The Covid-19 Pandemic and Democratic Resilience in Israel

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This article explores the need to strengthen democratic institutions and values in the decision-making process in Israel, in light of lessons learned from the State's efforts thus far to contend with the Covid-19 pandemic. It presents fields where democratic resilience in states of emergency is imperative, and defines standards and criteria that can assist in preserving critical democratic interests in times of emergency. The article begins with a brief survey of the democratic backdrop in Israel at the onset of the coronavirus crisis, and then focuses on the following democratic standards: preservation of checks and balances vis-à-vis the power of the executive branch; protection of freedom of expression and the freedom to criticize government authorities; the appropriate scope and manner of protecting human rights; the appropriate protocols of emergency legislation; transparent and credible government activity; the need to strengthen democratic elements within the decision-making process; and democratic culture during crisis management.

Safeguarding democratic principles pertaining to each of these aspects and fulfilling the standards proposed herein can help ensure Israel's continued democratic resilience. When democratic resilience is preserved, a new outbreak of Covid-19, or a different state of emergency, can be dealt with in a manner that maintains not only public safety and health, but also the image and core values of Israeli society and the State of Israel.

Introduction

This article explores the need to strengthen democratic institutions and values in the decision-making processes in Israel in light of lessons learned from the State's efforts thus far to contend with the Covid-19 pandemic.

The current period holds special significance for the public and for the protection of democratic values and institutions due to the turbulence caused by the crisis at hand, which joins the existing challenges in this realm. The unprecedented government activity relying on emergency powers – and the assessment that Israel will likely be forced to deal with other emergency scenarios in the future, whether due to another outbreak of the pandemic or to other disasters or crises – justifies an assessment of the strength of Israel's democracy in contending with states of emergency.

In our view, democratic resilience – i.e., the extent to which the democratic system can resist pressures during times of crisis and can properly recover from the challenges of the period – is no less important than other dimensions of the State's resilience. Accordingly, after a contextual overview, the article breaks down the issue into standards, criteria, and recommendations that can be used by decision makers and can help the public in assessing the actions of the State.

The Coronavirus Restrictions: A Democratic Challenge

For the citizens of Israel and of many other countries worldwide, including leading democracies, recent months have witnessed the imposition of unprecedented restrictions on individual liberties and the democratic sphere. In order to curb the spread of the pandemic, the rights and liberties of us all, and particularly the freedom of movement and the right to privacy, were suspended in a manner that was unprecedented – even during some Israeli wars. This was done within the framework of emergency legislation enacted by the Israeli government, in part without parliamentary supervision. As part of the state of emergency, the court system was shut down almost completely, and members of the military were used to assist civilian systems, both through military forms of coordination and liaison and in intelligence. The Israel Security Agency (ISA), which is responsible for preventing harm by enemies of the State, was recruited to monitor residents in order to identify individuals who came into contact with carriers of the virus. Like the people in other democracies around the world, the Israeli public displayed a willingness to surrender these rights for the sake of protecting the general public interest.

In our view, the way different countries around the world have dealt with the Covid-19 pandemic is instructive about the added value of the democratic regime over other governing systems. Although this is a complex issue requiring research and evaluation from the perspective of time, we can already identify several advantages of democracy in

the crisis. First, the coronavirus crisis has underscored the importance of credibility vis-à-vis the elected government handling the crisis. Some non-democratic governments concealed the scale of the problem and conveyed only partial or falsified data to the public in a manner that was detrimental to public health. In a democratic regime, there is a stronger foundation for demands that the government function with transparency, and the understanding that it can be criticized for concealing information. Second, the ability to criticize the government and to expose its misconduct, which exists in democratic regimes, creates an additional layer of protection for the public and ensures that publicly elected officials are more prone to promote the public good and not only their personal interest, as is prevalent among authoritarian rulers. Third, imposition of broad restrictions on individual rights and freedoms, as occurred in many countries around the world, requires close supervision and checks and balances among the branches of government to prevent misuse. In some non-democratic countries, these restrictions have served, inter alia, as a cover to act against opponents of the regimes; disperse protests; and weaken elements of the opposition. In countries with a stable democratic tradition and effective oversight of the regime, such practices have not been permitted.

Whether we believe that the State of Israel has responded appropriately to the pandemic or has placed excessive restrictions on the public, the unprecedented reality compels us to engage in "democratic self-reflection." Self-examination is also necessary since the crisis may be ongoing and lead to new routine practices, including continued restrictions on personal rights and freedoms. It is, therefore, important to examine the performance and ongoing function of essential democratic structures and institutions, and the way to protect them.

A democracy's steadfastness is reflected in part through its "democratic resilience." Societal resilience expresses "the capacity of a system to respond flexibly to a severe disruption or disaster – in accordance with its magnitude and severity of its consequences – in order to contain the damage and the inevitable decline of the system's functionality, and to bounce back rapidly to its normal entity, structure, and conduct."[1] "Democratic resilience" evolves from the concept of societal resilience, and seeks to examine the conditions under which democracy can properly deal with disruption or disaster.[2]

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[1]   Meir Elran, Zipi Israeli, Carmit Padan, and Alex Altshuler, "Social Resilience in the Jewish Communities around the Gaza Strip Envelope during and after Operation Protective Edge," *Military and Strategic Affairs* 7, no. 2 (2015): 8. See also Elran's comments in Shahar Smooha, "Fragile or Strengthened? The State of Israel's Democracy the Day After," *Hashomrim*, May 23, 2020. In comparison, see Dana Blander, "Inclusive Democracy, Social Resilience, and Terror" (draft from May 26, 2020, Israel Democracy Institute; copy on file with the authors).

