

## Israel's Emergency Doctrine, Institutions and Legal Framework, or lack of

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During its short years history since 1948, Israel had gone through numerous emergencies, most of which were related to national security. It is surprising, therefore, that Israel lacks a solid doctrine and comprehensive legislative and regulative framework dealing with preparation towards emergencies, mitigating emergencies, managing and recovering from them. Furthermore, the legislation that does exist on the law-books is far from reflecting reality, creating a dangerous gap between the law in the books and law in action. These conceptual and material failures became apparent during the current Covid-19 crises where there was neither obvious, well prepared, institution assuming the coordination of the crises' management, nor a legislative framework for handling the crises.

The purpose of this short paper is to describe the evolution of the Israeli legal and institutional framework relating to emergencies, how it operates in reality and what are its flaws, with possible more general and universal lessons.

### **1. Israel's Emergency Constitution**

Most of the world countries acknowledge that in times of emergencies the normal decision-making processes do not enable the quick and decisive needed actions and that more authorities should be granted to governments at the possible expense of individual rights, thus having an “emergency constitution”.<sup>1</sup> Indeed, more that 100 countries

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<sup>1</sup> According to Stefan Voigt, Contracting for Catastrophe: Legitimizing Emergency Constitutions by Drawing on Social Contract Theory, [Res Publica](#) 28(5), 2020, p. 149, the number of countries with emergency constitution is rising with the years and currently around 90% of states have an emergency constitution.

declared a state of emergency on the bases of an emergency constitution with the outbreak of the Covid-19 crises.<sup>2</sup>

The first statute enacted by the Israel Provisional Council in 1948 institutes the Israeli “emergency constitution”.<sup>3</sup> It empowers the Parliament (Knesset) to declare a state of emergency for a period of up to one year, and if the Knesset is unable to do so as the result of the emergency, the Government can declare such a state for up to seven days until the Knesset can conduct a vote. Such a declaration has two major legal consequences:

1. It brings into force pre-existing legislation, which is not applicable during “normal times”, such as *The Supervision on Prices of Services and Products Law 1957*, *The Emergency Powers (Detention) Law 1979* and until recently also *The Prevention of Terrorism Ordinance 1948*.

2. It empowers the cabinet or individual ministers to issue regulations “for the defense of the State, public security and the maintenance of supplies and essential services” with the force to supersede any existing law. These emergency regulations can be in force for a maximum period of 3 months, unless enacted as regular law by the Knesset. In other words, upon a declaration of emergency, the Government (the executive branch) is granted legislative powers. However, emergency regulations can impose neither retroactive punishment nor violation of human dignity and they are subject to judicial review.<sup>4</sup>

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<sup>2</sup> Christian Bjørnskov and Stefan Voigt, This Time is Different? -On the Use of Emergency Measures During the Corona Pandemic, [https://www.researchgate.net/publication/344777420\\_This\\_Time\\_is\\_Different\\_-\\_On\\_the\\_Use\\_of\\_Emergency\\_Measures\\_During\\_the\\_Corona\\_Pandemic](https://www.researchgate.net/publication/344777420_This_Time_is_Different_-_On_the_Use_of_Emergency_Measures_During_the_Corona_Pandemic)

<sup>3</sup> Article 9 of the Law and Administration Ordinance (1948), which was replaced in 1996 by articles 38-41 in *Basic Law: The Government*.

<sup>4</sup> Indeed, the Supreme Court of Israel has not hesitated to conduct judicial review of emergency regulations. It ruled, for example, already in 1963 that emergency regulation should be treated by the Court as any other secondary legislation and its legality depends on its being required for a necessary action, which in normal times would be unjustified to regulate by secondary legislation (Cr. A 156/63, *The Attorney General v. Ostreicher*, 17 PD 2088; 5 SJ (1963-65) 19). In 1990 the Court struck down emergency regulations made by the Minister of Housing who attempted by the regulations to shorten the process of granting building permits in order to enable the immediate construction of some 3000 units for a huge wave of immigrants arriving from the Soviet Union. The Court held that the immigration wave does not constitute an emergency situation and thus despite the fact that declaration of emergency was in force, the use of emergency regulations for that purpose was illegal (HC 2944/90, *Poraz v. The Government of Israel*, 44(3) PD 317).

