanatory factor for various measures of a country’s success, both in the social – quality of life – realm and in the pure economic realm (e.g. *Ballesteros* 2008; *Haggard* 2010).¹ Hence the growing popular calls to enhance the rule of law, which seem even to substitute, at least partially, the calls for democratization.² On the other hand, various governments’ responses to terror threats since 9/11, including those of established liberal democracies, brought about a surge in positive and normative writings as well as public debates about the rule of law under extreme conditions (e.g. *Gross and Aolain* 2006; *Johnsen* 2012; *Addicott* 2012) or the deviations from the rule of law, even by the most liberal democracies. However, the international law aspects of the rule of law under extreme conditions constitute a field that has received very little attention yet, and in this respect, the conference held in Travemünde on March 2014 is a pioneering one, as is the present volume of the papers presented there.

Discussing the rule of law under extreme conditions in the international arena from a Law and Economics perspective raises several challenges. First, although the concept of the rule of law as an ingredient of the ‘good’ state is established (though there is no agreement on its precise definition), the basic definition of the rule of law in the international arena is a much more virgin field (*Deller et al.* 2003; *Chesterman* 2008; *Nollkaemper* 2011). Most of the writings about the rule of law (both normative and positive) relate to the state

¹ Already 70 years ago, *Hayek* (1944) provided a theoretical explanation of the importance of the rule of law to economic success.

² One of the more significant examples is the adoption of a resolution to promote the rule of law by the UN as one of its prime goals in post-conflict societies, through both the activities of peace-keeping forces and of the UN Development Program. See the UN Secretary General’s report “Rule of law and transitional justice in conflict and post-conflict societies” (2004). For other UN actions in this realm, see www.un.org/en/ruleoflaw.

(the theory or practice of states). The mere concept of the rule of law in the international arena or in international law is vague and requires attention. Second, extreme conditions may challenge the normative and positive analysis of the rule of law (*Criddle and Fox-Decent* 2012). The theory of the state, from which we derive the common understanding of the principle of the rule of law, deals with the regular operation of collective life, institutions and decision-making. Under extreme conditions, most countries establish a different form of the rule of law (an emergency constitution, as phrased by some), compromising some of its essentials during regular times (*Zwitter* 2013). It can be argued on the normative level that this is justifiable; but to what extent and in which format? There is no coherent paradigm yet for the analysis of the desirable as well as the de-facto rule of law “balance” (e.g. state security versus human rights) under extreme conditions.

The third major challenge relates to the definition of those extreme conditions that merit a special look vis-à-vis the rule of law. Three types of extreme conditions have been discussed by the literature: (1) belligerency, war, terror and alike; (2) natural and man-made disasters; and (3) political or economic meltdowns. Are extreme conditions in the international arena identical to extreme conditions in the context of the state? Is the familiar distinction between the three types of extreme conditions referred to in the context of the state applicable to the international sphere?

I will try to contribute a few preliminary thoughts about each of these challenges, highlighting the perspective of Law and Economics. Section 1 will explore the concept of the rule of law in the international arena and in international law; Section 2 will elaborate on the economic philosophical foundations of the theory of the state and will examine their applicability to the international sphere and to extreme conditions; Section 3 will focus on the characterization of extreme conditions vis-à-vis the rule of law, including a short overview of the models put forward in the literature and also some methodological remarks for those who engage in a Law and Economics approach towards this topic.

A. The Rule of Law in International Law, or the Rule of Law in the International Arena

I. The rule of law in the context of the state

Although the idea of the rule of law has ancient roots (*Tamahana* 2004; *Black* 2009), it emerged as a distinct political idea in the 16th century and has become a key component in modern social contract political philosophy or the modern theory of the state shaped during the Enlightenment (*Chesterman*

2008; *Gosalbo-Bono* 2010) and practiced today.³ The rule of law denotes that every member of the polity is subject to the law and hence it negates the idea that rulers are above the law (such as expressed by the theory of divine right, which was the basis of political theory before the Enlightenment). The rule of law also means governing by laws, as opposed to ruling case-by-case, a practice that can lead to arbitrary rules (*Grimm* 2014). It also implies that all citizens are equal, as they are all subject to the same law and its uniform enforcement (*Raz* 1977; *Fallon* 1997).

The rule of law comprises two layers: formal and substantive (*Craig* 1997). The formal layer means that, on the one hand, individuals are free to pursue any activity they wish save those activities explicitly prohibited by law, and on the other hand, that governments and other authorities (and one can extend this to any unnatural legal person, such as corporations) are not entitled to pursue any activity save those that they are explicitly permitted to undertake by law.

Substantiation of this formal layer means that governments and other officials cannot prevent or sanction individuals' actions, save when they have violated the law, and, likewise, governments and other officials can only use the powers explicitly granted to them by law. Thus, prerogative powers, for example, which rulers assume in the course of extreme conditions, violate the rule of law unless explicitly provided for in the constitution or by some other form of legal empowerment (and this in turn negates the definition of prerogative powers). An implicit condition for achieving the formal layer of the rule of law is equal enforcement of the law. Similarly, to achieve the formal layer, laws must be publicly declared and publicized, with their prospective application, and they must possess the characteristics of generality, equality, and certainty (*Fuller* 1969; *Zimmerman* 2007). This means that there should be a clear identification of the law-making authorities, although democratic election of the legislature is not a condition for the formal facet of the rule of law. In other words, formally, states that do not hold elections for the legislature or for the executive can still maintain the formal facet of the rule of law. What seems to be a structural condition for substantiating the formal facet of the rule of law is the establishment and operation of independent and efficient enforcement agencies, primarily prosecution agencies and courts (*Raz* 1979), without which equal enforcement of the law would not be achieved.

On the theoretical level, corruption is an antithesis to the rule of law, as it means unequal enforcement of the law as well as officials' conduct outside the powers granted to them (*Uslaner* 2010). This can in turn shed light on the

³ The term "rule of law" and its first modern legal definition were coined by the English constitutional scholar A.V. Dicey in his book *An Introduction to the Study of the Law of the Constitution* (1889).

correlation between the rule of law as defined above and economic success. Governing by clear laws, prospective and equally enforced without corruption, enhances certainty in terms of the ability to plan ahead according to the law and to rely on its precise and equal enforcement. Certainty is crucial for internal and external investment and thus instrumental for economic development and progress. This last insight can also explain why it is in the interest of rational rulers, regardless of whether they are bound by popular will, to maintain the rule of law, and it also transforms the normative analysis of the rule of law into a positive analysis.

However, laws can impose far-reaching prohibitions on individuals, as well as endowing state authorities with extensive powers, all of this in full compliance with the formal facet of the rule of law. To prevent this, the substantive facet has to be incorporated. It denotes substantive limits to prohibitions on individual conduct and to the empowerment of state authorities or officials. While the formal facet of the rule of law only requires that prohibitions on individuals or the empowerment of government be anchored in a prospective, general, clear and equally enforced law, the substantive facet requires that such prohibitions or empowerment does not violate various content-based values. One such substantive limit is a concept of individual rights, which constrains prohibitions on individuals as well as the extensive empowerment of the government. Another constrain is the doctrine of separation of powers, which may (by law) limit the delegation of powers from the legislature to the executive or other officials (*Zimmerman 2011*).

A common mechanism to achieve the substantive facet of the rule of law is judicial review of legislation. Most constitutions include a structural part, which allocates powers to various state authorities, and a substantive part in the form of a bill of rights. Both parts constrain the legislature (and other state powers). The establishment of an effective and impartial enforcement mechanism is a crucial condition for realizing the substantive facet of the rule of law. In many countries, this role is assigned to courts – either a special constitutional court, as in most Civil Law countries (*Perez- Perdomo 2007*), or the general courts, as in most Common Law countries (*Gleeson 2001*). The independence (especially from the other branches of government), trustworthiness and quality of courts are, therefore, essential preconditions for the substantive layer of the rule of law.

The concept of the Rule of Law

	formal	
Every individual is free to do anything, save what was prohibited by law		Every state power or official is prohibited from doing anything, save what was empowered by law
	substantive	
Reviewing laws limiting individual freedoms		Reviewing laws empowering state organs

Figure 1: The Rule of Law

II. The rule of law in the international arena

As can be seen from the discussion above, we usually talk about the rule of law in the context of the state or the theory of the state. What does the rule of law mean in the international arena or in international law?

In the recent decade, the rule of law has become a hot topic also in the international arena or in international law (Kanetake 2012).⁴ Three distinct realms can be identified in this discussion: 1) how international law, collective action and institutions can promote the rule of law in the context of states; 2) what are the relations between international law and national law with respect to the rule of law (monism vs. dualism is part of this realm); and 3) promoting (some will argue constructing) the principle of the rule of law in the international arena itself, or in international law. In what follows, I will focus on the third realm and more specifically on the questions: What does the rule of law mean in international governance or in international law, and can we characterize the international governance system as adhering to the principles of the rule of law?

⁴ The UN in 2005 recognized the rule of law as one of its universal and indivisible core values and principles. See UN (2005, para 119).

Dating to the mid-19th century, international law is a very young field of law in relation to other fields (*Anghie 2005*). The major body of international law was developed even later, only in the second half of the 20th century, following the devastation of the two world wars. International law can be seen as comprising two major types of norms. The first category includes norms governing the interaction between states, imposing duties and establishing rights among them. The states are the principle subjects of these norms, their obligations are towards other states, and enforcement or actions are performed on the inter-state level. Examples include international trade treaties, but also some norms that belong to the origins of international law – *jus ad bellum* – i.e. norms that govern the justifications for using force externally or engaging in war.

A second category of international law, which has been developed primarily after WW2, consists of norms that limit states' internal actions or indeed their internal laws by requiring minimum substantive standards regarding human, political and social rights. Like those in the first category, some of these norms are only enforceable between states, but others can also be enforced directly on individuals (and state officials). While *jus ad bellum* regulates the legitimacy and legality of states taking action against other states, *jus in bello* – humanitarian international law – requires states to regulate the behavior of their soldiers during armed conflicts. These norms apply directly to the relevant soldiers or other officials, and their violation can entail legal proceedings against the infringing individuals. The same also applies to the various treaties and customary law requiring the safeguarding of various human, political and social rights, not only in the context of war. These norms address individuals within the jurisdiction of a state.

Traditionally, enforcement of both types of norms has been solely in the hands of international organizations, states or governments, rather than in the hands of individuals (the victims of a violation of international law norms could not have approached international courts), which can explain the fact that the dichotomy between the two types of international law norms that I offered is unconventional. However, in recent decades, international law has been developing towards encompassing duties of individuals, subjecting them directly to judicial enforcement, such as the jurisdiction of the International Criminal Court, and in the future it will possibly enable individuals to approach various means of enforcement and international tribunals directly.

In the past, national sovereignty was one of the core principles of international law (*Hunter 1998*). The applicability of International law norms and enforcement was contingent on the consent of the relevant state. A nation's power within its territory was considered exclusive and absolute. The principle of national sovereignty, however, stands in conflict with the second type of international law norms, which impose duties on governments and officials towards their citizens and others affected by their actions. The

enactment of various international law norms of the second type, alongside developments on the ground, such as NATO's bombing of Yugoslavia, Great Britain's denial of General Pinochet's immunity claims, conditional bailouts by the International Monetary Fund (IMF), and the United Nations' occupation of East Timor, seem to confirm UN Secretary General Kofi Annan's (1999) assertion that "state sovereignty, in its most basic sense, is being redefined [...]".

The principle of national sovereignty is directly connected to the meaning of the rule of law in international law and in the international arena. According to the traditional concept, which regards national sovereignty as the bedrock of international law, the formal facet of the rule of law should mean that, on the one hand, every state is free to engage in any activity save those activities which were explicitly prohibited by international law, and on the other hand, the international community, organs and officials are prohibited from engaging in any activity save those which international law explicitly entitles them to. The substantive facet of the rule of law will mean reviewing the prohibitions on states and the empowerment of international organizations and officials against substantive criteria, such as the principle of state sovereignty.

If we consign the individual as the core subject of the rule of law in international law, as I think ought to be done (in light of the actual developments in international law, alongside the development in the theory of international governance), the meaning of the rule of law in this realm changes considerably. On the formal layer, international law must ensure that individual freedoms and rights are not violated, save by explicit laws. Even if such laws exist, the substantive layer has to examine the compatibility of these laws with various requirements, such as minimal standards of human, political and social rights specified in various international law norms. Likewise, international law has to ensure that international as well as national authorities do not transgress the powers granted to them by law, and such laws have to be examined through the lenses of the substantive layer of the rule of law, including the norms of international law (*Criddle 2012*).

