

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

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The ‘rule of law’ has attracted a lot of scholarly writings 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 social - quality of life - realm and in the pure economic realm (e.g. Flores Ballesteros 2008; Haggard 2010).¹ Hence, the growing popular calls to enhance the rule of law, which seems 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 responses 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 regarding the rule of law under extreme conditions is a field that had received almost no attention so far and in this respect the conference held in Travemunde on March 2014 is a pioneering one and so does the current volume, based on 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 (although its precise

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¹ Hayek (1944) provided already 70 years ago 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 UN Secretary General’s report “Rule of law and transitional justice in conflict and post-conflict societies”(2004) and for other UN actions in this realm: <http://www.un.org/en/ruleoflaw/>.

definition is not agreed upon), 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 (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 with a Law and Economics approach towards this topic.

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

1.1 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(l) 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 in the bases of political theory beforehand). The rule of law means also governing by laws, as opposed to ruling by case-to-case, a practice that can lead to arbitrary rule (Grimm 2014). It also implies that all citizens are equal, as they are all subject to the same law and its equal 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 engage in any activity they wish, save those activities explicitly prohibited by law, and on the other hand, that government and other authorities (and one can extend this to any unnatural legal person, such as corporations) are not entitled to engage with any activity, save those activities that they were empowered to take explicitly by law.

Substantiation of this formal layer means that governments and other officials cannot prevent or sanction individuals' actions, save when they violated the law, and, likewise, government and other officials cannot use powers not granted to them explicitly by law. Thus, prerogative powers, for example, which are assumed by rulers in the course of extreme conditions, are violation of the rule of law, if they do not have explicit empowering provision in the constitution or in another form of legal empowerment (and this in turn negate the definition of prerogative powers). An implicit condition for

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).

achieving the formal layer of the rule of law is equal enforcement of the law. Similarly, to achieve the formal layer, laws have to be publicly declared and publicized, with prospective application, and they have to 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 obtaining the formal facet 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 are the construction 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 of 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 in turn can shed light on the correlation between the rule of law as defined above and economic success. Governing by clear laws, prospective and equally enforced, corruption-free, enhances certainty in terms of the ability to plan ahead according to the law and relying on its precise and equal enforcement. Certainty is crucial for internal and external investments and thus is prone towards economic development and progress. This last insight can also explain why rational rulers, not necessarily bound by popular will, should have a self interest to maintain the rule of law, transforming the normative analysis of the rule of law also into a positive analysis.

However, laws can impose far-reaching prohibitions on individuals, as well as empowering state authorities with extensive powers, all 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's conduct and to empowerment of state authorities or officials. While the formal facet of the rule of law requires only that prohibitions on individuals or granting powers to government will be anchored in the law, which is prospective, general, clear and equally enforced, the substantive facet requires that such prohibitions or power granting will not violate various content-based values. One such substantive limit is a concept of individual rights, which

constrain prohibitions on individuals as well as extensive granting of powers to the government. Another constrain is the doctrine of separation of powers which might limit delegation of powers (by law) 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, allocating powers to various state authorities, and a substantive part in a form of bill of rights. Both parts constrain the legislature (as well as other state powers). The establishment of an effective and impartial enforcement mechanism is a crucial condition for materializing the substantive facet of the rule of law. In many countries this role is assigned to courts – either a special constitutional court, as common in most Civil Law countries (Perez-Perdomo 2007), or the general courts, as common in most Common Law countries (Gleeson 2001). The independence (especially from the other branches of government), trustworthiness and quality of courts are, therefore, an essential condition 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

1.2 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 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?

The rule of law has become in the recent decade a hot topic also in the international arena or in international law (Kanetake 2012).⁴ But one has to distinguish between three different realms of 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 vis-à-vis 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 whether we can characterize the international governance system as adhering to the principles of the rule of law?

International law is relatively a very young field of law dating to the mid 19th century (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 interactions between states, imposing duties and rights among states. The states are the principle subjects of these norms, their obligations are towards other states and enforcement or actions are performed on the inter-states level. Such are treaties regulating trade, but also some norms that belong to the origins of international law - jus ad bellum – norms that govern the justifications to use force externally or engage in war.

⁴ The UN General Assembly recognized in 2005 the rule of law as one of the universal and indivisible core values and principles of the UN: 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), para 119.

A second category of international law, which has been developed primarily after WW2, consists norms that limit states' internal actions or indeed states' internal laws by requiring minimal substantive standards vis-à-vis human, political and social rights. Some of these norms are only enforceable, like the first category, between states, but others can be enforced directly on individuals (and states' officials) too. While Jus ad bellum regulates the legitimacy and legality of states taking actions against other states, Jus in bello – humanitarian international law - requires states to limit the actions their soldiers may take during armed conflicts. These norms apply directly to the relevant soldiers or other officials and their violation can bring to legal proceedings against the individuals who infringed them. Such are also the various treaties and customary law requiring the safeguarding of various human, political and social rights, not only in context of war. The subjects of these norms are individuals within the jurisdiction of a state.

Traditionally, enforcement of both types of norms has been in the sole hand of international organizations, states or governments, rather than in the hand of individuals (individuals who were affected by violation of international law norms could not have approached international courts), which can explain the fact that the dichotomy I offered between the two types of international law norms is unconventional. But 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 its alike, and possibly in the future it will enable individuals to approach various enforcement and international tribunals directly.