[2] Democracy's resilience refers to properties of "a political system's ability to cope with, survive and recover from complex challenges and crises that present stress or pressure that can lead to systematic failure." See *The Global State of Democracy 2017: Exploring Democracy's Resilience*, *Democracy's Resilience in*

Among the key properties of resilience, as applied to social systems, are (1) recovery – the ability to overcome from challenges or crises; (2) flexibility – the ability to absorb stress or pressure; (3) adaption – the ability to change in response to a stress to the system; and (4) innovation – the ability to change in a way that more efficiently or effectively addresses the challenge or crisis.[3] A democracy qualifies as resilient if its attributes of recovery, flexibility, adaptation, and innovation are "capable of addressing complex challenges, and weathering and responding to the crises that affect its survival or durability, and its overall quality and performance."[4]

Two fundamental propositions have been made to capture the relationship between democracy and resilience: "value resilience" and "demand resilience." The mechanisms proposed to design a more resilient democracy would vary depending on the adoption of these propositions. Value resilience holds that "democracy as a governance system based on fundamental values has built-in properties that enable countries to successfully cope with crises, challenges or deep-seated social change."[5] Demand resilience, on the other hand, does not view resilience as an inherent quality of democracy; rather it points to the *society* that adopts it. A democracy's resilience depends upon its continuing "demand" by civil society that creates an "underlying trust and social cohesion that in turn allows for contestation and contention in a democracy and strengthens its overall resilience when democracy comes under pressure."[6]

According to the **"demand resilience"** approach, improving democracy's resilience would arguably focus on strengthening the legitimacy and efficacy of the democratic regime among civil society and defending it against alternative ideologies,[7] while "value resilience" may emphasize the democratic *institutions* and *processes* themselves.
Democratic resilience is differentiated from both constitutional resilience and constitutional endurance in the sense that it is not satisfied by the mere survival of a democracy or constitution, but instead asks how it can resist the "hollowing out" of the democratic institutions of their core values. Such a definition of resilience is therefore mainly concerned not by the risk of the complete extinguishment of democracy, rather by a pseudo-democracy taking its place.[8]

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a Changing World, International Institute for Democracy and Electoral Assistance (International IDEA) (2017), p. 38.

[3] Timothy D. Sisk, *Democracy and Resilience: Conceptual Approaches and Considerations – Background Paper*, International Institute for Democracy and Electoral Assistance, (2017), p. 5.

[4] Ibid., 5-6.

[5] Ibid., 6.

[6] Ibid.

[7] Ibid., 49.

[8] Richard Albert and Michael Pal, "The Democratic Resilience of the Canadian Constitution (December 18, 2017) in *Constitutional Democracy in Crisis?* Eds. Mark Graber, Sanford Levinson, and

In this article, we seek to examine *institutional* and *decision-making* aspects of managing the Covid-19 crisis in Israel from a democratic perspective. In order to assess democratic resilience, we must therefore examine the extent to which the governance system in Israel contends with situations of emergency and disaster; contains the consequences of the situation to the principles and the institutions of democracy – for example, institutional oversight, restrictions on individual freedoms, or disruption of fundamental democratic processes, such as elections – and bounces back from the crisis to resume proper democratic function. To this end, and as part of a democratic resilience approach, we implement a simple *value resilience* assessment that seeks to examine and evaluate the function of institutional and procedural pillars of liberal democracy in Israel during the first wave of the pandemic. In this framework, we propose a list of standards that in our view must be monitored during the current period, in case of a second or third outbreak and in case of future emergency situations, in order to ensure that Israeli democracy perseveres.

Before presenting these standards, we briefly address the background conditions under which the Israeli democratic system began to contend with the Covid-19 pandemic and, in this context, relate to two relevant background crises: the constitutional crisis and the political crisis.

The Constitutional Crisis

The Covid-19 crisis erupted when Israel was in the midst of a social, political, and constitutional process of an erosion of democratic values, structures, and institutions such as the norm concerning the legitimacy of human rights protection and equality, norms of separation of powers, and the rule of law. In Israel,[9] similar to other countries in the liberal-democratic world,[10] recent years have witnessed a certain retreat from liberal

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Mark Tushnet (Oxford University Press 2018, forthcoming), available at SSRN: https://ssrn.com/abstract=3089941, pp. 2-3. Another aspect of democratic resilience is the capacity of the democratic regime to not only endure over time, but rather to preserve its underlying values. Under such a definition of democratic resilience, i.e., "the capacity of the regime to sustain competitive democratic politics and to withstand efforts from within to undermine its democratic foundations," external threats, such as war, are excluded, and the focus is on democratic sustainability in the face of internal threats.

[9] Mordechai Kremnitzer and Yuval Shany, "Families of Backsliding Democracies: Unhappy in their Own Way?" *Law & Ethics in Human Rights* (forthcoming 2020); Nadiv Mordechay and Yaniv Roznai, "A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel," *Maryland Law Review* 77 (2017): 244.

[10] For a discussion of Israel in a comparative context, see Joseph Weiler and Doreen Lustig, "A Good Place in the Middle: The Israeli Constitutional Revolution from a Global and Comparative Perspective," *Tel Aviv University Law Review* (*Iyunei Mishpat*) 38 (2016): 419 [in Hebrew].

democratic notions that once characterized the State, and which were reflected in constitutional provisions grounded in rulings of the Supreme Court.[11]

As part of this development, ethno-national values and values of governability and efficiency have gained increasing weight in recent years at the expense of traditional values of liberal democracy, constitutionalism, and the legitimacy of institutions that guard the latter values. The erosion of democratic values in Israel, also related to the ongoing reality of security threats against the State, is manifested in part in the notion that it is both reasonable and desirable to grant substantial power to the government and the leader at its helm to implement his or her policy with a minimum of limitations and restraints. Patterns of decision making surrounding the national effort to contend with the pandemic displayed familiar problems pertaining to the centralization of decision making powers in the hands of the Prime Minister.[12] Moreover, in recent years, under the banner of "returning governance to the elected" many attempts have been made to weaken the standing and the independence of the State gatekeepers, including institutional gatekeepers such as the judicial system, the law enforcement system, senior levels of public servants, and the elements responsible for review, as well as non-institutionalized elements, such as the media and civil society organizations. At the same time, significant criticism has been leveled at the Supreme Court and the Attorney General, the legal advisor to the Knesset, and law enforcement authorities, which intensified after Prime Minister Netanyahu came under suspicion and was indicted on criminal charges. All have been accused of pursuing a political agenda and "framing" the Prime Minister every time their actions or decisions challenged him. These accusations go hand in hand with the delegitimization of the law enforcement system and dissolution of the public's trust therein.