Obviously, the two proposed meanings of the rule of law in international law or in the international arena will have significant consequences on the positive and normative analysis of the rule of law under extreme conditions in international law or in the international arena. A separate question is to what degree the current structure and practices of international governance and law adhere to the principle of the rule of law. I am afraid that the answer to this question is "not much", even regarding merely the formal level of the rule of law. While international law does contain norms that are general, publicly declared, and have a prospective application, they are not effectively enforced and, more importantly, they are not equally and impartially applied. The crucial deficiency regarding equal enforcement is already apparent in the

stage of deciding whether to take a state or an individual to court in the first place. There are no enforcement and prosecution institutions or individuals who operate independently (especially independently of the government they represent). Inequality of enforcement also characterizes the judicial process itself, as international courts lack the crucial ingredients of impartiality and independence exhibited by municipal courts in enlightened countries (*von Bogdandy and Venzke 2012*).

Furthermore, crucial features of the rule of law are also lacking in the norms creation procedures and in the collective decision-making of international governance, as the decisions of international bodies cannot be challenged as violating substantive or formal components of the rule of law. Even the principled question whether international organizations are positively bound by international human rights law is disputable (*Kenetake 2012*).

It seems, therefore, that before one can seriously address the challenges of the rule of international law under extreme conditions, a coherent and agreed upon general concept of the rule of law in the international arena has to be constructed.

B. The Rule of Law and Extreme Conditions: National Law and International Law

The second challenge focuses on the transformation from regular times to extreme conditions vis-à-vis the rule of law, and I think that one of the prime issues here, at least from a Law and Economics perspective, is the theory of collective action, on the level of both normative and positive analysis. Here too, the focus on international law raises interesting and novel questions. In order to examine some of them, we have to resort to some theoretical foundations.

I. The rule of law under extreme conditions and the theory of the state

Recent years have seen growing scholarly discussion about the rule of law under extreme conditions, prompted by the various legal and policy responses in the aftermath of 9/11 and the “war on terror” (e.g. *Gross and Aolain 2006*). The topic, however, is not a new one (*Svensson-McCarthy 1998*). Already during the Roman Empire one can find a systematic theory and practice according to which war could prompt a declaration of emergency that suspends the regular conduct of government (*Criddle 2012*). The Roman theory allowed for a dictator to take over government for a fixed period of six months. A clear separation between normal and emergency times was created

with mechanisms preventing the dictator from extending his rule or influencing politics after a return to normality (*Ferejohn and Pasquino* 2004).

Modern constitutions prescribe special provisions for times of emergency. Such provisions, for example, allowed the German National Socialists to assume power in 1933. These arrangements and practices prompted fierce criticism from the perspective of political and legal theory and the theory of democracy. Well known is Carl Schmitt's statement that he who decides on the exception is the sovereign, disputing the core ideas that underlie modern liberal democratic theory (*Schmitt* 1934 [2005]). *Giorgio Agamben* (2005) expressed similar criticism regarding the legislative and administrative responses of established democracies to the threat of terror in the last two decades.

Analytically, the debate about the rule of law during extreme conditions implicitly assumes an ideal type of government (and hence an ideal format of the rule of law) designed for regular times, which might be deviated from in times of emergency. Indeed, the ideal type of government (and hence the format of law and the rule of law) is a consequence of modern political theory, social contract theories as the foundation of the modern theory of the state, and the analysis of collective action – all of which are analyzed for normal times. In order to understand the justifications for a shift in the rule of law during extreme conditions, it is therefore crucial to take one step back to these foundations.

II. The normative (economic) theory of the state - foundations

The leading literature providing a normative economic theory of the state (e.g. *Downs* 1957, *Buchanan* 1975) is founded on the basis of the social contract theories of the state (from *Hobbes* and *Locke* to *Rawls*). It departs from consensus or unanimity as the fundamental justification for collective action. It is important to remember that the ultimate normative goal is exogenous to economic analysis (*Salzberger* 2008). However, unanimity or consensual decision-making can be regarded as fulfilling both teleological (consequential) and deontological (governed by natural law) normative foundations.

Although consensus belongs to a set of principles that judge desirability according to the decision-making process rather than its outcome (as in teleological morality such as utilitarianism or wealth maximization) or its external correctness (deontological morality), consensual decision does entail utility enhancement. No-one would consent to a decision or a rule which decreases their utility, and a consensual decision will thus benefit at least one person without harming any other, yielding Pareto improvement or utility enhancement (*Coleman* 1998). Furthermore, in theory (in *Ronald Coase*' terminology: in a world with no transaction costs) every decision which

enhances collective utility can be reached by consensus, as those who benefit from it will compensate those who oppose it to the extent that the later become indifferent.

Consensual decision can also be regarded as a proxy for materializing deontological morality, as the fact that everyone agrees to a certain rule or decision can be considered the best available proof that it is the “right” decision in terms of deontological morality. The inherent problem with deontological morality is how can we know what is the “good” or “moral” course of action? Consensus can be regarded as one of the best proofs to this effect. Consensual decision-making, therefore, can be presented as the meeting point between teleological and deontological moral theories, and this can serve as an explanation of the fact that *Rawls’* theory of the state (1971) is claimed by both natural law and the positivist – social contract – traditions. His term of “overlapping consensus” can point in this direction.

It is important to note that in this sense, consensus is very different from majority decision-making (wrongfully assumed to be at the core of democracy), which lacks any coherent and integral first-order normative justification by both teleological and deontological moralities. A decision or rule reached by majority is neither necessarily utility enhancing (primarily because it fails to take into account the intensity of preferences), nor “right” in a deontological sense.

Based on these foundations of collective action, the economic approach regards the establishment of the state as justified if it the result of a contract to which all future citizens are parties (*Mueller* 2003, p. 57). In political or legal terms, this contract is dubbed “constitution”. Some scholars (e.g. *Rawls* 1971, *Posner* 1979) portray this consensual agreement as a hypothetical consent, and indeed we can hardly find historical examples of full consensus regarding the content and wording of the constitution. However, the drafters of constitutions in many cases make a serious attempt to obtain very wide support (as opposed to simple majority) for the document as a condition for its ratification, reflected by the fact that the decision-making rule for the adoption of a constitution or its amendment usually requires some kind of super-majority. This is certainly true of the process by which the oldest modern constitution still in force – that of the United States – was adopted: a unanimous vote of the constituent assembly members and ratification by all future States’ legislatures. It is likewise true of the process by which the newest constitutions – those of the countries of Eastern and Central Europe, which have undergone a transition from communism to democracy – were adopted (*Salzberger and Voigt* 2002).

Consensual decision-making also characterizes the international arena or the foundation of positive international law. The source of norms in international law is either treaties, which require unanimous consent of all parties subjected to them, or customary norms, which by definition emerge

from long-term unchallenged actual practices (together with *opinio juris*), i.e. unanimous acceptance. This formulation, however, does not solve the problem of who are the prime subjects whose consent is needed to construct a rule or collective decision – states/governments or individuals – which refers to the major contemporary field of theoretical tension in international law theory, as elaborated in the previous section. This field of tension can at least partly be mitigated if national collective decision-making adheres to the consensus principle. Under such a condition, the powers granted to governments to sign international law treaties bring about consensual decision-making, not only of governments or states, but also of the individuals who are members of the polities of the signatories.

III. The normative (economic) theory of the state – implementation I: representative democracy

The economic theory of the state justifies the establishment of central government and the familiar institutions in modern liberal democracies in the following manner: Although consensus is the first-order justification for collective action, unanimous decision-making cannot be an operative and sufficient principle for the operation of the state because of the immense decision-making costs involved in reaching consensus. Put differently, the initial contract or the constitution obviously cannot foresee every potential future issue meriting collective action, especially if it is designed to be in force for a very long term. By the unanimity rationale, the resolution of new public issues would be to gather everyone whenever such new issue arises, and to decide upon them unanimously. However, the decision-making costs would be prohibitive. This is the most commonly provided justification for the need for a central government in which the power to make collective decisions are deposited or, rather, entrusted. In contractual terminology, the establishment of central government and other state institutions is the result of uncertainties that exist in each individual's mind about the future of the society in which they live and about the future behavior of other members of that society (*Mueller 2003, p. 61*). Extreme conditions are an obvious example of such uncertainties, and thus a good constitution must relate to such conditions, prescribing rules and decision-making procedures that take effect during extreme circumstances.

The same rationale for the establishment of central government is also applicable for establishing the rule of law. First, under the view presented above, the state and its government are not real entities, but rather a mechanism to aggregate individual preferences. Their legitimacy derives from the consent of the polity members. Hence, no official can be above the law or not subjected to the law. Second, the very same rationale for delegating by consensus the daily collective decision-making powers to the

government indicates that it must govern through rules rather than on a case-by-case basis. The general nature of rules significantly reduces decision-making costs, as rules which cover a broad range of concrete situations will have a much better chance of unanimous support than case-by-case decisions, which most likely produce “losers” and thus fail to find unanimous support.

From the analysis above, we can derive that the contract, or the constitution, ought to establish the basic principles guiding the interactions between individuals and state institutions – the protective role of the state – and the basic principles dealing with collective choices – its productive role (Buchanan 1975, pp. 68–69). In its protective role, the state merely serves as an enforcement mechanism of the various clauses in the social contract itself, making no ‘choices’ in the strict meaning of the term. In its productive role, the state serves as an agency through which individuals provide themselves with ‘public goods’ (Gwartney & Wagner 1988, ch. 1). Indeed, constitutions usually include a substantive part – a bill of rights, which corresponds to the protective role – and a structural part – setting institutions and collective decision-making procedures, which mainly correspond to its productive role. The two facets of the rule of law discussed above are a direct reflection of the normative framework discussed here.

The two combined solutions offered by modern democratic theory to the immense costs of maintaining unanimous decision-making in the post-constitution public sphere are *representative democracy and majority decision-making*. Indeed, the Athenians’ resort to majority rule and to the appointment of government personnel by lottery were methods to overcome the difficulties, or costs, of consensual decision-making, although the latter remained the ultimate or aspired goal. The same applies to the modern developments of representative democracy and the tools designed to overcome its fallacies, such as the separation of powers. Representatives acting on behalf of their constituents save the costs of frequently ascertaining public preferences regarding each and every issue and the prohibitively high costs of coordinating massive numbers of people. An additional rationale for representative government is the ability of representatives to acquire more information and expertise about the issues to be decided, which also relates to the distinction between preference-aggregating collective decision-making and expertise-aggregating decision-making, on which I will elaborate further in Section 3.3.

From the perspective of economic theory, two important problematic phenomena of representative democracy ought to be mentioned. The first is agency costs, which are associated with decision-making by representatives rather than by principals. These costs are the result of ineffective monitoring of representatives by their voters and the ability of the former to act in a self-interested manner without being penalized by the latter (or where the penalties are smaller than the political or personal gains). The second phenomenon

of representative democracy is the power of interest groups to seek rents at the expense of the general public, and to make gains through pressure on the representatives. Interest groups are able to succeed because of the costs of collective action. These costs allow only small groups to organize – groups whose potential gain from collective action exceeds the costs of organization (*Olson* 1965, and in the legal context see *Farber and Frickey* 1991, ch 1). In our specific context, further research is needed in order to examine (theoretically and empirically) what happens under extreme conditions to agency costs and rent seeking. Such findings might prove significant in prescribing the changing rule of law balance under such circumstances.

A second pillar of the existing liberal-democracy paradigm of the state is majority decision-making. Regardless of the question as to who should operate the state – its citizens in a form of direct democracy or a central government representing the public – there is the important issue of the desirable daily decision-making procedures and rules. The economic rationale for resorting to majority rule rather than consensus is best represented by the model of collective decision-making introduced in *Buchanan and Tullock's* “Calculus of Consent” (1962). This model can be considered one of the classical presentations of a normative analysis of collective decision-making in the framework of the consensus principle. *Buchanan and Tullock* distinguish between external and internal costs of collective decision-making. The former are the total costs to individuals negatively affected by the collective decision. These costs are smaller, the greater the majority that is required for a decision. In unanimous decision-making, external costs are zero, as rational individuals will not consent to decisions that harm them. A dictator’s rule inflicts the highest external costs on the members of the community. The internal cost function reflects the costs involved in the decision-making process itself. Its shape is inversely related to the external cost function: Dictatorial rule is the least expensive to operate. The greater the majority required for passing a decision, the greater the costs involved in the decision-making process itself; the consensual rule is the most expensive to operate. The optimal decision-making rule is that which minimizes the sum of the two types of costs. *Buchanan and Tullock* show that in most areas this optimal rule is simple majority, but there may be special types of decisions, e.g. those that concern basic human rights, in which a qualified majority is the optimal decision-making rule.