In the past, the principle of national sovereignty had been 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. Nation's power within its territory was thought to be exclusive and absolute. The principle of national sovereignty, however, stands in conflict with the second type of international law norms, which imposes duties on governments and on 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 U.N. 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 views 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 with 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 to engage in any activity, save those which they were explicitly empowered by international law. 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 place 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 has to secure 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 secure that international as well as national authorities do not step out of 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 maintain the principles of the rule of law. I

am afraid that the answer to this question is “not much”, even on the formal level of the rule of law. It is true that there are norms in international law, which are general, publicly declared, with prospective application. However, these norms are not effectively enforced and, more importantly, they are not equally and impartially applied. The crucial deficiency regarding equal enforcement is apparent already 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 and individuals that operate independently (especially independent from the government they represent). Inequality of enforcement characterizes also the judicial process itself, as international courts are lacking the crucial ingredients of impartiality and independence similar to municipal courts in enlightened countries (von Bogdandy and Ingo Venzke 2012).

In addition, crucial features of the rule of law are lacking also in the norms creation procedures and in collective decision-making of international governance, as the decisions of international bodies cannot be challenged as violating substantive as well as 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 address seriously 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.

2. 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 both levels of normative and positive analyses. 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.

2.1 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 Aoláin 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 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 has been created between normal and emergency times with mechanisms preventing the dictator at emergency to extend his rule or to influence politics after return to normality (Ferejohn and Pasquino 2004).

Modern constitutions prescribe special provisions for times of emergency, such, that allowed, for example, the National Socialists in Germany to assume power in 1933. These arrangements and practices prompted fierce criticism vis-à-vis 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 lies behind modern liberal democratic theory (Schmitt 1934 [2005]). Similar criticism was expressed by Giorgio Agamben (2005) addressing 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, the social contract theories as the foundation of the modern theory of the state and the analysis of collective action, all are analyzed for normal times. In order to understand the justifications for a shift in the rule of law during extreme conditions it is crucial, therefore, to go one step back to these foundations.

2.1.1 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 bases 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 bring to utility enhancement. No one would consent to a decision or rule which decreases his or her utility and a consensual decision will thus benefit at least one person, without harming any other, yielding pareto improvement or utility enhancement (Coleman 1998). In addition, in theory (in Ronald Coase terminology - in a world with no transaction costs) every decision which enhances collective utilities can be reached by consensus, as those who benefit from it will compensate those who oppose it to the extent that they later become indifferent.

Consensual decision can also be regarded as a proxy to materializing deontological morality, as the fact that everyone agrees to a certain rule or a decision can be considered as 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 one of the explanations to the fact that Rawls’ theory of the state (1971) is claimed by both natural law and the positivist - social contract - traditions and 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 (assumed, wrofully to be in the core of democracy), which is lacking any coherent and integral first-order normative justification by both teleological and deontological moralites. Decision or rule reached by majority is neither utility enhancing (primarily because it fails to take into account the intensity of preferences), nor “right” in a deontological sense.

Based on these foundations for collective action, the establishment of the state is viewed by the economic approach as justified if it the result of a contract, to which all individuals who are the future citizens are parties (Mueller 2003, p. 57). In political or legal terms this contract is dubbed “constitution”. This consensual agreement is portrayed by some scholars (e.g. Rawls 1971, Posner 1979) as a hypothetical consent, and indeed we can hardly find historical examples for full consensus as to the content and wording of the constitution. However the drafters of constitutions in many cases make a serious attempt to obtain a 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 can characterize the process in 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. This can also charactrize the process in which the newest constitutions – those of the countries of East and Central Europe, which undergone a transition from communism to democracy, was adopted (Salzberger and Voigt 2002).

Consensual decision-making charactizes also 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/goverments or individuals, which resorts to the major

contemporary field of theoretical tension in international law theory, elaborated in the previous section. This field of tension can be at least partly mitigated if the consensus principle characterizes national collective decision-making. Under such condition, the powers granted to governments to sign international law treaties or to wide-spread actual practices, bring about consensual decision-making not only of governments or states but also of the individuals who are members in the polities of the signatories.

2.1.2 The Normative (economic) theory of the state – implementation I: representative democracy

The argument of the economic theory of the state justifying the construction of central government and the familiar institutions in modern liberal democracies goes like this: 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 where it is designed to be in force for a very long term. In the line of the unanimity rationale the solution for a new public issue would have been to gather everyone whenever such new issue arises, and to decide upon it unanimously. But such a solution would involve immense decision-making costs. This is the major justification, given by most scholars, for the need to have a central government in which the powers 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 one lives 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 has to relate to such conditions, prescribing rules and decision-making procedures designed to 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 individuals' 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 has to govern through rules rather than through case-by-case. The general nature of rules decreases significantly the decision-making costs, as rules which cover a broad range of concrete situations will have a much better chances to gather unanimous support, as opposed to case-by-case decisions in which most likely there would be "losers" and hence would not gather unanimous support.

From the analysis above it can be derived that the contract, or the constitution, ought to lay down the basic principles guiding the interactions of 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 serves merely as an enforcement mechanism of the various clauses in the social contract, 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 – produce and allocate - '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 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 of consensual decision-making, although the latter remained the ultimate or aspired goal. So do the modern developments of representative democracy and the tools designed to overcome its fallacies, such as separation of powers. Representatives acting on behalf of their constituents save the costs of frequently measuring public preferences on 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 skills about the issues to be decided, which also relates to the distinction between preferences-aggregating collective decision-making and expertise-aggregating decision-making, on which I will further elaborate in section 3.3.

