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ACADEMIC ARTICLE

Ministerial Emergency Powers Over Court Administration in the Israeli Judiciary

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This article focuses on the administration of courts in Israel during the Coronavirus Pandemic, and particularly on the emergency powers utilized by the Minister of Justice. The article points out that more attention must be granted to the confluence of two issues: emergency powers and court administration. While the literature on emergency powers has discussed at length the challenges inherent in maintaining the rule of law under extreme conditions, the literature on court administration has not shown as clear an awareness of the issue, even though it has extensively discussed the tensions intrinsic to executive control over court administration. This article points out, drawing on both of these theoretical discourses, that we must carefully structure emergency powers over the administration of courts taking care to maintain the realization of the principles of judicial independence and judicial accountability, which in emergencies necessitates a clear separation of the power to declare a state of emergency from the power to curtail court operations due to the emergency. Furthermore, we must also maintain transparency in the realization of these principles, which is almost as important as their actual realization in order to maintain public confidence in the courts.

Keywords: Covid19 Pandemic; Israel; Emergency Powers; Minister of Justice; Public Confidence

1. Introduction

In the small hours of the night between March 14 and 15, 2020, as part of sweeping measures enacted to combat the spread of Covid-19, the Minister of Justice of Israel Amir Ohana decreed the partial closure of the courts.[1] Since this decision instigated the postponement of the opening of the trial of Prime Minister Netanyahu, who was charged with corruption, the parliamentary opposition reacted furiously. A member of Knesset (Israel's Parliament) Ofer Cassif went so far as to say that the Minister's measure was an attempted coup by the Prime Minister, and called upon the courts not to follow "this illegal decree."[2] Months later, when Israel went through a second lockdown on account of the pandemic, the newly appointed

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[1] Announcement in the Official Gazette 8744 (15 March 2020).

[2] MK Ofer Cassif's Twitter Account <https://twitter.com/ofercass/status/1238968242011594752> [accessed 7 December 2020]. Unless otherwise noted, all translations from Hebrew in this Article are my own.

Minister of Justice Avi Nissankoren pointedly said that he would not decree the partial closure of the courts, since "in regular times, and even more so in times of crisis, democratic institutions are essential in defending civil rights and in conducting oversight over government action."[3] Later, the new acting Minister of Justice Benjamin Gantz gave similar assurances during the third lockdown.[4] Thus, though the court administration directed the postponement of various court proceedings during the third lockdown (to a lesser degree than in the first lockdown), it did so without formally curtailing court operations, without a ministerial decree, leaving judges the discretion to decide upon postponements, and, significantly, without a public outcry.

Why did the Minister of Justice have the power to decree the partial closure of the courts? Shouldn't the Judiciary's administrators be the ones empowered to decide if and when to reduce court operations in the face of a pandemic? In this Article, I tackle these questions. While I apply these questions on a local Israeli legal case study and on the particular circumstances of the Covid-19 crisis, I look at them from a comparative and theoretical outlook that could easily be applied elsewhere.

The tension between accountability and independence in the involvement of the Minister of Justice in court administration has been discussed in depth (e.g., Mikuli et. al., 2019), as has the issue of the influence of the realization of these principles on public confidence in the courts (e.g., Urbániková and Šipulová, 2018). The problem of the protection of rights, including the right of access to justice, during emergencies, has also been discussed at length (e.g., Albert and Roznai, 2020). This article points out that more attention must be granted to the confluence of the two issues: emergency powers and court administration. In particular, we must carefully structure emergency powers over the administration of justice, taking care to maintain the realization of the principles of judicial independence and judicial accountability, which in emergencies necessitates a clear separation of the power to declare a state of emergency from the power to curtail court operations due to the emergency. Yet we must also maintain transparency in the realization of these principles, which is as important as their actual realization in order to maintain public confidence in the courts.

The next section (section 2) will discuss the theoretical issues of control over court administration and the rule of law in emergencies, focusing on their convergence. Section 3 will give some background on the Israeli Judiciary, particularly on the transformation of its administration of courts during the crisis of the Covid19 pandemic. Section 4 will survey the ministerial decree that curtailed court operations, its legal basis and the legal challenges it faced, with a comparative view of responses in other jurisdictions. Section 5 will apply the article's theoretical framework on the Israeli case. Section 6 will conclude.

2. Ministerial powers in court administration

Ministers of Justice, in Israel and beyond, are frequently empowered to regulate the operations of courts and to control various crucial aspects of court administration (e.g., Mikuli et. al., 2019). When would that become a problem?

