Keele Law Review, Volume 3 (2021), 65-89
ISSN 2732-5679

Judging Under Extreme Conditions: A Court's Role During a National Crisis

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Abstract

Debating the role of a court during a national crisis is not a novel scholarly exercise. Several before having done so – and several others will follow. Despite the multitude of opinions on the topic, we are still not one step closer to resolving this issue as we were when these discussions first took place decades ago. The COVID-19 pandemic has given us another occasion to revisit the question. However, unlike the last time when this topic was the focus of discussion in the wake of the attacks of 9/11, the pandemic has taken place in the backdrop of a global decline in the quality of democracy and in an era in which courts have begun assuming a more active role in democratic societies. This allows us an opportunity to rethink some pre-existing notions. To add to it, legal academia has witnessed both a comparative and an interdisciplinary turn which helps reconsider this fundamental question using new insights and reference frames. This article is another addition to the long line of opinions on a court's role during a national crisis. Nonetheless, in contrast to its predecessors, this article addresses this quandary from bottoms-up and aims to construct a template for a court to operate in a national crisis that aspires to be applicable across different legal systems and social-political-economic environments.

I. Introduction

The COVID-19 pandemic and the uncertainty surrounding it have brought into the limelight several issues of law and politics. One such is the role of a court during a national crisis. Scholars, activists, and the populace had turned to courts to assist with countless problems during the pandemic ranging from threats to democracy and human rights to people's own livelihood and survival. Nevertheless, there was serious ambiguity over what a court should and should not be doing.[1] The question of 'what is the role of a court during

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* Fellow, University of Pennsylvania Law School. The author would like to thank Sophia Lee, Mitchell Berman, Kermit Roosevelt, and Riddhima Kedia for their comments, as well as discussions on various ideas presented in this paper. The author would also like to thank Karthik Rai, Aditya Phalnikar, and Anchal Bhatheja for their research assistance.

[1] For some of the recent discussion on the role of a court during the COVID-19 pandemic, see Vicente F. Benítez R., 'Hercules Leaves (But Does Not Abandon) the Forum of Principle: Courts, Judicial Review, and COVID-19' (Int'l J. Const. L. Blog, 8th May 2020) <http://www.iconnectblog.com/hercules-leaves-but-does-not-abandon-the-forum-of-principle-courts-judicial-review-and-covid-19/> accessed 1st January 2021; 'Jorge Roa-Roa, Column on Judicial Review of COVID-19 Measures' (Ámbito Jurídico, 30th April 2020); Andrés Cervantes, 'The Role of Constitutional Justice in Times of Crisis: The Case of Ecuador' (Int'l J. Const. L. Blog, 22nd April 2020) <http://www.iconnectblog.com/2020/04/the-role-of-constitutional-justice-in-times-of-crisis-the-case-of-ecuador/> accessed 1st January 2021; Gautam Bhatia, 'An Executive

a national crisis' is not a new one. In the wake of the 9/11 attacks, this question was in vogue and saw numerous high-quality academic works on the topic.[2] Even before 9/11, this question was taken up extensively in the context of wars and other emergencies that took place in the second half of the twentieth century.[3] To supplement these works, the general body of work on a court's role also illuminates the question of a court's role during a national crisis.[4] In fact, arguably, the question of a court's role in a society might just be the most debated issue in constitutional law and theory. However, despite the plethora of scholarship, there is very little clarity on 'what is the role of a court during a national crisis.'