The attack on democratic institutions and the erosion of political norms also pertain to the weakening of the ethos of the rule of law. Up until recently, social and political acceptance of the obligation to respect legal decisions of legal advisors and the courts, even when they are undesirable in the eyes of the government and run counter to a specific political agenda, was a social convention. In recent years, however, statements have been made relating to legal decisions, and even court rulings, as little more than

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[11] For a broad comparative discussion of this trend, see Ran Hirschl, "Opting Out of 'Global Constitutionalism," *The Law & Ethics of Human Rights* 12 (2018): 1-36. On the need for a renewed strengthening of political and constitutional norms in the wake of the Covid-19 pandemic, see Bell Yosef, "Coronavirus and Constitutional norms," *Parliament* 86 (2020), https://www.idi.org.il/parliaments/31835/31841 [in Hebrew].

[12] They also reflect the complexity of the relationship between the security authorities and civilian structures. This topic is explored by a parallel working group of the Israel Democracy Institute and INSS led by Dr. Meir Elran and Prof. Amichai Cohen. For a discussion of the trend of centralization of political power in leaders as opposed to parties, and of Israel's portrayal as a state characterized by a high level of "political personalization," see Gideon Rahat, *The Decline of the Group and the Rise of the Star(s): From Party Politics to Personal Politics* (2020) [in Hebrew].

guidelines that can be honored when they are consistent with the political will and otherwise disregarded.[13] The authority of the decisions of the Attorney General has also been impaired, and the government is increasingly acting contrary to his rulings regarding illegality or unconstitutionality. Government authorities' respect for the law and the subsistence of mechanisms of effective supervision and control – internal and external, legal, and otherwise – are of great importance for a democratic regime in routine times. In times of emergency, when the government possesses much greater freedom of action, including that which infringes on individual rights, these mechanisms are even more essential for ensuring democratic resilience. During the Covid-19 pandemic, it has been evident that these mechanisms still fulfill their function of supervising the government and restraining its actions. It is important to ensure that they remain strong and independent in the future when Israel is forced to contend with a new wave of the pandemic or with another state of emergency.

The Political Crisis

In addition to the constitutional crisis, which reflects a deep-rooted trend, the Covid-19 pandemic erupted during a political crisis and time of severe political polarization that has challenged the State's social cohesion more than in the past. Three elections were required to establish a government, and at the time of the pandemic's outbreak, a long-time transitional government was still in office. The absence of an effective Knesset in the initial weeks of the crisis led to a severe democratic lapse in the Knesset's parliamentary oversight of the government, particularly pertaining to emergency regulations that granted far-reaching powers to the government and were enacted without the possibility of subjecting them to a fundamental Knesset debate.[14]

Moreover, that a Prime Minister receives strong public and political support while under the shadow of indictment is an extraordinary situation. This anomalous political reality resulted in initiatives to make fundamental constitutional changes in the structural constitution. In May 2020, the Supreme Court, in an expanded panel consisting of 11 justices, ruled that there was no legal obstacle preventing the President of the State from awarding the mandate to form a government to a prime minister under indictment;[15] however, it left many questions pertaining to the details of the coalition agreement for future judicial review, and there are still concerns regarding various measures that could

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[13] In this context, consider the unusual occurrence of Knesset Speaker Edelstein's decision to refrain from holding a discussion on the election for Speaker of the Knesset, despite the request of a majority of Knesset members and an explicit court order to do so. See HCJ 2144/20, The Movement for Quality Government in Israel v. Speaker of the Knesset (March 23, 2020). See also the ruling in HCJ 2144/20 of March 25, 2020.

[14] See HCJ 2109/20, Ben-Meir v. Prime Minister (injunction and ruling of March 19, 2020).

[15] HCJ 2592/20, Movement for Quality Government in Israel v. Attorney General (summation of arguments from May 6, 2020, and full arguments from May 27, 2020).

undermine the foundations of the State's democratic regime.[16] Any changes in regime provisions that weaken the democratic system may undermine democratic resilience when contending with emergency situations.

The political crisis is of special concern considering the looming economic crisis, which could constitute fertile ground for increased radicalism, corruption, and anti-democratic tendencies. Political forces may channel feelings of frustration and economic hardship into feelings of animosity toward the foreigner and the "other," as has occurred throughout history around the world.

Standards for Assessing Democratic Resilience
Having surveyed the constitutional and political crisis in Israel, we return to a discussion of the Covid-19 pandemic to examine what democracy-related lessons emerged from this crisis, and what should guide decision makers as they manage subsequent State efforts or preparations for the crises to come.
For the purpose of analyzing the democratic resilience of a State in times of emergency, this section considers the extent to which certain democratic standards should be met in the following areas:

- Checks and balances on the power of the executive branch
- Freedom of expression and freedom to criticize the authorities
- The scope and protection of human rights
- Protocols for emergency legislation
- Transparency and credibility of the governing authorities
- Democratic elements in decision-making processes
- Democratic culture of crisis management

Checks and Balances on the Power of the Executive Branch
The standard: In times of emergency it should be ensured that all senior government authorities and gatekeepers function in a full and independent manner and work in concert with one another, while maintaining an effective system of checks and balances.

In crisis situations, it is sometimes necessary to pool the resources of the State and its agencies in order to contend with the threat in an integrated manner.[17] However,

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[16] See Aziz Huq and Tom Ginsburg, "Democracy's 'Near Misses,'" *Journal of Democracy* 3, no. 4 (2018). For an earlier discussion of the Israeli case, see Pnina Sharvit Baruch, "Is Israeli Democracy at Risk?" in *Strategic Assessment for Israel, 2018-2019*, eds. Anat Kurz and Shlomo Brom (Tel Aviv: Institute for National Security Studies, 2019).

[17] For a description of such "pooling of powers" by the executive branch, see, for example, Daphna Renan, *Pooling Powers*, *Columbia Law Review* 211 (2015): 115. For a discussion on the subject in the context of security-related states of emergency, see Oren Gross and Fionnuala Ní Aoláin, "A Skeptical View of Deference to the Executive in Times of Crisis," *Israel Law Review* 41 (2008): 545.

alongside its advantages, such pooling poses challenges to the rule of law, the system of checks and balances, and the protection of civil liberties. One concern pertains to the unlimited transfer of certain powers to the executive branch, which is constitutionally and legally authorized to deal with the threat, at the expense of balancing mechanisms of constitutional, political, legal, social, and professional nature that serve to restrain its power in normal times.[18] The danger in times of emergency is of the government at once becoming an overpowering branch of government on which few other actors, if any, can set limits.[19] During the Covid-19 pandemic, especially in the first phase, power accumulated with the Prime Minister, and even ministers were excluded from exercising fundamental influence on decisions.