This Israeli general constitutional framework, which was later entrenched in Basic Law: The Government, seems reasonable *vis-à-vis* the rule of law - the declaration is made by the legislature for a fixed period and emergency regulations have substantive limits and are subject to judicial review. However, in practice, a declaration of emergency was made with the establishment of the State in a midst of the Independence War and was extended by the Knesset almost automatically every year since.<sup>5</sup> Having said that, since the 1990 Supreme Court ruling which struck down emergency regulations,<sup>6</sup> the legal tool of emergency regulations (norms promulgated by the executive) has been hardly exercised until the Covid-19 crises. Since March 15<sup>th</sup>, 2020 the Israeli government issued numerous emergency regulations, ordering a partial and later full general lockdown and reduction of the activity of the economy to 30 percent. The regulations included also a penal section and enforcement measures. Only a few months later, on July 23<sup>th</sup>, 2020 did the Knesset enact a special Corona law (with a sunset clause), which ended the utilization of emergency regulations based on the “emergency constitution”.

## 2. Emergency doctrine and legal framework

A constitutional set up of a declaration of emergency and legislative powers granted to the executive is only a mechanism for rapid decision-making during emergencies. It does not cover the preparation for different types of emergencies, mitigation efforts, the actual concept how to handle different types of emergencies and the recovery from emergencies, and it does not reflect any general doctrine or plan relating to different types

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<sup>5</sup> This fact brought the mere question of the emergency declaration also to be challenged by judicial review. In 1999 the *Israeli Association for Civil Rights* petitioned the Supreme Court against the prevailing extensions of the declaration of state of emergency. Following criticism of the Court (who kept the application pending for many years), the Government accepted the need to end the state of emergency but asked for more time to adjust all the legislation which is contingent on the declaration (By 1999 there were many pieces of legislation the validity of which were tied to the declaration of emergency). Until this day the adjusting process has not been completed and thus the Knesset renews every 6 months the declaration of emergency. This “adjustment” process means that some emergency laws are now re-legislated as regular laws for normal times, vindicating the general criticism of emergency becoming normality, or a shift from the “emergency constitution” to the “business as usual” model. The new 2016 Counterterrorism law is part of this process. On the different emergency models see: Eli Salzberger, “[The Rule of Law Under Extreme Conditions and International Law: A Law and Economics Perspective](#)”, in Thomas Eger, Stefan Oeter, Stefan Voigt (eds.), *The International Law and the Rule of Law Under Extreme Conditions*, Mohr Siebeck (2017), pp. 3-56

<sup>6</sup> Poraz case, *supra* note 4

of extreme conditions and derived strategies to manage them. In this respect, Israel, unlike many other countries, lacks a comprehensive emergency legislation which sets up emergency institutions and reflects a comprehensive doctrine, a fact that had a crucial impact also on the management of the Covid-19 crises. Moreover, the actual Israeli conduct relating to emergency preparedness, management and recovery is very remote from what can be learned from the laws in the book. Let me elaborate.

## 2.1 The Civil Defense Law

Soon after its independence in 1948, the Knesset passed the Civil Defense Law, 1951 that was based on the British Civil Defense Law 1948. The Law establishes the Civil Defense Service (CDS) and sets its authorities and responsibilities. Civil defense is defined in the law as "measures, for defending against an attack, or a threat of an attack on the civilian population, and for reducing the consequences of such attack".<sup>7</sup> Although this definition seems to cover only emergencies involving an armed attack on civilian areas, Section 2(11) of the law states that the Civil Defense Service is authorized "to act, with the approval of the Minister of Defense, in general or for a specific matter, and in coordination with the respective authorities, to save life and property that does not involve civil defense".

Although the law did not state that the Civil Defense Service is a military unit and stated only that the head of the CDS was to be an officer in the army (not stating whether in active service), from the onset the CDS was integrated into the Israel Defense Forces (IDF). This reflected the main challenge that faced (and still faces) the country – that of military conflict or terror attacks. The CDS was visible and active in the first two decades of Israel, when its personnel, mainly retired IDF volunteers, took care of maintaining public shelters, conducting evacuation exercises in schools, and indeed, during war times, coordinated the civil population responses (such as shadowing windows or placing sand bags to protect properties). But after the 1967 War when Israel's borders were shifted away from dense population areas and wars were fought far from them, the CDS faded away. Most Israelis today are not aware of the mere existence of the CDS. The Civil

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<sup>7</sup> Civil Defense Law, 5711 - 1951, Section 1

Defense Law, however, remained the main legal framework, for example, for regulating the obligations to construct private and public shelters and for regulating the preparedness of private as well as public entities towards emergencies. The law has been periodically updated where its last amendment dates to 2011.