While this is partly due to this question's complex nature, scholars' own approaches to tackling this issue have not helped. Several scholars have addressed this question from a top-down manner which could be inadequate in many situations. Some scholars have used very specific and narrow frame of references to theorise for a larger context. This could be both regarding the events under question that they consider a national crisis or the examples/principles that form their theories' building blocks.[5] Other scholars have deliberately focused on micro components of this larger question which, although an important academic exercise, does not help portray an entire picture.[6] There are also scholars who have failed to recognise that a court is not an actor insulated from politics. In its decision-making, a court must pay attention to several factors that might impact its legitimacy, credibility, and independence (and which it does).[7] The handful of scholars who recognise these concerns often make the mistake of assuming that these

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Emergency: India's Response to Covid-19', VerfBlog (13th April 2020) <https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/> accessed 1st January 2020; Lindsay F. Wiley and Steve Vladeck, 'COVID-19 Reinforces the Argument for "Regular" Judicial Review—Not Suspension of Civil Liberties—In Times of Crisis' (Harvard L. Rev. Blog, 9th April 2020) <https://blog.harvardlawreview.org/covid-19-reinforces-the-argument-for-regular-judicial-review-not-suspension-of-civil-liberties-in-times-of-crisis/> accessed 1st January 2021.

[2] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional' (2003) 112 Yale L. J. 1011, 1019; Mark Tushnet, 'Defending Korematsu?: Reflections on Civil Liberties in Wartime' (2003) Wis. L. Rev. 273, 306; David Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Mich. L. Rev. 2565; Federico Fabbrini, 'The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice' (2010) 28 Yearbook Eur. L. 664; Yigal Mersel, 'Judicial Review Of Counter-Terrorism Measures: The Israeli Model For The Role Of The Judiciary During The Terror Era' (2006) 38 Int'l L. Pol. 672; Samuel Issacharoff and Richard H. Pildes, 'Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime' (2004) 5 Theoretical Inquiries L. 1; Stephan J. Schulhofer, 'Checks and Balances in Wartime: American, British and Israeli Experiences' (2004) 102 Mich. L. Rev. 1906; Mary Arden, 'Human Rights in the Age of Terrorism' (2005) 121 L. Q. Rev. 604; Dorit Beinisch, 'The Role of the Supreme Court in the Fight Against Terrorism' (2004) 37 Isr. L. Rev. 281.

[3] Daniel C. Kramer, 'The Courts as Guardians of Fundamental Freedoms in Times of Crisis' (1980) 2(4) Universal Human Rights 1; Clinton Rossiter and Richard Longaker, The Supreme Court And The Commander-In-Chief (Cornell University Press, 1976); Learned Hand, The Spirit Of Liberty: Papers And Addresses Of Learned Hand (Knopf, 1960); Arthur J. Sabin, In Calmer Times: The Supreme Court And Red Monday (University of Pennsylvania Press, 1999).

[4] n 24, n 30, n 32, n 35, n 41, n 46, n 55.

[5] For e.g., a lot of recent discussion on the role of court during a national crisis has focussed heavily on terrorism as the example of national crisis (n 2).

[6] An example of this could be just focusing on courts role in financial crisis (n 51).

[7] See text body accompanying notes 66-100.

considerations affect decision-making only for the case at hand rather than over protracted periods.[8] Then there is also the issue of the impossible 'one size fits all' role for the comparative context. As this article itself will later argue, it is improbable that a singular theory would ever be able to account for the different legal systems and social-political-economic conditions in which different courts operate. Another problem with works that could be classified as 'comparative' is their choice of case studies (if that is the approach utilised in their works) used to construct theories regarding the role of a court during a national crisis. The choice of case studies often follows no methodological reasoning and some of these works compare cases that cannot be compared or studied together. Lastly, and perhaps the most significant issue with many works is that they are dated. The way a court is thought of in society has changed considerably over the past few decades.[9] Additionally, with the comparative and interdisciplinary turn in legal scholarship, many new insights are available that can make scholars severely rethink their earlier notions.

