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Inaction as a State Response to the Coronavirus Outbreak: Unconstitutionality by Omission

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INTRODUCTION

In late 2019, the World Health Organization (WHO) learned of precarious cases of pneumonia in Wuhan City, China. Soon after, authorities reported that a novel coronavirus (COVID-19) was the cause. The coronavirus, known as SARS-CoV2 (Severe Acute Respiratory Syndrome Coronavirus 2), began to spread rapidly across the globe. On March 11, 2020, the WHO declared the novel coronavirus outbreak a pandemic. Two years later, the coronavirus has infected individuals in

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more than 225 countries and territories. Over four hundred million people have contracted coronavirus disease (hereinafter COVID-19), and more than six million people have died.[1]

The pandemic's rapid spread across the world put pressure on governments to respond. Public health was at stake. The mortality of the new virus was high—estimated at up to 1%[2] and much more fatal than the common influenza while the transmission intensity and the spread of the virus were much faster.[3] To put it simply, the COVID-19 pandemic, during its first waves, "[was] the most serious seen in a respiratory virus since the 1918 H1N1 influenza pandemic."[4]

An extraordinary situation emerged as a result of the pre-variant virus's mortality rate and the transmission intensity, the lack of medicine and vaccination, the need for hospitalization, and the scarce resources of the health systems around the world.[5] One infected person at a dinner or party could spread the virus to rest of the attendants. For example, the well reported incident from New Jersey. In early March 2020, the members of an Italian American family attended an ordinary gathering. Two weeks later, the family matriarch and three siblings died, another three were

1. Worldometer offers real-time world statistics on COVID-19. *See generally Worldometer*, https://www.worldometers.info/coronavirus/ [https://perma.cc/8U9R-QD6L].

2. According to a report published in February 2020, the case fatality ratio (CFR) was estimated in the range 1.2%–5.6%. However, the mortality rate from country to country varied, as it depends on the statistical methods and the "sensitivity of the divergent surveillance systems to detect cases of differing levels of severity of the illness." *See* Ilaria Dorigatti, Lucy Okell, Anne Cori, Natsuko Imai, Marc Baguelin, Sangeeta Bhatia, Adhiratha Boonyasiri, Zulma Cucunubá, Gina Cuomo-Dannenburg, Rich FitzJohn, Han Fu, Katy Gaythorpe , Arran Hamlet, Wes Hinsley, Nan Hong , Min Kwun, Daniel Laydon, Gemma Nedjati-Gilani, Steven Riley, Sabine van Elsland, Erik Volz, Haowei Wang, Raymond Wang, Caroline Walters , Xiaoyue Xi, Christl Donnelly, Azra Ghani & Neil Ferguson, REPORT 4: SEVERITY OF 2019-NOVEL CORONAVIRUS (NCOV) 1 (2020), https://www.imperial.ac.uk/media/imperial-college/medicine/mrc-gida/2020-02-10-COVID19-Report-4.pdf [https://perma.cc/YD8E-C2ZM] [hereinafter REPORT 4].

3. A report published in January 2020 estimated that each patient infected 2.6 new people. Natsuko Imai, Anne Cori, Ilaria Dorigatti, Marc Baguelin, Christl A. Donnelly, Steven Riley & Neil M. Ferguson, REPORT 3: TRANSMISSIBILITY OF 2019-NCOV 5 (2020), https://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-3-transmissibility-of-covid-19/ [https://perma.cc/2ZTQ-HAP6] [hereinafter REPORT 3].

4. *See* Neil M. Ferguson, Daniel Laydon, Gemma Nedjati-Gilani, Natsuko Imai, Kylie Ainslie, Marc Baguelin, Sangeeta Bhatia, Adhiratha Boonyasiri, Zulma Cucunubá, Gina Cuomo-Dannenburg, Amy Dighe, Ilaria Dorigatti, Han Fu, Katy Gaythorpe, Will Green, Arran Hamlet, Wes Hinsley, Lucy C. Okell, Sabine van Elsland, Hayley Thompson, Robert Verity, Erik Volz, Haowei Wang, Yuanrong Wang, Patrick G.T. Walker, Caroline Walters, Peter Winskill, Charles Whittaker, Christl A. Donnelly, Steven Riley & Azra C Ghani, REPORT 9: IMPACT OF NON-PHARMACEUTICAL INTERVENTIONS (NPIS) TO REDUCE COVID-19 MORTALITY AND HEALTHCARE DEMAND 1 (2020), https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf [https://perma.cc/S4AM-QJYD] [hereinafter REPORT 9].

5. See generally REPORT 4, *supra* note 2, for more details on the severity of the COVID-19 and the unprecedented challenges to the healthcare system.

hospitalized in a critical condition, and more than a dozen others were infected.[6]

As a result, ordinary tools in the policymaker's toolbox, in developed and developing countries alike, were unable to face the exigency of the situation. In particular, there was an urgency for the passing of new laws tailored to meet the requirement of the health crisis, which was incompatible with the slow-paced law-making procedures. On top of that, lawmaking bodies were unable to assemble as the risk of infection was very high among the representatives.

Some states balanced basic rights and freedoms, such as the freedom of movement and assembly, with public health measures by adopting emergency measures. These emergency measures ranged from imposing lockdowns to more specific bans and restrictions.

Thus, the strategy for mitigation and suppression of the virus included measures such as the policy of social or physical distancing, night curfews, travel bans, quarantines, mandatory testing certificates, limited capacity for indoor activities, and mandatory use of protective masks.[7] For instance, on February 23rd, the Italian government issued, in terms of Article 77 of the Italian Constitution, an executive decree[8] delegating the authority to the head of the government to issue further executive decrees in response to the crisis caused by COVID-19. The Italian government was able to issue such a decree under Article 77 of the Italian Constitution. In like manner, on March 14th, the Spanish government activated a so-called "state of alarm" with the issuance of a Royal Decree 9 under Article 116(2) of the Spanish Constitution and the Organic Law of States of Alarm Exceptions and Situations Act.

Social distancing means that people are instructed to keep a safe distance, about six feet, between themselves and other people not from the same household in both indoor and outdoor spaces.[9] Practically speaking, daily activities such as attending school, sports, and religious activities,

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6. J. K. Elliott, *Mom, Sister, Two Brothers Gone: How Coronavirus 'Decimated' a New Jersey Family* GLOB. NEWS (Mar. 20, 2020), https://globalnews.ca/news/6707275/coronavirus-new-jersey-family/ [https://perma.cc/JAU4-P9N6].

7. REPORT 9, *supra* note 4, at 1 ("Two fundamental strategies are possible: (a) mitigation, which focuses on slowing but not necessarily stopping epidemic spread – reducing peak healthcare demand while protecting those most at risk of severe disease from infection, and (b) suppression, which aims to reverse epidemic growth, reducing case numbers to low levels and maintaining that situation indefinitely.").

8. DECRETO-LEGGE 23 febbraio 2020, n.6, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-02-23;6!vig= [https://perma.cc/BG8W-76Z7].

9. *See How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL (Feb. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html [https://perma.cc/9USC-KUEY].

working in an office, dining at a restaurant, or using public transportation became impracticable.