The Buchanan-Tullock model is one of the few modern justifications for majority rule. However, it can also justify a departure from majority when both types of costs are very high. Decision-making during extreme conditions may constitute such a case. In other words, in times of war, acute natural or man-made disasters or an economic and political meltdown, decisions must be made very swiftly, so that the regular majority decision-making rule may create huge costs due the lengthy time required to reach a decision, which can

also increase the external costs significantly. This fact may serve as justification for special arrangements for collective decision-making under extreme conditions that bypass the regular procedures established by the general principles of the rule of law and democratic theory. Two obvious factors can be identified as affecting the extent and mode of departure from the regular decision-making processes under extreme conditions: the degree of uncertainty about the nature of the extreme conditions and the cost-benefit analysis regarding the swiftness of the decisions to be taken.

IV. The normative (economic) theory of the state – implementation II – the structure of government

Returning to the skeleton argument of the economic theory of the state: we have seen that transaction costs require a departure from unanimity to representative government ruled by majority.⁵ Various mechanisms are needed to balance this shift to secure that collective decision-making does not reflect raw majority, exploitation of minorities, capture of decision-making bodies by interest groups and the like. These mechanisms include substantive review (constitutional and administrative judicial review) of majority-led decision-making against an entrenched bill of rights, and an institutional structure aimed to elevate decision-making outcomes from reflecting mechanic simple majority to reflecting super majority after deliberation. These mechanisms are embodied in the structure of central government, the desirability of which ought to be derived from the list of functions assigned to the state, including its role under extreme conditions.

The doctrine of separation of powers is a major structural principle of the economic theory of government. Separation of powers can be viewed as comprising several components: separation of functions, separation of agencies, separation of persons and a form of relations between the powers. Let us elaborate on each of these components, an important discussion especially in light of the fact that such concepts in international governance and law are almost non-existing and rarely discussed.

There are two types of *separation of functions*, and one of them is usually overlooked. We have distinguished between the protective function of the state and its productive function. The protective function is connected mainly, but not exclusively, to the constitutional stage and the binding force it exercises over post-constitutional collective processes; the productive

⁵ The traditional analysis has not incorporated changing technology (e.g. the internet), which may have significant effect on this cost-benefit analysis and can thus shift the balance between consensus-based collective action and majority decision-making, and between direct and representative democracy. I have elaborated on this key issue in previous writings (e.g. *Elkin-Koren and Salzberger* 2004, ch. 10). It might be a key factor also in the analysis of the rule of law under extreme conditions.

function is related mainly to the post-constitutional stage (*Buchanan* 1975, pp. 68–70). From a theory of the state point of view, this distinction should be considered as the more important grounds for the separation of powers.

The second and more familiar functional division of central government is between rule-making, rule-application and rule-adjudication, or, as they are more commonly called – legislation, administration and adjudication. History reveals that this functional division has always existed, regardless of the era (or at least since long before the doctrines of separation of powers and the rule of law existed) and type of regime (*Montesquieu* 1748, Book I, section 3). This phenomenon also has an “economic” logic: governing by the creation of rules, their application to concrete questions and (ex-post) examination of such application, rather than making each decision individually and independently, is more efficient. It minimizes transaction costs from the perspective of the government or of the decision-makers, as it is cheaper to apply a rule than to deliberate every question from initial principles. It also minimizes agency costs from the viewpoint of the citizens, namely the exercise of individual control over the government, by providing certainty and predictability (*Brennan & Buchanan* 1985, chs. 6–8). This form of separation of functions is an integral ingredient of the meaning of the rule of law: governing should take place by general rules as opposed to case-by-case decision-making. However, extreme conditions might require deviation from this general principle, as some extreme conditions are *sui generis*, requiring particular collective decisions rather than the application of a general rule.

There is a large distance, both historically and conceptually, between the mere separation of functions and the *separation of agencies*. The latter principle has a significant effect on the structure of government because it implies that not only must the three functions – legislative, executive and judicial – exist, but they should be exercised by separate institutions or branches of government.

The state can be perceived, from a microeconomics perspective, as a micro-decision unit (like a firm) or perhaps as a set of micro-decision units (like an industry) that primarily produce public goods. In this context, the separation of agencies is connected to the monopoly problem (*Silver* 1977; *North* 1986; *Whynes & Bowles* 1981, ch. 5). The concentration of all governing powers in the grasp of one authority creates a vertically integrated state with monopoly powers or even discriminating monopoly powers. Monopolies cause inefficiency and a distorted division of wealth between the producers and the consumers, i.e. in the case of the state, between the government and the citizens.

There are several possible ways to promote competition in the case of the state as a monopoly: the existence of other states, to which it would be possible to emigrate, i.e. the “exit” option (*Hirschman* 1970), a federal structure (*Tullock* 1969; *Posner* 1987, *Mueller* 2003, ch. 6), and the

separation of agencies. These methods of promoting competition can be regarded as substitutes. Thus, a more accessible exit option can reduce the need for the separation of agencies. Likewise, a federal state has less need for a strict horizontal separation of powers. On the international level, however, there is neither an exit option nor a federal structure, and therefore the separation of agencies is the only way to tackle monopolistic power. This is yet another under-researched aspect that merits further studies on both the conceptual and the empirical levels.

There is another important rationale for the separation of agencies – diminishing agency costs. As we have seen above, the democratic system is a kind of compromise or second-best solution, which results from the need to transfer powers from the people to a central government, and at the same time to place the government under effective control by the people, in a way that is not too costly. In this sense, it was probably appropriate to describe democracy as the least evil system of government. The main problem of the transfer of powers to a central government (even with periodical control by the citizens) is agency costs, which are caused by the differences between the incentives of the agents (the politicians) and the incentives of the principals (the citizens).

Three categories of costs are typically involved in a principal-agent relationship: bonding costs, monitoring costs and residual loss (*Jensen & Meckling* 1976). In the case of a central government (agent) and citizens (principals), the residual loss is the dominant element. This loss is created by the mere fact that the rulers-politicians seek to maximize their own interests by gaining more powers, instead of maximizing the population's well-being (*Michelman* 1980, *Backhouse* 1983). One way to reduce these agency costs is to divide the agency into separate sub-agencies, creating different incentives for each. In that way, while legislators act to maximize their political powers and chances of re-election, administrators and judges have different incentives, as a result of different institutional arrangements. If this is the case, the reduction of agency costs will be more significant if the division of powers occurs not only by separation of agencies but also by assigning each agency a different governing function (*Macey* 1988). We are thus approaching the classical idea of separation of powers.

The economic history explanations to the political changes in seventeenth and eighteenth-century Europe (e.g. *North* 1981), among them the emergence of the separation of powers, is a particular example related to the theoretical explanation above. In a nutshell, this explanation focuses on the financial crises of the early nation states, which obliged the rulers (the monarchs) to seek loans from the public. One of the methods to gain the lenders' confidence in the government's commitment to honor the credit was the creation of other governmental agencies, including an independent judiciary, which were to enforce these contracts in an impartial manner. The emergence

of representative government is also associated with this explanation. However, the general normative framework analyzing the desirable degree of separation of agencies might change under extreme conditions, especially in the context of agency costs. In such conditions, the gap between the incentives of the agents and the principals might be narrower, which may justify a consolidation of powers relative to normal times.

A careful look at the role definitions of the protective and the productive functions will yield the conclusion that a corresponding separation of agencies is necessary due to the conflict that arises between the two functions. While the protective state aims to enforce the initial contract – the constitution –, the productive state is engaged in the production of public goods, whose costs are shared by the individuals, necessitating also the re-allocation of resources. Naturally there are conflicting desires within the productive state, but due to transaction costs, their resolution cannot be based on unanimity (as we have explained, the optimal decision-making rule, which also takes into account the excessive costs of the decision-making process itself, will deviate from unanimity). Conflicts between the outcomes of the productive state and the basic contract are therefore to be expected.

The productive state will tend to exceed the boundaries of the initial contract, aiming to reach its “technical productive frontier” (North in *Elster* 1986; *Eggertson* 1990, pp. 319–328). This may be aggravated by principal-agent problems between the government and the people, interest-group politics and rent-seeking activities (*Gwartney & Wagner* 1988, pp. 17–23; *Eggertson* 1990, pp. 350–353). The protective state will not take into account the benefits of each alternative against its opportunity costs, and its outcomes will not necessarily be the set of results which best represent some balance of opposing interests (*Buchanan* 1975, pp. 68–70). Even if the productive state is guided by utility maximization or wealth maximization, it will not compensate those whom the decisions make worse off because their votes are not required to pass decisions (unlike when decisions require unanimity). For these reasons, it would be desirable to separate the agencies assigned to fulfill the protective and the productive functions.

Parliaments are the main institutions of the productive state. Separating the protective and productive agencies means that parliaments should not be given constitution-making powers. The constitution aims to constrain the powers of the parliament, and it cannot do so properly if it is drafted and approved or amended only by parliament. In the post-constitutional stage, the protective function is of a judicial nature, and in most Common Law countries, it is indeed assigned to the judiciary; but it is distinguishable from the role of the judiciary within the productive state. Indeed, in many Civil Law countries, the protective function is assigned to a body such as a constitutional court, which is not perceived as part of the ordinary judiciary. This distinction between the regular court system and the constitutional court

makes sense in light of the rationales for separating the agencies of the productive and the protective state. While the constitutional court must be independent from the state's post-constitutional organs (though accountable to the people), the regular courts, whose main task is to adjudicate disputes between individuals, must be independent from the public, but less so from the post-constitutional organs of government.

Separation of persons is considered to be the third fundamental element in the doctrine of separation of powers (together with separation of functions and separation of agencies) and its most dramatic characteristic (*Marshall* 1971, pp. 97–100). This element was, in fact, already incorporated into our analysis of separation of agencies, because economic analysis is based on individuals and their rational-personal choices. Their preferences (or their utility functions) crucially depend on exogenous incentives and constrains. Thus, choices made by government personnel depend on the branch of government they work in and its institutional structure, including reward and penalty schemes. In other words, in the context of economic analysis, there is no meaning to establishments and institutions without their human operators, just as there is no meaning to the analysis of individual behavior without an examination of the institutional arrangements and incentive mechanisms which they are subject to. Thus, separation of agencies is meaningless unless separation of persons is an integral component of it.

However, this does not mean that only lawyers should form the judiciary and that only bureaucrats should work in the executive. Some legal systems (especially in Continental Europe) encourage a mixture of professionals in the different branches of government, and this might indeed even be more efficient. Separation of persons merely means that no-one should simultaneously belong to more than one branch of government. This requirement is not as trivial as it may look at first glance. In most parliamentary systems of government (as opposed to presidential systems), such separation of persons does not exist, when, for example, cabinet members are (and in some systems they are even required to be) also parliament members.

We noted before that separation of agencies might reduce agency costs, which result from the government-citizens (agent-principals) relationship. One way of achieving this is different representation structures for each of the branches, which can increase popular control over the government and the interplay between particular and general issues on the public agenda and between short, medium and long term interests. Without separation of persons, a significant share of these advantages would be unavailable. Extreme conditions are a good example of how these factors interact. On the one hand, decision-making anticipating extreme conditions should be derived from a long-term view, which looks beyond the election cycle. On the other hand, decision-making during extreme conditions should be geared to taking

immediate effect, hence bypassing some of the regular decision-making procedures.

The most controversial element of the desirable structure of government is the issue of *the relationships between the separated powers* or branches of government. There are at least two distinct, though interrelated, questions here: 1) To what degree is separation of powers advantageous (this question involves the issue of delegation of powers); and 2) what is the degree of freedom or independence that each of the branches should have? The former question relates mainly to functional separation; the latter relates to institutional separation (separation of agencies). These questions are strongly interrelated in the sense that there could be a significant trade-off in differently combined solutions to them.