From the perspective of economic theory two important problematic phenomena, which exist in 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 voters (or where the costs of the penalties being 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 make gains through pressure on the representatives. Interest groups are able to succeed in their actions because of the costs of collective action. These costs allow only small-sized groups to organize - groups whose potential gain from collective action is higher than 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, findings which might turn 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 who should operate the state – its citizens in a form of direct democracy or a central government representing the public – there is an important issue of the desirable daily decision-making procedures and rules. The economic reasoning for resorting from consensus to majority rule is best represented by the model of collective decision-making set by Buchanan and Tullock's "Calculus of Consent" (1962). This model can be considered as 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 costs of collective decision-making and internal costs. The former is the total costs to individuals negatively affected by the collective decision. These costs diminish, as the majority that is required for reaching a decision is larger. In unanimous decision-making the external costs are reduced to zero, as rational individuals will not grant their consent to decisions that harm them. A dictator's rule inflicts the highest external costs on the members of his or her community. The internal cost function reflects the costs involved in the decision-making process itself. Its shape is in an inverse way to the external cost function: dictatorial rule is the least expensive to operate. As the majority required for passing a decision is greater, so are the costs involved in the decision-making process itself; consensual rule is the most expensive to operate. The optimal decision-making rule is the one, which minimizes the sum of the two types of costs. Buchanan and Tullock show that in most areas this optimal rule is a simple majority, but there might be special types of decisions, e.g. decisions that touch upon basic human rights, in which the optimal decision-making rule is a qualified majority.

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. Such a case can characterize decision during extreme conditions. In other words, in times of war, acute natural and man-made disaster or economic and political meltdown, decisions has to be made very swiftly and the cost of employing the regular majority decision-making rule might bear huge cost due the lengthy time required to reach a decision, duration which can increase also the external costs significantly. This fact may serve as a justification to have special arrangements for collective decision-making under extreme conditions, bypassing 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 degree and mode of departure from the regular decision-making processes under extreme conditions: the degree of uncertainty with regard to the nature of the extreme conditions and the cost-benefit analysis regarding the swiftness of the decisions which has to be taken.

2.1.3 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 the minorities, capture of decision-making bodies by interested group and alike. These mechanisms include a substantive review (constitutional and administrative judicial review) of majority-lead decision-making against an entrenched bill of rights, and an institutional structure aimed to increase 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**; 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 upon post-constitutional collective processes; the productive function is related mainly to the post-constitutional stage (Buchanan, 1975, pp. 68-70). From a theory of a state point of view this distinction should be considered as the more important grounds for separation of powers.

⁵ The traditional analysis has not incorporated changing technology (e.g. the Internet), which might have significant effect on this cost-benefit analysis and thus can shift the balance between consensus-based collective action and majority decision-making, and between direct democracy and representative one. I elaborate 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.

The second, 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 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 according to rules, their application and their enforcement, rather than making each decision individually and independently, is more efficient. It minimizes transaction costs from the point of view of the government or of the decision-makers, as it is cheaper to apply a rule than to deliberate every question from first 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 function is an integral ingredient of the meaning of the rule of law: Governing should be by general rules as opposed to case-by-case particular 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 an application of a general rule.

There is a long way, both historically and conceptually, between mere separation of functions and the **separation of agencies**. The latter principle has a significant effect on the structure of government, because, according to it, not only do the three functions - legislative, executive and judicial - exist, but they ought to be carried out 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), producing primarily public goods. In this context separation of agencies is connected to the monopoly problem (Silver 1977; North in Elster 1986; Whyne & Bowles 1981, Ch. 5). The concentration of all governing powers in the grasp of one authority creates a vertically integrated state, which has 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, namely 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 substitute measures. Thus, a more accessible exit option can soften the need for separation of agencies. Likewise, a federal state weakens the need for a rigid separation of powers. On the international level, however, there is neither an exit option nor a federal structure and therefore separation of agencies is the only way to tackle monopolistic powers. This is yet another under-researched aspect meriting further studies on both the conceptual and the empirical levels.

There is another important rationale for separation of agencies - diminishing agency costs. As we have seen above, the democratic system is a kind of a compromise or a second best, which is the result of the need to transfer powers from the people to a central government, and at the same time place the government under effective control of the people, in a way that would not be too costly. In this sense it was probably appropriate to describe democracy as the least bad system of government. The main problem of the transmission of powers to a central government, leaving only periodical control, 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.

There are three typical categories of costs involved in a principal-agent relationship: bonding costs, monitoring costs and residual loss (Jensen & Meckling 1976). In the case of 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, Backhaus 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 would be more significant if the division of powers would not only be by separation of agencies but also by assigning each agency a different governing function (Macey 1988). Here we are getting closer to 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 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 brought the rulers (the monarchs) to seek loans from the public. One of the methods to gain the confidence of the lenders in the government's commitment to honor its 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 context of agency costs. In such conditions the gap between the incentives of the agents and principles might be narrower, which may justify consolidation of powers, compared to normal times.

A careful look at the role definition of the protective and the productive functions will result in the conclusion that corresponding separation of agencies is necessary due to the conflict that arises between the two functions. While the protective state is aimed at enforcing the initial contract - the constitution, the productive state is engaged in activities involving production of public goods for which the costs are shared by the individuals, and hence involve re-allocation of resources. There are, naturally, conflicting desires within the productive state, but due to transaction cost their resolution cannot be based on unanimity (as we have explained, the optimal decision-making rule, which takes into account also the excessive costs of the decision-making process, will depart 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 overstep 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 worsened 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 any one 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 will be guided by utility maximization or wealth maximization, it will not compensate those who become worse-off from the decisions, because their vote will not be needed to pass decisions (unlike the case when unanimity is required for passing a decision). 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 between the protective and productive agencies means that parliaments should not be given constitutional-making powers. The constitution is aimed at constraining the powers of the parliament, and it will not do a good job if it is drafted and approved or amended only by parliament. In the post-constitutional stage, the protective function is of 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 to be part of the ordinary judiciary. This distinction between the regular courts system and the constitutional court makes sense vis-à-vis the rationales for separating agencies of the productive and protective states. While the constitutional court has to be independent from the post-constitutional organs of the state, but accountable to the people, the regular courts whose main task is to adjudicate disputes between individuals, have to 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 the most dramatic characteristic of it (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 choice. Their preferences (or their utility functions) are crucially dependent upon exogenous incentives and constraints. Thus, choices made by government personnel are dependent upon the branch of government in which they work and its institutional structure including method of rewards and penalties. In other words, in the context of economic analysis there is no meaning to establishments and institutions without their human operators; as there is no meaning to the analysis of individuals' behavior without the examination of the institutional arrangements and incentives mechanism to which they are subject. Thus, separation of agencies is meaningless unless separation of persons is an integral component of it.