In turn, mindful of these limitations (as well as the advances in the field), this article hopes to take another shot at figuring out the answer to the question 'what is the role of a court during a national crisis.' In undertaking this exercise, there are a few clarifications and qualifications. This article does not aim to provide a descriptive account of this question but rather a normative one. Additionally, this article will aim to offer a generalised answer to this question using a bottoms-up approach. Furthermore, this article will limit its analysis to a court's role in constitutional decision-making – even though a court's role during a national crisis might implicate several questions that might be important civil or criminal issues - this is a shortcoming of this article's analysis. This article will use the term 'court' as an umbrella term for both decentralised supreme courts and centralised constitutional courts.[10] Lastly, this article will use the term 'national crisis' in an extremely broad and literal sense to mean any situation where the nation and its people face intense difficulty, uncertainty, danger, or threat and which often requires an immediate response on the part of public officials. This is done to account for as large a range of scenarios as possible and not only those where a state of emergency is formally declared.[11]

Laying all the cards on the table upfront, this article will not devise a unified theory for a court's role during a national crisis but would instead propose a generalised

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[8] Šimon Drugda, 'Who will Help Judges Save the Redheads?' (2021) Wm. & Mary Bill Rts. J. Online < http://wm.billofrightsjournal.org/wp-content/uploads/2021/01/Drugda.pdf> accessed 1st May 2021. (See also text body accompanying n 160).

[9] See text body accompanying (n 22 and n 140-144).

[10] Constitutional review is carried out by both specialized designated bodies called constitutional courts as well as ordinary supreme courts. However, as stated above, in my article, I refer to both these types of courts as 'courts'. I do acknowledge that there are differences between these two courts which can impact their decision making and operation. E.g., Lech Garlicki, 'Constitutional Courts Versus Supreme Courts' (2007) 5 Int'l J. Const. L 44. Nonetheless, those differences would not have an impact of this article's analysis or arguments.

[11] For e.g., as the COVID-19 pandemic shows, most countries did not even declare a state of emergency and used ordinary legislation to take actions. Yet the pandemic was clearly a national crisis. Thus, considering situations where an official emergency is declared would be too narrow. E.g., Tom Ginsburg and Mila Versteeg, 'States of Emergencies: Part I', Harvard L. Rev. Blog, 17th April 2020 <https://blog.harvardlawreview.org/states-of-emergencies-part-i/> accessed 1st January 2021.

template/approach that can be used to tackle the question in the broader comparative context. This article will argue that thinking about the normative role of a court during a national crisis would first require answering the question 'what can a court realistically do in a given time and space without negative consequences.' The answer to this question would then guide a court's operation. Such an approach will be able to account for a range of scenarios and can steer a court's operation across distinct contexts and legal systems. As this article will argue in detail later, this is the only realistic way to address 'what is the role of a court during a national crisis' without making the same old mistakes. Any other approach to dealing with the question would not make significant headway and will encounter roadblocks at one point or the other that would render it an unworkable approach beyond a point.

The rest of this article proceeds as follows. Part II will provide a brief overview of the different range of actions that a court could undertake during a national crisis. This is to guide discussions in the later parts of the article. Part III will address some practical considerations and challenges that a court might potentially encounter in its decision making during a national crisis and which are essential to keep in mind in answering 'what is the role of a court during a national crisis' in a realistic manner. Part IV will finally describe this article's approach to dealing with the question of 'what is the role of a court during a national crisis?' and will also address some ancillary questions/criticisms that might come along the way. Lastly, Part V will provide the concluding remarks, including how the approach suggested by this article could be developed into more detailed and specific approaches.

II. THE ROLE OF A COURT DURING A NATIONAL CRISIS: THE DIFFERENT POSSIBILITIES

As mentioned in the introduction, a court's role in society has been one of the most debated constitutional law and theory topics. Whereas most of these debates have ensued at a generic level, several scholars have extended them to the context of a national crisis/emergency.[12] Taken together, the debates on judicial role (whether generic or in the context of a national crisis/emergency) provide endless prospects concerning the role a court can perform during a national crisis. Though there are too many diverse and nuanced views to do justice to the entire breadth of scholarship on the topic, this section hopes to paint broad strokes regarding how some of the varied purported roles of a court might play out in the context of a national crisis to guide discussions in the remainder of this article.[13] Consequently, this section will elucidate five different roles a court could potentially perform during a national crisis. These are (a) ensuring constitutional compliance, (b) protecting human rights, (c) safeguarding democracy, (d) acting as a

[12] n 1-3.