Judicial review can serve as a good example. The conventional debate concerning judicial review is usually within the boundaries of the second question: Should the legislature and the executive be controlled by the judiciary, and if so, to what extent? But this issue could also be raised in the framework of the first question. In this context, we would first ask whether judicial review is part of the legislative or the judicial function. In the former case, we will have to ask whether the allocation or delegation (*Salzberger* 1993) of the powers to participate in rule-making to the judiciary is desirable or legitimate.

The two extreme approaches to the second question are the independence approach or the pure doctrine of separation of powers, on the one hand, and the checks and balances approach, on the other hand (*Yasky* 1989; *Vile* 1967, ch. 1; *Marshall* 1971, pp. 100–103). Analytically, these two approaches can refer to the functional level, which is directly related to the first question about sharing powers (or delegating powers), or to the institutional and personal levels, i.e. the accountability of agents in each branch to those in the other branches, or to both levels.

It is possible, for example, to argue that an optimal structure of separation of powers would adopt the checks and balances doctrine with respect to the functional level, and the independence doctrine with regard to the personal level. This is the underlining idea behind the American form of separation of powers: On the one hand, a collective decision by one of the branches of government is subject to approval or review by other branches. On the other hand, it is very difficult for one branch of government to remove any of the agents in any of the other branches. Thus, in contrast to popular perception, the USA adopted the checks and balances approach only on the functional level, while independence (or pure separation) is adopted on the personal level. By contrast, most European parliamentary democracies do not feature independence on the personal level. The members of the executive are accountable to the legislature and the Prime Minister has the power to dissolve Parliament. Likewise, the appointment and promotion of judges is

under the power of the executive. However, there is relatively more independence on the functional level. For example, the legislature cannot review appointments within the executive and legislation is not subject to veto by the executive.

The theoretical framework for analyzing these questions is, again, transaction costs and decision-making costs on the one hand, and agency costs on the other hand. A smaller degree of independence will tend to raise the former costs but reduce the latter ones, and the optimal level may depend on variables such as the size of the jurisdiction (*Silver 1977*), the representation structure of each branch, and others.

As to the first question about the degree and rigor of the desirable separation, the solution might be the result of a cost-benefit analysis, or, more accurately, a comparison of costs analysis. This analysis is the second stage in a theoretical hierarchical decision-making model. Let us take, for example, the function of rule-making: In the first stage of this model, we have to decide on the merits of a substantive issue – whether a certain rule or a collective action is desirable at all. In the second stage, we have to decide which of the three branches of government can most cheaply perform the collective action. The costs include both transaction costs (the costs of the decision-making process) and agency costs (*Aranson et al. 1982*, pp. 17–21). In making general rules, we may expect that the legislature would be the most expensive with respect to transaction costs, but the least expensive with respect to agency costs. This might not be the case with minor, secondary or more particular decisions or actions, in which case we may conclude that separation of powers (or, rather, separation of functions) should not be absolute. Under extreme conditions, the suggested cost structure may change, where decision-making costs may become the crucial factor (delaying the decision may entail huge costs) while agency cost might diminish. This hypothesis merits further study.

The interrelations between the branches of government can digress from the protective function to the productive function of the state. It is possible to advocate, for example, as some do, checks and balances within the protective state or with regard to ‘ultimate power’, and independence or pure separation within the productive state, or with regard to ‘operational power’. In other words, it can be suggested that the checks and balances model be employed to enforce the initial contract, but within this contract each power would be given full autonomy.

To sum up, separation of powers is the major tool of liberal democracies to compensate for the shift from unanimity to majoritarianism and from direct to representative democracy. New technological developments, such as the internet and accompanying technologies, should prompt us to revisit various components and traditional arguments within the theory (*Elkin-Koren and Salzberger 2004*). The internet enables us to operationalize more direct

democracy and more consensual or super majoritarian decision-making and rule-making processes. This, in turn, invalidates some of the rationales for separation of powers and diminishes the magnitude of others. As the structurally crafted and institutional design for separation of powers in the physical world, and especially the establishment of mechanisms of checks and balances, is itself costly, the bottom line is that the future state will need less structured separation and checks and balances mechanisms. A parallel rationale may apply to optimal collective action during extreme conditions.

V. The rule of law under extreme conditions in the international arena or in international law

I went into extensive details in presenting the economic theory of the state or of collective action for normal times, as without such detailed account it is impossible to analyze and evaluate the rule of law under extreme conditions. But this detailed account of the theory of the state can also serve as an important baseline for the analysis of the governance of the international arena or of international law, and its transformation under extreme conditions.

Two important background factors, conceptual and historical, can shed light on the differences between the theory of the state and that of international governance with respect to our interest in the rule of law under extreme conditions. First, as we have seen in the detailed account of collective action in the context of the state, its crucial point is the shift from consensual decision-making to representative government ruled by majority, and the various substantive (bill of rights and judicial review of legislation) and structural (separation of powers) elements intended to compensate for this shift. The current structure of governance in the international arena is still very much based on consensus (of states, rather than individuals). Under a consensual decision-making rule, there is no need for separation of powers or other measures which are the result of resorting to majority decision-making.

However, the growing role of international law and the aspiration for global governance ought to prompt us to rethink collective action in the international sphere. The numerous examples of international actions (e.g. the war in Iraq and the bombing of Kosovo) that bypassed the 'legal' (consensual) decision-making processes (primarily bypassing the Security Council because of the veto power of the countries that opposed these interventions), demonstrate the need for fresh thinking on these issues, especially regarding extreme conditions, which characterize these examples. In other words, even if in normal times collective action in the international sphere can be conducted by consensual decision-making (which is also open for debate in light of the growing activities on the global level), there is a need to explore different modes of international collective action during

extreme conditions. One may point out that the UN Security Council was designed specifically for this purpose. However, it is mainly designed for one category of extreme conditions – armed conflicts – but not the other categories of disasters and political or economic meltdowns. In addition, the growing number of multi-national military interventions in recent decades that bypassed the Security Council as the result of permanent member veto powers calls for re-examining the theory and practice of international collective action under extreme conditions, whose characteristics will be discussed in the next section.

Second, the historical perspective is of no less importance: Unlike modern state and municipal law, international law originated from the need to address times of emergency, especially wars. Indeed, the laws of war, culminating in rules regarding the use of force and rules regarding legitimate means of war, were the first codified, written and formally recognized norms of international law. The same applies to the institutions of international governance, such as the League of Nations (established in 1919 following WWI) and the United Nations (founded in 1945 following WWII). In this respect, extreme conditions can be perceived not as the exception, as in the theory of the state, but as the origins and *raison-d'être* of international law. It is not surprising, therefore, that – when international law was extended to rules setting obligations on states and governments towards their own people (i.e. human rights law) – built-in mechanisms were constructed for times of emergency. Such are the various treaties and declarations which enable states to announce derogations from their obligations due to “public emergency which threatens the life of the nation” and when the measures are “strictly required by the exigencies of the situation”.⁶ This mechanism echoes the state-based “emergency constitution” model (on which I will elaborate in the next section), but it lacks many of the checks and balances that have been developed in the context of the state in the past 50 years. Indeed, about half of world’s countries have used the derogation procedure between 1986 and 1997, without effective scrutiny mechanisms.

To sum up, it seems that due to the two background features characterizing the establishment and evolution of international law, the mere concept of the rule of law in the international arena and especially its interplay between normal times and extreme conditions, has been neither theorized properly nor practiced in a coherent way, leaving much work to be done in this realm.

⁶ E.g. Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR) and Article 27 of the American Convention of Human Rights (ACHR).

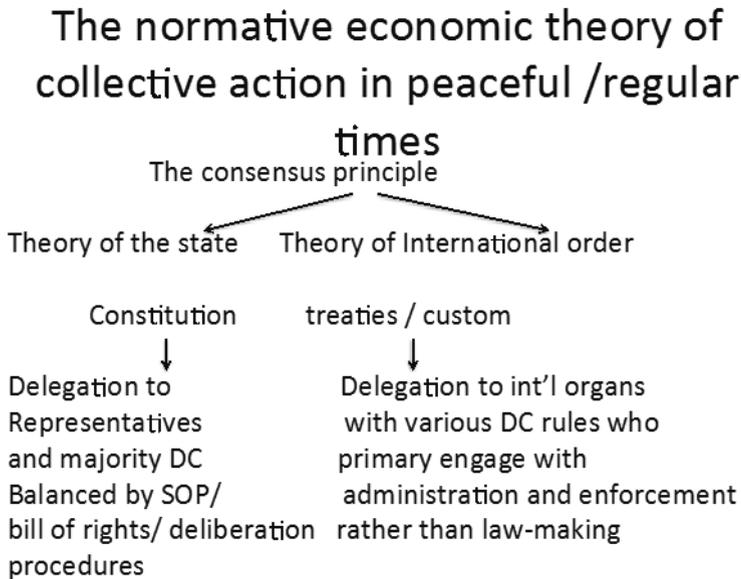


Figure 2: The economic theory of collective action

C. Extreme Conditions as Affecting the Rule of Law

The previous section characterized the principles of the rule of law as emerging from political philosophy, comparing the theory of the state and the theory of international collective action, and pointing to possible justifications in times of extreme conditions to depart from the normal times or from the general theory. This section will tackle the topic in a reverse fashion, characterizing extreme conditions and whether and how they merit *sui generis* substantive and/or procedural and institutional rules. I will also critically scrutinize the different models proposed in the literature. In this framework, In addition, I will mention some important methodological points that are specifically of interest to the Law and Economics approach and the way in which they can be developed in future research.

I. Characterizing extreme conditions: national law and international law

The literature distinguishes between three types of extreme conditions: (1) belligerency, war, terror and alike; (2) natural and man-made disasters; and (3) political or economic meltdowns. The first category is the more veteran

and recognized one, and during the Roman republic, the special switch in the rule of law (the appointment of a dictator for a fixed period of six months) was structured to meet its challenges, or more specifically the challenges of war. However, the first category, as well as the two others, raises one of the key questions in terms of the rule of law under extreme conditions: Exactly in which circumstances does a disaster or an economic crisis or indeed an armed activity constitute extreme conditions that justify special arrangements or an exception regarding the rule of law?

In each of these categories, we can draw a dichotomous line (rather than a clear-cut dichotomy) between a major crisis (e.g. a full-blown war launched on the polity; a major earthquake striking a densely populated area; an armed attempt at revolution) and a minor disruption to normal life (e.g. a minor terrorist attack; local floods; a 5% stock market crash). In addition, in each of these categories, technological advancements challenge traditional definitions. For example, does a Cyber-attack constitute an armed attack? (For the international law aspects, see *Schmitt* 2013.) How should we treat man-made disasters, such as an oil spill, which in the past could not be regarded as major disasters because of the size of the tankers? Philosophically, normality can be defined as an exact routine or identical occurrence of events – which does not exist in reality, for every situation in life and every point in time is to some degree different from previous ones. Thus, the borderline that defines an extreme condition is not an obvious or a natural one. Respectively, the law has regular built-in obligations and powers designed to address irregular situations. The police might have specific powers to enter private property or to limit freedom of movement when there is a reasonable suspicion of a crime being committed or in case of fire. Contract law includes provisions that allow non-performance or delayed performance due to unexpected circumstances, etc. All these arrangements are within the normal arrangements of the rule of law in the face of irregular circumstances.

Indeed, one model of the rule of law under extreme conditions, the *business as usual model* (see below), denies any justification for departing from the regular rule of law, arguing that substantive norms and decision-making procedures can function under any condition, including extreme conditions. If this model is rejected and changes to the law and collective decision-making procedures are recognized as legitimate, the crucial question concerns the *magnitude* of the irregular condition (constituting an “extreme condition” or an “exception”) that merits a departure from the law; there is no agreed upon answer to this question.

Likewise, everyone will from time to time encounter an individual extreme condition, be it armed burglary, a leak in the house pipes causing a flood, or unexpected individual economic hardship. Such personal extreme conditions can and should be dealt with within the normal rule of law. But when a

certain extreme condition simultaneously affects masses of people – the gun threats concern the whole population, the flood affects a whole region etc. – the extreme condition might require special substantive and/or procedural rules. Unlike the previous point, which addressed the nature of extreme situation itself, here I refer to the number of people affected, or to the *population spread* of the extreme condition, which might be relevant to justifying a departure from the regular rule of law.