What we have just said does not mean that only lawyers should be part of the judiciary and that only bureaucrats should work in the executive. There are legal systems (especially in Continental Europe) in which a mixture of professionals in the different branches of government is encouraged, and in our perspective this indeed might even be more efficient. Separation of persons merely means that no one should be part of more than one branch of government at the same time. This is not such a trivial requirement, as it looks in a 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 are the result of the government-citizens (agent-principals) relationship. One way of achieving this is different representation structures for each of the branches, which can increase the people's 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 fade away. Extreme conditions are a good example how these factors interplay. On the one hand, decision-making anticipating extreme conditions should be derived from a long-term view, which overcomes the election cycle. On the other hand, decision-making during extreme

conditions should be geared to have 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 separation of powers is advantageous (this question involves the issue of delegation of powers); and 2) what is the degree of freedom or independence that we ought to assign each of the branches. 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 great deal of trade off in different 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. If it is seen as part of the legislative function, 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, every collective decision of 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, checks and balances approach is adopted in the USA only on the functional level, while independence (or pure separation) is adopted on the personal level. In contrast, in most European parliamentary democracies, there is no 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, appointments and promotions of judges is under the power of the executive. But 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 a 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 is inclined 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 more.

As to the first question about the degree and rigor of the desirable separation, the solution might be a 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 enact this rule or perform the collective action most cheaply. 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, and if this is the case it is possible to conclude that separation of powers (or, rather, separation of functions) should

not be absolute. Under Extreme conditions the suggested costs structure may change, where the 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 democracy to representative democracy. New technological developments, 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 operate 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 are costly themselves, the bottom line is that the future state will need less structured separation and checks and balances mechanisms. A parallel rationale might characterize optimal collective action during extreme conditions.

2.2 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 serve also as an important baseline for the analysis of the governance of the international arena or of international law, and its transformation under extreme conditions.

There are two important background factors, conceptual and historical, that can shed light on the differences between the theory of the state and that of international governance vis-à-vis 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 which are meant 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 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 practices (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 powers of those countries who opposed these interventions), demonstrate the need for fresh thinking on these issues, especially vis-à-vis extreme conditions, which characterize these examples. In other words, even if in normal times collective action in the international sphere can be conducted using consensual decision-making (which is also open for debate in the 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 can point that the UN Security Council was designed specifically for this purpose. However, it is mainly designed to meet one category of extreme conditions – that of armed conflicts – and not the other categories of disasters and political or economic meltdowns. In addition, the growing number of cases of multi-national military interventions in recent decades that

bypassed the Security Council as the result of veto powers of its permanent members calls for re-examining the theory and practice of international collective action under extreme conditions, the characteristics of which will be discussed in the next section.

Second, the historical perspective is of no less importance: International law, unlike the modern state and municipal law, originated from the need to address times of emergency, especially wars. Indeed, the laws of war, culminating to 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. So did 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 of states and governments towards their own people – human rights law, in-built mechanisms were constructed for times of emergencies. 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 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, not 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) (3) and Article 27 of the American Convention of Human Rights (ACHR)



Figure 2 – The economic theory of collective action

3. 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 for departing from the normal or the general theory in times of extreme conditions. This section will tackle the topic in a reverse way, characterizing extreme conditions and whether and in which format they merit sui-generis substantive and/or procedural and institutional rules. I will also critically scrutinize the different models put forward in the literature. In this framework I will also mention some important methodological points that are specifically of interest to the Law and Economics approach and the way in which it can be developed in future research.

3.1 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 in the times of

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: in which exact circumstances armed activity or a disaster or an economic crises etc. constitute extreme conditions, which justify special arrangements or an exception vis-à-vis the rule of law?

In each of these categories we can portray a dichotomous line from a major crises (e.g. a total war launched on the polity; a major earthquake striking densely populated area; an armed revolution attempt) to a minor disruption to normal life (e.g. a minor terrorist attack; local floods; a 5% crash of the stock market). 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 tankers? Philosophically, normality can be defined as an exact routine or identical occurrence of events, which does not exist in reality; every life situation and every point in time is to some degree different from previous ones. Thus, the borderline that constitutes an extreme condition is not an obvious or a natural one. Respectively, the law has a regular in-built obligations and powers designed to address irregular situations. The police might have specific powers to enter a private property or to limit freedom of movement when there is a reasonable suspicion that a crime is being committed there or when fire breaks out there. Contract laws include 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, facing irregular circumstances.

Indeed, one model of the rule of law under extreme conditions, the **business as usual model** (see below), negates the idea that there is a justification to depart from the regular rule of law, arguing that substantive norms and decision-making procedures can function under every condition, including under extreme conditions. If this model is rejected and changes in the law and collective decision-making procedures are recognized as

legitimate, the crucial question relates to the **magnitude** of the irregular condition (constituting an “extreme conditions” or an “exception”) that merits a departure from the law; this question does not have an agreed upon answer.