[13] Scholars such as Tushnet (n 2) and Gross (n 2) argue that emergencies/national crises are extraconstitutional moments where a court should not involve itself and instead should leave questions to the political branches. While technically, this is an opinion on a court's role during a national crisis, however for the sake of clarity, this section will not delve into this issue. Instead, it will take this debate up in section IV, after discussing in Section III some practical challenges and considerations that could impede a court's decision-making during a national crisis.

check against short-term and unwise responses to panics and popular pressures, and (e) filling in for inactive or dysfunctional elected branches.[14]

To start with, in line with the most straightforward conception of a court's role, it could be argued that the role of a court during a national crisis is to ensure constitutional compliance.[15] A court could check the elected branches from exceeding their constitutionally prescribed mandates by holding laws, decrees, and amendments that run counter to the constitution as invalid. This role emerges from the Kelsenian view of courts as the 'guardians of the constitution.'[16] A prominent application of such a conception of a court's role during a national crisis would be to referee whether the elected branches have declared an unconstitutional emergency or have exceeded the emergency powers accorded to it by the constitution.[17] As far as such a conception of a court's role is concerned, scholars' primary disagreement has been regarding the standard of review that a court should apply. In his seminal article, 'Origin and Scope of the American Doctrine of Constitutional Law,' James Bradly Thayer insisted that a court should only hold governmental actions unconstitutional when the elected branches have made an obvious error.[18] This was the predominant view in the Anglo-American legal academy for

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[14] Several scholars have approached the question of judicial role from extremely creative angles. For example, Federico Fabbrini (n 2) 697 states that a court's role during a national crisis is dynamic. As he mentions, "courts move from an initial phase of judicial self-restraint and limited review, via an intermediate phase of judicial pragmatism and manifest error review, to a conclusive phase of judicial self-confidence and full fundamental rights review." This role is somewhat similar to the approach advocated by Martin Shapiro who argues that judicial processes in any circumstance is likely to be incremental in nature – Martin Shapiro, 'The Supreme Court and Administrative Agencies' (Free Press, 1968) 44, 74. Yet, Fabbrini discusses such an approach to judicial review with respect to a courts' role in protecting the constitution and fundamental rights.

On the other hand, at a generic level, Sandra Fredman, *Comparative Human Rights* (OUP, 2018) 79-114, in discussing a court's role in protecting human rights, argues that the court's role is to help create a dialogue with the elected branches and seek reasons from them. Similarly, Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory Of Legal Interpretation* (HUP, 2006) 223–24, asserts that scholars often discuss questions regarding judicial role in wrong ways and questions regarding judicial role rests on institutional and empirical premises about the capacities of judges and the systemic effects of their rulings. Nonetheless, all of such creative ways of looking at questions of a court's role still see a court ending up performing an act that could be classified in one of the roles for a court discussed in this section. That being said, I acknowledge that there is still the possibility that an act of a court (or a particular type of role) during a national crisis is not covered by one of these five roles, but those would most likely be major exceptions rather than norms.

[15] Dante Gatmaytan, 'Judicial Review and Emergencies in Post-Marcos Philippines' in Richard Albert and Yaniv Roznai, *Constitutionalism Under Extreme Conditions: Law, Emergency, Exception* (Springer, 2020) 43-62.

[16] This conception of a court's role has generally been associated with Hans Kelsen who argued for the said role in his debate with Carl Schmitt who believed that the president is the authority to guard the constitution. See Hans Kelsen, *Wer Soll Der Hüter Der Verfassung Sein?* (Mohr Siebrek, 1931); Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 J. Pol. 183, 188.

[17] Several constitutions explicitly give their courts the power to do so like Article 16 of the 1958 Constitution of France, Article 48(3) of the 2011 Constitution of Hungary, Article 20(5) of the 1962 Constitution of Jamaica, Article 80 of the 2014 Constitution of Tunisia 2014, etc.