A related factor is the *geographical reach* of an extreme condition. Regular local or regional law may be sufficient to address an extreme condition affecting part of the population in the region; regular national law may be sufficient to address an extreme condition such as a local terror attack, a natural or man-made disaster or acute economic hardship that occurs in several regions of the state. But when the extreme condition affects the whole state, the regular laws and decision-making procedures may not suffice to address the situation promptly and effectively. This is also the juncture between national law and international law. Extreme conditions may extend or spread to neighboring states, creating an international crisis. From an international law perspective, and in light of the distinction between international law norms that govern the interactions among states and those that impose obligations and minimal standards for national law (see section 1), the recognition in a state of exception becomes more complicated: Should the definition be identical for the two categories of norms? Should the definition of extreme conditions in international law be identical to the definition in the context of national law?

A tentative answer is that, while the definition of an extreme condition on a state level ought to match the definition of an extreme condition in the norms of international law that limit a state's actions towards its citizens, the definition of extreme conditions in international law norms governing the interactions among states might be different. As far as I know, while the definition of an extreme condition for the purpose of the former category of international law is very general and is de facto delegated to the country concerned, there is no agreed upon definition of an international emergency corresponding to the second category of international law norms, and various international organizations declare international emergencies on the basis of different *sui generis* or self-defined criteria (for example, the recent declaration of emergency by the World Health Organization due to the Ebola epidemic⁷). Further study in this realm is needed.

It seems that the concept of extreme conditions in the first category of international law norms in times of extreme conditions is more established. One of the obvious examples is the procedure for declaring derogations. Various international and regional human rights treaties allow states to adjust

⁷ www.who.int/mediacentre/news/statements/2014/ebola-20140808/en.

their obligations temporarily during exceptional circumstances by declaring derogations.⁸ Their validity is contingent on a number of requirements set by the treaty law, such as qualifications of severity, temporariness, proclamation and notification, legality, proportionality, consistency with other obligations under international law, non-discrimination and, lastly, non-derogability of certain rights recognized as such in the relevant treaty.

The European Court of Human Rights has qualified the time of public emergency as “an exceptional situation of crisis or emergency, which afflicts the whole population and constitutes a threat to the organized life of the community of which the State is composed”.⁹ The European Commission on Human Rights further developed the definition of a legitimate “public emergency” which (1) must be actual or imminent, (2) its effects must involve the whole nation, (3) continuance of the community’s organized life must be threatened and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.¹⁰

A complication of the definition of emergencies in international law of the first category relates to another dimension of the definition and to the question whether such a definition should be absolute or relative. Different regions of the world and different states are accustomed to different kinds of disasters. While earthquakes are frequent in East Asia, they are rare in Africa; droughts are common in Africa but not in East Asia. Israel is accustomed to various security threats including terror attacks, while they have been very rare in Western Europe in the past 70 years; floods are common in many parts of Europe but very rare in Israel, etc. A country that is used to a disaster of a certain type is likely to construct substantive and procedural norms to tackle this type of disaster, and its effective treatment is conducted within the regular rule of law. This may suggest the need for a relative definition of an extreme condition for the purpose of justifying deviating from the regular rule of law – another factor that further complicates the definition of extreme conditions, especially vis-à-vis international law.

Lastly, the question arises whether all types of extreme conditions should be dealt with in a homogenized arrangement vis-à-vis the rule of law. The mere fact that extreme conditions are divided into three categories may suggest a unique legal arrangement for each category. Indeed, one of the obvious characteristics of the first category of extreme conditions – war,

⁸ E.g. Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR) and Article 27 of the American Convention of Human Rights (ACHR).

⁹ *Lawless v. Ireland*, (1961) 1 EHRR 15.

¹⁰ For a more elaborate account see: www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php.

terror and the like – is that such conditions involve an “enemy” – a state, an organization or a group which is responsible (or perceived as responsible) for the extreme condition. This may raise various questions, for example in relation to the violation of human rights (e.g. the legitimacy of profiling), which do not exist in the context of natural disasters. The analysis of human behavior, rational and irrational, might be totally different in the two types of extreme conditions, which may in turn suggest a totally different theory and consequently a different legal approach. However, the very same factor might suggest a distinction within the second recognized category of extreme conditions – between natural disasters (e.g. earthquakes) and man-made disasters (such as oil spills). Likewise, constitutional crises in the format of an actual political constellation to which the constitution does not have a singular solution – ‘crises of constitutional operation’ (Whittington 2002) – might be very different from a constitutional crisis whose background is lack of faith by the majority (‘crises of constitutional fidelity’, as phrased by Whittington 2002). Similarly, should derogation or departure from the rule of law be recognized as valid or legal in the case of a threat of popular revolution in a non-democratic state which naturally wants to maintain its rule? Such a question, alongside the various issues discussed above, are awaiting better conceptual framing.

II. A possible concept of the rule of law and extreme conditions

Many of the issues discussed above are under-researched and merit more extensive study from both theoretical and empirical perspectives. An interim, working framework for such further research might distinguish three possible modes of the rule of law vis-à-vis extreme conditions:

- 1) Normal times: substantive norms as well as procedures and institutional design for collective decision-making to enact or amend norms and their execution, enforcement and adjudication, all designed for regular or normal times;
- 2) Times of emergency: specific – *sui generis* – norms, procedures and institutional design tailored for various types of irregular or extreme conditions that are envisaged *ex ante* and, hence, the legal arrangements (both substantive and procedural) exist before the occurrence of the extreme condition, which merely triggers them;
- 3) Times of exception: an option for a dramatic departure from (1) where a major non-envisaged crisis occurs and hence even (2) is not sufficient to take the appropriate measures – the real state of exception.

The *magnitude, spread and geographical scope* of the disaster are some of the key features that distinguishes between (1) and (2). The *predictability* of

the situation might be the key element that distinguishes between (2) and (3), and this feature of predictability of course differs from polity to polity and depends on external circumstances (such as an area prone to natural disasters) and past experience (such as terror attacks or political crises).

The more problematic situation (which indeed prompted Schmitt's and Agamben's criticism) is situation (3), and a possible summary of the points raised in the previous section is that two crucial characteristics of an extreme condition are relevant from the vantage point of the rule of law: non-predictability and urgency. Both factors must be present in order to justify a non-envisaged (i.e. not prescribed *ex ante*) change in decision-making procedures and substantive arrangements. When a situation prompts a need for *swift* and *effective* measures to mitigate its effects and restore normality but the situation is predictable on the basis of past experience, the norms granting powers to governmental authorities and/or limiting individual freedoms can be prescribed *ex ante* and thus enjoy all the benefits of the regular collective decision-making procedures, including deliberation, striving for consensus, checks and balances, and judicial review (corresponding to situation 2). When a polity faces an unpredictable threat which, though sufficiently large to endanger the very existence of the polity, has no immediate effects, the regular parameters of the rule of law are again sufficient (corresponding to situation 1 and/or 2). Thus, a state prone to seasonal floods can prepare *ex ante* specific legal arrangements and an institutional set-up to engage in swift and effective measures to restore normality (situation 2). Global warming, though possibly endangering the existence of states, is not an immediate threat that constitutes a justification for a type (3) exception to the rule of law.

Since the exceptional extreme condition (3) is unpredictable, its legal definition has to be broad but should include the parameters of urgency and unpredictability. The justification for its existence is to ensure the survival of the state and its citizenry and to restore normality by temporarily changing the structure of state functions in favor of efficiency and effectiveness (Zwitter 2013).

The analysis above also provides an indication as to what we should expect of situations (2) and (3) in terms of departure from the rule of law in normal times. Urgency denotes a need for speedy decision-making and action. It can thus include some of these elements: a) granting to the executive rule-making powers that are usually in the competence of the legislature; b) granting more authority to the state and its officials and thus limiting individual freedoms in comparison to normal times; c) reducing democratic control (checks and balances, judicial review etc.) over the executive (Zwitter 2013). Most of these changes compromise the substantive facet of the rule of law, and indeed, some of the ingredients of the formal layer of the rule of law should not be compromised during extreme

conditions. These include the public declaration of new norms with their prospective applications and equality in front of the law or equal enforcement of the law. Other components of the formal facet of the rule of law, such as governing by general norms, may be compromised in response to the uniqueness (unpredictability) of the situation and the need for swift *sui generis* action.

III. A Law and Economics approach to the rule of law under extreme conditions: A methodological note

How can the parameters of the discussion above be phrased in Law and Economics language? This section addresses those who wish to develop such Law and Economics analysis of the rule of law under extreme conditions in the contexts of the state and the international arena. As an introductory paper, similarly to other insights of this paper, it will contain only very general remarks, although I believe that these are crucial for any serious future research in this area.

The traditional Law and Economics normative and positive analyses of the theory of the state and of international governance have been conducted primarily with the paradigm of Public Choice, which is implicitly based on two important presuppositions. The first one is that all issues that are or have to be collectively decided in society are of the type of preference aggregation. The second presupposition is that individual preferences are fixed and exogenous to the decision-making process itself. In other words, the economic theory of the state views the world as comprising individuals who have a fixed order of preferences or utility functions regarding the various choices to be made regarding the way to live their lives. As individual preferences will often be at odds with preferences of other individuals, collective action is needed, and in this context the virtues of consensual decision-making, the fallacies of majority decision-making, the shift to representative democracy with separation of powers, checks and balances and an entrenched bill of rights are prescribed and analyzed.

Relaxing the assumption of fixed preferences yields interesting changes to the traditional Law and Economics political theory that can explain and rephrase the Republican tradition, deliberative democracy and other political philosophies in the framework of the Law and Economics paradigm. I have addressed this issue in previous papers (*Elkin-Koren and Salzberger 2005; Salzberger 2008*) and will not elaborate here.

Relaxing the assumption regarding the preference aggregation nature of collective decision-making in the context of political theory might be the next step in the development of the economic theory of the state and might be specifically important for the analysis of the rule of law under extreme conditions. The current preference aggregation paradigm assumes that there

is no objective correct social or collective decision. Good and bad are subjective; each individual has his or her own concept of right and wrong, hence the need to develop the best decision-making procedures and institutions to optimally aggregate individual preferences (e.g. to achieve utility maximization, wealth maximization, Pareto optimality, just distribution etc.). This is not the full picture of collective action. Some political decisions are made explicitly or implicitly with the aim to achieve an external objective truth. These types of decisions do not aggregate preferences but rather aggregate expertise. The decision to divide a budget between the ministry of education and the ministry of transportation is predominantly a preference aggregation decision, whereas the decision how to allocate the budget for reducing fatalities and damage from road accidents is predominantly an expertise aggregation decision. Everyone agrees that reducing road accidents is a worthy goal. Given the budget of the ministry of transport (determined on the basis of the aggregation of individual preferences), the decision whether to spend the budget on traffic lights or on a roundabout or on widening the road is an expertise decision. Only one specific allocation will yield the best result.

The picture is far more complicated as many decisions involve both aspects and the categorization of specific issue into preference vs. expertise aggregation is itself debatable and contingent upon meta-philosophical questions. For a deontologist, for example, the basic distinction between good and bad, right and wrong, is an expertise issue rather than a subjective and individual preference issue. However, both a moral deontologist and a moral teleologist will agree that some collective decisions are of a preference aggregation nature and some are of an expertise aggregation nature. They will debate (only) the specifics. I think that methodologically this distinction is of great importance as it has significant consequences on various issues regarding the best structure of governance and collective decision-making, i.e. on the theories of the state and of international governance.

Interestingly, the founders of Social Choice and Public Choice have dealt with both realms. *Marquis de Condorcet* (1785), for example, renowned for his writings about the paradox of majority voting, which was generalized by *Arrow* (1951) to the impossibility theorem – all in the realm of preference aggregation –, is famous also for the jury theorem. The latter assumes that there is one correct decision and that each individual has a certain probability of reaching this correct decision. Under the assumption that this probability is equal across all decision-makers and lies between 0.5 (flipping a coin) and 1, majority rule is the best decision-making rule to maximize the probability of the group reaching the correct decision. Condorcet's theorem and its extensions also assert that the greater the number of decision-makers, the greater the group probability of obtaining the correct decision. However, the marginal contribution of additional decision-makers falls and, depending on

the specific probabilities and of course on the cost of the decision-making process itself, a group of three decision-makers may often be optimal.

A simple example for applying the Condorcet theorem is a situation where a group has to estimate the number of balls in a pot (or for a dichotomous decision: whether the pot contains more or fewer than 50 balls). In this case, there is a clear and external correct decision. Paradoxically, in the case of a jury verdict in court – the name and example used by Condorcet – the type of decision is less clear. On the one hand, whether the accused committed the actual acts he is charged with to most philosophers is a matter of expertise (e.g. there is one correct external truth). On the other hand, whether these acts constitute a crime is a matter of legal interpretation, which is at least partly a matter of preferences (where no correct external unitary truth exist). Different theories of law will present the latter question differently vis-à-vis the dichotomy between preferences and expertise.