## 2.2 The developments in the last 30 years – the establishment of the Home Front Command

The developments “in reality” were very different from what the law captures. In 1990, after many years of conventional wars fought at Israel’s borders, the first Gulf War brought them back into populated central areas like Tel Aviv, as missiles suspected as carrying chemical weapons were launched from Iraq. This attack on the civilian population brought to a major change in the Civil Defense organization. It was the trigger for the establishment of the Home Front Command on February 1992 as part of the core command units of the IDF. The Head of the Home Front Command was made a full ranked General in the Israel Army (IDF) and his status became equal to that of the other Military Commands in Israel; in addition to the Northern, Southern and Central Commands there was now the Home Front Command. The commander of Home Front Command has been since its establishment appointed as head of CDS and the responsibilities and authorities of the CDS, therefore, were implicitly transferred to the Home Front Command.

In order to deal with the new type of threat – long range missiles launched towards dense civilian areas, organizational changes were made in the CDS and consequently changes were made also in the Civil Defense Law, in order to provide legal authority and responsibility for the newly established Home Front Command (HFC). Thus, amendments to the CDS Law during the 1990s granted additional authorities to both the Minister of Defense and to high-ranking officers in the IDF, such as Chief of Staff, Deputy Chief of Staff and other Generals, to give instructions to the civilian population during times of emergencies. For instance, they are authorized to instruct the population to stay at home or in safe rooms, limit public events, etc.<sup>8</sup> It should be noted that the HFC is not specifically

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<sup>8</sup> Section 9 D of the Civil Defense Law, 5711 – 1951

mentioned by this name in the Civil Defense Law. In practice, the HFC Commander is appointed by the Minister of Defense to act as the Head of the CDS. The result is that, on the one hand, the HFC has a dual entity – it is a legal entity acting as the CDS with all its responsibilities and authorities under the Civil Defense Law, and it is a military unit, with all implications. On the other hand, this arrangement is not entrenched in the law, creating a significant gap between reality and the laws in the book.

Additional changes to the Civil Defense Law included the establishment of districts and appointing district commanders, with powers towards the local authorities and individuals within the district, granting limited powers connected with emergency preparedness to local authorities, and regulating some budgetary issues connected to emergency preparedness. But the amended law by no means can be viewed as a comprehensive emergency legislation which reflects a doctrine, institutional structure and decision-making procedures to prepare, manage and recover from emergencies. While the Home Front Command was established in the 1990s, as described above, there was no equivalent central civilian authority to deal with emergency situations on a national level in order to coordinate the efforts of all civilian national authorities (like fire fighter, rapid medical response services etc.), local authorities and non-governmental organizations.

In 1997 a new Section 9D was added to the CDS Law, empowering the government (and in some circumstances the Minister of Defense) to declare a special situation in the home front, in the whole of Israel or in specific parts of it, upon high likelihood of an imminent attack on civilian population. Such declaration, which is subject to the approval of the Foreign and Defense committee of the Knesset, grants extra powers to the Army and to the CDS vis-à-vis the civilian population, such as closure of schools and other institutions, a duty to stay in certain locations etc. The need for such a procedure was the result of the constant state, and thus the insignificance, of the “constitutional” emergency. While the Civil Defense law clearly covers emergencies related to armed attacks, terror and alike, it is unclear whether it covers other types of emergencies such as natural disasters. Indeed, during the Big Carmel Mountain fire in 2010 and in the current Covid-19 crises no declaration of a special situation in the Home-front was made. Such declaration, however, was made recently in May 2021 during the latest round of hostilities between

Israel and Gaza and was applicable to the arears up to 80 kilometers from the border with Gaza.

### 2.3 Civil Disaster Event

It should be noted that there is no comprehensive legislation in Israel concerning the management of national disasters, such as earthquakes (the main natural threat in Israel). The only legislation dealing directly with natural disasters is the Police Ordinance. According to Article 90(a) of the Ordinance, which was enacted only in 2005, a "Civil Disaster Event" is an "event causing serious harm to the public welfare, personal security or property relating to a large public or a large area, or an event that or is liable to cause such harm, including due to natural disaster, environmental hazard, hazardous substances event, chemical or biological event, radiological radiation event, accident or terrorist activity".

According to Article 90B(a) of the Police Ordinance, the power to declare a "civil disaster event" is vested in the Minister of Home Security, save in some circumstances involving military factors, where the authority is invested in the Minister of Defense or the Prime Minister. Such declaration is valid for 48 hours and it empowers the Police force to take command of operations at the scene of the disaster, to give orders to other bodies involved in the rescue efforts such as army, fire fighters and also civilians. Such declaration was made in May 2021 by the Minister of Defence in the city of Lod due to civil unrest during the latest round of the Israel-Gaza hostilities. However, the Police Ordinance deals neither with the stages of prevention and mitigation, nor with the stage of rehabilitation and does not reflect even a strategy of managing an emergency.