2.1. Independence and accountability

The issue of the institutional control over court administration usually comes back to the basic principle of judicial independence. Judicial independence is not a purpose in itself, but rather a means of preserving the rule of law and realizing justice. Similarly, institutional

[3] Minister Avi Nissenkorn's Twitter Account <https://twitter.com/AviNissenkorn/status/1280515546400858113> [accessed 7 December 2020].

[4] Minister Benjamin Gantz's Twitter Account <https://twitter.com/gantzbe/status/1347481597478645760> [accessed 4 February 2021].

judicial independence of the judiciary from the perspective of the control over court administration is a means of preserving the decisional and personal judicial independence of the individual judge (Burbank and Friedman, 2002). The dilemma is that, in some matters, granting complete control over court administration to judges in order to maintain to the utmost their decisional independence, may hinder other vital public interests, including possibly the efficiency of the system, which may thus cease to operate as a coordinated system. It may also hinder the decisional judicial independence of individual judges ("inner judicial independence") if the heads of the judiciary or presidents of courts receive control over court administration (Popova, 2012; Wallace 1978).[5] One of the public interests that may suffer due to granting complete control over court administration to the Judiciary itself is judicial accountability before the citizens and the other branches of government (e.g. Langbroek, 2010; Yein Ng, 2007), particularly if elected officials lack a say in judicial administration (Kosař, 2016).

In other words, there is a tension between the principles of judicial independence and accountability in the issue of control over court administration, though of course in some instances they may complement each other (e.g., Woodhouse, 2007; Contini and Mohr, 2007). As a plethora of writing in recent decades has shown, while the realization of both principles is necessary for the rule of law, the application of each one of these principles in court administration may sometimes come at the expense of the other principle (e.g.: Andenas & Fairgrieve, 2006; Bermant & Wheeler, 1994; Ferejohn & Kramer, 2002; Langbroek, 2010; Yein Ng, 2007). A different but related tension in matters of court administration may exist between pursuing quality of justice in particular judicial decisions and the efficiency of the court system as a whole (van Dijk and Dumbrava, 2013).

Tensions are also associated with ministerial involvement in the prosecution of criminal offences, with regards to various aspects related to the administration of prosecutorial institutions (E.g.: Langer and Sklansky, 2017; Tonry, 2012). For reasons specified below in section 3.1, this article will not elaborate on this issue.

2.2. Models of control over court administration

Two different models (or, ideal types) of judicial administration have been sometimes juxtaposed: the executive model that grants these powers to the minister of justice or a similar institution; and the judicial model, which grants these powers to the judiciary. The U.S.A, in particular, has a relatively extreme model of judicial self-governance in judicial administration, in the hands of the Judicial Conference of the United States, which is composed of judges who are partly elected by their peers and partly *ex officio* members. At the other end of the spectrum are some European countries, who have placed the powers of court administration at the hands of a ministry of justice. From the point of view of the principles of independence and accountability, the U.S.A. model emphasizes independence, while the continental model emphasizes accountability (Smith, 2008; Baar et. al., 2006; Shetreet, 1985; Millar and Baar, 1981).

In practice, both ideal types are rare, and, indeed, because of fears for decisional judicial independence, the complete control of the minister of justice over court administration has been very much mitigated by various institutional safeguards that grant powers to judges in particular spheres of court administration: whether through granting significant local autonomy to presidents of courts (Blisa and Kosař, 2018), through utilizing judges in the ministry of justice (e.g., as traditionally has been the case in Italy and France) (Millar and Baar, 1981), and through various other mechanisms (Baar et. al., 2006).

[5] *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84–85 (1970).

Thus, while the two ideal types or models still persist, in practice today one may characterize the world's landscape in this regard as a pluralistic manifestation of various hybrid or intermediate models. For instance, the recent trend of the institution of judicial councils, who have received powers of judicial administration from ministers of justice, has sometimes been seen as a tool to realize the principles of independence and accountability under the roof of a single institution (e.g. Fitzpatrick, 2008; Garoupa and Ginsburg, 2015; Voermans, 2000). However, various compositions, procedures and powers of judicial councils determine the exact balance among these principles. Indeed, recent years has seen a robust discussion on the role and import of judicial councils that are sometimes critically assessed both for their benefits as well as for their harmful effects (Garoupa and Ginsburg, 2015; Guarnieri, 2013; Kosař, 2016; Kosař 2018).

2.3. State of emergency versus normal times

While the literature on judicial administration has debated these issues at length, one point has garnered less comment. This point is the issue of who has the powers to put aside regular norms and declare a state of emergency. Carl Schmitt has famously argued that the sovereign is whoever decides that such a state of exception exists (Schmitt, 2006 [1922]). To borrow from this conceptualization, whoever may declare an emergency and decide upon the curtailment of court operations in emergencies (in Israel, the Minister of Justice), holds ultimate control over court administration. Thus, arguably, even if we transfer powers to a council for the judiciary, for instance, if the minister of justice holds this ultimate power, either *de jure* or *de facto*, he retains ultimate control over court administration.