Interestingly, the global reach of the virus allowed researchers and academics to record and compare the policy implemented by different countries. In particular, the response to the pandemic in each country or region was dependent on (1) the number of infections and (2) the institutional capacity, i.e., available healthcare material and available intensive care units. However, when the pandemic erupted during the second quarter of 2020, the scientific uncertainty regarding the virus, in combination with the lack of experience and the minimal preparedness, led to the activation of emergency regimes and the implementation of emergency regulations.

However, during the first wave of the pandemic, some countries, such as the United Kingdom (U.K.)[10] and Sweden[11], did not implement any emergency regulations. The governments in these countries initially followed a business-as-usual policy.

Such a reaction—in practice an omission—was an emergency situation paradox. From a public policy perspective, there are two main reactions to a state of emergency that attract the interest of academics and practitioners. The first and most common is the "overreaction" when policymakers adopt regulations that disproportionately burden the public's rights and freedoms. The second, which is not as common but is the subject of this Article, is omission. In this Article, omission refers to policymakers' failure to detect the exigency of a situation and failure to enact emergency measures to mitigate the impact of the emergency.

That said, the omission that took place in the U.K. and Sweden during the first wave was a policy option, an intentional omission. Lawmakers and policymakers decided not to implement an emergency regulation. Interestingly, this reaction from the U.K. and Sweden underpins a neglected aspect of the emergency framework, a novel aspect in the omission in a state of emergency. Omission, like a written

10. The policy first implemented in the U.K. was in practice "accepting that herd immunity by infection" as the inevitable outcome. HOUSE OF COMMONS, HEALTH AND SOCIAL CARE AND SCIENCE AND TECHNOLOGY COMMITTEES, CORONAVIRUS: LESSONS LEARNED TO DATE, SIXTH REPORT OF THE HEALTH AND SOCIAL CARE COMMITTEE AND THIRD REPORT OF THE SCIENCE AND TECHNOLOGY COMMITTEE OF SESSION 2021–22 (U.K.).

11. For a discussion of the so-called Swedish exceptionalism see Stefan Baral, Rebecca Chandler, Ruth Gil Prieto, Sunetra Gupta, Sharmistha Mishra & Martin Kulldorff, *Leveraging Epidemiological Principles to Evaluate Sweden's COVID-19 Response*, 54 ANNALS OF EPIDEMIOLOGY, Feb. 2021, at 21, 25 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7682427/pdf/main.pdf [https://perma.cc/4SZG-PRJY].

regulation, produces legal effects.[12] The act of omission is thoroughly examined in the administrative law area;[13] however, in the context of emergency laws, there is a paucity of literature. Moreover, the omission in emergencies raises the question of whether emergency powers are too concentrated and monopolized in an executive branch's hands.

That said, the key question is what constitutional mechanisms to compel action exist in an emergency omission. In this Article, I seek to answer that question and inspire reflection on what constitutional mechanisms exist to compel the executive to take action in an emergency. I will argue that there are three approaches to compel action and avoid emergency omission and that the best approach is resolution through the political process.

The first approach is based on the constitutional design of the executive power. In most unitary countries, the emergency power is concentrated in the hands of the central government. This is a system I refer to as the monopoly of emergency powers. On the other hand, in countries with multilevel governments such as in federal and devolved states, the two-tier executive, at the national and local level, allows constitution designers to allocate to both executives' emergency powers. Hence, if one tier stays inactive, the other might take action to regulate emergencies.

The second approach puts courts at the heart of the solution with judicial review. People can compel action via ordinary judicial review. It is self-evident that governments are expected to care and are expected to act in times of emergency. Such expectation is based on the political relationship between representatives and voters. Voters elect their representatives, and they entrust them with a democratic mandate. But as Locke has put it, voters expect that themselves, their liberty, and property will be preserved.[14] In addition, Machiavelli remarked that "[s]ensible rulers and well-run states have always done all they can not to drive the nobles to despair and to keep the people happy and satisfied"[15], which implied a duty to care.

On top of that, in some countries like Spain, the constitutional text recognizes a general provision prescribing the obligation of the state to protect the rights of the people.[16] In others, such as the United States, the

12. However, some scholars criticize treating positive acts and omissions in the same way. For more details, see JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES (1977). Moreover, the last part of this article will show that courts treat omissions differently than acts.

13. *See* Glover, *supra* note 12; *see also* TONY HONORÉ, RESPONSIBILITY AND FAULT (1999).

14. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 131 (1689).

15. NICCOLÒ MACHIAVELLI, THE PRINCE 74 (Tim Parks ed., 2014).

16. *See* CONSTITUCIÓN ESPAÑOLA [C.E.] [CONSTITUTION] Dec. 27, 1978, B.O.E n.116 (Spain). For instance, the "recoursos de amparo." *Id.*

duty to care and a duty to act has a very limited scope.[17] However, while lawmakers tend to enact policies via action and omissions cumulatively, in practice courts are less likely to find state authorities liable and accountable for non-feasance. On top of that, the deference that judges show in times of emergency would deter the chances for judges to compel emergency action.

Based on these approaches, this article will argue that the third approach, the political process, is the best resolution to omission.

In Part I of this Article, I will first elaborate on the legal theory of emergencies in the context of government, and I will focus on the specific emergency measures that different countries enacted to address the pandemic. In Part II of this Article, I will provide examples of countries that did not enact any emergency regulation during the first wave of the coronavirus pandemic, and I will use these examples to elaborate on the concept of emergency omission. Finally, I will conclude with an analysis of the available remedies to compel executive action. In particular, I will focus on the emergency authority, and by examining cases from Brazil and Spain, I will highlight how the duopoly of emergency powers between the central and the local governments led to action. Then, I will discuss the role that citizens and the courts can play via judicial review against emergency omission, and elaborate on the two inherent limitations: first, the practice of deference and second, the tendency of the courts not to find state authorities liable for omission.

I. THE LEGAL FRAMEWORK OF EMERGENCIES AND THE PANDEMIC

A. Legal Theory on Emergencies

According to the fracture mechanics, materials are characterized by their resistance to fracture. What distinguishes brittle materials from ductile materials is the ability of the material to undergo plastic deformation before the fracture. In practice, the ductile fracture is preferred in most applications because materials with a relatively high extensive ability for plastic deformation before they crack absorb more energy to tolerate stress before fracture. [18]

This analog can be useful when thinking about constitutionals. Constitutional drafters' paramount aim is to create enduring constitutions that have the ability to sustain stress and pressure to avoid constitutional

17. The U.S. Due Process Clause protects the right to personal security of the people incarcerated in state institutions. *See e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

18. For more details about brittle and ductile fracture see RAYMOND A. HIGGINS, THE PROPERTIES OF ENGINEERING MATERIALS 384 (Industrial Press, 2d ed., 1994).

mortality.[19] In other words, constitutions are not simply rulebooks but are artificial materials that define the structure, performance, properties, and processes in the legal order.[20]

When drafters create a constitution with procedural provisions such as the lawmaking power of a legislature alongside institutional guarantees such as checks and balances and human rights protections, they make the legal order rigid and solid. But in times of emergency—an age-old problem[21]—constitutions, like materials, need flexibility and the ability to absorb energy to tolerate stress and avoid fracture to respond to national and international emergencies.

Constitution designers incorporate such flexibility in a number of constitutional provisions that provide for a special emergency regime that affects the separation of powers, constitutional guarantees, and rights. Indeed, constitutional provisions in numerous constitutions prescribe for a deviation from specific rules and procedures upon several conditions and constraints.