Moreover, times of emergency open the door for various political initiatives driven by considerations that have nothing to do with the emergency. Only the existence of strong governing authorities, mechanisms of checks and balances, and alert public discussion can protect against such exploitation. It is, therefore, crucial that judicial and parliamentary oversight are ensured in times of emergency.[20]

Judicial oversight: Effective constitutional and administrative judicial oversight of the government and the Knesset is an essential tool for protecting democracy. Judicial review is not suspended in times of emergency. In the current crisis, it is noteworthy that the constitutionality of the major measures taken by the government was subject to examination by the Supreme Court. For example, the Court heard a number of petitions regarding the closure of cities and neighborhoods such as Bnei Brak or neighborhoods in Jerusalem, denying them only after it was satisfied that the infringement of rights was justified and proportionate.[21] Other petitions dealt with means of monitoring and tracking those who tested positive for the virus, particularly while utilizing ISA capabilities. The Court employed a relatively procedural approach by not delving deeply into balances as it normally would and allowed the executive branch to deploy the vast majority of the steps it sought to carry out during the first wave, expressing an understanding of the urgency of the crisis and the needs of the government. The Court did, however, impose restrictions

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[18] For a presentation and analysis of emergency regimes in Israel, including the emergency regime in the People's Health Ordinance, see Margit Cohen, "'Patchwork' of Emergency Legislation," *Mishpatim* 29 (1998): 623 [in Hebrew]. For another look at constitutional emergency law and proposals for reform, see Daphne Barak-Erez, "Constitution for Times of Emergency," *Shlomo Levin Book* (2013) [in Hebrew]; Ariel Bendor, "State of Emergency," *Dorit Beinisch Book* (2018) [in Hebrew].

[19] Even in normal times, there are relatively few institutional oversights mechanisms over the Israeli executive. See Amichai Cohen, *The Overriding Clause: Checks and Balances of Political Institutions and the Justice System* (2018) [in Hebrew].

[20] See the provisions proposed for times of emergency by the Israel Democracy Institute: *Constitution by Consensus: Proposal of the Israel Democracy Institute* (2005), pp. 134-136, https://www.idi.org.il/media/4569/constitution-by-consensus.pdf [in Hebrew].

[21] For a representative case, see HCJ 2435/20, Leventhal v. The Prime Minister (April 7, 2020); HCJ 2492/20, Social Manager Ramon Alon v. The Government of Israel (April 14, 2020).

that were intended to halt the continued usage of the government's powers over time without explicit legislation, ruling that alternatives that minimize infringement of rights must always be considered.[22] Thus, the Court did attempt to pave the way for minimizing infringement of rights down the line, even though it had refrained from exercising intensive judicial review of the proportionality of the emergency provisions during the first wave of the coronavirus pandemic.[23]

Parliamentary oversight: The Knesset, and the parliamentary opposition, plays a major role in oversight of the government. This importance intensifies in times of emergency when the government exercises broad powers and infringes upon the rights of individuals. As previously mentioned, at the outset of the current crisis, there was no functioning Knesset to oversee government actions. Subsequently, however, and also as a result of Supreme Court intervention, Knesset committees were formed to conduct in-depth hearings, most of which were open to the public, demanding answers from government representatives and instituting conditions for and limitations on the usage of certain measures. The Supreme Court sought to strengthen parliamentary supervision, both in decisions dealing directly with the establishment of the Knesset committees[24] and in its ruling ordering the government to conduct a legislative process for continued use of powers that infringe upon the right to privacy.[25]

However, despite the judicial and parliamentary oversight, the crisis has raised concerns regarding the preservation of checks and balances between the branches of government. First, the Covid-19 crisis has resulted in the unprecedented usage – which is still underway – of emergency regulations on a scale that has exceeded such instances in all the wars fought by Israel combined.[26] Although Israel has recently witnessed processes indicating a return to regular legislation routes,[27] this wave of emergency legislation appears to reflect the ease felt by the government in bypassing the normal legislative processes. In addition, with regard to oversight by the Knesset, the fact that Supreme Court involvement was necessary to establish Knesset committees attests to the

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[22] HCJ 2109/20, Ben Meir v. The Prime Minister (April 26, 2020), sections 40-42.

[23] On the unique emergency situation in the courts, see also Guy Luria, "The Functioning of the Judicial Branch during the Covid-19 Pandemic: Lessons for the Future," *Parliament* (2020), https://www.idi.org.il/parliaments/31835/31847 [in Hebrew].

[24] For analysis of this subject, with an emphasis on the democracy-supporting role of the Court, see Nadiv Mordechay and Yaniv Roznai, "Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and Dynamic Judicial Review," *Verfassungsblog* (April 8, 2020).

[25] For the full ruling in the matter of Ben-Meir, see note 9 above. See also Assaf Shapira and Avital Friedman, "The Knesset's Functioning in a Time of Emergency: Lessons from the Covid-19 Pandemic," *Parliament* 86 (2020) [in Hebrew].

[26] For data on this matter, see Nir Kosti, "Emergency Regulations: A Contemporary Historical Look" (draft from May 14, 2020, copy on file with the authors) [in Hebrew].

[27] An HCJ legal proceeding is also pending on this matter. See HCJ 2399/20, Adalah v. The Prime Minister (see, for example, the ruling of May 7, 2020). See also Bill Memorandum: Special Powers for Contending with the New Coronavirus Pandemic (Temporary Order), 2020.

government's preference to avoid parliamentary oversight of its activities, or at least to the fact that it assigns little importance to the presence of such supervision. As for the intervention of the Supreme Court, although substantial hearings were held in which government representatives were required to provide justifications and committed to take the Supreme Court's comments into consideration, there is reason to believe that had the Court failed to authorize the measures, it might well have suffered a severe attack.