Of course, in times of crisis, we may wish for decisive and quick action to deal with the emergency. Yet the problem with any such emergency is the inherent risk it entails for the rule of law and rights of the individual, since, as Oren Gross argued: "in such times, the temptation to disregard constitutional freedoms is at its zenith, while the effectiveness of traditional checks and balances is at its nadir" (Gross, 2003: 1027). This tendency is especially ominous in an atmosphere of democratic backsliding, when one should particularly fear an attack on courts by populist political leaders, using emergencies as a pretext for executive aggrandizement. These attacks may occur since the proper operation of courts of law may be seen as an obstacle for a regime with authoritarian aspirations. But such tendencies may occur even without such purposeful abuse of the emergency, but simply due to an overreaction or panic.

Due to this fear, which exists in any such crisis and in other spheres of governmental action, not only in the administration of justice (Albert and Roznai, 2020), various measures are used to check executive powers in emergencies (Gross and Aoláin, 2006). Israel, as elaborated below in sections 4 and 5, follows a legislative model (Ferejohn and Pasquino, 2004) with regard to the administration of courts, in which a specific emergency law (rather than a generic one) attempts to legislatively accommodate the crisis (Gross, 2003). But one of the keys to such measures is to either separate the body declaring the emergency from the body utilizing emergency powers (thus limiting the incentive for abuse), or, if we do not make this separation, make the body that uses emergency powers effectively accountable (Ferejohn and Pasquino, 2004: 230). What we should ask, in the context of judicial administration, is whether effective measures are used to check emergency powers to curtail court operations during crises, either by separating the power to declare an emergency and the power to curtail court operations or by utilizing tools of accountability?

2.4. Public confidence

While emergency powers in judicial administration have not garnered attention, public confidence in the judiciary has been discussed at length. However, public confidence in the

judiciary is a slippery concept. Discussions over how to define and measure public confidence in the judiciary abound, and the variables that determine it are contested (Gibson et. al., 2003). Certainly, independence, impartiality and neutrality of the judges are essential elements for public confidence in the judiciary (Pasquino, 2003), as well as accountability, transparency and diversity in judicial appointments (Mak, 2018). That said, how to realize these principles in a way that would promote public confidence is not always clear (Urbániková and Šipulová, 2018; Mak, 2018).

However, public perceptions in this regard are important, and perhaps even to a degree as important as actual practices. If the judiciary is deemed by the public as partial and politically influenced, even wrongly, for instance through lack of transparency, public confidence may suffer a blow. Here the Covid19 crisis in Israel, and the way in which the judiciary handled it, have important lessons to teach us.

3. Background on the Israeli Judiciary during the pandemic

In order to more fully understand the argument of this article, some introductory background on the Israeli judiciary is in order, as well as some background on the changes that the judiciary went through in response to the Covid-19 crisis.

3.1. Background on the Israeli Judiciary and its Administration

The Israeli judiciary is designed hierarchically, with a single supreme court at the head of a pyramid, presiding over six geographic districts having each a single district court and several magistrate courts. This court system deals with almost all judicial matters (civil, criminal, administrative, etc.), with the Supreme Court serving as both a court of final appeal, as well as a court of first instance, when it sits as the High Court of Justice, hearing petitions against governmental authorities.[6]

Court administration in Israel follows a hybrid model, having features of both common law and continental law systems (Lurie et. al, 2020). The Minister of Justice has far reaching powers to regulate court operations.[7] He appoints the Director of the Courts with the consent of the President of the Supreme Court. The Director of the Courts heads the Administration of the Courts and is responsible before the Minister for the implementation of administrative arrangements in the courts.[8] Yet the President of the Supreme Court also has charge of various matters of court administration, and to a large degree the Director of the Courts is seen as a liaison between the President and the Minister. Indeed, in practice, the Director has been enjoying an increasing degree of limited institutional autonomy (Lurie et. al., 2020).

As the aforementioned ministerial action curtailing court operations could plausibly be construed as an intervention in the prosecution of cases, a few words are also in order on Israel's prosecution. The head of the prosecution is the Attorney General, who in Israel is not a political figure but rather a member of the public service. While nominally sitting at the Ministry of Justice, the Attorney General is considered independent in decisions regarding the prosecution of individual cases as well as prosecutorial policy. While the Attorney General needs to consult with the Minister of Justice in important matters, the final word both in matters of policy and in the prosecution of individual cases rests with the Attorney General.[9]

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[6] Basic Law: The Judiciary [Hebrew]; Courts Law 1984 [Hebrew].