At the same time, lawmakers with ordinary legislative powers create permanent agencies responsible for emergency planning and executing those plans when necessary. Lawmakers also set expectations about cooperation and partnership between different agencies, such as governmental and regional authorities, non-governmental organizations, and volunteers.

Constitutional theory and political philosophy have dedicated a plethora of articles and books to the issue of "states of emergency."[22] Carl Schmitt ignited the discussion by famously stating that the "[s]overeign is he who decides on the exception."[23] Schmitt argued that during states of emergency, the rule of law has no place because the powers of the sovereign need to be endless and unlimited to address an emergency.

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19. On the issue of constitutional mortality, see ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (CUP) 12246.

20. Xenophon Contiades & Alkemene Fotiadou, *On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?* 9 VIENNA J. ON INT'L CONST. L. 3 (2015).

21. On emergencies during the roman period see GREGORY KUNG GOLDEN, EMERGENCY MEASURES: CRISIS AND RESPONSE IN THE ROMAN REPUBLIC 89 (2011); for more details on the emergency configuration in the Roman period see CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 15 (Princeton University Press 1948).

22. *See generally* Antonios Kouroutakis, *The Virtues of Sunset Clauses in Relation to Constitutional Authority*, 41 STATUTE L. REV. 16 (2020) (the state of emergency is a concept opposed to the state of normality).

23. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE THEORY OF SOVEREIGNTY 5 (George Schwab ed., 2005).

After the tragedy of the Weimar Republic,[24] liberal constitutional theory recognized three main responses to emergencies.[25] The first common approach is the 'accommodation' model, with Bruce Ackerman as one of its prominent proponents.[26] This approach allows policymakers to adopt tailored laws to accommodate a crisis. The departure from ordinary legislation—legislation that, in other words, regulates the life of the people in times of normality—is regarded as necessary because ordinary legislation is considered inadequate to respond to a state of emergency.

The incorporation of a state of emergency provision into constitutional documents has been described, in liberal constitutional theory, as a Trojan horse and as a normalization of the state of exception. Hence, Dyzenhaus proposed another method, the "business as usual" model.[27] According to this approach, policymakers simply employ ordinary laws from their existing legal arsenal when dealing with emergencies. States, therefore, rely on mechanisms such as legislation related to war and crime.[28]

Finally, the third approach is the so-called "extra-legal measures" model. According to Gross, a proponent of this model, this approach presumes that public officials may act extra-legally when emergency measures are necessary for protecting the nation. However, this model does provide for, and its defenders acknowledge, that officials taking extra-legal action may be held legally or politically accountable for those actions, should they be proven wrongful.[29] Similar to this model is the "extraconstitutional" model.[30] Inspired by the Korematsu case, originator Mark Tushnet argues that emergency powers should be treated as extraconstitutional and subject to judicial and political post scrutiny.[31] In fact, this model is encapsulated in Dicey's analysis of the use of Habeas

24. Kouroutakis, *supra* note 22, at 23.

25. The liberal response to emergencies is based on the idea of rule of law constrained emergency powers. The alternative model would be unconstrained emergency powers as perceived by Schmitt. *See* Schmitt, *supra* note 23, at 8.

26. *See generally* Bruce Ackerman, Essay, *The Emergency Constitution*,113 YALE L.J. 1029 (2004).

27. *See* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (2006).

28. *Id.*

29. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*. 112 YALE L.J 1011, 1023 (2003). For criticism over this third approach see David Dyzenhaus, *The State of Emergency in Legal Theory*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY 65 (Michael Yew Meng Hor, Victor Vridar Ramraj & Kent Roach eds., 2009); Ackerman, *supra* note 26, at 1041.

30. *See* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273–307 (2003).

31. *Id.* at 306.

Corpus Suspension Acts in combination with retrospective Indemnity Acts as an alternative to the imposition of martial law.[32]

B. Adoption of COVID-19 Emergency Measures

Historically, emergencies were at stake in times of external and internal risks, such as in times of war, mayhem, riots, and public disorder. However, the scope of emergencies expanded, for instance, with the massive scale terrorist attacks on September 11 and recently with the COVID-19 pandemic. Emergencies have the following four characteristics according to the European Commission of Human Rights, which describes the features of such an emergency. In particular:

> (1) It must be actual or imminent. (2) Its effects must involve the whole nation. (3) The continuance of the organised life of the community must be threatened. (4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.[33]

Constitutional provisions and statutes cover a wide range of emergency situations, provide distinct emergency response frameworks, and bestow a wide range of executive powers upon policymakers so they may respond accordingly.[34] Emergency constitutional provisions, in general, also usually use vague terms, such as "protecting the civilian

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32. A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 237 (10th ed., 1959).

33. Den. v. Greece, App. No. 3321/67, Nor. v. Greece, App. No. 3322/67, Swed. v. Greece, App. No. 3323/67, Neth. v. Greece, App. No. 3344/67, 1 Eur. Comm'n H.R. Dec. & Rep. *in The Greek Case*, 1 COUNCIL OF EUR., 1, 70 (1970).

34. *See e.g.*, the Constitution of Spain, which regulates in Article 116 three different types of emergencies with three distinct procedures.

> 1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations. 2. A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period my not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply. 3. A state of emergency shall be declared by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements. 4. A state of siege (martial law) shall be declared by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration and terms.

Constitution of Spain, Article 116. C.E, B.O.E. n.116, Dec. 27, 1978 (Spain).

population,"[35] "public order,"[36] "the independence of the Nation,"[37] "extraordinary circumstances of an urgent and unforeseeable need,"[38] natural disasters,[39] giving policymakers further discretion and flexibility to act.[40]

There are several reasons why the pandemic is considered a situation requiring emergency measures. To begin with, the pandemic is a state of exception, as Agamben describes it,[41] and it is a concept opposed to the state of normality; It is an extraordinary situation, as viruses, without vaccines and medicines, and with such easy transmission are extremes way outside the state of normality. They are not part of ordinary life. Second, when hospitals were overwhelmed with patients once the number of patients with COVID-19 increased substantially and the availability of the ICU was eliminated, a sense of urgency and time pressure prevailed. Thus, policymakers did not have the luxury of time to prepare and plan a response according to ordinary procedures. Third, as the death tolls rise, a general sense of the uncertainty and a lack of predictability of the consequences prevails. Finally, the current status quo emergency is expected to be reversible and temporary once the vaccine and medicines work and bring results. Consequently, it is expected that such an extreme situation as described above would trigger the emergency framework of each country.

As the first wave of COVID-19 broke out, many states took swift preventative emergency regulations based on public health concerns. For instance, the Italian government issued, on February 23rd, in terms of Article 77 of the Italian Constitution, an executive decree.[42] This decree has given Prime Minister Conte the authority to issue further executive

35. Grundgesetz [GG] [Basic Law], Art. 80a, *translated by Federal Ministry of Justice*, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0424 [https://perma.cc/YH4E-YPB7] (Ger.).

36. 1975 SYNTAGMA [SYN.] [CONSTITUTION] Art. 18 (Greece).

37. 1958 CONST. art. 16 (France).

38. 1975 SYNTAGMA [SYN.] [CONSTITUTION] Art. 44 (Greece).

39. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Convention on the Rights of Persons with Disabilities, Art. 11 (Braz.).

40. For more details about the utility of vague expressions, see Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design* (U. of Chi. Pub. L. & Legal Theory, Working Paper No. 389, 2012).

41. For more details on the state of exception, see GIORGIO AGAMBEN, STATE OF EXCEPTION 1.1 (Kevin Attell trans., 2003).

42. *See* DECRETO-LEGGE [Decree-Law] 23 Febbraio 2020, n.6 (Feb. 23, 2020), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2020-02-23;6!vig= [https://perma.cc/97WW-6ZFA].

decrees in response to the crisis caused by the pandemic.[43] The President of the United States, on March 13th, declared a state of emergency in alignment with sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601).[44] Similarly, the Spanish government, on March 14th, activated a so-called "state of alarm" with the issuance of Royal Decree 463/2020,[45] issued in terms of Article 116(2) of the Spanish Constitution and the Organic Law of States of Alarm, Exceptions, and Situations Act.[46]

In practice, policymakers implemented the medical recommendation for social distancing by imposing lockdowns of the non-essential parts of the economy and by imposing people to stay at home.[47] This meant that people's freedom to exercise their religion, their freedom of assembly to demonstrate, their right to work, or their liberty to go for a walk was constrained. Such measures were challenged before the courts, and some were upheld, but others were found unconstitutional. For instance, in Germany, the Constitutional Court held that the new pandemic-related rules could not limit the right to hold political protests.[48] Meanwhile, in the U.S. the Supreme Court held that pandemic-related rules may impose restrictions on worship.[49]

Scholars and judges have criticized emergency measures from several perspectives. For instance, Dyzenhaus argues that such temporary measures will spread, and the temporary measures will become permanent, threatening civil liberties.[50] Justice Brennan has raised the

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43. A list of Executive Decrees is available at http://www.governo.it/it/approfondimento/coronavirus-la-normativa/14252 [https://perma.cc/4JSL-NSGH].

44. *See* Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak [https://perma.cc/Q5HJ-SAB8].

45. *See Ministerio de la Presidencia, Relaciones con las Cortes y Memoria Democrática*, BOLETÍN OFICIAL DEL ESTADO [OFICIAL GAZETTE] (Mar. 14, 2020) (Spain), https://www.boe.es/boe/dias/2020/03/14/pdfs/BOE-A-2020-3692.pdf [https://perma.cc/G2D4-CS3A].

46. *See Ley Orgánica 4/1981, de 1 de Junio, de los Estados de Alarma, Excepción y Sitio*, LEGISLACIÓN CONSOLIDADA (June 5, 1981) (Spain), https://www.boe.es/buscar/pdf/1981/BOE-A-1981-12774-consolidado.pdf [https://perma.cc/F9Z7-85YB].

47. About the policies implemented in Germany to face the pandemic see Pierre Thielbörger, *Germany – Federalism in Action*, *in* MATTHIAS C KETTEMANN & KONRAD LACHMAYER, PANDEMOCRACY IN EUROPE POWER, PARLIAMENTS AND PEOPLE IN TIMES OF COVID-19, at 95 (2021).

48. Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 15, 2020, 1 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 828/20 (Ger.).

49. S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1152 (2020).

50. *See* David Dyzenhaus, *The Permanence of the Temporary: Can Emergency Powers Be Normalized?*, *in* THE SECURITY OF FREEDOM: ESSAYS ON CANADA'S ANTI-TERRORISM BILL 21, 28 (Ronald J. Daniels, Patrick Macklem & Kent Roach eds., 2001).

issue of overreaction saying "[a]fter each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary."[51]

Justice Brennan's concerns about overreactions to emergency responses were seen in many countries' responses to COVID-19. For instance, Hungary and Indonesia both had responded with an overreaction. In Hungary, a law was enacted to transfer tremendous powers to the executive branch and several freedoms were thus unnecessarily restricted.[52] In Indonesia, an enacted emergency law deviated from constitutional requirements regarding the budget bills and provided immunity to government officials.[53] While much ink has been spilled over the proper reaction to emergencies, the scholarship has neglected the issue of state inaction during emergencies. The following part will discuss the case of inaction in a state of emergency.

II. EMERGENCY OMISSION AND HOW TO COMPEL ACTION

A. Inaction During Emergencies

The existing legal framework, which is meant to govern under ordinary circumstances, cannot respond to an emergency's special and exceptional circumstances. Thus, a state emergency creates a need for action, which may fall within the purview of the executive or legislative branch.[54] For instance, if there is intelligence that a terrorist attack is developing, state authorities or policymakers might activate permanent emergency protocols, such as mass surveillance, to prevent the attack, or they might enact new emergency regulations such as a stay-at-home order to mitigate its impact.

But what if the state authorities decide not to take action while an emergency is looming? This is not a novel question. Indeed, Richard A.

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51. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11, 11 (1988).

52. Gábor Halmai, Gábor Mészáros & Kim Lane Scheppele, *From Emergency to Disaster: How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law*, VERFASSUNGSBLOG (May 30, 2020), https://verfassungsblog.de/from-emergency-to-disaster/ [https://perma.cc/ZA8C-KJNC].

53. Stefanus Hendrianto, *Early Warning Signs of Abusive Constitutionalism in Indonesia: Pandemic as Pretext*, INT'L J. CONST. L. BLOG (June 20, 2020), http://www.iconnectblog.com/2020/06/early-warning-signs-of-abusive-constitutionalism-in-indonesia-pandemic-as-pretext/ [https://perma.cc/5F78-CBER].

54. For instance, the U.S. Congress has the authority to suspend the Writ of Habeas Corpus, or to "provide for calling forth Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. art. I, § 8 cl. 15. For more details see Antonios E. Kouroutakis, *Separation of Powers and the War on Terror- An Analysis of the Role of Its Institution*, 42 BRACTON L.J. 27, 31 (2010).

Posner stressed that during emergencies, the core problem is not the overreaction but the lack of action.[55] Specifically, according to Posner,

> the lesson of history is that officials habitually exaggerate dangers to the nation's security. But the lesson of history is the opposite. It is because officials have repeatedly and disastrously underestimated these dangers that our history is as violent as it is. Consider such underestimated dangers as that of secession, which led to the Civil War; of a Japanese attack on the United States, which led to the disaster at Pearl Harbor; of Soviet espionage in the 1940s, which accelerated the Soviet Union's acquisition of nuclear weapons and emboldened Stalin to encourage North Korea's invasion of South Korea; of the installation of Soviet missiles in Cuba, which precipitated the Cuban missile crisis; . . . of the Tet Offensive of 1968; of the Iranian revolution of 1979 and the subsequent taking of American diplomats as hostages. . . .[56]

Though the lack of action may occur when policymakers underestimate the magnitude of an emergency,[57] emergency inaction or omission is different. Emergency inaction occurs when the decision makers are aware of the existence of an emergency but deliberately do not deal with it. Several reasons, such as political or economic motivations, explain emergency inaction. This conscious decision to not act is nevertheless an action. For instance, in 1982, when Argentina invaded and occupied the Falkland Islands, which are British Overseas Territory in the South Atlantic, the British Prime Minister was advised not to take action to avoid a war.[58] Eventually, the British Prime Minister took diplomatic action, and a series of emergency powers were exercised in connection with the operation to recover the Falkland Islands.[59] Thus, in this example, inaction when it is an intentional decision based on facts and evidence, functions as a type of action because it mirrors policy actions' principles and conditions. The term "inaction" differs from the term "inertia" because inaction implies intention. In contrast, the latter implies the tendency to

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55. Richard A. Posner, *The Truth About Our Liberties*, *in* RIGHTS VS. PUBLIC SAFETY AFTER 9/11: AMERICA IN THE AGE OF TERRORISM 24, 26 (Amitai Etzioni & Jason H. Marsh eds., 2003).