[18] James Bradley Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 Harv. L. Rev. 129, 144.

the bulk of the 20th century and continues to guide modern-era legal debates.[19] Scholars in the comparative context have also endorsed similar views as Thayer.[20] Even in cases of a national crisis, scholars agree that the situation might warrant extraordinary actions and value judgments, and hence a court should accord elected branches with significant leeway.[21] Nevertheless, with the recent emergence of the global trend of the 'judicialisation of mega politics', judicial restraint has slowly gone out of sale in the comparative context.[22] Consequently, scholars have claimed that a court could be assertive rather than exercise restraint in a national crisis.[23]

Ever since the global renaissance of human rights, perhaps the most commonly discussed role for a court is protecting human rights.[24] This role for a court becomes particularly relevant as a national crisis is seen as a situation where human rights are under stress.[25] Bruce Ackerman has cautioned us in the case of a national crisis dealing with terrorism that "no serious politician will hesitate before sacrificing rights to the war against terrorism."[26] Akin to the case with the aforesaid discussed role of ensuring constitutional compliance, even a role that envisions a court protecting human rights has various dimensions. Some scholars, like Aileen Kavanagh, have contended that this role has to be performed with restraint.[27] By contrast, scholars like Ronald Dworkin have rejected judicial restraint and claimed that even in challenging cases where there are no clear laws, a court should safeguard individuals' rights.[28] Moreover, for Dworkin, human rights included a broad range of personal freedoms such as privacy, free movement, decisional autonomy, non-discrimination, and freedom from cruel, inhuman, and degrading treatment.[29] On the other hand, scholars have gone a step ahead and asserted that a court's role includes ensuring the protection of social and economic rights.[30] In a national crisis, protecting social and economic rights does come in the limelight, considering several parts of the populace's socio-economic strains.[31] In those instances, when scholars

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[19] Richard A. Posner, 'The Rise and Fall of Judicial Self-Restraint,' (2012) 100 Cal. L. Rev 519; Pamela Karlan, 'The Transformation of Judicial Self-Restraint' (2012) 100 Cal. L. Rev 607; Larry Kramer, 'Judicial Supremacy and the End of Judicial Restraint' (2012) 100 Cal. L. Rev 621; Steven Calabresi, 'Originalism and Judicial Restraint' (2019) 113 N.W. L. Rev 1419.
[20] Petra Butler, 'Margin of Appreciation: A Note Towards a Solution for the Pacific', (2008) 39 Victoria U. Wellington L. Rev. 687; Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 (1) Univ of Toronto L. J 23.
[21] Aharon Barak, 'The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism' (2003) 58 Univ. Miami L. Rev. 125, 136-140.
[22] Ran Hirschl, 'Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend' (2002) 15 Can. J.L. &. Juris. 191, 191.
[23] Monica Castillejos-Aragón, 'Judicial Assertiveness in Times of Crisis: The Case of El Salvador' (16th November 2020, IACL Blog) <https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-3dhf6> accessed 1st January 2021.
[24] For example, see John Bell & Marie-Luce Paris (eds), Rights-Based Constitutional Review - Constitutional Courts in A Changing Landscape (Edward Elgar, 2016); Martin Scheinin et. al (eds), Judges as Guardians of Constitutionalism and Human Rights (Edward Elgar, 2016).
[25] Gross (n 2) 1019.
[26] Bruce Ackerman, 'Don't Panic' (2002) 24(3) London Rev. Books 15, 16.
[27] Kavanaugh (n 20).
[28] Ronald Dworkin, *Taking Rights Seriously* (HUP, 1977) 137.
[29] George Letsas, 'Dworkin on Human Rights' (2015) 6(2) Jurisprudence 327, 327-340.
[30] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties (*OUP, 2008).
[31] For example, see Safeguarding Human Rights in Times of Economic Crisis (Council of Europe 2013); Protecting Economic and Social Rights During and Post-Covid-19 (HRW, 29th June 2020)

do not advocate for a court to play an extremely prominent role in protecting human rights, they nonetheless see a court as a vital actor who could counter the risk majoritarian democratic processes possess to harm the rights of minorities.[32] Such a role saw renewed prominence during the war against terror, where Muslim communities worldwide were disproportionality targeted.[33] In the most minimalist version of a court's role in protecting human rights, it could perhaps be argued that a court could ensure that elected branches do not arbitrarily attempt to curtail the most core fundamental rights or their enforcement during a national crisis.[34]