Likewise, all of us encounter from time to time an individual extreme condition, whether it is a burglar who threatens us with a gun, a leak in the house pipes causing a flood or an unexpected individual economic hardship. These are personal extreme conditions, which can be dealt with within the normal rule of law. But when a certain extreme condition simultaneously affects masses of people – the gun threats are pointed to a whole population, the flood affects a whole region etc. – the extreme condition might be such that a special substantive and/or procedural rules have to take effect. Unlike the previous point, which addressed the characterization of 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 a relevant factor in 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 local authority or 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 an acute economic hardship, which occur in several regions of the state. But when the extreme condition affects the whole state, the regular laws and decision-making procedures may not be sufficient 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 crises. From international law perspective, and in light of the distinction between international law norms that govern the interactions among states and international law norms 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 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 limiting state 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 de-facto is delegated to the concerned country, 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 bases 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 of declaring derogations. Various international as well as regional human rights treaties allow states parties to adjust their obligations temporarily during exceptional circumstances by declaring derogations.⁸ Their validity is contingent on fulfilling 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 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 community is composed” (Lawless v. Ireland, 1961). The European Commission on Human Rights further developed the definition of legitimate “public emergency” which (1) must be actual or imminent, (2) the effects of emergency must involve the whole nation, (3) the

⁷ <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>

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) (3) and Article 27 of the American Convention of Human Rights (ACHR).

continuance of the organized life of the community 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.⁹

A complication of the definition of emergencies in international law of the first category relates to another dimension of the definition of extreme conditions and to the question whether such 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 in West Europe they have been very rare in the past 70 years; floods are common in many parts of Europe but are very rare in Israel, etc. A country that is used to encounter a disaster of certain type is likely to construct substantive and procedural norms to tackle this type of disaster, the effective treatment of which is conducted within the regular rule of law. This can point to the need for a relative definition of an extreme condition, which might justify departure from the regular rule of law, another factor that makes the definition of extreme conditions even more complex, especially vis-à-vis international law.

Lastly, a 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 hint that each category merits a unique legal arrangement. Indeed, one of the obvious characteristics of the first category of extreme conditions - war terror and alike - is that in such conditions there is an “enemy” - a state, an organization or a group, which is responsible (or perceived as responsible) for the creation of the extreme conditions. 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 in turn

⁹ For a more elaborated account see: http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php

might merit a totally different theory and consequently a different legal approach. However, the very same factor might merit a distinction within the second recognized category of extreme conditions - between natural disasters (e.g. earthquakes) and man-made disasters (such as an oil spill). 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 the background of which 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 case of 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.

3.2 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 between 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 emergencies: Specific – sui-generis – norms, procedures and institutional design tailored for various types of irregular or extreme conditions, where these conditions are envisaged ex-ante and hence the legal arrangements (both substantive and procedural) exist before the occurrence of the extreme condition, which only puts them into effect;
- 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 in order to mitigate the situation – the real state of an 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 distinguished between (2) and (3) and this feature of predictability is of course different 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 there are two crucial characteristics of an extreme condition relevant from the vintage point of the rule of law: 1) non-predictability, and 2) urgency. Both factors have to be present in order to justify a non-envisaged (and hence a change not prescribed ex-ante) in decision-making procedures and substantive arrangements. When a situation prompts a need for **swift** and **effective** measures to mitigate its negative effects and restore normality, but the situation is predictable on the bases of past experiences, the norms granting powers to governmental authorities and/or limiting individuals' freedoms can be prescribed ex-ante, enjoying all the benefits of the regular collective decision-making procedures, including deliberation, striving to consensus, checks and balances and judicial review. (corresponding to situation 2). When a polity is faced with an unpredictable threat, but this threat, even though it is so big that the mere existence of the polity is endangered, 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 institutional set-up to engage in swift and effective measures to resort normality (situation 2). Global warming which can endanger the existence of states is not an immediate threat that constitutes a justification for a type (3) exception vis-à-vis the rule of law.

The exceptional extreme condition (3) is unpredictable and hence 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

bring the situation back to normality by temporarily changing the structure of state functions in favor of efficiency and effectiveness (Zwitter 2013).

The analysis above also provides a direction to what should we expect situation (2) and (3) to be in terms of departure from the rule of law at normal times. Urgency denotes a need for speedy decision-making and action. It can thus include some of these elements: a) granting rule-making powers, which usually are in the competence of the legislature, to the executive; b) granting more authorities to the state and its officials and thus limiting more individual freedoms in comparison to normal times; c) reducing the 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. Such are public declaration of new norms with prospective application 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, as the result of the uniqueness (unpredictability) of the situation and the need for a *sui-generis* swift action.

3.3 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 is meant for those who wish to develop such Law and Economics analysis of the rule of law under extreme conditions in the context of the state as well as in the context of 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 as well as positive analyses of the theory of the state and of international governance have been conducted primarily with the paradigm of Public Choice, which implicitly is structured upon two important presuppositions. The first presupposition is that all issues that are or have to be

collectively decided in society are of the type of preferences' aggregation. The second presupposition is that individuals' 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 as to the way ones ought to live his/her life. As materialization of these individual preferences can conflict with preferences of others, 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 entrenched bill of rights are prescribed and analyzed.

Relaxing the assumption regarding the fixed nature of 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 within 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 preferences' 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 preferences 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, and hence the need to develop the best decision-making procedures and institutions to optimally aggregate individual preferences (e.g. achieving 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. A decision how to allocate a budget between the ministry of education and the ministry of transportation is dominantly a preference aggregation decision, but the decision how to allocate the budget dedicated

to decreasing fatalities and damage from road accidents is dominantly an expertise aggregation decision. Everyone agrees that decreasing road accidents is a worthy goal. Given the budget of the ministry of transportation (decided in light of aggregation of individual preferences), the decision whether to allocate the budget to construct traffic lights or a roundabout or to widen the road is an expertise decision. Only one specific allocation will yield a minimization of damages caused by accidents.