[7] Courts Law 1984 [Hebrew].

[8] *Ibid*, section 82.

[9] Public Commission on the Matter of the Authority of the Attorney General, *Report of the Commission* (1962) [Hebrew]; Public Commission to Consider the Manner of Appointing the Attorney General, *Report of the Commission* (1998) [Hebrew].

The issue of prosecutorial independence versus prosecutorial accountability before the Minister of Justice and the public, with particular reference to the Minister's overall authority to provide administrative support for the prosecution, might thus have been conceivably relevant to the issue at hand, though Israel's prosecution is comparatively speaking relatively insulated from political influence (for this issue from a comparative outlook, see: Langer and Sklansky, 2017; Tonry, 2012). Yet this Article will not elaborate on this issue, not only because of this relative (though incomplete) insulation, but also since its main focus is on court administration (the court and prosecutorial systems are institutionally distinct in Israel), as well as since ministerial intervention in the prosecution in this case was more indirect than in court administration.

3.2. Covid19 as a catalyst for change

As of the writing of this article, Israel has had three lockdowns on account of the pandemic, the first began in mid-March 2020 until it gradually began to be lifted in mid-April. The second lockdown began on 18 September 2020 until it gradually began to be lifted in mid-October, and the third lockdown began on 27 December 2020 until it gradually began to be lifted in early February 2021. The judiciary reduced its operations in the first lockdown, beginning on 15 March 2020, gradually increased operations in April, until resuming normal operations on 12 May 2020.[10] It did not formally reduce operations in the second and third lockdowns, in which it remained mostly operational,[11] though as noted in the introduction the Director of Courts called upon the postponement of certain hearings.[12]

In the first lockdown, in which operations were greatly reduced, only urgent proceedings were heard in the courts.[13] Thus, during the first lockdown, a typical week saw the judiciary conducting only about 31% of its prescheduled hearings (about half of them pretrial detention hearings).[14] However, overall during the crisis, the judiciary managed to conduct a greater proportion of its operations. As of November 2020, since the beginning of the crisis in March 2020, the judiciary conducted about 59% of the normal volume of court hearings. The volume of cases opened was about 81% of the volume in normal times and the volume of closed cases was about 71% of the volume in normal times (Kahana, 2020). This output seems comparatively high (Susskind, 2020).

Covid19 was a catalyst for change in the Israeli Judiciary. Reforms contemplated beforehand were pushed forward in light of the pandemic, as the Israeli judiciary tried to maintain high levels of operations partly through increased technological means. Thus, the judiciary tried to maintain access to justice through online submissions (e.g., the judiciary increased the types of possible proceedings that could be initiated through online submissions[15]) and

[10] Announcements in the Official Gazette 8744 (15 March 2020), 8746 (16 March 2020), 8765 (22 March 2020), announcements at the Israeli Judiciary's website (8 April 2020), <https://www.gov.il/he/departments/news/spokemenmessage08042020> [accessed 10 December 2020], (27 April 2020) <https://www.gov.il/he/departments/news/spokemenmessage_27042020> [accessed 10 December 2020], and a list of other announcements at the Israeli Judiciary's website <https://www.gov.il/he/departments/general/the_judicial_authority_coronavirus_instructions> [accessed 10 December 2020].

[11] However, a courts' vacation prescheduled for the Jewish holidays was prolonged by about five days in October 2020. See: Court Regulations (Vacation) (Temporary Measure) 2020.

[12] Announcement of the Director of Courts (7 January 2021).

[13] Announcement of the Director of the Courts on the kinds of matters to be heard before the courts, according to the Court and Enforcement Regulations (Rules of Procedure in a Special State of emergency), 1991 (16 March 2020).

[14] The Judiciary's Spokesperson, Statement, Judiciary's Website (April 5, 2020), <https://www.gov.il/he/departments/news/presidentspeech050420> [accessed 10 December 2020].

[15] See an announcement at the Israeli Judiciary Website (22 April 2020), <https://www.gov.il/he/Departments/publications/reports/judiciary_advance_notice_family_law_net_21042020> [accessed 10 December 2020].

through audio-visual proceedings (the judiciary transferred pretrial detention hearings and other such proceedings to audio-visual means,[16] began a pilot of audio-visual civil proceedings in some Magistrate Courts,[17] and regulations that allow judges to hear certain parts of civil proceedings through audio-visual means came into force in January 2021[18]); and attempted to realize the open court principle through the broadcasting of proceedings (the Supreme Court decided to embark on a pilot of broadcasting live ten High Court of Justice hearings[19]).

