

Abstracts from the panel

Law in Crisis? Analysing the Challenge of Making  
Laws Work in and after Disasters and Crises

# Different Language, Different Law? An Analysis of Key Concepts used in Swedish and EU Crisis Management Legislation

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The aim of this paper is to analyse the different concepts, definitions and language used to define and describe crisis in Swedish and European legislation, and to discuss what consequences the differences may lead to when developing policy and operational responses in an actual crisis situation.

The paper will, in particular, focus on the relationship between the Swedish approach to total defense and the EU focus on security (with some sneaked in notions of defense) and on the Swedish proposals focused on peace time crisis and the EU's civilian protections approaches. It will also discuss the question of derogations under the European Convention for Human Rights.

The paper is proposed for the panel about Law in Crisis.

# Scenario Analysis as a Method in Legal Science

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Many projects in legal science deal with questions surrounding the strengths and weaknesses of a particular system of laws and regulations. This type of legal research often starts with questions inspired by and derived from real events taking place in society, which then are extrapolated into more general hypothetical questions formulated and discussed in light of the current framework of legal rules and obligations. The results sought are often focussed on finding deficiencies and gaps in the web of legal obligations.

This paper aims to draw on experiences and knowledge from other research disciplines where scenario analysis has been an established method for decades, in order to develop a method where the system of legal obligations can be tested by hypothetical events, similar to the way described above, but fundamentally different on one vital point - the research question will be a result of the scenario analysis, instead of a result of what the individual researcher chose as an interesting topic.

The difference may appear a small one, but it is significant in terms of how transparent the methodology can be as well in terms of intersubjectivity and researcher's bias. The difficulty of dealing with researcher's bias in legal science has always been a huge challenge, as the results of legal research has a direct impact on the norms and the application of norms in the legal system. The way to deal with the normative implications of legal scientific analysis is to minimize the researcher's own normative bias. It is the ambition of this project to contribute to legal science by adapting scenario analysis for legal research.

# Does necessity know the constitution? Constitutional powers in civilian crises

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It is said that “necessity knows no law”, but whether this is true in regard to the Swedish constitution and actions taken by Swedish state actors is somewhat unclear. The Swedish legislator has largely rejected the notion of “constitutional necessity”, a principle that means that the state agents, in an emergency situation where society is endangered, can disregard the constitution and still claim to have acted lawfully.[1] The Swedish Instrument of Government (IG, *regeringsformen*) does however not contain any provisions relating to crises in peacetime, the IG knows only two situations – peace and war. Instead of regulation in the IG, necessity or a provision on proclaiming a state of emergency, the Swedish legislator has chosen to use anticipatory statutorification (*författningsberedskap*) in relation to peacetime crises. This is mainly based on the idea that the rule of law should not be overlooked in times of crises. Hence, the Swedish approach has been to enact new ordinary legislation, or specific provisions, relating to crises in advance. Extraordinary measures in times of crises should therefore be taken in compliance with the existing legal framework. Despite the notion that peacetime crises are to be handled within the existing framework there are examples of when the government has referred to unwritten rules and exceptions from the constitution - which would then make unconstitutional action in civilian crisis situations justifiable.[2] It is in these cases that constitutional necessity has, at least implicitly, been applied. The occurrence of crises that challenge the notion that extraordinary measures should be taken in compliance with the existing framework are thus not unthinkable, and the question of whether “constitutional necessity” can then be used is unsettled. These are central questions for my on-going PhD-project with the aim to provide a concept for the legal challenges that may arise in different types of civilian crises and whether the notion of necessity can be used to legitimize actions taken outside of the constitution. This is also what I would wish to present and discuss at the conference for the panel *Law in Crisis? Analysing the Challenge of Making Laws Work in and after Disasters and Crises*.

[1] See e.g. Jermsten, Henrik, *Konstitutionell nödrätt*, Juristförl., Stockholm, 1992, p. 9; SOU 2005:104, p. 57.

[2] See e.g. KU 1973:20; KU 1974:22; Bergling, Per m.fl., *Krisen, myndigheterna och lagen: krishantering i rättens gränsland*, 1. Uppl. Malmö: Gleerups Utbildning, 2016, p. 76 f.

# Addressing Economic State of Emergency in the EU: the Analysis of the Economic Responses to the Covid-19 Pandemic

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The ongoing global health emergency, caused by the outbreak of the SARS-CoV-2 virus, has been testing the viability of the European project in many respects, vividly demonstrating the transformative nature of emergencies,[1] their unpredictable development[2] and massive amount of negative spill-over effects in different areas of regulation. Whereas Covid-19 pandemic is first and foremost an emergency in the field of public health, an area where the EU has a limited capacity to act due to its complimentary competence in this sphere,[3] this extraordinary crisis triggered a new economic emergency in the EU, whose long-term implications will be present for years to come.

Having to act swiftly, the EU came up with some legal solutions, aiming at providing the grounds for the stabilisation of the shattered economy of the Union. This resulted in invoking special mechanisms, either already existing or recently adopted ones, whose application has been specifically tailored for this particular emergency. It remains to be investigated, however, what impact the enacted instruments will have on the constitutional architecture of the EU and whether the urgently adopted measures live up to the expectations regarding upholding the foundational values of the Union, especially, the rule of law.[4]

This article aims to elucidate the economic responses of the EU to the Covid-19 pandemic by outlining the competence of the Union in the context of economic emergencies and providing a thorough analysis of both novel and “old” economic tools relied upon in the battle against the Covid-19 emergency together with their interaction with the requirements of the rule of law. Special attention is to be given to tracing the legacy of the Euro-Area Crisis toolkit in Covid-19 economic instruments and understanding its influence on the current constitutional framework of the EU.