56. *Id.*

57. *Id.*

58. For instance, Reagan pleaded with Thatcher not to take military actions for Falklands. *See Record of Telephone Conversation Between President Reagan and the Prime Minister at 1840 Hours on Thursday* (May 13, 1982), https://ee9da88eff6f462f2d6b-873dc3788ab15d5cbb1e3fe45dbec9b4.ssl.cf1.rackcdn.com/820513%20MT-RR%20telcon%20PREM19-0627%20f150.pdf [https://perma.cc/N7VY-X8RN].

59. For a detailed list of statutory powers exercised by Ministers in connection with the Falkland Islands see Falkland Islands, 25 Oct. 1982, HC Deb (1982) vol. 29 c257W(Written Answers to Commons by Prime Minister) (U.K.), https://api.parliament.uk/historic-hansard/written-answers/1982/oct/25/falkland-islands [https://perma.cc/7KER-RZXH].

perpetuate existing policy options and procedures, which is more similar to the lack of an action policy approach. Technically, emergency inaction is a form of the "business as usual" approach, but one that can be defined as competent authorities choosing inaction when a crisis is looming.

The initial responses of the U.K. and Sweden to the COVID-19 outbreak are examples of emergency inaction. In Sweden, the government did not act by imposing emergency orders like quarantine mandates or curfews to limit the spread of the disease.[60] Instead, Sweden acted through non-emergency processes, especially recommendations, to address the coronavirus emergency. First, it relied on the existing delegation of power to limit public gatherings to five hundred people, but later reduced gatherings to fifty people and ordered university and high school teaching to move online.[61] Second, it issued recommendations, rather than mandates, to the citizens "to maintain 'social distancing,' in all public places and on public transport."[62]

Similarly, the U.K. government did not respond to the COVID-19 outbreak with emergency mandates.[63] It did not introduce emergency measures of the kind adopted by many other countries, such as travel and free movement restrictions, the closure of schools and universities, and bans on large gatherings. It limited its action to a series of recommendations for topics such as social distancing and travel advice.[64]

The Swedish policy and the initial U.K. policy were informed by an assumption that herd immunity would stop the spread of the virus.[65] Herd immunity is achieved when a sufficient portion of a population develops immunity from infection, offering incidental protection to non-immune members.[66] Accordingly, the decision to not impose emergency mandates

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60. For more details about the reaction by Sweden, see Julia Dahlqvist & Jane Reichel, *Swedish Constitutional Response to the Coronavirus Crisis: The Odd One Out?*, *in* PANDEMOCRACY IN EUROPE: POWER, PARLIAMENTS AND PEOPLE IN TIMES OF COVID-19, at 135 (2021).

61. Iain Cameron & Anna Jonsson-Cornell, *Sweden and COVID 19: A Constitutional Perspective*, VERFASSUNGSBLOG (May 7, 2020), https://verfassungsblog.de/sweden-and-covid-19-a-constitutional-perspective/ [https://perma.cc/4JM9-XQUW].

62. *Id.*

63. About the detailed response in the U.K., see Robert Thomas, *Virus Governance in the United Kingdom*, in PANDEMOCRACY IN EUROPE: POWER, PARLIAMENTS AND PEOPLE IN TIMES OF COVID-19, at 71, 73 (2021).

64. *See Guidance Staying at Home and Away from Others (Social Distancing)*, GOV.UK (last visited May. 20, 2022), https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others.

65. *See* Sarah Boseley, *New Data, New Policy: Why UK's Coronavirus Strategy Changed*, GUARDIAN (Mar. 16, 2020), https://www.theguardian.com/world/2020/mar/16/new-data-new-policy-why-uks-coronavirus-strategy-has-changed [https://perma.cc/92FX-YNB9]; *see also* Nele Brusselaers, David Steadson, Kelly Bjorklund, Sofia Breland & Jens Stillhoff Sörensen, *Evaluation of Science Advice During the COVID-19 Pandemic in Sweden*, 9 HUMANS. & SOC. SCIS. COMMC'NS. 1 (2022).

66. *See* REPORT 9, *supra* note 4, at 3.

to face the pandemic was intentional inaction. The goal of inaction was to build herd immunity. Thus, the two policies are examples of emergency inaction because they were justified by principles based on public health rationales.

Another example of emergency inaction is the 2009 Greek financial crisis.[67] In 2009, the Greek government failed to adopt any measures to reduce the country's excessive primary budget deficit.[68] The government did not take any steps despite Greece's economy being under surveillance since 2005,[69] and many European countries had fallen into recession because of the 2008 global economic crisis. Instead of adopting emergency measures, the government called for snap elections just a few months before the economy's collapse.[70]

In theory, emergency inaction is a legal fiction equivalent to an omission in administrative law or a legislative omission.[71] The actor, in this case the governments, is not the source of the risk. As Honore has put it, "[o]missions are therefore those not-doings that violate norms."[72] While state authorities are liable for their actions as long as they are conducted by and made in the exercise of power, for omissions, liability exists only if state authorities are under a duty requiring them to act.

A state of emergency creates a distinct duty for the government to act.[73] First, governments have a distinct duty to act due to the nature of emergencies. If governments do not act then the burden is transferred to the individual. But, because emergencies are unusual events of such a magnitude, no private entity has the resources to face them without government support. Second, there is a contractual argument between people and the government. Constitutions embody the values of the social

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67. *See* Antonios E. Kouroutakis & Despina Glarou, *Der Ökonomische Ausnahmezustand in Griechenland. Was Ist Schief Gelaufen? (The Economic Crisis in Greece. What Went Wrong?)*, *in* AUSNAHMEZUSTAND: THEORIEGESCHICHTE – ANWENDUNGEN – PERSPEKTIVEN, 199 (Matthias Lemke ed., 2017).

68. *Id.*

69. *See* Press Release, European Comm'n, Commission Assesses Greek Stability Programme and Compliance with Excessive Deficit Recommendations (Apr. 6, 2005) (on file with European Commission).

70. *See* Antonios E. Kouroutakis & Despoina Glarou, *Der Ökonomische Ausnahmezustand in Griechenland*, *in* AUSNAHMEZUSTAND: THEORIEGESCHICHTE – ANWENDUNGEN – PERSPEKTIVEN 199, [214] (Matthias Lemke ed. 2017).

71. According to a Venice Commission Report a "[l]egislative omissions occur in every country and happen when Parliament, which had the duty to legislate, fails to ensure that the relevant and necessary acts are passed and are complete, thereby leaving a legal gap, lacunae or vacuum in the legal system." *General Report of the XIVth Congress of the Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence*, VENICE COMM'N (Dec. 2008), https://www.venice.coe.int/files/Bulletin/SpecBull-legislative-omission-e.pdf.