4. The ministerial response

In light of the crisis atmosphere that the pandemic instigated, the discordant public tone that met the decision to curtail court operations in March 2020 may be surprising. The key to unlocking the puzzle as to the source of the public anger is the combination of two factors. The first factor is that the government at the helm at the time was a caretaker government, following Knesset elections that were held on 2 March 2020. At the head of the government was Prime Minister Benjamin Netanyahu, who was not able to form a new government without his main rivals. Netanyahu's rivals ran against him partly based on a platform that pointed to his corruption charges as delegitimizing his continued tenure. The Minister of Justice, on the other hand, was his close political ally, a member of his own Likud party and a personal appointment (Kershner, 2020). To this political factor one must add the second legal factor. Namely, the Minister of Justice, who was seen by the opposition as a political appointee of a corrupt prime minister, had the authority to curtail courts' operation in the face of a crisis. To this legal factor we will now turn.

4.1. The ministerial decree

Why did the Minister of Justice have the power to curtail court operations in emergencies? The Government in Israel has an emergency power to promulgate "emergency regulations" when a "state of emergency" has been declared by the Knesset, entailing sweeping legislative powers.[20] Yet these "emergency regulations" are bound by the constitutional principle of access to justice, enshrined in section 39(d) of the Basic Law: The Government, which states that the Government may not use emergency regulations "to prevent access to justice." Thus, crucially, the public could petition against emergency regulations that they consider excessive. As will be detailed below, this right was upheld and utilized in the present case.

Beyond the general governmental authority to promulgate emergency regulations, the Minister of Justice, as noted, has various powers to regulate the operation of the courts according to the Courts Law 1984. In 1991 (in the context of the war between the U.S led coalition and Iraq) the Minister of Justice published regulations that would empower him to announce that reduced operations of the courts are in place during a "special state of emergency." During this state of emergency, according to the regulations, only urgent matters specified in the regulations may be heard (e.g., pretrial detention or urgent petitions to the

[16] Emergency Regulations (the Novel Coronavirus) (Holding Hearings by Technological Means), 2020; Emergency Regulations (Arrest Hearings), 2020; Two Announcements at the Israeli Judiciary Website (20 March 2020), <https://www.gov.il/he/departments/news/spokemenmessage20032020> [accessed 10 December 2020] and (24 March 2020) <https://www.gov.il/he/departments/news/spokemanmessage240320202> [accessed 10 December 2020]; Law on Holding Hearings by Visual Means with the Participation of Detainees and Prisoners during the Spread of the Novel Coronavirus (Temporary Measure), 2020.

[17] Announcement at the Israeli Judiciary Website (5 April 2020), <https://www.gov.il/he/departments/news/presidentspeech050420> [accessed 10 December 2020].

[18] Particularly pre-trial hearings and, in certain cases, testimonies. See sections 61(c) and 72 of the Civil Procedure Regulations, 2018.

[19] Rules of Procedure of the President of the Supreme Court, number I-20 (13 April 2020).

[20] Sections 38 and 39 of the Basic Law: The Government.

High Court of Justice). Yet the "special state of emergency" was defined in these regulations only as a "situation in which the normal order of life in the state or in parts thereof have been disrupted due to the state of security."[21] In other words, the regulations applied to the state of security, and not to health crises. Indeed, over the years, ministers of justice had applied these regulations due to various security crises in specific regions of Israel, such as military clashes between Israel and the Gaza Strip.[22]

On 11 March 2020 the Minister of Justice amended these almost thirty-years-old regulations. According to his amendment, the "special state of emergency" could also include a disruption due to "an actual concern for a great harm to the public's health or due to a hazard of nature."[23] These new regulations then empowered the Minister of Justice to his next act: as noted, during the small hours of the night between 14 and 15 March 2020, the Minister of Justice decreed, based on these regulations, the reduced operations of the courts due to a special state of emergency.[24]

The judiciary later explained that the Minster's decrees were made in concert with the President of the Supreme Court and the Director of the Courts.[25] Indeed, while the decree applied the regulations, which as noted state the types of urgent matters that will be heard by the courts, the Director of the Courts, according to his authorization in the regulations, published announcements that somewhat enlarged upon the types of urgent matters that would be heard.[26]

As already mentioned, the ministerial decree and the reduction of operations of the courts were met with public outrage, particularly from opposition parties. They saw it as a blatant attempt by the Minister of Justice to help the Prime Minister in his private legal matters (Kershner, 2020), by making the courts postpone the opening of his trial on corruption charges, scheduled to open in the District Court of Jerusalem just two days later, on March 17, and indeed the opening of the trial was postponed.[27]

4.2. A comparative view

Why did the opposition parties see this as an illegitimate move? A brief comparative view of measures taken in other jurisdictions may be helpful. In the U.S., for instance, that same period saw the U.S. Supreme Court postponing a hearing involving the release of tax documents of President Donald Trump (Liptak, 2020). That announcement saw no public outcry. The only difference was that in Israel the Minister of Justice announced the reduction of court operations, and not the courts themselves, as in the U.S.