### 2.4 The National Emergency Management Authority

In the Second Lebanon War in 2006 hundreds of rockets were launched to populated civilian areas in the north and central area of Israel, and it seemed that the Home Front command failed in managing the crises, especially regarding cooperation and coordination of local authorities' conduct. In the aftermath of the war, the State Comptroller issued an extensive critical report and recommended establishing a central body with responsibility and authority to prepare and manage emergency situations.

As a result, in 2007 the National Emergency Management Authority (hereinafter – NEMA) was established, but only by a government resolution, rather than by legislation. Its main objective is to coordinate activities of governmental ministries and agencies in preparation for and during emergencies. NEMA was placed under the Ministry of Defense in order to help it manage its responsibility in emergency situations in the civil arena. It should be noted that although NEMA was established in the aftermath of the Lebanon War, it was established to deal with emergencies of various sources and origins, including natural disasters. The major natural disaster that poses a threat to Israel is that of earthquakes, as Israel lies in the Syrian-African fault and statistically is hit with a major earthquake approximately every hundred years. Since the last one was in 1927, the clock is ticking.

In 2011 a Home Front ministry was established and NEMA was moved to the new ministry. However, in 2014 the ministry was abolished and the Defense ministry re-took responsibility over NEMA. This can mark also the beginning of the decline of NEMA. Thus 15 years after its establishment there is still no legislation governing NEMA's structure, authorities, responsibilities and activities. Since its' establishment there have been efforts to draft such a law (for example a draft bill proposed by the former Ministry of Defense legal advisor), which so far, were unsuccessful. The major problem with the absence of such a law is that NEMA's authority is limited to governmental agencies, as a governmental resolution cannot empower it to exercise authority towards non-governmental agencies – including local authorities. Even its authorities towards governmental entities are vague and do not provide the management apparatus needed to exercise its responsibilities and coordinate all bodies – governmental and non-governmental - involved in emergencies. In addition, there is no legislation that states the responsibility and authority of every government ministry – separately and collectively – to do its part in the preparation and management of disasters and emergencies. There is no legislation that governs the realm of activity of the business sector, non-governmental and civilian organizations such as non-profit organizations and NGOs.

Furthermore, political battles brought to the weakening of NEMA and decrease in its budget, and recent recommendations (The Mizrachi committee 2018) to change the structure of NEMA, scale it down and integrate many of its activities with the Home Front



Command where the latter is the major emergency body, were adopted. Indeed, the Home Front Command, a well-organized and budgeted body, has developed in recent years emergency procedure prototypes with and within local authorities, geared mainly towards security threats, but also with other potential threats such as earthquakes. It took over many of the activities assigned or conducted by NEMA.

## 2.5 The Covid-19 crises

Epidemics were clearly identified as part of the Comprehensive Threat Scenario for the Home Front approved by the government in 2016. NEMA annually reports to the government on the level of preparedness for each of the major risks. But, as the last major epidemic - Polio - occurred in 1950s the level of preparedness for pandemics was never high, despite the latest version of the national government guidance paper on pandemics issued in 2018.<sup>9</sup> Beyond the conceptual agreement on the need to prepare for pandemics, it was not perceived as an acute threat. Consequently, the regulatory framework was not updated, and the required budget to ensue preparedness was not allocated. The law regulating the prevention and management of pandemics dates back to the British Mandate – *the Public Health Ordinance 1940*, lastly amended in 2001.<sup>10</sup>

When the Covid-19 crises erupted in early 2020, the relatively well-developed existing mechanisms for managing emergencies and inter-sectoral cooperation were not utilized. Thus NEMA has not been involved, the Home Front Command (and through it - local authorities) were involved only in a later stage as subordinates to the Ministry of Health and with limited authority. Instead, after a few weeks in which the crises was managed by the Ministry of Health and on the bases of decrees which the Public Health Ordinance empowers the general director of the ministry to issue, the government instructed the National Security Council, an advisory (in contrast to an operative) body to the government in foreign affairs and national security, to coordinate the management of the crises. The obvious body to coordinate the crises – The National Emergency Management Authority (NEMA) was incorporated partly only at a late stage, because it was weakened and under-staffed due to political struggles and lack of anchor in

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<sup>9</sup> <https://m.knesset.gov.il/news/pressreleases/pages/press14052020a.aspx>

<sup>10</sup> <http://extwprlegs1.fao.org/docs/pdf/isr49185.pdf>

legislation. Temporary, Covid-19 focused, legal framework was legislated by the Knesset only on July 27<sup>th</sup> 2020, 5 months into the crises and paradoxically it assigns minor role to NEMA, ignoring altogether the Council for National Security.