72. HONORÉ, *supra* note 13, at 43.

73. For the distinct duties theory see *id.* at 43–46, 54–60.

contract both between the people and between the people and their representatives. In such a contract, there is a tremendous transfer of power to the executive in times of emergencies. Such wide power necessarily implies a distinct duty.

Once we examined the concept of emergency inaction, it would be of interest to examine whether there is a remedy for such emergency inaction. Could citizens compel action via the courts? Could citizens ask the courts to recognize the unconstitutionality of the omission and ask the courts to compel action? The following part will shift its focus to how to address these issues.

B. How to Compel Action? A Review of the Legal Basis

1. Monopoly of Emergency Powers and the Exception of Multi-level Governance

In many countries, especially in unitary states, an imperfect formulation of the separation of powers doctrine underpins the development of the constitution. Unclear delegation of powers leads to adopting provisions giving the executive branch a monopoly over a state's emergency response. Governments during emergencies have discretion on how to react. In particular, they have discretion on the content, timing, and duration of regulations. Likewise, the government has the discretion to act or to stay inactive; since failing to include a constitutional mechanism compelling the executive to act during emergencies allows the executive to choose to remain inactive.

One example of the monopoly of the emergency powers exists in states with federalism. In these systems of government,[74] the duality of executive power between federal and state government allows state authorities to step in and take emergency actions in case the federal government does not, and vice versa. For instance, in Brazil the federal government insisted it would not adopt governmental policies against COVID-19, but the state and municipal authorities enacted restrictions, such as restrictions on public transport and schools.[75] The constitutionality of these measures was challenged in the courts, and the Supreme Court in

74. On federalism see generally Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999).

75. *See* Emilio Peluso Neder Meyer & Thomas Bustamante, *Authoritarianism Without Emergency Powers: Brazil Under COVID-19*, VERFASSUNGSBLOG (Apr. 8, 2020), https://verfassungsblog.de/authoritarianism-without-emergency-powers-brazil-under-covid-19/ [https://perma.cc/9DZH-6SW].

Brazil confirmed the power of state governments to implement lockdown policies.[76]

Additionally, an exception to such monopoly exists in unitary states with strong devolution.[77] These states contain multilevel structures with strong decentralized authorities.[78] Interestingly, according to Spain's organic law 3/1986 the local governments have the emergency power to implement regulations on public health.[79] During the pandemic, when the number of COVID-19 patients increased drastically, the Regional Premier did not implement stricter coronavirus regulations; instead, it stayed inactive "on the basis that they would do further harm to the economy."[80]

Against such inaction, the central government enacted restrictions—such as perimetral lockdowns and early closing times for businesses, and 10 PM curfews for commercial businesses.[81] Subsequently, the local government of Madrid filed an appeal with the national High Court (known officially as the Tribunal Superior de Justicia Sección Octava de la Sala de lo Contencioso-Administrativo) against the restrictions on the basis that the restrictions encroached on its powers.[82] The national High Court eventually struck down the restrictions.[83]

As a response, the central government of Spain used an alternative legal route to implement the emergency regulations. It activated the state of alarm provision of the Constitution[84] to re-enact the exact same

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76. Jen Kirby, *Jair Bolsonaro Undermined Brazil's Coronavirus Response. Now There's a Political Crisis*, VOX (Apr. 28, 2020), https://www.vox.com/2020/4/28/21228512/brazil-bolsonaro-coronavirus-moro [https://perma.cc/W3JY-J49Z].

77. On the devolution in Spain see Xabier Arzoz, *Extent and Limits of Devolution in Spain*, 25 EUR. PUB. L. 83, 83 (2019).

78. *Id.*

79. Artículo 3 de la Ley Orgánica 3/1986, de 14 de abril, de Medidas Especiales en Materia de Salud Pública (all translations done by the author).

80. Simon Hunter, *Madrid High Court Strikes Down Health Ministry's Coronavirus Restrictions*, EL PAÍS (Oct. 8, 2020), https://english.elpais.com/society/2020-10-08/madrid-high-court-strikes-down-health-ministrys-coronavirus-restrictions.html [https://perma.cc/MDG9-BD2K].

81. Order 1273/2020, of October 1, of the Ministry of Health (Orden 1273/2020, de 1 de octubre, de la Consejería de Sanidad).

82. High Court of Justice, Eighth Section of the Contentious-Administrative Chamber 128/2020 (Tribunal Superior de Justicia. Sección Octava de la Sala de lo Contencioso-Administrativo 128/2020; *El TSJ de Madrid Deniega la Ratificación de las 'Medidas Covid' al Afectar la Orden Comunicada del Ministro de Sanidad Derechos Fundamentales*, PODER JUDICIAL ESPANA (Oct. 8, 2020), https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-TSJ-de-Madrid-deniega-la-ratificacion-de-las—medidas-Covid—al-afectar-la-Orden-comunicada-del-ministro-de-Sanidad-derechos-fundamentales [https://perma.cc/9D59-G6W9].

83. *El TSJ de Madrid Deniega la Ratificación de las 'Medidas Covid' al Afectar la Orden Comunicada del Ministro de Sanidad Derechos Fundamentales*, PODER JUDICIAL ESPANA (Oct. 8, 2020), https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-TSJ-de-Madrid-deniega-la-ratificacion-de-las—medidas-Covid—al-afectar-la-Orden-comunicada-del-ministro-de-Sanidad-derechos-fundamentales [https://perma.cc/9D59-G6W9].

84. *See* CONSTITUCIÓN ESPAÑOLA [C.E.] [CONSTITUION] B.O.E. n.116, Dec. 27, 1978 (Spain).

measures found in the original restrictions and overcome the inaction from the local government.[85]

Therefore, what federalism and devolution teach us about times of emergency is the utility of the two-tier duopoly of the emergency powers between the central government and the decentralized authorities. Such duopoly might solve the problem of emergency omission that occurs when the executive chooses to remain inactive. If one tier of authority stays inactive, the other tier of authority can activate the emergency regime and enact emergency regulations, as was seen to be successful in Brazil and Spain.[86]

2. The Role of Judicial Review and Its Limitations

Apart from the alternative institutional response to emergency omission seen in duopoly systems, people can use judicial review to compel action. To begin, governments have discretion to how or whether to respond to an emergency.[87] Both affirmative acts and omissions are causes of action subject to judicial review.[88]

However, two issues relevant to the judicial review of emergency omission are worth touching on. First, judges tend to show deference to the government in times of emergency. Second, judges are more likely to

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85. On October 9, 2020, the Ministry of the Presidency issued a Royal Decree, which declares "the state of alarm to respond to situations of special risk due to uncontrolled transmission of infections caused by SARS-CoV-2." *See* REAL DECRETCO, B.O.E 2020, 268 (BOE-A-2020-12109) (Spain) (all translations done by the author).

86. In addition, the multilevel governance has the benefit that a dialogue is created between the central government and the decentralized authorities. Moreover, it is probable that emergency regulations enacted by different tier of government, complement each other. Finally, it is probable that emergency experiments take place as emergency regulations enacted at a local level are tested and the most efficient in the end would prevail.

87. Jocelyn Stacey, T*he Environmental Emergency and the Legality of Discretion in Environmental Law*, 52 OSGOODE HALL L.J. 985, 991 (2016).