Indeed, court administration in the U.S.A. lies at the end of the spectrum as a judicial model of court administration, and thus the various courts took sole responsibility tackling the implications of the pandemic on the courts, as they took court-administration measures similar to those taken in Israel (Jarvis, 2021). Another example would be Romania. It took

[21] The Courts and Enforcement Chambers Regulations (Special State of Emergency Rules of Procedure) 1991.

[22] E.g. Announcement of the Minister of Justice (29 December 2008), Official Gazette 5933 (19 March 2009).

[23] Courts and Enforcement Chambers Regulations (Special State of Emergency Rules of Procedure) (Amendment) 2020.

[24] Official Gazette 8744 (15 March 2020). This decree was reinstated again and again in the following days and weeks. See: Official Gazette 8746 (16 March 2020); Official Gazette 8765 (22 March 2020); Announcement of the Minister of Justice (8 April 2020) <https://www.gov.il/he/departments/news/spokemenmessage08042020> [accessed 20 December 2020].

[25] Announcement of the President of the Supreme Court (21 March 2020), <https://www.gov.il/he/departments/news/spokemenmessage21032020> [accessed 20 December 2020]; The State's Response to Petition HCJ 2130/20 *The Association for Civil Rights in Israel v. the Minister of Justice* (Response of 20 March 2020).

[26] Announcement of the Director of the Courts on the Matters to be Heard in Courts according to the Courts and Enforcement Chambers Regulations (Special State of Emergency Rules of Procedure) 1991 (16 March 2020).

[27] C.C. 67104-01-20 *The State of Israel V. Benjamin Netanyahu et. al.*, (court decision, 15 March 2020).

similar measures in court administration. Yet Romania is an intermediate model of court administration, thus the body responsible for taking these measures there was the Superior Council of Magistracy, a body composed of a majority of judges (CEPEJ, 2021). At the other end of the spectrum, in Austria, which has an executive model of court administration, the Minister of Justice took yet again similar measures tackling the Covid19 crisis, through an ordinance to amend the rules of procedure for the courts (CEPEJ, 2021).

4.3. The petition to the High Court of Justice

On 18 March 2020 the Association for Civil Rights in Israel petitioned the High Court of Justice to annul the Minister's announcements with regard to the special state of emergency in the courts and to also annul the regulations limiting proceedings in courts. The petitioner argued that the amendment of the regulations, allowing the Minister of Justice to announce that there is a special state of emergency and impose limits on the operation of the courts, had been instituted *ultra vires*. As the petitioner argued, "such a far-reaching arrangement must be legislated through statute; it must not be left at the hands of the minister alone, and the explicit authorization in the law, required in order to institute regulations infringing on human rights, does not exist here."[28] In other words, the explicit statutory authorization is required in this case since the Minister in his decree infringes on the right to access to justice. Its lack, according to the petitioner, invalidates the Minister's decree.

The state argued in response, first, that the application should be rejected as a delayed petition. In other words, the regulations that were attacked had been in place since 1991, and therefore the petition was extremely late in coming. Second, the state responded by arguing that the Courts Law 1984 duly authorizes the minister of justice to regulate the operations of the courts, and thus the regulations and the announcements are not *ultra vires*.[29]

The High Court of Justice dismissed the petition on 2 April 2020, without prejudice to the petitioner's right to reapply. The court's ruling was based on the consent of the state to a suggestion made by the Court. Without commitment or obligation to do so, the state agreed that in the year following the end of the crisis, it would consider whether to draft proposed legislation giving the Minister of Justice statutory authorization to institute the regulations against which the petitioner applied.[30] As of the writing of this article, this consideration process (if indeed it occurs) has yet to produce legislation.

5. Analysis of the Israeli case study

The policy of judicial administration in Israel in the face of Covid19 instigated an unnecessary public confidence crisis in the judiciary, even if it was a short term one. In order to understand the import of this crisis, let us go back to the Israeli model of court administration.