To ensure that effective checks and balances between the branches of government endure times of emergency, the following benchmarks should be met:

a. *A strong and independent Court:* Courts must have broad powers to supervise the activities of the government and the Knesset and their rulings must be fully executed.

b. *A functioning Knesset that supervises the government:* Effective parliamentary oversight in times of emergency is of critical importance, including by means of special committees dealing with issues pertaining to the emergency, preferably headed by representatives of the opposition.

c. *Reinstating "regular" checks and balances as quickly as possible*: Even if an emergency has been declared, and the government has been granted the right to institute regulations instead of the Knesset, or to place restrictions on the actualization of different rights, it is nonetheless important to establish a principle whereby the regular mechanisms of control are applied even before the emergency has concluded. These mechanisms include a combination of parliamentary review of government decisions; a preference for Knesset legislation over government regulations; judicial review of the measures implemented by the government based on "regular" constitutional review; and an effort to resume the activity of the regular mechanisms of control during and after decision making, such as the institution of the State Comptroller.

Freedom of Expression and Freedom to Criticize the Authorities

The standard: In times of emergency, freedom of expression and the ability to freely criticize the authorities shall be fully maintained.

In times of emergency, there is a natural tendency to unite in face of the threat, to close ranks, and to support the government. The resilience of a democracy is reflected in the fact that even in emergencies, freedom to express criticism of the authorities is maintained. Moreover, the ability to express oneself freely and to raise critical voices must also be maintained on the level of public discourse. Caution must also be exercised to avoid a rally-'round-the-flag phenomenon – meaning, the conviction that when we are fighting an enemy, it is preferable not to criticize the government. Such a situation could

lead to erroneous measures not being subject to review and could allow the government to exploit the state of emergency in order to silence legitimate criticism.

To Israel's credit, the emergency regulations that were enacted in the course of the Covid-19 pandemic explicitly omitted demonstrations from prohibited gatherings, and during the crisis, civilians retained their ability to hold demonstrations, including bitter political demonstrations against the government. In addition, concerns of journalists about safeguarding sources due to measures to track phone calls or limiting correspondents' movements were acknowledged by the Supreme Court and received special attention by the authorities.[28] The protection of these rights should be maintained, and orders of government officials should not attempt to limit the scope of the right to freedom of expression.[29]

When protecting freedom of expression during such a crisis, the following benchmarks should be met:
   a. *No restrictions on freedom of expression and the right to demonstrate*: The right to freedom of expression must be fully ensured, and non-essential restrictions on the right to assemble and to demonstrate should be avoided.
   b. *Free criticism*: The freedom of media, academia, and civil society elements to express themselves without restrictions and to criticize the government without fear must be ensured.
   c. *Tolerance of critical views*: A variety of views must be respected, including expert views presenting different positions from those presented by the government. Silencing of critical voices, or labeling them as "enemies of the people," must be avoided, and the delegitimization of public criticism must be opposed.

The Scope and Protection of Human Rights
The standard: In times of emergency human rights must be maintained and protected at the existing level to the greatest possible extent.

A state of emergency does not obviate a democracy's obligation to protect the constitutional rights of its citizens. In other words, constitutional principles and the protection of human rights are not suspended during times of emergency.[30] In constitutional democracies, the authority to act during a state of emergency is granted

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[28] See the matter of Ben-Meir cited in note 9 above, paragraphs 35-43.
[29] On this matter, see the April 2, 2020 letter from the Attorney General to the Association for Civil Rights (titled "Invalid Restrictions on the Freedom to Protest in the People's Health Ordinance"), and the April 13 response of the Ministry of Health on the matter [in Hebrew].
[30] For a comprehensive and updated presentation of this subject, see Aharon Barak, "The Stability of Law" (Article 12 of Basic Law: Human Dignity and Liberty) in *Basic Law: Human Dignity and Liberty* (forthcoming, 2020; copy on file with the authors) [in Hebrew].

under the constitution, and not by virtue of political or external social legitimacy, and the constitution stipulates the scope of the State's obligation to respect the human rights in such situations. Likewise in Israel, the provisions for protecting human rights during times of emergency are set in the State's basic laws.[31] In a state of emergency, the scope of some rights may be limited in order to protect against and eliminate threats. Infringement upon certain human rights – such as the right to human dignity,[32] privacy, property, freedom of occupation, and freedom of worship – which in normal times is viewed as patently unconstitutional, may be temporarily justified in times of emergency to meet the requirements of the unique situation.

The underlying tenet is that the human rights that are protected in Israel must continue to be protected even in times of emergency, and deviations can only occur when there is pertinent and convincing justification. The idea that the protection of human rights is automatically weakened and subject to limitations due to the mere existence of a state of emergency must be rejected. This is particularly important in Israel, which constitutes a highly exceptional case in the democratic world, where the scope of the constitutional rights grounded in basic laws is extremely narrow and where there is an ongoing state of emergency.[33] Although the right to human dignity has been interpreted in court rulings in a manner that encompasses the protection of additional rights, this protection is still partial and relatively weak.[34]

As a result, imposing restrictions on individual rights may be justified during a time of emergency only if the following benchmarks are met:

a. *The measures are taken for a worthy cause*: The measures are necessary to meet a concrete need stemming from the state of emergency, and the powers granted to the government are not used to erode these rights for reasons that are not connected to the state of emergency.

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[31] Israel is also obligated to protect human rights under international law. On this point, see Yuval Shany, "Human Rights in Times of Emergency: The Perspective of International Law," *Parliament* 86 (2020) [in Hebrew].

[32] The right to human dignity also includes human dignity during medical treatment, patients' rights pertaining to medical treatment, and the right of the patient and his or her family to part with one another. On human dignity in contexts of medical treatment, see the introduction of Dana Blander, Karmit Haber, and Mordechai Kremnitzer, *Human Dignity: A Living Right in Medical Treatment* (Israel Democracy Institute, 2020) [in Hebrew].

[33] Israel has been assigned the lowest ranking among the countries that are traditionally assessed as democracies, with only six fixed constitutional rights. Even the expansion of the right to human dignity into a right that protects other subsidiary rights may, in times of emergency, enjoy partial and lacking protection. For demonstrating this lacking protection in the context of the Covid-19, see, Nadiv Mordechay, "Judicial Review of Administrative Decisions of the Ministry of Health," Israel Democracy Institute, April 30, 2020 [in Hebrew].