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 subjective and individual preference issue. However, both a moral deontologist and a moral teleologist will agree that some collective decisions are of preferences aggregation nature and some are of expertise aggregation nature. They will debate (only) on 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, who is famous for writing about the paradox of majority voting, which was generalized by Arrow (1951) to the impossibility theorem, all in the realm of preferences 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 to reach this correct decision. Under an assumption that this probability is equal among all decision-makers and 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 asserts that the greater the number of decision-makers, the greater the group probability to get to the correct decision. However, the marginal contribution of additional decision-makers decreases

and, depending on the specific probabilities and of course on the cost of the decision-making process itself, a group of three decision-makers in many cases might be optimal.

A simple example for applying Condorcet theorem is a situation where a group has to estimate the number of balls in a pot (or for a dichotomous decision-making: whether there are less or more than 50 balls in the pot). This is a case in which there is a clear and external correct decision. Paradoxically, in a 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 was charged with is for most philosophers 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 elaborated on this point because it might 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 epidemic spreads quickly, a tanker crashes, spilling huge amount of lethal materials, when an army is launching an attack and progressing to concur a piece of land of 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 a ‘pure’ expertise aggregation decision-making in the context of political governance of states and of the international community does not exist, the theoretical and empirical research in this realm is lacking. There are some interesting insights from psychology, with direct input into behavioral Law and Economics, which have not been

incorporated yet into the economic theory of the state. For example, the question whether we have a better chance to derive at the “correct” decision if each decision-maker makes his/her decision independently (what is called in psychology – a nominal group) or 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 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.

3.4 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 for or actually practiced, indicating some of the advantages and disadvantages of each of the models 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, to the international arena and to international law.

A possible typology of the different models put forward in the literature distinguishes between three groups that can be dubbed: ex-ante, during and ex-post. The ‘ex-ante’ models believe and advocate substantive and procedural arrangements that are adequate to face extreme conditions, enacted ex-ante to the extreme conditions. The ‘during’ models hold that while it is impossible to make the substantive collective decisions needed to face extreme conditions before such conditions occur, it is possible and desirable to prescribe ahead (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 anticipating any

type of extreme conditions and hence advocate for stepping out of the ‘regular’ rule of law, if necessary, legitimizing and legalizing or discrediting the actions taken ex-post. Here is a brief description of each of the models:

3.4.1 Ex-ante models

The common feature of the models in this group is the belief that both substantive norms as well as procedures for collective action can be prescribed in general and prior to extreme conditions, and the general features of the rule of law are in tact during such conditions. These models correspond to situation (1) in the section 3.2, negating the need to ever utilize 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* (1866) holds that legal systems should not, under any condition and regardless of any circumstances, recognize emergencies as deserving special treatment and accommodation (Gross 2003).

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

- 1) Reality undermines theory: there is no polity which had not adopted a special set of norms in times of extreme conditions (either in form of emergency constitution or in another form) or deviated de-facto from the legal order in such conditions. The recent history of declarations of derogations by signatories of various human rights treaties is a good proof of this point (Hartman 1981), and the construction of the derogation mechanism itself demonstrates that international law rejects this model in theory and practice. Other parts of international law (and as specified in section 1, including 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.

2) Extreme conditions becoming normality: A polity that will opt to adopt this model will phrase its norms (and especially constitutional ones) in such a way that they will include as a matter of routine excessive powers to the government and various officials and the empowerment to limit individual rights. This will significantly affect the adherence to the substantive facet of the rule of law also in times of normality. This point, as the previous one, echoes also in international law, exemplified by the debate regarding the relations between international humanitarian law (applicable in times of extreme conditions) and international human rights law.¹⁰

3) Threatening the rule of law: A polity that will not follow (2) is likely to violate its own norms, as when faced with serious threats to the life of the nation, governments will take whatever measures they deem necessary to end the crisis. This, in turn, will deepen the gap between the law in the books and law in action and endanger the 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**”. According to it, 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 norms accommodated are permanent additions to the legal system; others will be in force only upon some kind of emergency declaration, 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 can characterize 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

¹⁰ The International Court of Justice constructed recently a doctrine according to which international humanitarian law is *lex specialis* to the always applicable international human rights law – the *lex generalis*, as can be 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.

America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act (2001) are good examples. But even in countries, unlike the UK and the USA, where an emergency constitution exists (e.g. Germany, Turkey and India), the emergency constitution route has hardly been employed and, instead, regular legislation providing more powers to the executive or other authorities and allowing to curtail individual rights have been enacted, 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 set 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 an armed conflict erupts, without a need for a special declaration or control.

As with regard to the previous model, there are a few problems with this model vis-à-vis our discussion on the rule of law and extreme conditions:

- 1) Reality is too complicated to predict: The characteristics of the most acute extreme conditions, specified in the previous section, are unpredictability alongside the need for a 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 existence of unpredictable situations that merit 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 those responsible for the attacks as well as powers to enable the prevention of future such attacks, but in our context they did not reveal capability to predict the exact nature of future threats of different nature and therefore they cannot be considered as a comprehensive legal mechanism that can accommodate the concerns of future extreme conditions. In other words, accommodation by legislation is not a real ex-ante mechanism to address extreme conditions.