88. In general, on the justiciable nature of discretion, Craig has accurately pointed out the position of the U.K. and U.S. Courts. In particular Craig remarked that

> [t]he mere presence of some species of discretion does not entail the conclusion that the matter is thereby non-justiciable. In the United States, it was once argued that the very existence of discretion rendered the decision immune from negligence. As one court scathingly said of such an argument, there can be discretion even in the hammering of a nail. Discretionary judgments made by public bodies, which the courts feel able to assess, should not therefore preclude the existence of negligence liability. This does not mean that the presence of such discretion will be irrelevant to the determination of liability. It will be of relevance in deciding whether there has been a breach of the duty of care. It is for this reason that the decisions in *Barrett* and *Phelps* are to be welcomed. Their Lordships recognized that justiciable discretionary choices would be taken into account in deciding whether the defendant had acted in breach of the duty of care. There may also be cases where some allegations of negligence are thought to be non-justiciable, while others may be felt suited to judicial resolution in accordance with the normal rules on breach.

PAUL CRAIG, ADMINISTRATIVE LAW 898 (4th ed., 2003).

find state authorities liable and accountable before the courts for misfeasance but not for non-feasance. The combination of these two limitations makes it less probable for citizens to compel action via the courts. The part below will analyze these two inherent limitations pertaining to the judicial review of emergency omission.

First, there is voluminous literature on the practice of deference.[89] In 2008, the Supreme Court of Canada, in the case *Dunsmuir v New Brunswick*, defined the term deference as follows:

> [B]oth an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" . . . Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.[90]

Courts show deference to the government's political branches, especially in times of crisis when the decision-making process requires expertise. For instance, in the U.S., a sound practice of deference is established during times of emergency[91] while such practice has migrated to a plethora of countries, such as Argentina,[92] Australia,[93] the Czech

89. *See generally* T.R.S. Allan, *Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review*, 60 U. TORONTO L.J. 41 (2010); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

90. Dunsmuir v. New Brunswick, [2008] S.C.R. 190, 221 (Can.) (internal citations omitted).

91. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, *Institutional Alternatives to Judicial Deference* in TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 161–81 (2007).

92. Pedro Aberastury, *Deference to the Administration in Judicial Review in Argentina*, *in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 23, 23–36 (Guobin Zhu ed., 2019).

93. Fleur Kingham, *Deference to the Administration in Judicial Review in Australia*, *in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL Review 39, 39–83 (Guobin Zhu ed., 2019).

Republic,[94] Denmark,[95] Finland,[96] and Greece.[97] In principle, emergency regulations are political actions; therefore, the judicial branch does not intervene; however, in reality, this has not and will not occur.[98]

Second, a neglected aspect of the judicial deference pertains to administrative omissions. Courts' institutional positioning in the separation of powers system often makes them reluctant to intervene in non-feasance or omission cases. From a structural perspective, the court's role in the separation of powers system is purely defensive, for instance, to block actions hindering human rights, but they lack a creative dimension such as the ability to propose solutions and a course of action. If the judiciary prescribes the course of action, such decision resembles an executive function. Therefore, courts would substitute the political branches of the government in decision making.[99]

This reluctance to encroach on the role of executive function was enshrined in the US Supreme Court Case, *Juliana v. United States*.[100] In this case the plaintiffs alleged that climate-change related injuries "caused by the federal government continuing to 'permit, authorize, and subsidize' fossil fuel . . . and sought declaratory relief and an injunction ordering the government to implement a plan to 'phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide].'"[101] The majority rejected the claim on standing grounds[102] holding in the *obiter dictum (as an incidental statement)* that the case posed a political question and that the judiciary was not equipped to provide an effective remedy.[103] It noted that:

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94. Zdenek Kühn & Josef Staša, *Deference to the Administration in Judicial Review in the Czech Republic*, *in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 133, 133–154 (Guobin Zhu ed., 2019).

95. Bent Ole Gram Mortensen & Frederik Waage, *Deference to the Administration in Judicial Review in Denmark*, *in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 157, 157–162 (Guobin Zhu ed., 2019).

96. Olli Mäenpää, *Deference to the Administration in Judicial Review in Finland*, *in* DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW 181, 181–200 (Guobin Zhu ed., 2019).

97. Antonios Kouroutakis & Despina Glarou, *Der Ökonomische Ausnahmezustand in Griechenland*, *in* AUSNAHMEZUSTAND: THEORIEGESCHICHTE–ANWENDUNGEN–PERSPEKTIVEN 199 (Matthias Lemke ed., 2017).

98. For instance about the deference shown in times of emergency by U.K. Courts, see generally John Ip, *The Supreme Court and the House of Lords in the War on Terror: Inter Arma Silent Leges?*, 19 MICH. ST. J. INT'L L. 1 (2010).

99. This argument resembles the discourse pertaining to the enforceability of social rights. For more details see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 227 (2008); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221 (2002).

100. *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

101. *Id.* at 1164.

102. *Id.* at 1174.

103. *Id.* at 1164–65, 1175.

> The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. . . . We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.[104]

The treatment of state authorities' omission is indicative of how emergency omission might be treated. In the light of the precedent from the US Supreme Court on state authorities' omission, a fortiori emergency omission is an issue that courts would likely be reluctant to dictate action to the executive. In particular, in the case *DeShaney v. Winnebago County*, which was a case about the liability of the Department of Social Services due to inaction,[105] the court acknowledged that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[106] Under this reasoning courts would likely find that they lacked jurisdiction to adjudicate whether an executive omission was improper.

Moreover, in the U.K., the judiciary has confirmed that omissions are legally different from positive acts in many cases.[107] In particular, the conduct of inaction must violate a public authority duty to act based on a statutory provision, which will substantiate the negligence.[108] The challenge is that to hold public authorities liable one must prove a nexus exists between the inaction of the public authorities and the harm caused.[109] Additionally, a key issue underlies the problem as it is up for debate whether private entities can bring a claim against the government at all.

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104. *Id.* at 1175 (internal citations omitted).
105. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 192–93 (1989).
106. *Id.* at 196.
107. Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4 [4550]
108. Stovin v. Wise [1996] AC 923 (HL) [28] (appeal taken from HM).
109. Alcock v Chief Constable of South Yorkshire [1992] 1 AC 310, 632F.

Pertaining to the duty to act, *Stovin v. Wise* is a seminal decision distinguishing between statutory power and statutory duty.[110] The Court held that the presence of a duty to care does not automatically mean there is a duty to act and thus a failure to exercise a statutory power, does not necessarily mean that there is rise for a claim for damages.[111]

Furthermore, recent case law is illustrative and instructive on whether private entities can bring a claim against the government. In the case *Gorringe v. Calderdale Metropolitan Borough Council* the claimant sought damages after a road accident. [112] The main argument was whether the highway authority was liable for its omission to mark a road with a warning about the need to slow down.[113] Lord Hofmman stated the following: "whether [the statute] was intended to give rise to a private right of action depends upon the construction of the statute."[114] And he concluded that the statute did not create a duty to act, on the other hand Lord Scott remarked that the statute "cannot possibly be construed so as to justify the conclusion that a private action in damages can be brought for breach of the statutory duty."[115]

Moreover, the *obiter dictum* comes to confirm what at the theoretical level is argued, that omissions are legally different from positive acts. In particular, Lord Steyn remarked that "the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy"[116] and Lord Scott said:

> [A]n overriding imperative is that those who drive on public highways do so in a manner and at a speed that is safe having regard to such matters as the nature of the road, the weather conditions and the traffic conditions. Drivers are first and foremost themselves responsible for their own safety.[117]

As a conclusion, according to the legal precedent in the U.K., state authorities are probably more liable and accountable before the courts for misfeasance but not for non-feasance.