5.1. The model in Israel: de jure and de facto

As already mentioned, Israel exhibits a hybrid model of court administration. While the Director of the Courts is responsible by law before the Minister of Justice for the administrative practices of the courts, he is appointed by the Minister only with the approval of the President of the Supreme Court.[31] Still, the Minister of Justice and other organs of the Executive have *de jure* far reaching powers in the administration of the courts: regulating civil rules of procedure (sole decision of the Minister); budgetary control (largely under the

[28] Petition in HCJ 2130/20 *the Association for Civil Rights in Israel V. The Minister of Justice* (18 March 2020).
[29] Response to the Petition in HCJ 2130/20 *the Association for Civil Rights in Israel V. The Minister of Justice* (20 March 2020).
[30] HCJ 2130/20 *the Association for Civil Rights in Israel V. The Minister of Justice* (2 April 2020).
[31] Courts Law 1984 [Hebrew].

purview of the Ministry of Finance); control over administrative personnel and judicial personnel; opening new courts; and more.[32] In some cases, such as the control over the judicial personnel, the Minister of Justice sometimes needs the approval of the President of the Supreme Court. At other times, he does not. Perhaps the reason why the judiciary has been relatively content with this state of affairs, or at least for the past twenty-five years has not suggested reform, is the already alluded to growing *de facto* institutional autonomy of the Administration of the Courts, through the formal sharing of powers by the President of the Supreme Court and the powers of court presidents, as well as through other informal practices, such as the existence of the informal conference of court presidents that increasingly directs more of the policy in matters of judicial administration (Lurie et. al., 2020).

The ministerial response to the Covid19 crisis is the perfect example of the growing gap between the *de jure* state of affairs and the *de facto* practice of court administration. By law, the Minister of Justice had sole authority in dealing with the crisis: he had the authority to institute regulations (contested by the petition to the High Court of Justice); he had the authority to decide that a special state of emergency is in place and to decree the curtailment of court operations. By law, he could decide completely on his own.

Nonetheless, in practice the judiciary and the Minister declared that the ministerial decree was made in concert with the Director of the Courts and with the President of the Supreme Court. They said that they shared responsibility for the decision to curtail court operations. In other words, the decision was reached *de jure* by the Minister alone, but *de facto* by the Minister with the consent of the Director and the President.

Is this state of affairs desirable?

5.2. The advantages of executive ultimate control in emergencies

There are advantages to granting the Minister ultimate control in emergencies to determine upon the curtailment of court operations. The principle of democratic accountability may be more fully fulfilled by granting such a power to a member of the government responsible before the elected legislature. There are also, arguably, advantages in emergencies for the swiftness of decision-making processes, enabled by a single and central decision-maker, who is part of the body (government) that is also handling other aspects of the crisis. If *de facto* decision-making with regard to curtailing court operations is made with the participation, or at least with input from, the heads of the Judiciary and the Director of the Courts, then what is the harm of keeping the ultimate legal power at the hands of the Minister?

While democratic accountability seems indeed to benefit from Ministerial powers, the issue of centralization is more complicated. Perhaps centralization contributes to the efficiency of the system, and may seem as one of the measures promoting court governance, as had been sometimes discussed for instance in the context of the ways judiciaries dealt with the aftermath of the economic crisis of 2008 (van Dijk and Dumbrava, 2013; Vapnek, 2013). Yet even if a central administration of courts is indeed more efficient than localized administrators and presidents of courts, would not a judiciary-based central administration enjoy the same efficiency benefits? Indeed, if in regular times the Minister does not in fact manage the courts, how would his or her ultimate power contribute to court governance in emergencies?

5.3. The disadvantages

Even if there are accountability benefits from Ministerial ultimate powers, apparently, as the Israeli case shows, the harm resulting from the exercise of these powers may be quite extensive. The greatest disadvantage is the detraction from institutional independence of the

[32] Ibid.

courts. As noted, the judiciary declared that it was consulted, thus implicitly arguing that its independence was not threatened. Yet in all of the points detailed below, public perception, as manifested in opposition outrage and in the petition, saw the institutional independence of the judiciary in the administration of justice threatened by the ministerial decree.

5.3.1. Lack of transparency

According to the law, at least as the state saw it, the Minister had sole authorization to curtail court operations. The Minister utilized his sole authorization to the fullest, decreeing the curtailment of court operations in the small hours of the night, following a completely opaque decision-making process. This lack of transparency, made possible by his sole legal authorization, hid the *de facto* participation in the decision-making process of officials from the judiciary. Thus, the lack of transparency struck a blow to public confidence in the judiciary (as manifest in opposition outcry and the petition). In contrast, when the Director of Courts called upon the postponement of certain hearings during the third lockdown, an action that did not provoke a public outcry, he did so after a transparent process of consultation involving the Minister of Justice, the President of the Supreme Court and representatives of the Bar.