I have elaborated on this point because it may be specifically relevant for collective decision-making under extreme conditions. The primary task of the government or of the international community when a man-made or a natural disaster occurs is to restore the polity or the world to normality, minimizing fatalities, casualties and damage, using the optimal means. The share of expertise type decision-making is greater than in normal and peaceful times. When an epidemic spreads quickly, a tanker crashes, spilling huge amounts of lethal materials, when an army is launching an attack and progressing to conquer the neighboring state, the sort of collective decisions and actions is different from debating the desirable progressiveness of the tax system or whether to increase the state deficit in order to combat unemployment, whether to legalize prostitution or recognize same sex marriage.

While in reality ‘pure’ expertise aggregation decision-making does not exist in the context of the political governance of states and of the international community, this realm lacks theoretical and empirical research. There are some interesting insights from psychology, with direct input into behavioral Law and Economics, which have not yet been incorporated into the economic theory of the state. For example, whether we have a better chance of arriving at the “correct” decision if each decision-maker makes his or her decision independently (a ‘nominal group’ in psychology terminology) as opposed to interactively with the other members of the group is a question with direct bearing on structures and procedures of institutions and decision-making procedures, and on the interplay among them, resonating to the traditional analysis of separation of powers and checks and balances.

My modest intention in this methodological note is to broaden the tools and methodologies of economic analysis, which might be significant particularly to the rule of law under extreme conditions.

IV. Models of the rule of law under extreme conditions in the literature

As indicated in the introduction, the major terror attack on the US in 2001 and the legal responses to it prompted a new body of literature regarding the existing as well as the desirable models of the rule of law under extreme conditions. This section will provide an overview of the models advocated or actually practiced, indicating some of the advantages and disadvantages of each model in light of the points raised in the previous sections. We will also examine the compatibility of the various models, all discussed in the context of the state, with the international arena and with international law.

A possible typology of the different models proposed in the literature distinguishes between three groups that can be dubbed: ex-ante, during and ex-post. ‘Ex-ante’ models advocate substantive and procedural arrangements to face extreme conditions that are enacted before the extreme conditions. The ‘during’ models hold that while the substantive collective decisions needed to face extreme conditions cannot be taken before such conditions occur, it is possible and desirable to prescribe beforehand (and hence within the ‘regular’ rule of law) the collective decision-making procedures for times of emergencies. The ‘ex-post’ group of models negate the possibility to prescribe rules and decision-making procedures that anticipate any type of extreme conditions and hence advocate transcending the ‘regular’ rule of law, if necessary, legitimizing and legalizing or discrediting the actions taken ex-post. Here is a brief description of the models:

Ex-ante models

The common feature of the models in this group is the belief that both substantive norms and procedures for collective action can be prescribed in general terms and prior to the extreme conditions, and that the general features of the rule of law remain intact during such conditions. These models correspond to situation (1) in Section 3.2, negating the need to ever resort to situations (2) and (3).

The most radical of these models is the “*business as usual*” model, which claims that the ordinary legal system provides the necessary answers to any potential crisis without the legislative or executive assertion of new or additional governmental powers in times of disasters. The model, as articulated in the 1866 US Supreme Court decision *Ex parte Milligan*,¹¹ holds that legal systems should not, under any condition and regardless of any circumstances, recognize emergencies as deserving special treatment and accommodation (Gross 2003).

¹¹ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866).

There are several problems with this model, the most important being:

- Reality undermines theory: All polities have at some point adopted a special set of norms (by means of an emergency constitution or in some other form) or deviated de facto from the legal order in times of extreme conditions. The recent history of declarations of derogations by signatories of various human rights treaties provides good proof of this point (*Hartman* 1981), and the establishment of the derogation mechanism itself demonstrates that international law rejects this model in theory and practice. Other parts of international law (including, as specified in section 1, the most veteran segments of international law), such as the laws of war, are designed to take force only during extreme conditions, negating the business as usual model.
- Extreme conditions becoming normality: A polity that adopts this model will phrase its norms (especially constitutional ones) in such a way as to include as a matter of routine excessive powers to the government and various officials, and the empowerment to curtail individual rights. This will significantly affect adherence to the substantive facet of the rule of law also in normal times. This point, as the previous one, echoes also in international law, as exemplified by the debate regarding the relations between international humanitarian law (applicable in times of extreme conditions) and international human rights law.¹²
- Threatening the rule of law: A polity that does not follow (2) is likely to violate its own norms, for when faced with serious threats to the life of the nation, governments will take whatever measures they deem necessary to end the crisis. This will in turn widen the gap between the law in the books and law in action and endanger popular faith in the law and in the rule of law, with lasting effects long after the extreme conditions terminate (*Gross* 2003).

A second “ex-ante” model can be dubbed “*accommodation by legislation*”. It holds that extreme conditions can and should be dealt with in the framework of the regular constitutional and legal order, through amendments to the existing legal norms or the enactment of new norms, all according to the regular collective decision-making processes (*Gross* 2003). Some of the

¹² The International Court of Justice recently constructed a doctrine according to which international humanitarian law is *lex specialis* to the always applicable international human rights law – the *lex generalis*, as exemplified by the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (ICJ Reports 1996): Para. 26; International Court of Justice, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, Advisory Opinion, General List No. 131 (9 July 2004): Para. 102–106.

norms accommodated are permanent additions to the legal system; others will be in force only upon some kind of declaration of emergency, but all these norms are basically enacted according to the regular legislative procedures adhering to the ordinary rule of law format.

This model is of special interest as it characterizes the actual current practice of most modern democracies (*Ferejohn and Pasquino 2004*). The UK Prevention of Terrorism Acts (1974, 1976, 1984 and 1989) and the US PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act (2001) are good examples. But even in countries that, unlike the UK and the USA, have an emergency constitution (e.g. Germany, Turkey and India), the emergency constitution route has hardly been employed; instead, these countries have enacted regular legislation providing more powers to the executive or other authorities and allowing the curtailment of individual rights, bypassing the special constitutional emergency powers avenue (*Minerva 2014*). Some of these emergency laws are limited in time; others are not and are expected to be in force until repealed by the legislature.

In the international arena, the laws of war can correspond to this model. These sets of norms were not created by special procedure (as opposed, for example, to executive law-making enabled by emergency constitutions) or by a special institution. They are a permanent segment of international law that is in force whenever and wherever armed conflict erupts, without a need for a special declaration or control.

As with the previous model, this model implies a few problems vis-à-vis our discussion on the rule of law and extreme conditions. First, reality is too complicated to predict: As specified in the previous section, the most acute extreme conditions are characterized by unpredictability and the need for swift action. A model that is constructed upon the belief that substantive arrangements can be enacted ex-ante according to the normal norm-making procedures even in such extreme conditions implicitly does not believe in the possibility of unpredictable situations that demand a swift response. Indeed, the examples given above, such as the Prevention of Terror legislation, were typically enacted *after* the occurrence of the extreme condition (in this case terror attacks). They include extra powers to enable tracing the perpetrators and to enable the prevention of future attacks, but in our context they did not reveal the capability to predict the exact nature of future threats of a different nature and therefore they do not constitute a comprehensive legal mechanism that can accommodate the concerns about future extreme conditions. In other words, accommodation by legislation is not a real ex-ante mechanism to address extreme conditions.

Second, we have the slippery slope of collective action: As we have seen above, a real extreme condition requires a swift response. Collective decision-making during normal time aspires consensus, reflected in actual

mechanisms of liberal democracies such as checks and balances, institutional platforms of deliberation (which are partly achieved through requiring three readings in the course of law-making, approval by different legislative houses etc.) and judicial review. Accommodation by legislation during extreme conditions can only be swift if it compromises these requirements, and this in turn can corrupt not only the laws enacted during extreme conditions, but it can also pose significant dangers to the process of rule-making after the termination of the extreme conditions. The US PATRIOT Act is a good example in hand. The lengthy and detailed legislation, granting draconic powers and allowing severe individual rights violations, was enacted swiftly, six weeks after the 9/11 terror attacks. Although it initially contained some sunset clauses, the law was made permanent in 2006 with only minor amendments. Not only was the initial legislative process in the aftershock of the terror attacks incompatible with the normal law-making mechanisms, the law became permanent in normal times, almost 5 years after the extreme conditions that brought it to light.

Third, the slippery slope of normality: Progress and change are in the nature of humanity. Many questions facing legislatures today are being discussed for the first time because technological, biological, ideological, social and other sorts of changes raise issues which could not have been on the social agenda in the past. The theory of collective action prescribes the best procedures to address these questions and to yield new rules meant to be in force until future changes will prompt a need for different solutions, i.e. accommodation by legislation. To include in this framework rules that are meant to address extreme conditions implicitly means negating the temporary nature of such conditions, or, in other words, accommodation of extreme conditions by legislation transforms the nature of normality. More specifically, extreme conditions create a legitimate need for more state powers and more limitation of individual freedoms. Addressing those needs by regular legislative amendments denies their interim nature and establishes a new normality in which the government enjoys extra powers and individual freedoms are permanently curtailed. This is true for specific legislation that is explicitly or declaratorily justified by reference to extreme conditions and that lacks formal mechanisms to secure its termination at the end of the extreme conditions. (In this context, even sunset clauses are not a sufficient remedy.) But the even more acute concern is the impact of this approach on various amendments to normal legislation without any formal mechanisms for its re-examination in light of the termination of the extreme conditions. Hence the danger of a slippery slope of normality.

During models

The models of this second group acknowledge the non-predictability of extreme conditions and hence they do not, in contrast to the models of the first group, attempt to prescribe substantive rules *ex-ante*. Instead, they construct special procedures for decision-making, recognizing the need to enable swift decisions, which naturally compromise some of the acute requirements on the collective decision-making process during normal times. I will mention three such models, beginning with the most veteran, which is also the most radical one among this group – the *Roman model*.

The Roman Republic (509 BC–27 BC) had a complex system of government with various decision-making institutions and some forms of democracy and separation of powers. However, under extreme conditions, particularly in occasions of military threats, a dictator was appointed for a fixed period of six months. During this period, he held all collective decision-making powers to issue decrees and orders, including the infringement of people's established rights. At the end of the period, the dictator had to step down, he was not allowed to hold any other office, and his decrees and decisions were nulled, restoring the legal situation that prevailed before his appointment. The model creates a sharp distinction between normality and extreme conditions and, in our terminology, allows a total departure from the rule of law during extreme condition that is however limited in time and permits no leaks from the legal order during emergency to the legal order in normal times. The decision to declare emergency was in the hands of the Senate, whereas the Consuls had the authority to appoint the dictator, a mechanism that served to prevent any abuse of the emergency declarations.

As described by *Ferejohn and Pasquino* (2004), the Roman model was the source for the development of the modern *Emergency Constitution* model, which can be regarded as a separate model within the 'during' category. The emergency constitution model rejects the *ex-ante* models, acknowledging, on the one hand, the unpredictable nature of extreme conditions and thus the inability to prescribe all the specific substantive rules needed for such conditions, and, on the other hand, the need to enable efficient and swift decision-making during extreme conditions. Like the Roman model, it is constructed on the basis of a clear separation between the rule of law under normality and the rule of law under extreme conditions, but instead of delegating powers to a dictator upon declaration of emergency, it enables the delegation of some powers, most importantly law-making, to the executive (either the President of the Cabinet), preserving some features of normal times rule of law.

This model characterizes the constitution of the Weimar Republic and the legal path to its collapse. The actual practice of the model by contemporary constitutions in many countries evolved over the years, trying to ensure that

the events of the Weimar Republic will not repeat themselves. In a sense the Roman model had better safeguards to insure that the emergency is temporary, by limiting its time and requiring personal separation between the emergency and normal governments, and that its declaration will not be abused (declaration by the Senate rather than by the head of government), but during the emergency it compromised the essential ingredients of the rule of law, especially its substantive facet. The modern version, sometimes dubbed the *Neo-Roman model* (Ferejohn and Pasquino 2004), does not have a clear separation between normality and extreme conditions, at least not on the personal level: Those in power under extreme conditions are the same politicians as during normal times, creating incentives to use (or abuse) the emergency avenue for promoting goals which are not necessarily justified by the extreme conditions, compromising the rule of law. However, in contrast to the Roman model, the Emergency Constitution maintains various safeguards, checks and balances also during extreme conditions, which vary in their efficacy and actual practice across different countries.