[34] For data on this subject, see Adam Chilton and Mila Versteeg, "Small-c Constitutional Rights," Virginia Public Law and Legal Theory Research Paper No. 2019-67 (November 20, 2019), available at SSRN: https://ssrn.com/abstract=3490919.

b. *The measures are necessary and proportional*: The infringement must be necessary for the sake of protection against the dangers that gave rise to the state of emergency; it must be the minimal infringement required in order to achieve this result; and the anticipated residual benefit of the measure must exceed the harm. In this context, simplistic comparisons between abstract values – such as the right to life against all other rights, which ostensibly always outweighs them – should be avoided, and instead a concrete calculation must be adopted that also takes into account the extent of the danger to life and the existence of reasonable risks that are justifiable.

c. *The measures are not discriminatory*: The rights must be limited in a manner that does not improperly discriminate among different groups in the population. Distinctions stemming from pertinent considerations, such as the desire to prevent the spread of a pandemic among a specific group or in a certain area, do not constitute improper discrimination, as long as the means are reasonable and proportional.

d. *The measures are temporary and implemented only as long as necessary*: A regular assessment must be conducted for every measure that infringes upon rights in order to determine whether the needs of the hour justify the ongoing injury; as long as it is still required, it must be ensured that the injury to a right does not exceed what is necessary and that its aim is to enable a return to routine life as soon as possible.

e. *Ongoing consideration of alternatives that minimize infringement to rights*: Active and ongoing effort must be made to identify alternatives that can provide the necessary protection for coping with the emergency situation while annulling or at least curtailing the infringement to individual rights. The action to identify alternatives must also be translated into institutional mechanisms of decision making. When a measure is chosen, it must be examined in order to ensure that it does not suffer from over-generalization, and action must be taken to ensure a tight fit.

Protocols for Emergency Legislation

The standard: In times of emergency the process of declaring a state of emergency, and determining provisions for states of emergency, must follow a specified order and keep the emergency provisions to a minimum.

The main tools used thus far to impose different restrictions on the public have been orders issued under the People's Health Ordinance and emergency regulations that were enacted by the government. The use of both has grown over time. In the initial stages of the crisis, there was no parliamentary supervision over these regulations.[35]

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[35]   For an analysis of the constitutional legal framework of emergency legislation and recommendations to improve this process, see Mordechai Kremnitzer and Nadiv Mordechay, "State

Declaring a state of emergency requires a discussion by decision makers that must be transparent to the public. It must examine the extent to which the declaration is required and specify the goal of the emergency provisions. This discussion in itself constitutes a check on hasty or excessive measures and obligates a process of introspection by decision makers. This is especially important when the emergency provisions mandate restrictions on human rights, or when they contain a change to law and administration, such as restrictions on the activity of state institutions, including the closure of courts of law, or on fundamental regime processes, as in the case of postponing elections.

For this purpose, a number of relevant benchmarks should be met:

a. *A separate declaration of a state of emergency in accordance with the situation*: In the current crisis, a specific state of emergency was not declared. The government, which was a transitional government, based its actions on the ongoing state of emergency in the country that was declared just a few days after the establishment of the State due to threats to the security of the State and extended in February 2020, unrelated to the Covoid-19 pandemic. Relying on an already existing state of emergency presents significant operational difficulties. Beyond the substantial and familiar constitutional difficulty of simply extending this state of emergency, it cannot serve as a basis for issuing emergency provisions stemming from a state of emergency to which it is not at all related.

b. *Limited use of emergency legislation*: The use of emergency legislation by the government in the form of emergency regulations should be kept to a minimum, and a legislative process in the Knesset is preferable. At the very least, what measures justify the use of emergency regulations must be deliberated, as well as what measures require enactment through a regular legislative process. If necessary, a rapid process of "temporary order" legislation can also be carried out within a parliamentary framework, and not only in the framework of the government. Although this type of legislation also presents difficulties, as experience shows that temporary orders become permanent, it is appropriate, in any event, to discuss a legislative tool that is suitable for every means, and not simply to channel all legislative measures into emergency regulations. As was once noted by the Supreme Court, and reiterated by the Court in the case dealing with the authorization of the ISA:

Generally speaking, the legislative process in the Knesset is more complex, protracted, and expensive than the administrative process. Nonetheless, efficiency is not necessarily

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of Emergency: Order of Actions and the Need for a 'Minor Parliament,'" *Parliament* 86 (2020), https://www.idi.org.il/parliaments/31835/31844 [in Hebrew]. See also Lila Margalit, "Emergency Powers and Parliamentary Review during the Covid-19 Pandemic," Israel Democracy Institute, May 30, 2020, https://www.idi.org.il/articles/31524 [in Hebrew].

an advantage when there is a question involving infringement upon human rights. It is precisely the "cumbersome" nature of primary legislation, and the requirement of a majority of the people's representatives in order to pass a statute, which provides a kind of institutional guarantee that basic rights will not be violated except when necessary.[36]

    c. *Limited duration of the provisions*: Measures adopted in times of emergency should be limited in duration and extended only upon reexamination. This is applicable to emergency regulations enacted by the government that are limited in duration by their nature, but temporary orders enacted by the Knesset should also be limited to as short a period as possible. A related matter is the gap between the classic logic of constitutional emergency powers and the ongoing nature of the epidemiological crisis. In general, the approach underlying the state of emergency referred to in Basic Law: The Government is that the emergency powers granted are justified for a short period of time. A pandemic, however, is a phenomenon that can take a long period of time to eradicate. Moreover, the needs for coping with a pandemic are, from the outset, less known and less clear than security needs in wartime and could require special provisions based on the nature of the pandemic. These factors question the use of constitutional emergency powers for contending with a pandemic, at least with regard to means intended to apply until the virus is completely eradicated. It may be more effective to make the necessary provisions for such an effort using regular primary legislation, or special legislation, as was done by some countries that have contended with epidemics in the recent past by means of specific modern epidemiological legislation.

    d. *Establishment of supervisory mechanisms within the enacted emergency provisions*: Emergency regulations should incorporate provisions for supervision and control conducted by independent non-governmental bodies. Indeed, the emergency regulations that dealt with activating ISA powers to locate and track individuals included supervision by the Attorney General and the legal counsel of the Ministry of Health. Such supervision is extremely important to maintain democratic resilience, provided that the officials in question are independent and not political appointments or confidants. Still, in light of the unprecedented nature of using ISA capabilities vis-à-vis citizens, even more independent supervisory elements should be considered to examine the use of powers in concrete instances, for example, a former Supreme Court justice, as well as the establishment of an appeals mechanism to facilitate such an examination.