5.3.2. Lack of accountability

The Israeli emergency regulations with regard to the courts are problematic. The Minister of Justice both declares the emergency and with this same act uses the powers, thus implicitly following a model of *ex post* accountability (politically to the Government and the Knesset and legally to the Court). This arrangement is problematic since political accountability is generally weak in Israel (Cohen, 2018), and since the ability of courts at *ex post* accountability in emergencies is notoriously feeble when such emergency legislation is concerned, as the law itself contains within it a *carte blanche* authorization difficult to judicially review (Neocleous, 2006: 206). Indeed, in other contexts, Israel's emergency laws, including its latest emergency legislation with regard to the Covid19 Pandemic, at least *de jure* adopted a prior statutory authorization model.[33]

The state argued in the case at hand that it had proper prior authorization, through the general authorization by the Courts Law for the Minister to institute regulations with regard to rules of procedure in the courts and his responsibility to execute the Courts Law. Yet is this very non-specific authorization enough to grant the Minister authority to almost completely shut down the courts? Indeed, the power to curtail court operations was granted to the Minister by himself, in the regulations he published a few days prior to his March 15 decision. Would such a general authorization be deemed proper even if he similarly allowed himself through regulations the powers to completely close down the courts in emergencies? Where do we draw the line?

5.3.3. Lack of institutional independence

The present case in which, as noted, the Minister of Justice was perceived by the public as a close political ally of the beleaguered Prime Minister shows how problematic such a self-granted power may be, particularly without specific legislative authorization or parliamentary oversight. The measures taken by the Minister were seen as illegal also because the Minister was deemed in this case to be acting in a conflict of interests, to protect the Prime Minister in his capacity as a criminal defendant.

Indeed, granting the Minister the power to curtail court operations, as seen in the Israeli case, creates an institutional conflict of interest between his role as regulator of the courts

[33] Special Powers in Dealing with the Novel Coronavirus Law (Temporary Measure) 2020.

and between his roles as a potential litigant in court and as a political actor. The Minister may be a litigant since the court serves as a check on his powers (on behalf of the rule of law), particularly on their misuse. In this case, an explicit fear of the public (even if baseless) was that the Minister's actions were taken in order to curtail the court's ability to serve in this capacity.

6. Conclusion – A new model of emergency powers

We need a new model of emergency powers, in Israel and in other jurisdictions in which the Minister of Justice holds sole authority to curtail court operations.

6.1. Proper legislative authorization and oversight

First and foremost, the rule of law and principles of accountability demand that the Minister receive this authority only through specific prior statutory authorization, i.e. a proper legislative model of accommodating emergencies (Ferejohn and Pasquino, 2004; Gross, 2003). A general authorization to institute regulations with regard to court administration is not specific enough as such emergency statutes go. Self-granted powers, through such regulations published by the Minister, do not provide for democratic accountability or any kind of check on the power of the minister.

Second, parliamentary oversight must immediately follow. Any decision to declare an emergency in the judiciary, and any decision to curtail court operations due to the emergency, must be immediately scrutinized by the relevant parliamentary committee.[34] If such declarations are not approved by the committee within a short period of time to be stipulated in the law, the declarations must not remain in force.

6.2. Reforming the authority to declare an emergency in the courts

Third, both in Israel and in other jurisdictions that maintain ministerial powers over court administration, the authority to declare a state of emergency in the courts must be separated from the authority to use emergency powers, thus maintaining both principles of independence and accountability. For instance, the Minister may have the power to declare an emergency, but the curtailment of court operations would not be automatic but would require a separate action by the judiciary itself, and, as already suggested, must be followed by parliamentary review and approval. Another option would be a shared declaration, signed both by the judiciary and by the Minister. Perhaps a proposed declaration would come from the judiciary and then signed by the Minister. But in any case, we must reject the possibility of granting sole authority to the Minister of Justice, since, as Schmitt taught us, that grants him ultimate control over court administration.

6.3 Wider reform?

I believe that beyond the narrow issue of court administration in emergencies, the Israeli model of court administration needs wider reform. Such wider reform should close the wide gap in Israel between court administration in law and in practice. More concretely, such reform needs to strengthen the institutional independence of the judiciary in matters of court administration. The powers of the Minister of Justice in this regard are problematic, particularly when they are under his sole authority. Relying on a *de facto* sharing of powers and limited autonomy for the Judiciary to prevent an abuse of power, is problematic, as the Covid19 crisis has shown us.

[34] Cf. a recent similar arrangement in section 4(d) of the Special Powers to Deal with the Novel Corona Virus Law (Temporary Measure), 2020.

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Competing Interests

After this article had been completed and accepted for publication, former Minister of Justice Avi Nissenkorn, who is mentioned in the article, joined the Israel Democracy Institute as a senior visiting fellow.

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