[1] Alan Greene, ‘Questioning Executive Supremacy in an Economic State of Emergency’ (2015) 35 *Legal Studies* 594, 609.

[2] Anna Zemskova, ‘ESM in the context of the Coronavirus Crisis – a Much Needed Lifejacket or Another Lead Blanket?’ (*European Law Blog*, 7 April 2020).

[3] Anna Zemskova, “Guest Note on the Impact of the COVID-19 Outbreak on EU Law” (2020) 3 *Nordic Journal of European Law* III, IV; Vincent Delhomme, ‘Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health’ (2020) 11 *European Journal of Risk Regulation* 747, 747–750.

[4] Article 2 TEU.

# Pandemic preparedness and response in human rights-based multi-level governance perspective: Insights from four municipalities in Zimbabwe

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Disasters unfold at different scales from the individual to the international. Recognizing this dynamic, the Sendai Framework for Disaster Risk Reduction endorses a multi-level, multi-stakeholder approach to disaster risk reduction. In practice, however, national law and policy tends only partially to reflect international standards, and local actors often lack resources and capacity to implement directives from the capital. Moreover, competing as well as intersecting priorities and interests within and between levels add layers of social complexity to complicate ambitions of coherent governance frameworks.

This paper takes the experience of members of residents' associations interacting with local authorities in four municipalities in Zimbabwe as a point of departure for examining questions about the enjoyment of the right to health and the right to water in the context of the COVID-19 pandemic. It examines national legal and policy responses to the pandemic from the perspective of international human rights law, and then traces the implementation of this legal framework down to the local level. It explores how legal frameworks structuring the relationship between national and sub-national levels affect implementation, paying attention to how responsible actors at different levels leverage the law in pursuit of their own objectives, which include, but may not be limited to, protecting people within their jurisdiction from risks associated with the pandemic and the measures taken to contain its spread.

The particular circumstances arising during the pandemic are situated within a broader political ecology characterized by widespread corruption, persistent drought, and a legacy of epidemics including cholera and HIV/AIDS. Taking these compounding factors into account, the paper aims to identify opportunities for enhancing pandemic preparedness and response that are contextualized and pragmatic.

# Republican theory and the EU: Emergency Laws and Constitutional Challenges

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Emergencies and risk regulation have been a hot topic in EU law for a long time particularly in the aftermath of terrorism attacks (9/11etc) and to what extent measures could be taken on an emergency basis to prevent risks. Moreover, risk and crises measures have been frequently discussed in the context of, e.g., the financial crisis of 2008 and the migration crisis of 2015. The current Covid-19 crisis has thrown a sharp light on public health measures and the EU borders, as well as the boundaries of emergency legislation and what measures can be taken on the basis of risk and emergency. In this context, the EU Commission has issued a communication stressing that border management at the EU level is key.<sup>[1]</sup> The Commission highlights the challenge of protecting the health of the population whilst avoiding disruptions to the free movement of persons, and the delivery of goods and essential services across Europe. Many countries have introduced lock-downs and some countries are accused of avoiding judicial scrutiny over decisions taken. For example, in Hungary, Orbán was criticized for using the crisis as a way of passing emergency legislation.<sup>[2]</sup> As Kim Lane Sheppele explains, among the emergency measures adopted in Hungary, for example, is a criminalization of people who disrupt the emergency laws.<sup>[3]</sup> This is to some degree connected to the wider rule of law debate in the EU also and is interesting from the perspective of judicial review.<sup>[4]</sup>

The paper has two parts. The first part of the paper is a doctrinal EU legal part on the question of judicial review, the rule of law and what is meant by risk and emergency. The second part of the paper is theory-oriented and discusses the notion of non-domination and constitutional theory in the light of the real time problems of emergency.

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[1] COM (2020) 1753 final, Covid-19, Guidelines for border management measures to protect health and ensure the availability of goods and essential services

[2] K Lane Sheppele, 'Orban's emergency' available at, <https://verfassungsblog.de/orbans-emergency/> (29 March 2020)

[4] "Rule of Law: European Commission acts to defend judicial independence in Poland", [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm), press release 20 December 2017

# But will it happen? Perception of Future Risks by Politicians in the German Bundestag (Parliament)

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Since 2010, the German Federal Office of Civil Protection and Disaster Assistance (BBK), as the responsible national authority for emergency management in Germany, has regularly compiled risk analyses on various potential future risks and sent them to the Committee of Internal Affairs and Community at the German Bundestag, as set by law. Here, political discussions should take place as well as anticipatory decision to mitigate or prevent future risks.

However, the last ten years have shown that it did not take place as intended. Reasons and factors seem to exist which hamper a political discussion on potential future risks. A future-oriented Emergency Management rely on a timely political course-setting to prevent or mitigate a materialization of future risks.

In order to identify explicit and implicit factors which prevent future-oriented political action, 15 guided interviews with active and former members of the German Bundestag were conducted as well as two moderated focus groups with research assistants of members of the German Bundestag. Foci of the study were the perception on future risks in general and factors which affect a political agenda setting in context of future risks – exemplified by the mentioned risk analyses.

Based on a heuristic model combining the Multiple Stream Framework (MSF) (e.g. Zahariadis 2019; Herweg et al. 2015) and findings from science communication and risk communication (e.g. Fischhoff 2019, 2013; Renn 2017), a structured qualitative content analysis of the material was conducted (e.g. Mayring und Fenzl 2019; Kuckartz 2018) in accordance with defined evaluation categories.

Findings will be presented on a) Structural challenges within the political system, b) Challenges of risk communication and political perception as well as action practice, c) Modes of transmission and communication.

The assessment of a future risk as a political relevant issue is highly relevant for the concept of anticipatory government, since politicians are responsible to set the right course.

Finally, recommendations will be presented for an improved communication strategy of potential future risks to politicians.