- 2) 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 to 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 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 initially it had some sunset clauses, the law with minor amendments was voted as a permanent law in 2006. Not only that the initial legislative process in the aftermath of the terror attacks cannot be characterized as maintaining the normal law making mechanisms, it became permanent in times of normality, almost 5 years after the extreme conditions that brought it to light.
- 3) The slippery slope of normality: Progress and change are in the nature of humanity. Many questions that are deliberated today by legislatures are discussed for the first time because technological, biological, ideological, social and other sort of changes raise issues to be decided 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 on individual freedoms. Addressing those needs by regular legislative amendments negate 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 declaratory justified by reference to extreme conditions, which lacks formal mechanisms securing its termination with the end of the extreme conditions (and in this context even sunset clauses are not a sufficient remedy). But the even more acute concern is the impact of this approach facing extreme conditions on various amendments to normal legislation without any formal mechanisms that prompt its re-examination in light of the termination of the extreme conditions. Hence the danger of a slippery slope of normality.

3.4.2 During models

The models belonging to this second group acknowledge the non-predictability nature of extreme conditions and hence they do not attempt to prescribe substantive rules ex-ante as the models of the first group. Instead, they construct special procedures for decision-making, recognizing the need to enable swift decisions, which naturally compromise some of the acute requirements from the collective decision-making process during normal times. I will mention three such model 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 had all collective decision-making powers to issue decrees and orders, including infringement of people's established rights. With the end of the period the dictator had to step down and was not allowed to hold any official function and his decrees and decisions were nullified, restoring the legal situation to the one 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, but limited in time and ensuring 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 abuse of 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 negates the ex-ante models, acknowledging, on the one hand, the unpredictable nature of extreme conditions, hence 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, the most important of which are law-making, to the executive (either the President of the Cabinet), preserving some features of normal times rule of law.

This model can characterize the constitution of the Weimer Republic and the legal track for its collapse, and the actual practice of the model by contemporary constitutions in many countries evolved with the years, trying to ensure that what happened to the Weimer Republic will not repeat itself. In a sense the Roman model had better safeguards to insure that the emergency is temporary, by limiting its time and requiring a personal separation between the emergency and normal times governments, and that its declaration will not be abused (declaration by the Senate rather than by a presidential declaration of emergency), but it compromised in times of emergency 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 who have the power under extreme conditions are the same politicians who function during normal times, creating incentives to use (or abuse) the emergency avenue for promoting goals which are not necessary justified by extreme conditions, compromising the requirements of the rule of law. However, as opposed 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 are also present 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 imposing duties on states towards their citizens, acknowledging that declaration of emergency can relieve them from these duties, but only temporarily. The later example creates a decision-making mechanism different from the regular, consensus based, mechanism in the international arena, which can enable swift and efficient actions 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 against the ex-ante models, they also have several deficiencies, the most of important are:

- 1) The potential abuse of emergency declaration: During the 300 years of the Roman Republic 95 emergency declarations and dictator rules were recorded. Today, the vast majority of countries have “emergency constitution” and a great share of them had declared emergency, some countries very frequently. This is certainly the case for non-democracies, but also the recent history of many democracies, in some of which such declaration led to periods of dictatorships.¹¹ In some countries declaration of emergency is used for the purpose of political survival.¹²
- 2) Emergency turning to be normality: Not only that there is a potential abuse in declaration of emergency, in some countries such declaration is not repealed for long periods of time. In the Roman republic the duration of emergency was fixed for 6 months. In modern constitutions, although there are theoretical mechanisms

¹¹ In Argentina, for example, 52 declarations by both democratic and non-democratic governments, were recorded since the 1854 Constitution came into force.

¹² Indira Gandhi, for example, declared emergency in 1975, following her indictment in corruption charges, a declaration that allowed her to rule under decree for several years.

of checks and balances, such as a need for the legislature approval of declarations or their extensions beyond a set period, once declaration is made it might remain in force for a long period of time.¹³

- 3) 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, which 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 this bypassing the temporariness of the emergency constitution avenue and thus undermining 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 would not step out of its powers and that individual rights would not be violated. 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. Courts, according to this model, may employ different interpretation to the scope of government powers and of human rights under extreme conditions by their regular usage of various balancing test, threshold requirements and other private and public law doctrines.

¹³ Egypt, for example, is under emergency since 1967. Israel is under emergency since its establishment and the parliament extends this declaration annually without a real debate about its necessity.

Although in theory this model strives to preserve separation between the rule of law in normal times and the rule of law under extreme conditions, in practice this separation is blurred. Courts do not have tools to limit their rulings ex-ante to specific circumstances and for limited periods and thus their declaration of law in times of emergency are bound to spill over to regular times. This can incentives power holders to attempt stretching their authorities and curtailing individual rights, with the additional risk of falling faith of the general public in the judiciary and its ability to protect individuals.

3.4.3 Ex-post models

The ex-post models attempt to overcome the deficiencies of the other models. The models in this last category recognize the need for a swift and effective actions during extreme conditions and their unpredictable nature, which does not enable subscribing specific rules ex-ante. But it also negates the desirability and/or the ability to prescribe ex-ante special decision-making procedures or a unique rule of law format tailored to operate under extreme conditions, maintaining 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 of the models within this group 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 asserts that even if the constitution does not grant the president or the executive specific powers to operate during extreme condition, these powers exists as derived from the very rationale of the establishment of the state or its social contract. This model can characterize the actual practice of the US during emergencies from the times of President Lincoln until 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 upon 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 stepping outside the rule of law during extreme conditions, leaving the deliberation as to the legitimacy of the measures taken to the times when normality is restored.

The model assumes that the nature of 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 views a real 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 do not succeed in creating such separation, because the regulation of the extreme filters to the laws of normality and even to courts' discourse, which is contaminated and is likely to result in less protection of human rights during normal times. Oren Gross advocating this model (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 discretization, which will bare the necessary political ramifications.