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[36] HCJ 5936/97, Lam v. Director-General of the Ministry of Education, PD 53(4), 864, also quoted in the matter of Ben-Meir, note 9 above.

Transparency and Credibility of the Governing Authorities
The standard: In times of emergency the authorities should operate in a transparent manner based on information that is as credible and well-based as possible, while conveying full information to the public.

Public trust in the government authorities is an essential component of democracy. Such trust is grounded in authorities operating on the basis of a factual foundation that is as credible and informed as possible, as well as in the authorities' conveyance to the public of relevant and reliable information as fully as possible. An important component of assessing democratic resilience is the credibility of information provided to the public, as well as the level of transparency of the decision making.

In this context, the messages to the public should be conveyed by professionals and designated spokespersons. It is also important to facilitate open dialogue, be attentive to public voices, and answer the questions posed by the media. The practice that developed during the first wave of the Covid-19 pandemic, of the Prime Minister serving as a main spokesperson conveying messages to the public, in most cases without allowing journalists to pose questions, is not a desired model and raises concerns regarding abuse of the crisis. This concern is particularly salient in light of the current political and legal cloud hanging over the Prime Minister.

Maintaining credibility and transparency in times of emergency requires meeting the following benchmarks:

a. *Information sharing that is as complete as possible*: All information should be shared with the public, including information that has accumulated and emerged during the decision making process in government, with the exception of information that, if released, could damage critical or other state interests. When the state of emergency is not security-related, as in the case of the coronavirus crisis, it is appropriate to demand maximal transparency, due to the lack of an "eavesdropping enemy," which exists during conflicts with a human enemy. In this regard, it is recommended to appoint supervisors to oversee transparency during times of emergency, similar to the administrative apparatus that exists within the government to protect and fulfill the values of freedom of information and transparency in routine times.

b. *Commitment to credible and well-based information*: Even in conditions of uncertainty, the information that is provided to the public must be as accurate as possible. Particular care must be taken that it is not presented in a manner that could lead to false conclusions. The public should not be imbued with false hope; however, it is also important to refrain from unfounded alarming forecasts.

c. *Open public discussion*: Actions should be taken to allow an open public discussion, in the media and throughout the public, based on the relevant information.

d. *Professional spokespersons*: Designated spokespeople and professionals should be assigned to the foreground of speaking to the public about the crisis and the measures pertaining to it, as opposed to parties that can be suspected of being politically motivated.

Democratic Elements in Decision-Making Processes

The standard: In times of emergency, decision-making processes must include institutional elements that ensure the preservation of democratic values.

In times of emergency there is a concrete possibility that measures that severely infringe upon the rights of the individual will be taken, and that the executive branch will expand its use of power free of the balancing mechanisms that exist in routine times. While this could be justifiable on its own, it has the potential to constitute a threat to democracy and open the door to an abuse of the situation in order to further private or sectarian interests, instead of tending to the interests of the public as a whole. Prevention of this contingency cannot rely solely on formal legal mechanisms. It is essential that the decision-making process itself include elements that prevent such abuse and hinder the possibility of the government harming democratic values under the cover of a state of emergency.

Therefore, and to this end, certain components must be incorporated into the decision making during times of emergency, as follows:

a. *Internal oversight processes*: Internal control within the government by professional independent parties is of extreme importance during times of emergency, in light of the assumption that external mechanisms are less effective, at least during the initial stage of the crisis. A classic example of this is the legal advisory apparatus of the executive branch. Indeed, the measures taken during the Covid-19 pandemic included close supervision by the Attorney General. It seems that in contrast to the common political rhetoric during times of emergency, the Attorney General is perceived by both the authorities and the public as a trustworthy and independent party who can be relied upon to represent the public interest. In this context, the right approach is that the binding opinion of the government legal advisors is strengthened, as opposed to weakened, in times of emergency. Another example can be found in the elements of budgetary control in the Department of the Accountant General, the Bank of Israel, and other professional elements in the government administration that create professional internal control. Budgetary and fiscal oversight are of special importance, considering the need to expand public expenditure rapidly in times of emergency without the usual parliamentary oversight mechanisms.

b. *Reliance on professionals and credible information*: Although a state of emergency requires swift action, the current crisis shows that it is both possible and necessary for the government to welcome involvement of professionals from a broad spectrum of relevant fields, and to rely on them to generate credible professional information during decision making.

c. *Examination of alternative measures*: Government action, against the background of sound alternatives, is an accepted way of ensuring the professionalism and legality of measures. In times of emergency, it is important to maintain and create the ability to engage in diligent, ongoing examination of alternatives that do less injury to individual rights and the foundations of democracy.

d. *Integrating a variety of parties from throughout the public into decision making processes*: The decisions made during times of emergency have broad implications for the public as a whole, and therefore they should be made by a forum of women and men representative of the entire population, including people from the center of the country and the periphery, secular and religious, Arabs and ultra-Orthodox Jews, and representatives of different sectors of the economy. Such a diverse constitution would contribute to the best possible decision making, as indicated by many studies that note diversity's positive impact on the quality of the decisions made.

e. *Consulting with relevant sectors*: Decisions that impact directly on different groups within the population should be taken after discussion that incorporates all relevant parties. It is especially important to involve representatives of disadvantaged groups – both those that are usually disadvantaged and those that became disadvantaged due to the pandemic. For example, representatives of Israel's Arab population and ultra-Orthodox community should be incorporated into the decision making, as well as representatives of the elderly and the chronically ill.[37]

f. *Mechanisms for examining orders and regulations that significantly infringe upon human and civil rights*: As part of the decision-making process, special resources should be allocated to a systematic examination of provisions that are particularly injurious to rights. This should not necessarily be carried out by the decision makers that are directly involved in executing the powers and dealing with the crisis, but rather by external or mixed working groups. This examination should be based on administrative and constitutional principles and adopt a broad perspective. To the extent possible, the findings of such examinations should be recorded in writing for the sake of public discussion. When necessary, it is important to conduct a process of reevaluation, in real time, to examine the orders