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110. Stovin v. Wise [1996] AC 923 (HL) [4] (appeal taken from HM).

111. In particular, Lord Hoffmann observed that "I think that the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised." *Id.* at [28].

112. Gorringe v Calderdale Metropolitan Borough Council [2004] UKHL 15 (HL) [7].

113. *Id.* at 8.

114. *Id.* at 23.

115. *Id.* at 54.

116. *Id.* at 2.

117. *Id.* at 76.

That said, the previous two parts show that the features of judicial review in relation to emergency omission make judicial review less effective. The first is the well-established and widespread practice of deference in times of emergency, and the second is omission as an aspect of regulation is subject to a distinct approach from the courts. To offer an effective mechanism to compel action, judicial review should show more activism and treat both acts and omissions in like manner.

The recent decision of Brazil's Supreme Court (known officially as Supremo Tribunal Federal) contains several interesting *obiter dicta* about the emergency omission[118]. The case was about the constitutionality of a provisional law signed by President Bolsonaro, which exempted public agents from punishment for mistakes or omission made in combatting the COVID-19 virus.[119] The law required a gross error or manifest error to occur in the causal link between a public agent's conduct and the harmful result of that conduct.[120] The legal effect of this law was to restrict or take away the possibility of responsibility and liability of public agents during the pandemic, in reality legalizing emergency omission.

A legal challenge was brought before the Supreme Court arguing that such a law violates the Constitution because it contradicts the State's objective civil liability provision—that is, the public authority is liable for actions and omissions.[121] The Court delivered its judgment and decided to limit the scope of the provisional law.[122] Hence the Court limited the "provisional measure that frees public agent from punishment during [the] pandemic."[123]

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118. Provisional Measure 966/2020 (Medida Provisória nº 966, de 13/05/2020), https://legislacao.presidencia.gov.br/atos/?tipo=MPV&numero=966&ano=2020&ato=c4coXU65EMZpWT91f [https://perma.cc/66PN-GN5N].

119. *Id.*

120. *Id.* Article 2 reads as follows:

> For the purposes of the provisions of this Provisional Measure, a gross error is a manifest, evident and inexcusable error practiced with serious fault, characterized by an act or omission with a high degree of negligence, imprudence or malpractice." Article 3 reads as follows: "In assessing the occurrence of gross error, the following will be considered: I - the real obstacles and difficulties of the public agent; II - the complexity of the matter and the powers exercised by the public agent; III - the circumstance of incomplete information in urgent or emergency situations; IV - the practical circumstances that have imposed, limited or conditioned the action or inaction of the public agent; and V - the context of uncertainty about the most appropriate measures to face the Covid-19 pandemic and its consequences, including economic ones.

121. See in particular CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37.6 (Braz.) l.

122. *See* ADI 6.421 MC - Supremo Tribunal Federal.

123. Fernanda Vivas & Márcio Falcão, *Supremo Limita Medida Provisória que Livra Agente Público de Punição Durante Pandemia* (May 21, 2020), https://g1.globo.com/politica/noticia/2020/05/21/maioria-do-stf-vota-por-limitar-mp-que-livra-agente-publico-de-punicao-durante-pandemia.ghtml [https://perma.cc/7WD3-8R8P].

3. Emergency Omission and the Role of Politics

While there are legal mechanisms to compel executive action during emergencies, political tools are proven to be more efficient.[124] To begin with, in the sphere of politics, emergency inaction is a public policy choice. It is a political decision to the extent that it is based on expertise and calculations. Every public policy has effects, which will be assessed by people and eventually the voters evaluate every public policy during elections. Accordingly, if people are not satisfied with the emergency omission, they will oust their representative from office. This is the so-called self-correctness promise of politics.[125]

However, the weak side in relation to the political mechanism to compel action is that the people's voice is heard once elections take place. This implies that the political remedy might be subject to the constrain of time and substantially delayed.

In principle, the accountability mechanism in democracies might work as the more reliable tool to spur action during emergencies and prevent emergency omission. If governments do not take any emergency measures during a terrorist attack, civilian casualties will substantially increase, and if governments do not enact any emergency regulations during a pandemic, the number of infections in the society by the virus will be vast. The risk from the emergency omission is so high, and the possibility of a disaster works as an incentive for action from the different branches of the government, which are accountable to the people.

All in all, the choice of inaction during an emergency cannot be disentangled from the broader political questions during elections. And for the political actors and policymakers, there is no greater punishment for their policies than political defeat in elections.

CONCLUSION

Because of COVID-19, one country after another enacted emergency regulations. They had to shut down and restrict cross-border travel, impose sweeping restrictions on everyday life, and ban public gatherings, religious ceremonies, and free movement. The pandemic made an ideal environment for lawyers to compare and contrast the emergency responses under the same conditions, in particular the same virus with the same

124. For more details in the use of ordinary politics to resolve legal problems and disputes, see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).

125. Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* Democracy and Difference: Contesting the Boundaries of the Political 23 (Selya Benhabib ed., 1996).

characteristics.[126] However, some countries, especially during the first wave of the pandemic, decided not to enact emergency measures to curb the spread of the virus. This inaction revealed the issue of emergency omission.[127]

Political theory has traditionally assumed that the executive branch of a state will take action in emergencies. Therefore, the focus of scholarship has been on preventing executive overreaction and the resultant disproportionate burdening of fundamental rights and freedoms.

Emergency omission is caused due to the concentration of emergency powers to the executive in unitary countries. However, such deadlock may be avoided if drafters of the constitution draw inspiration from designing the emergency provisions allocating power to both the central and decentralized authorities. Such constitutional configuration would make inaction less probable.

What is novel with the idea of emergency inaction is the possibility of unconstitutionality by omission, which is linked to whether infringement on individuals' rights is possible via state inaction. The possibility of infringement of rights due to state *in*action adds an extra dimension to the discussion of the infringement of rights via state or private action.[128]

However, the courts' tendency to show deference in times of emergency,[129] together with the fact that government is less likely to be found liable for non-feasance compared to misfeasance, shows the inherent limitations of judicial review of emergency omissions.

Emergency omission is a new phenomenon, and it may be approached with legal and political tools. While the legal tools are subject to some limitations—for instance, the courts are reluctant to dictate action to the executive based on separation of powers concerns—the political tools via the ordinary political process might be more appropriate to spur action.

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126. The core difference, however, existed between countries in the Northern Hemisphere and countries in the Southern Hemisphere, as the warmer seasons had an impact on the intensity of the pandemic wave.

127. *See supra* text accompanying note 60.

128. For instance, in the U.S. the Supreme Court has developed the state action doctrine and its exceptions, which is about the violation of human rights from state activities vis-à-vis private actors. Regarding the U.S. see Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 412 (2003); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 522 (1985).

129. *See supra* text accompanying note 90.