Another crucial role that could be envisioned for a court during a national crisis is to protect democracy.[35] Recent years have witnessed increased advocacy of courts as actors who can protect democracy.[36] This is mainly due to the global backsliding of democracy in the last decade and how it has occurred.[37] Democracy in the modern era has not been subverted via military coups accompanied by an instant democratic breakdown but rather incrementally through legal means using the veneer of law and legitimacy.[38] While democracy itself is a severely contested notion,[39] there are certain core elements that all democracies have at a bare minimum, and that separates them from non-democracies.[40] These are (1) free and fair elections, (2) separation of powers, and (3) fundamental political rights. Therefore, a court's role in protecting democracy from eroding, would at the bare minimum, also entail them donning different hats.[41] This would include: first, ensuring that the channels of political participation are kept open, and that electoral markets are free, fair, and competitive. Second, in policing the boundaries of separation

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<https://www.hrw.org/news/2020/06/29/protecting-economic-and-social-rights-during-and-post-covid-19> accessed 1st Jan 2021.

[32] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP, 1980) 181-182; Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22(2) O.J.L.S. 275; Minh Tuan Dang, 'Constitutional Protection of Fundamental Rights: Comparative Analysis of the American and European Model of Constitutional Review', in Martin Belov (ed), The Role of Courts in Contemporary Legal Orders (Eleven 2019) 189.

[33] For example, see Neal Katyal, 'Equality in the War on Terror' (2007) 59 (5) Stanford L. Rev. 1365, 1356-1394.

[34] This could be in line with the Indian view of human rights in times of emergency according to which fundamental rights or their enforcement cannot be suspended during an emergency. Mofidul Islam, 'Position of Fundamental Rights During Emergency in India' (2020) 11(9) Int'l J. Mgmt. 729, 731-733.

[35] Aharon Barak, 'The Supreme Court 2001 Term Foreword: A Judge On Judging: The Role Of A Supreme Court In A Democracy' (200) 116 Harv. L. Rev. 19; Samuel Issacharoff, 'Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World' (2019) 98 N.C. L. Rev. 1.

[36] Samuel Issacharoff, *Fragile Democracies: Contested Power in The Era of Constitutional Courts* (CUP 2015); David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest L. Rev. 859; Sujit Choudhry, 'He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 Const. Ct. Rev. 1.

[37] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) J. Dem. 5.

[38] See generally Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 U. Chi L. Rev. 545.

[39] Charles Tilly, *Democracy* (CUP, 2007), 1-25 (describing the various connotations of the term democracy).

[40] Steven Levitsky & Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (CUP, 2010), 5-6 (describing how scholars that have converged around such definitions).

[41] John Hart Ely, 'Toward a Representation - Reinforcing Mode of Judicial Review' (1977) 37 Mad. L. Rev. 637; Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 Geo. L.J. 961; Amal Sethi, 'Towards a Pluralistic Conception of Judicial Review' (2021 Forthcoming) 91 UKMC L. Rev. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545792> accessed 1st January 2021; Yaniv Roznai, 'Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2021) 29 Wm. & Mary Bill Rts. J. 327; Barak (n 21).