Similar ‘during’ models also exist in international law. The derogation arrangement entrenched in various international and regional human rights treaties is one example in hand. The UN Security Council is another. The former example focuses on the second type of international law norms (see Section 1.2) – those that impose duties on states towards their citizens, acknowledging that a declaration of emergency can relieve them of these duties, but only temporarily. The latter example is a decision-making mechanism different from the regular, consensus-based mechanism in the international arena which enables swift and efficient action in times of extreme conditions, hence creating ex-ante decision-making procedures but not substantive arrangements for times of extreme conditions.

Although the Roman model and the Emergency Constitution model (also referred to as the Neo-Roman model) overcome some of the criticism leveled against the ex-ante models, they also have several deficiencies, the most important of which are:

- The potential abuse of emergency declaration: During the 500 years of the Roman Republic, 95 emergency declarations and dictator rules were recorded. Today, the vast majority of countries have “emergency constitutions” and many of them have declared emergency, some quite frequently. This is certainly the case for non-democracies, but also for the recent history of many democracies, in some of which such declarations led to periods of dictatorship.¹³ In

¹³ In Argentina, for example, 52 declarations by both democratic and non-democratic governments have been recorded since the 1854 Constitution came into force.

some countries, declarations of emergency are used for the purpose of political survival.¹⁴

- Emergency turning to be normality: Besides the risk of abusing a declaration of emergency, some countries have maintained such declarations for long periods of time. In the Roman republic, the duration was fixed at 6 months. In modern constitutions, while there are theoretical mechanisms of checks and balances, such as a requirement for declarations or their extensions to be approved by the legislature, once a declaration is made, it may remain in force for a long period of time.¹⁵
- Failure of separation: The main rationale of the emergency constitution model is to create a clear separation between normal times and extreme conditions, preventing the spillover of the emergency measures into regular times. However, reality is different: Many countries that have an emergency constitution opt to use (instead or on top) accommodation by legislation. Responses to the surge in terror threats in recent decades, for example, prompted new legislation or amendments to the existing legislation, in which the government was given more powers and individual rights were curtailed, all of which bypassed the temporariness of the emergency constitution avenue and thus undermined its main *raison-d'être*.

A third model in the category of 'during' is *accommodation by interpretation*. Like the business as usual model, it asserts that the regular laws are sufficient and suitable also for times of extreme conditions; however, their actual interpretation may differ. The law in the books does not change during extreme conditions but the law in action changes (*Gross 2003*). The constitution or laws do not provide the government or other authorities with additional powers during emergencies but the exercise of the given powers may shift. Likewise, the rights given to individuals are not curtailed during extreme conditions but their actual materialization can change. Courts are the main channels through which society guarantees that the government will not transgress its powers and that individual rights will be honored. Government acts may be challenged in courts, which interpret the constitution and other laws. Courts' rulings are the declaration of the exact content of the law. According to this model, the courts may adopt a different interpretation of the scope of government powers and of human rights under extreme conditions

¹⁴ For instance, Indira Gandhi declared emergency in 1975 in response to her indictment for corruption, allowing her to rule by decree for several years.

¹⁵ Egypt, for example, has been in a continuous state of emergency since 1967. Israel has been under emergency since its establishment and the parliament extends this declaration annually without much debate about its necessity.

by their regular use of various balancing tests, threshold requirements and other private and public law doctrines.

Although in theory this model strives to preserve the separation between the rule of law in normal times and the rule of law under extreme conditions, in practice this separation is blurred. The courts cannot ex ante limit their rulings to specific circumstances and to certain periods, and thus their rulings in times of emergency are bound to spill over to regular times. This can incentivize those in power to attempt to stretch their authority and to curtail individual rights, with the additional risk of the public losing faith in the judiciary and its ability to protect individuals.

Ex-post models

Ex-post models attempt to overcome the deficiencies of the other models. They recognize the need for swift and effective action during extreme conditions and that the unpredictability of such conditions implies that specific rules cannot be prescribed ex ante. However, ex-post models also deny the desirability and/or possibility to ex ante prescribe special decision-making procedures or a unique rule of law format tailored to extreme conditions that maintains a clear separation between normal times and extreme conditions. Hence, they advocate effective measures outside the rule of law and their legalization or legitimation ex post.

One such model is *Accommodation by Inherent Powers or the Prerogative Powers Model*, which can be traced back to the political philosophy of *John Locke* (1689). The model assumes that, even if the constitution does not grant the president or the executive additional powers during extreme conditions, such powers exist on the basis of the very rationale of the establishment of the state or its social contract. This model characterizes the actual practice of the US during emergencies from the times of President Lincoln until the present (*Gross* 2003).

While the answer to the key question whether the Prerogative Powers Model is within the rule of law is unclear and depends on the theory of law (or, rather, on the adoption of a specific theory of law), the second model within this category and the last to be mentioned here – *the Extra-Legal Measures Model* – explicitly and manifestly calls for transcending the rule of law during extreme conditions, leaving the deliberation as to the legitimacy of the measures taken for the times when normality is restored.

The model assumes that the nature of the extreme conditions is unpredictable, hence the inability of regular norms – prepared ex-ante to foresee catastrophes and prescribe the right rules – to mitigate them. It regards proper separation between normality and extreme conditions as the most essential element in addressing the concerns of the rule of law, and

believes that all other models fail to create such separation because regulating extreme occurrences will also affect the laws pertaining to normality and even the courts' discourse, which is consequently contaminated and likely to result in less protection of human rights during normal times. Advocating this model, *Oren Gross* (2003) argues that it also promotes deliberation in the ex-post discussion regarding the legitimacy of the measures taken. This discussion, after return to normality, may result in legitimation or discreditation, which will entail the necessary political ramifications.

The ex-post models have in fact been employed in the international arena. Notable examples are the practice of international coalitions for military intervention in ex-Yugoslavia and Iraq, when veto power at the Security Council prevented operation 'within' the international rule of law.

'Ex-post' models do take seriously the two main characteristics of extreme conditions – unpredictability and the need to enable swift action –, but they suffer from several deficiencies, the most important of which are:

- The prerogative powers model is in fact not a separate model at all: If such powers are prescribed by the constitution or another law, the model is tantamount to the Emergency Constitution model and shares its critique. If the powers are not prescribed by a legal empowering norm, it is identical to the Extra-Legal Powers model. It is exactly this kind of ambiguity that makes this model more dangerous than the two models it blends with. It is presented as falling within the rule of law, but in the former case it does not meet the basic requirements of the rule of law – a clear manifestation of its actual threshold prerequisites – namely governing by prospective and equally enforced rules etc. In the latter case, it is also presented in the framework of the rule of law, while denying all its foundations, including the source of sovereignty, and discrediting the prime advantage of the extra-legal measures model: the ability to deliberate ex-post the legitimacy and legalization of the measures taken during emergency.
- Even on the theoretical level, these models can work only in liberal democracies with platforms to exchange views formally and informally and bring to account those who took illegitimate actions. As elaborated in Section 1, non-democracies can maintain significant ingredients of the rule of law, but these will be crucially frustrated if the ex-post models are implemented. Moreover, it is doubtful whether democracies can conduct such ex-post scrutiny regarding the legitimacy of extra-legal measures taken during extreme conditions, and whether actions that were approved ex-post would not still be perceived as legitimate after the return to normality. The actual history of such ex-post practices does not reveal truly

effective deliberation, monitoring and prosecution of those who took non-legitimate or excessive extra-legal measures during emergencies.

As can be seen from the survey above, the literature offers various models prescribing the desirable mode of the rule of law under extreme conditions. All of these models have actually been practiced by different states and by the international community. An initial closer look at the 'law in action' (more research is required in this realm too) reveals that most entities do not adopt a singular model. Many states, with an emergency constitution, have also used the accommodation frameworks (accommodation by legislation and/or accommodation by interpretation) alongside the emergency constitution. Stepping outside the rule of law altogether can also characterize the practice of many countries, despite the existence of other avenues, such as accommodation and emergency constitutions. This mixture of practices is another cause of concern as such practices forfeit the relative advantages of each of the models when applied separately and singularly.

The picture in the international arena is not very different; most of the models discussed in the context of the state have parallels in international law and governance, and de facto hybrid practices also characterize the international community. This conclusion reiterates the importance of further thinking, theorizing, proposing and implementing a more coherent approach towards the rule of law under extreme conditions.

Possible models for dealing with extreme conditions

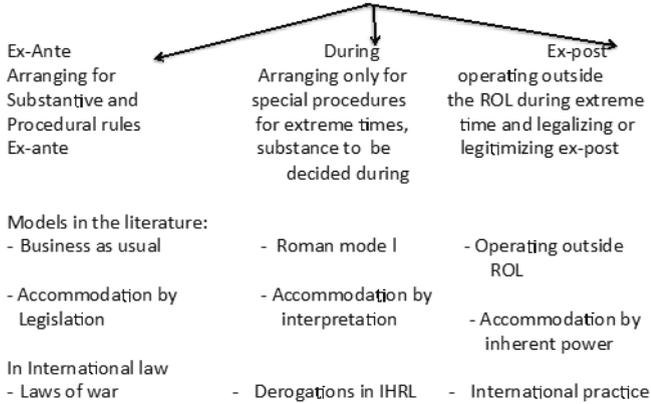


Figure 3: Models of the rule of law under extreme conditions

D. Conclusion

This eclectic paper has touched upon various issues connected to the rule of law during extreme conditions in the realm of the state and of the international arena, emphasizing the Law and Economics methodology and perspective. It has offered neither a coherent model or theory, nor specific policy recommendations. Rather it attempted to map the general issues meriting further research and discussion. Let me conclude by pointing to what I regard as the major issues.

A serious attempt to prescribe the rule of international law under extreme conditions cannot succeed without a coherent basic general concept of the rule of law in the international arena, which has to be derived from a theory of international governance. The twentieth century saw the nation-state as the most important unit of collective action. It was preceded by the construction of the modern theory of the state, in which the social contract theories dominated; the traditional economic theory of the state (elaborated on in Section 2) can be regarded as part of that tradition. It seems that the 21st century will be characterized by an increasing role of super national bodies and of collective action in the international sphere. The current institutions

and decision-making procedures in the global arena are not equipped to assume a leading collective action role, and theory of international governance has to take the lead in proposing fresh ideas for the ways international governance should be developed. The Law and Economics approach can take a leading role, by adapting some of its traditional insights from the theory of the state to a theory of international governance and by relaxing some of its long practiced assumptions, which can shed a fresh light on the desirable international and indeed national governance.

An example of the adaptation of the theory of the state to the international arena is the examination of the shift from consensus to representative majority with substantive and institutional balances (such as judicial review and separation of powers) adapted to the international sphere (initial ideas were discussed in Section 2). On the international level, for example, there is neither an exit option nor a federal structure (though the latter can be considered) and, therefore, separation of agencies is the only way to tackle monopolistic powers. A separate but related issue, which touches upon the essence of the rule of law, is whether international law aspires to represent a consensus of states or a consensus of the world's individuals.

The relaxation of some assumptions built into the traditional economic approach to collective action and the theory of the state is an essential avenue to sustain the relevance of the Law and Economics approach. Two key examples mentioned in Section 3 are the assumption regarding the fixed (exogenous) nature of preferences and the assumption that collective action is always about the aggregation of preferences.

The last point is especially relevant to extreme conditions, where it can be hypothesized that the share of the expertise aggregation type of decision-making increases in relation to preference aggregation. Likewise, it might be interesting to examine whether, during extreme conditions, the format of a possible shift in individual preferences, after relaxing the assumption regarding their fixed-exogenous nature, is different from normal times (perhaps in the direction of more altruistic preferences). Moreover, preferences might shift differently in different types of extreme conditions (e.g. natural disasters vs. man-made catastrophes, and between different types of man-made disasters – terror vs. industrial accidents). Insights from Behavioral and Experimental Law and Economics should be incorporated to study these questions. More research should address additional questions, which are crucial when discussing the best institutional design and collective decision-making procedures during extreme conditions. For example: what happens under extreme conditions to agency costs and rent seeking, or whether the precautionary principle – a key Law and Economics concept guiding the substance of rules for normal times – can be applied to times of emergency.