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

The '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 other deficiencies, the most important of which are:

- 1) 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 merges into the Emergency Constitution model and shares its critique. If the powers are not prescribed by a legal empowering norm, it merges into 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 – governing by prospective rules, equally enforced etc. In the latter case it is presented in the framework of the rule of law, while negating all its foundations, including the source of sovereignty, and discrediting the prime advantage of the extra-legal

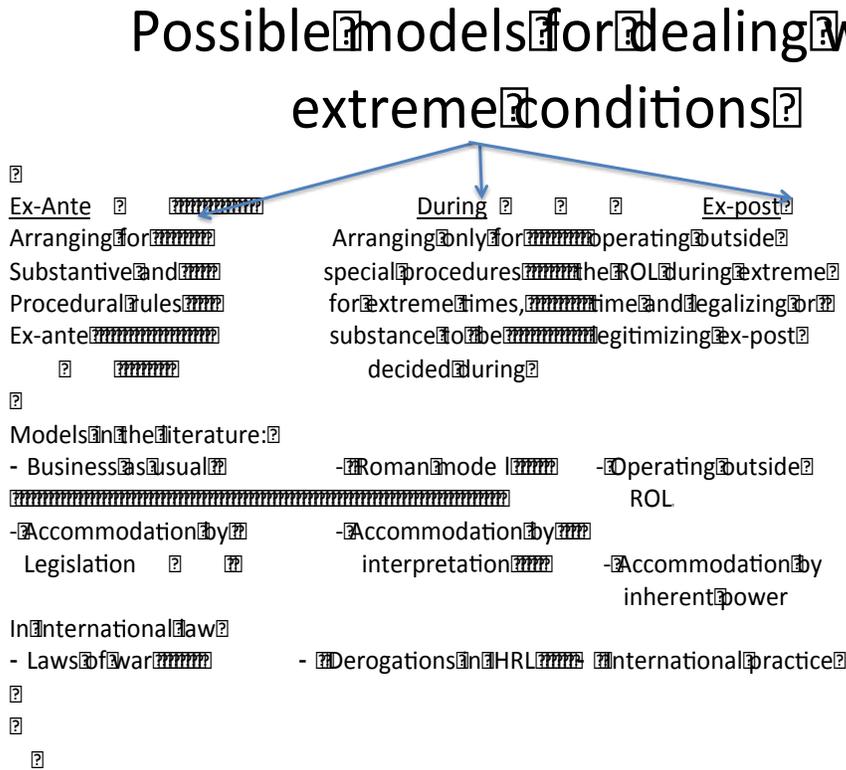
measures model – the ability to deliberate ex-post the legitimacy and legalization of the measures taken during emergency.

- 2) These models, even on the theoretical level, can work only in liberal democracies, in which there are 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 would be crucially frustrated if the ex-post models are allowed to operate. Moreover, it is doubtful whether democracies can conduct such an ex-post scrutiny regarding the legitimacy of extra-legal measures taken during extreme conditions, and whether actions that were approved ex-post would not be perceived as legitimate measures also after return to normality. The actual history of such ex-post practices does not reveal a real effective deliberation, monitoring and holding accountable those who took non-legitimate or excessive extra-legal measures during emergencies.

As can be seen from the survey above, various models prescribing the desirable mode of the rule of law under extreme conditions are offered in the literature. All of these models have been actually practiced by different states and by the international community. An initial closer look in the ‘law in action’ (more study has to be conducted in this realm too) reveals that most entities do not adopt a singular model. Many states, which have an emergency constitution, had used the accommodation frameworks (accommodation by legislation and/or accommodation by interpretation) alongside the emergency constitution. Stepping outside the rule of law altogether can characterize the practice of many countries as well, despite the existence of other avenues, such as accommodation and emergency constitution. This mixture of practices is another factor for concern as such practices lose 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 the de facto hybrid practices can characterize the international community too. This conclusion

reiterates the importance of further thinking, theorizing, putting forward and implementing a more coherent approach towards the rule of law under extreme conditions.



Fig

ure 3 – models of the rule of law under extreme conditions

Conclusion

This eclectic paper 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 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 view 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 were dominant; 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 on 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 presuppositions, which can shed a fresh light on the desirable international and indeed national governance.

An example for 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 separated but related issue, which touches upon the essence of the rule of law, is whether international law aspires to represent consensus of states or consensus of the world's individuals.

The relaxation of some presuppositions in-built in 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 were the assumption regarding the fixed (exogenous) nature of preference, and the assumption that all collective actions are about preferences aggregation.

The last point is especially relevant to extreme conditions, where it can be hypothesized that the share of expertise-aggregation type of decision-making increases in relation to preferences-aggregation. Likewise, it might be interesting to examine whether during extreme conditions the format of 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 other-regarding preferences). Moreover, shift of preferences might be of a different nature in different types of extreme conditions (e.g. natural disasters vs. man-made catastrophies 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 be conducted regarding 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, which is 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 elaborated on the different models prescribing 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-ante models and the ex-post ones should be rejected. Societies ought to give serious thoughts about potential extreme conditions and to prescribe substantive rules tailored for such circumstances. Some of the advantages of future-looking legal planning include the possibility to employ better decision-making procedures that will reflect deliberation and consensus building, integrating also legal areas which are usually outside the radar of emergency laws, such as private law. However, the increasing pace of social and technological changes do not enable to predict 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 decrease 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 abuses, (2) limited duration of emergency and procedures to terminate such declaration, and (3) some mechanisms of checks and balances during emergency rule to avoid total departure from the rule of law. Again, insights of Public Choice and Law and Economics in general might 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, through non-state actors, to the rapid spread of new epidemics, cannot be properly addressed by ex-ante rules, especially whereas unanimity based decision-making rule is still dominant in international law. Perhaps something like an Emergency Constitution has to be constructed for the international arena as well.

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