of powers and ensuring that one branch does not encroach upon the functions of other branches or centralises power in its hand, and third, and in perhaps overlap with the aforesaid mentioned role of protecting human rights – protecting rights necessary for political participation such as the right to vote, the right to assembly, free speech etc. Just like the case with human rights, a national crisis is a period when democracy is under excessive strain. Richard Albert and Yaniv Roznai state that there is perhaps, no question more foundational than what may a democracy do to defend itself when confronted with an emergency or a crisis that can potentially undermine the democratic order itself?[42] The COVID-19 pandemic was the first large scale crises that coincided with the global decline of democracy, and during the pandemic, democracy faced heightened threats and saw further backsliding.[43] World over would-be-autocrats used this period to centralise power, silence their critics, and weaken important accountability institutions.[44] However, it is worth noting that the debate regarding exercising restraint versus assertiveness does not escape a court even in performing a democracy protection role.[45]

Beyond these somewhat traditional conceptions of a court's role during a national crisis, it could also be claimed that a court can act as a check against panics and popular pressures.[46] During a national crisis, people panic, and to pacify them, elected leaders make short-term and unwise decisions. They only look ahead to the next election and not to the future.[47] Indeed, democratic stability requires short-term fixes to immediate political problems, but they also require long-term thinking about overall welfare and future generations.[48] Such panics have been common during national crises all throughout history. During the second world war, President Roosevelt ordered the internment of American Japanese in the wake of the attack on Pearl Harbour by Japan.[49] Post the 9/11 attacks on the twin towers, several governments world over passed retroactive laws, engaged in mass surveillance, and undertook actions without following the due process of law. This is a place Kim Lane Scheppele argues that a court could step in and ensure that elected leaders do not give in to short term panics.[50] Another instance

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[42]Roznai and Albert (n 15) 4.

[43] Democracy Under Lockdown: The Impact of COVID-19 on the Global Struggle for Freedom (Freedom House, 2020).

[44] Ibid 1.

[45] Roznai (n 41), 358-364 (Discussing the three different approaches (and summarising scholarship on the same) court can adopt in dealing with such issues i.e., assertiveness or confronting the elected branches, restraint or going down the bunker, and carrying on business as usual. Roznai sides on the option of carrying out business as usual).

[46] Kim Lane Scheppele, 'Parliamentary Supplements or Why Democracies Need More than Parliaments' (2009) 89 B.U. L. Rev. 795, 811.

[47] Ibid.

[48] Ibid.

[49] The Unites States Government, Executive Order 9066 (1942).

[50] Scheppele (n 46), 812-818. To illustrate the role a court can play in such times Scheppele cites examples from the Federal Constitutional Court of Germany, among others. Two relevant examples are (1) Bundesverfassungsgerichts [2005] 58 Entscheidungen des Bundesverfassungsgerichts 2289, striking down as unconstitutional the adoption of the European Arrest Warrant on the grounds that the law had not considered adequately the constitutional requirement that German citizens cannot be extradited to stand trial where they would not have German constitutional protections; and (2) Bundesverfassungsgerichts [2006] 59 Entscheidungen des Bundesverfassungsgerichts 1939, striking down as unconstitutional a datamining laws that insufficiently protected the privacy of those whose files were reviewed.

of panics where a court could be said to be relevant is during a financial crisis.[51] For example, controlling inflation almost always weakens the economy and produces unemployment.[52] As a result, elected branches are tempted to inflate their way toward robust economic performance, at least in the short term.[53] To balance the population's future welfare against panics' immediacy, a court could force the elected branches to think beyond immediate electoral pressures. Court's interventions in financial crises are also an area of juridical action that has seen growth in the years following the Eurozone crisis.[54]

Perhaps a somewhat innovative role that a court could be expected to play during a national crisis is to fix the shortcomings of the political process or fill in for dysfunctional or inactive elected branches.[55] Much of the comparative context lacks the constitutional culture seen in developed democracies.[56] These environments witness the elected branches not working in their intended way and not taking their job or constitutionally mandated procedures seriously.[57] In such scenarios, it has been asserted by scholars such as David Landau that a court could work to fix governmental institutions performance and ensure that they operate in their intended manner.[58] Such a role for a court is backed by significant practice in the comparative context, particularly the global south.[59] A textbook example of this is the Colombian Constitutional Court attempting to improve the legislature's institutional performance in the 2003 case C-816/04. In this case, the Colombian Constitutional Court struck down a national security law on procedural grounds in which the legislature had not debated significant issues at all stages of debate and added a provision very late in the legislative process.[60]