The last part of the paper has elaborated on the different models that prescribe the desirable format of the rule of law under extreme conditions, their advantages and disadvantages and their adaptability to international governance and international law. In my opinion, the ex-post models should be rejected. Ex-ante models should be preferred as much as possible. Societies ought to give serious thought to potential extreme conditions and to prescribe substantive rules tailored for such circumstances. The advantages of forward-looking legal planning include the possibility to employ better decision-making procedures that will reflect deliberation and consensus building and that also integrate legal areas usually outside the radar of emergency laws, such as private law. However, the increasing pace of social and technological change prevents a prediction of the exact nature of future emergencies and the best tools to mitigate them. Hence, comprehensive substantive laws cannot be fully prescribed ex-ante. A polity can reduce the potential violations of the rule of law if institutional design and collective action procedures are prescribed ex-ante, leaving the exact content of rules and decisions to be decided during the occurrence of extreme conditions.

Such a framework requires special consideration as to (1) the procedure of emergency declaration, preventing its possible abuse, (2) limits to the duration of emergency and procedures to terminate such declaration, and (3) some mechanisms of checks and balances during emergency rules to avoid a total departure from the rule of law. Again, insights from Public Choice and Law and Economics in general may be very helpful in recommending the optimal arrangements for each of these issues. I believe that a parallel framework is the desirable format for international law and governance, which currently suffers from a lack of clear separation between normal times and times of extreme conditions.

As the following papers of this volume demonstrate, the numerous novel contemporary global challenges to international law and governance, from cyber terrorism to non-state actors and the rapid spread of new epidemics, cannot be properly addressed by ex-ante rules, especially where a unanimity-based decision-making rule is still dominant in international law. Perhaps something like an Emergency Constitution should be constructed for the international arena as well.

References

- Addicott, J. F.* (2012), Rightly Dividing the Domestic Jihadist from the Enemy Combatant in the “War Against al-Qaeda” — Why It Matters in Rendition and Targeted Killing, 45 *Case W. Res. J. Int’l L.* 259.
- Agamben, G.* (2005), *The State of Exception*, University of Chicago Press.

- Annan, K. (1999), Two concepts of sovereignty, *The Economist* (16 Sep. 1999) <http://www.economist.com/node/324795>.
- Anghie, A. (2005), *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press.
- Aranson, P., Gelhorn, E. and Robinson, G. O. (1982), A Theory of Legislative Delegation, 68 *Cornell Law Review* 1.
- Arrow, K. J. (1951), *Social Choice and Individual Values*, New York: John Wiley & Sons, Inc.
- Backhaus, J. (1983), Constitutional Guarantees and the Distribution of Power and Wealth, 39 *Public Choice* 45.
- Ballesteros, F. L. (2008), Corruption and development. Does the “rule of law” factor weigh more than we think? 54 *Pesos*. <http://54pesos.org/2008/11/15/corruption-and-development-does-the-%E2%80%9Crule-of-law%E2%80%9D-factor-weigh-more-than-we-think>.
- Black, A. (2009), *A World History of Ancient Political Thought*, Oxford University Press.
- Bogdandy, A. v. and Venzke, I. (2012), In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification, 23 *European Journal of International Law* 7.
- Buchanan, J. (1975), *The Limits of Liberty: Between Anarchy and Leviathan*, University of Chicago Press.
- Buchanan, J. and Brennan, G. (1985), *The reason of Rules: Constitutional Polity*, New York: Cambridge University Press.
- Buchanan, J. and Tullock, G. (1962), *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, Ann Arbor: University of Michigan.
- Chesterman, S. (2008), An International Rule of Law?, 56 *American Journal of Comparative Law* 331.
- Coleman, J. (1998), *Markets, Morals and the Law*, Cambridge University Press.
- Condorcet, J. A. N. de *Caritat, Marquis de*, (1785), Essai sur l'application de l'analyse à la probabilité des décisions rendues à la pluralité des voix (Essay on the Application of Analysis to the Probability of Majority Decisions), Paris: l'Imprimerie Royale.
- Craig, D. (1997), Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, *Public Law* 467.
- Criddle, Evan J. and Fox-Decent, E. (2012), Human Rights, Emergencies, and the Rule of Law, William and Mary Law School Faculty Publications. Paper 1531 34 (1) 46 <http://scholarship.law.wm.edu/facpubs/15>.
- Deller, D., Makhijani, A. and Burroughs, J. (2003), *Rule of Power or Rule of Law? An Assessment of US Policies and Actions Regarding Security-Related Treaties*, New York: Apex Press.
- Dicey, A.V. (1889), *An Introduction to the Study of the Law of the Constitution*, London: Macmillan and Co.
- Downs, A. (1957), *An Economic Theory of Democracy*, New York: Harper.
- Eggertson, T. (1990), *Economic Behavior and Institutions*, New York: Cambridge University Press.
- Elkin-Koren, N. and Salzberger, E. M. (2004), *Law, Economics and Cyberspace: The Effects of Cyberspace on the Economic Analysis of Law*, Edward Elgar Publishing.
- Elkin-Koren, N. and Salzberger E. M. (2005), The Effects of Cyberspace on the Economic Theory of the State”, in Marciano, A. and Josslin, J. M (eds.) *How to Shape a Democratic State*, Edward Elgar, p. 58.

- Fallon, H. R. Jr. (1997), "The Rule Of Law" as a concept in Constitution Discourse, 97 *Columbia L. Rev.* 1.
- Farber, D. A. and Frickey, P. P. (1991), *Law and Public Choice: A Critical Introduction*, The University of Chicago Press.
- Ferejohn, J. and Pasquino, P. (2004), Law of Exception: A Typology of Emergency Powers, The Symposium: Emergency Powers and Constitutionalism, 2 *Int'l J. Const. L.* 210.
- Fuller, L. (1969), *The Morality of Law*, Yale University Press.
- Gleeson, M. (2001), Courts and The Rule of Law, The Rule of Law Series, Melbourne University.
- Gosalbo-Bono, R. (2010), The Significance of the Rule of Law and Its Implications for the European Union and the United States, 72 (2) *University Of Pittsburgh Law Review* 229.
- Grimm, D. (2014), Levels of the Rule of Law on the Possibility of Exporting a Western Achievement, in: Ehlers, D., Glaser, H. and Prokati, K. (eds.), *Constitutionalism and Good Governance: Eastern and Western Perspectives*, Baden-Baden: Nomos, 141–152.
- Gross, O. (2003), Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?, 112 *Yale L.J.* 1011.
- Gross, O. and N. Aoláin, F. (2006), *Law in Times of Crisis: Emergency Powers in Theory and Practice*, Cambridge University Press.
- Gwartney, J. D. and Wagner, R. F. (1988), *Public Choice and Constitutional Economics*, Greenwich, Conn.: JAI Press Inc.
- Haggard, S. and Tiede, L. (2010), The Rule of Law and Economics Growth: Where Are We? 39(5) *World Development*, 673.
- Hartman, J. F. (1981), Derogation from Human Rights Treaties in Public Emergencies, 22 *Harv. Int'l L. J.* 1.
- Hayek, F. V. (1944), *The Road to Serfdom*, University of Chicago Press
- Hirschman, A. O. (1970), *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, Harvard University Press
- Hunter, D. B. (1998), *International environmental law*, West Publishing Company.
- Jensen, C. M. and Meckling, H. W. (1976), Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 *Journal of Financial Economics* 305.
- Johnsen, D. (2012), "The Essence of a Free Society": The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference, 106 *NW. U. L. Rev.* 467.
- Kanetake, M. (2012), The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions, 9 (2) *International Organizations Law Review* 267.
- Kanetake, M. (2014), The Interfaces between the National and International Rule of Law: A Framework Paper, SSRN Research Paper.
- Kelsen, H. (1955), Foundations of Democracy, 66 (1) *Ethics* 31.
- Macey, J. (1988/9), Competing Economic Views of the Constitution, 56 *George Washington Law Review* 50.
- Marshall, G. (1971), *Constitutional Theory*, Oxford: Clarendon Press.
- Merryman, H. J. and Pérez-Perdomo, R. (2007), *The Civil Law Tradition: an introduction to the legal system of Europe and Latin America*, Stanford University Press, 3rd edition.
- Michelman, F. (1980), Constitutions, Statutes, and the Theory of Efficient Adjudication, 9 *Journal of Legal Studies* 431.
- The Minerva Center for the Rule of Law under Extreme Conditions at the University of Haifa (2014), *Law and Emergencies: A Comparative Overview*, Research Paper available

- ble at http://minervaextremelaw.haifa.ac.il/images/Law_and_Emergencies-_A_Comparative_Overview-_March_27-2014-A.pdf
- Montesquieu (1748), *The Spirit of the Laws*, New York: Hafner Press.
- Mueller, D. (2003), *Public Choice III*, Cambridge University Press.
- Nollkaemper, A. (2011), *National Courts and the International Rule of Law*, Oxford University Press.
- North, D. (1981), *Structure and Change in Economic History*, New York: Norton.
- North, D. (1986), A Neoclassical Theory of the State, in John Elster (ed), *Rational Choice*, Worcester: Blackwell.
- Olson, M. (1965), *The Logic of Collective Action*, Harvard University Press
- Posner, R. (1979), Utilitarianism, Economics, and Legal Theory, 8 *Journal of Legal Studies* 103
- Posner, R. (1987), The Constitution as an Economic Document, 56 *George Washington Law Review* 4.
- Rawls, J. (1971), *A Theory of Justice*, Cambridge, MA: Belknap Press of Harvard University Press.
- Raz, J. (1977), The Rule of Law and Its Virtue, 93 *Law Quarterly Review* 195.
- Raz, J. (1979), *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, Oxford University Press.
- Salzberger, E. M. (1993), A Positive Analysis of the Doctrine of Separation of Powers, or Why Do We Have an Independent Judiciary, 13 *International Review of Law and Economics* 350.
- Salzberger, E. M. (2008), The Economic Analysis of Law – The Dominant Methodology for Legal Research?!" 4 *Haifa Law Review* 207.
- Salzberger, E. and Voigt, S. (2002), On Constitutional Processes and the Delegation of Power – with Special Emphasis on Israel and Central and Eastern Europe", 3 *Tel Aviv Theoretical Inquiries in Law* 207
- Schmitt, C. (1934 [2005]), *Political Theory: Four Chapters on the Concept of Sovereignty*, George D. Schwab, trans., University of Chicago Press.
- Schmitt, M. (2013), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press.
- Silver, M. (1977), Economic Theory and Constitutional Separation of Powers, 29 *Public Choice* 95.
- Svensson-McCarthy, A. (1998), *The international law of human rights and states of exception*, Martinus Nijhoff Publishers.
- Tamanaha, B. Z. (2004), *On the Rule of Law: History, Politics, Theory*, Cambridge University Press.
- Tullock, G. (1969), Federalism: Problems of Scale, 6 *Public Choice* 19.
- UN Secretary General (2004), *Rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>.
- UN (2005). *2005 World Summit Outcome*, UN Doc. A/RES/60/1 (24 October 2005).
- Uslaner, E. M. (2010), *The Bulging Pocket and the Rule of Law: Corruption, Inequality and the Rule of Law*, Cambridge University Press.
- Vile, M. (1967), *Constitutionalism and the Separation of Powers*, Oxford: Clarendon Press.
- Voigt, S. and Salzberger, E. (2002), On the Delegation of Powers – with Special Emphasis on Central and Eastern Europe, 13 *Constitutional Political Economy* 25.
- Whittington, K. E. (2002), Yet Another Constitutional Crisis?, 43 *Wm. & Mary L. Rev.* 2093.

- Whynes, K. D. and Bowles, R. A. (1981), *The Economic Theory of the State*, New York: St. Martin's Press.
- Yassky, D. (1989), A Two-Tiered Theory of Constitution and Separation of Powers, 99 *Yale Law Journal* 438.
- Zimmerman, A. (2007), The Rule of Law as a Culture of Legality: Legal and Extra-legal Elements for the Realization of the Rule of Law in Society, 14 *eLaw J.* 10.
- Zimmermann, A. (2011), Legal Culture and the Rule of Law in Latin America, in: *Jurisprudence of Liberty*, LexisNexis Butterworths, 115.
- Zwitter, A. (2013), The Rule of Law in Times of Crisis – A Legal Theory on the State of Emergency in the Liberal Democracy, University of Groningen Faculty of Law Research Paper Series 24.