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[37] In the HCJ ruling in the matter of Leventhal (paragraph 35 of the ruling of Justice Amit), see the Court's remark to the effect that it would have been appropriate to consult with the municipality of Bnei Brak before placing the city under lockdown.

and the regulations that have already been enacted to minimize the injury to human rights.

g. *Integrative management of comparative information*: In states of emergency that also afflict other countries, including democracies, as during the Covid-19 pandemic, action should be taken during the crisis to collect and generate information on legal and other measures taken by other countries. This will enable the adoption of provisions that have been employed successfully, as well as the identification of warning signs. For this purpose, research groups (both within and outside the government) should be granted designated resources to generate information and research in this field. This pertains not only to "intelligence" but also to comparative information, which should be produced by parties that are not necessarily from the national security establishment.

h. *Maintaining external inquiry, and learning lessons*: To ensure that excessive infringement upon rights or harm to the foundations of democratic government does not occur during the state of emergency, and to generate lessons for future crises aimed at keeping such injury to an absolute minimum, the crisis should be followed by inquiries and processes to derive lessons that consider these aspects as well.

Democratic Culture of Crisis Management
The standard: In times of emergency and crisis management the democratic culture must be preserved, manifested in the way the government authorities conduct themselves vis-à-vis citizens and the way public discussion is held.

The previous sections of this article set operational standards expected from decision makers and other organs of the State. Another dimension that is relevant to democratic resilience pertains to the political and constitutional culture of managing the crisis, which is not necessarily measurable or immediately translatable into policy measures, but whose proper management is no less important than that of other variables.[38] In this context, it is imperative to learn from the way the coronavirus crisis has been handled hitherto and to take measures to improve the decision-making formats and their public management in future states of emergency, regarding, inter alia, the following aspects:

a. *Framing the crisis*: Decision makers bear responsibility for mediating the crisis to the public in a manner that reflects the crisis as is. The messages that are conveyed must maintain a level of fear throughout the public that is consistent with the level of assessed danger. Instilling excessive fear augments public

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[38] One aspect that on a strategic level is relevant to maintaining such a democratic culture is education for democracy. On this, see Tammy Hoffman's article "Education for Democracy in the Education System: Old Insights in Light of a New Crisis," *Parliament* 86 (2020), https://www.idi.org.il/parliaments/31835/31849 [in Hebrew].

sensitivity, which is already elevated due to the emergency. Creating an atmosphere of fear can lead to disproportionate infringements on human rights, and to decisions that do not meet democratic standards and that are, at times, irrational. When excessive fear is instilled in the public, members of the public are quicker to accept broad infringement upon their rights and are grateful to the authorities for protecting them. Herein lies the temptation of instilling excessive fear. It is therefore important to learn from previous measures taken in the democratic world with regard to the question of how to mediate decisions and messages to citizens during states of emergency in a manner that does not intentionally or unintentionally exude panic. Another aspect in this context is to avoid framing non-security-related states of emergency, such as a pandemic or a natural disaster, in security terminology. This is important in preventing a rise in nationalist sentiment against the background of the crisis, and to avoid opening a door to the excessive use of security forces in the domestic sphere.

b. *Clear, fair, and logical rules of conduct conveyed to the public*: The rules delineating the conduct of the public that are conveyed to the public in times of emergency must be clear, consistent, and implementable, and must take public needs into consideration. Unclear rules, and decrees that the public is unable to fulfill, create a lack of clarity that paves the way for the arbitrary application of law by the governing authorities.

c. *Avoiding the creation of a scapegoat*: Historically, times of emergency are periods in which the social "other" faces greater danger than groups that are part of the consensus. In Israel, the social group that is typically in danger during security-related times of emergency is the Arab population. During the Covid-19 pandemic, however, it was the ultra-Orthodox Jewish sector that found itself heavily under attack. From a democratic perspective, it is hard to ignore the hate-talk that developed, especially during the initial stages of the crisis, by parts of the general public, which led to the labeling of Israel's ultra-Orthodox Jews as responsible for the spread of the virus.[39] Such a trend is extremely dangerous. In addition to the measures that are certainly necessary for contending with the rates of infection in the sector, it appears that lessons must be learned regarding possible ways of reducing the hatred toward special population groups during such a crisis. Government authorities that are engaged in eliminating racism, particularly within the Ministry of Education and the Ministry of Justice, must develop plans of action in these contexts. Their leadership bears the responsibility of mediating the complexity of dealing with the ultra-Orthodox population and other populations in a manner that will decrease the antagonism against them.

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[39] On this discourse of hate, see Yedidia Stern, "The Ultra-Orthodox Integration into Israeli Society under Cover of the Coronavirus," Israel Democracy Institute, April 3, 2020, https://www.idi.org.il/articles/31197 [in Hebrew].

Conclusion

Times of crisis and emergency, like the crisis surrounding the coronavirus pandemic, are challenging times for democracies. They necessitate a concentration of powers in the hands of the executive branch, accelerated and centralized decision making, and infringement upon human rights and freedoms, stemming from the state of emergency. They pose a challenge faced by democracies worldwide. The crisis caught Israel in the midst of a constitutional crisis involving the attempted erosion of the standing of the State's gatekeepers, and a political crisis rooted in the absence of a stable government and a functioning Knesset. These crises affect the standing of gatekeepers and the public's trust in the leadership, as well as increased concern that the current state of emergency, and states of emergency in the future, could be exploited to further erode the fortitude of democracy in Israel. Against this backdrop, it is important to ensure the democratic resilience of the State – that is, its ability to contend with states of emergency and disaster, while containing the situation's impact on the actualization of democratic values and its ability to bounce back from the crisis and return to a state of proper democratic functioning.

We have sought to propose standards and benchmarks for evaluating and maintaining democratic resilience. We focused on the following areas: checks and balances on the power of the executive branch; freedom of expression and the freedom to criticize the authorities; the scope and means of protecting human rights; protocols for emergency legislation; transparency and credibility of the governing authorities; democratic elements in the decision-making process; and democratic culture of crisis management. Preservation of democratic values in each of these dimensions will help maintain Israel's democratic resilience. When democratic resilience is maintained, the pandemic, or any other state of emergency, can be dealt with in a manner that maintains both the wellbeing and the health of the public and the core values of Israeli society and the State of Israel.