### **3. Discussion and Conclusion**

Many countries do have a comprehensive emergency legal framework which reflects a doctrine related to preparing, mitigating, managing and recovering from emergencies.<sup>11</sup> Such legislation typically set up institutions to deal with emergencies in all above stages, on three levels – national, district and local, with specific duties, decision making procedures and indeed additional powers vis-à-vis the general public according to the three stages. During the eruption of emergencies these institutions receive extra powers which they do not hold in normal times and in New Zealand, for example, such softer extra powers are granted also during the recovery stage.

Despite the long exposure of Israeli society to security threats, until today there is no such comprehensive emergency law. Rather, emergency arrangements are imbedded in various laws and governmental decisions, which grant powers and allocate responsibilities to numerous governmental and local agencies, with no clear designation of a coordinating body for emergency preparedness, response and recovery. This was a cause for major failures in past emergencies, as reflected in numerous reports of the Israeli State Comptroller over the past decades, as well as from elaborated interviews with some 20 senior officials from all the emergency bodies, as well from local authorities and the industry, conducted by a research team of the National Knowledge and Research Center for Emergency Readiness over the past 3 years.<sup>12</sup> They point specifically to the following failures:

1. Lack of comprehensive legal framework brings about excessive dependence on the specific individuals holding office, in terms of the understanding the role of their

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<sup>11</sup> These include, according to Salzberger and Neufeld, "Towards an Israeli Emergency Doctrine" (in Hebrew), 2022 the UK, Japan, the Philippines, Canada, New Zealand.

<sup>12</sup> Salzberger and Neufeld, "Towards an Israeli Emergency Doctrine" (in Hebrew), 2022 <https://minervaxtremelaw.haifa.ac.il/wp-content/uploads/2022/03/SalzbergerNeufeld-24-2-2022.pdf>

organization vis-à-vis emergencies, the extent the organization is dedicating time and resources to emergencies and specific segments of them, in terms of the relations between the organization and other bodies, etc. Change of officials can bring about significant changes in the organization operation and weight within the emergency apparatus.

2. The emergency framework lacks systematic long and medium-term planning, setting goals and examining achieving those. Instead, the conduct is short-term and reactive, without serious process of lessons learning, especially across different types of emergencies, preservation of information and implementing criticism.
3. Lack of comprehensive doctrine reflected by a detailed legal framework also brings about lack of coordination and escaping responsibilities and accountabilities and inability to promote inter-organizational coordination and working protocols.
4. Even if emergency institutions wish to exercise their responsibilities, there are no sufficient tools, which the law should provide, to do that.

Well, one can argue justifiably that at the end of day, Israel managed its emergencies quite proficiently and none turned into an existential catastrophe. Indeed, Israeli culture, including governmental and public service culture, can be characterized by high degree of flexibility, innovative thinking, taking initiatives, bending inflexible rules and role definitions. This Israeli audacity is useful especially during extreme conditions. However, the range and degree of complexity of contemporary threats of both man-made and natural disasters are broader than in the past and likewise our capabilities to meet the new threats are greater, but many of them require long preparations and processes in which orderly long-term planning and capabilities building is essential.

A good example in hand is the Covid-19 crises which found Israel (among many other countries) unprepared. In a research conducted in our center comparing Israel to four East Asian countries which share many characteristics with Israel (like size, centralized governments, geo-political features etc.) – Taiwan, South Korea, Singapore and Hong Kong - we found that the four East Asian countries were well prepared due to previous

pandemics (SARS and MERS) and comprehensive as well as particular emergency legislation and institutions, and hence their response and management of the crises brought about far less deaths, critically ill and infected people per population, while imposing far less severe measures to fight the pandemic (in terms of lockdowns, closure of institutions and businesses etc.).<sup>13</sup> The study focused on the first 6 months of the pandemic. These gaps narrowed significantly in the later stages of the pandemic, as Israel learned from its first wave experience and managed much better thereafter. Likewise, as result from previous experience, Israel can manage acute security and extreme conditions. However, it could have done better with expected and experienced emergencies if a comprehensive emergency doctrine backed by detailed regulation had been in place, and it could have done significantly better with new and unexpected extreme conditions, such as Covid-19 or the future of climate change related disasters.

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<sup>13</sup> Eran Feitelson, Pnina Plaut, Eli Salzberger and Deborah Shmueli, Alex Altshuler, Smadar Amir, Michal Ben-Gal, [Learning from Others' Disasters? A Comparative Study of SARS/MERS and COVID-19 Responses in Five Polities](#), International Journal of Disaster Risk Reduction, Volume 74, 2022