Likewise, scholars have stated that a court could also be asked to fill in for dysfunctional legislatures in cases where the dysfunction sees them not working sufficiently to ensure the general populace's welfare.[61] In fact, judges in the global south have invoked the pretext of dysfunctional elected branches to legitimise their activist law-making decisions.[62] This conception of a court's role also gains importance during a national crisis. Though elected branches overstepping their mandates during a national crisis is a

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[51] Alicia Hinarejos, 'The Role of Courts in the Wake of the Eurozone Crisis', Mark Dawson et. al (eds), *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* (OUP, 2015), 112-134; Antonia Baraggia, 'Judging in Times of Economic Crisis: The Case Law on Austerity Measures in Comparative Perspective' in Roznai and Albert (n 15), 175-196.
[52]Scheppele (n 46) 819.
[53] Ibid.
[54] n 51
[55] David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 B.C.L Rev. 1500; Kim Lane Scheppele, 'Democracy by Judiciary: Or Why Courts Can be More Democratic than Parliaments' in Adam Czarnota et al. (eds) in Rethinking The Rule Of Law After Communism (CEU Press, 2005) 45-52.
[56] Landau (n 55) 1502.
[57] Ibid 1508-1512.
[58] Ibid 1520-1526.
[59] See generally Daniel Bonilla Maldonado (ed), *Constitutionalism of The Global South: The Activist Tribunals of India, South Africa, And Colombia* (OUP, 2013).
[60] Landau (n 55) 1522-23.
[61] Ibid.
[62] Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 Wash. U. Global Stud. L. Rev. 1, 8–17 ("describing how the then Chief Justice of India stated that in light of the constant failures of governance taking place at the hands of the other organs of State....it is the function of the Court to check, balance and correct any failure arising out of any other State organ").

standard occurrence, so are elected branches underacting.[63] In several countries such as Brazil and the United States, presidents severely under-acted during the COVID pandemic leading to both human and economic loss.[64] In such situations, it could be argued that a court could step up and fill in for the elected branches in cases where they underact.[65]

III. Some Practical Considerations And Challenges

The preceding section examined the possible macro contenders regarding the role of a court during a national crisis. However, answering the question of 'what is the role of a court during a national crisis' also requires considering certain challenges and considerations that impact judicial decision-making. The first is that there is a probability that a court decides not to rule against elected branches in times of a national crisis even when its role (or the law in a polity) requires it to do so. The second being, in cases of many of the aforesaid mentioned variants of roles, even if a court is ready to rule against the elected branches, it is not necessary that judicial intervention is a prudent option for the overall welfare of the society. Consequently, this section will provide a tour d'horizon of these challenges and considerations to shed light on how any normative conception of a court's role during a national crisis might be impacted and what needs to be kept in mind in formulating the same. As a caveat, this section, in no way, aims to make a 'one size fits all claim' regarding the considerations and challenges that impact a court's decision-making during a national crisis. Rather this section hopes to highlight what possible considerations and challenges might arise (if at all) during a court's decision-making process in a national crisis.

As an institution without the 'power of the purse or sword,' a court is dependent on the elected branches for its functioning and enforcement of its decisions.[66] Elected branches will only enforce a court's decisions or tolerate its independence if it is in their interests or the costs of not doing so are too high, i.e., if non-compliance with court's decisions or curtailing its independence could result in protests or electoral defeats in the future etc.[67] During a national crisis, elected branches might undertake several steps to pacify a panicked public or respond to the crisis, which might be problematic from a constitutional, human rights, or democracy standpoint. The elected branches might see these steps as vital to the countries' national interests and their own future political interests because of the demand for such actions by the public. If a court vetoes these actions, there is a high probability that the elected branches do not comply with the court's orders.[68] They can easily do so because chances of any backlash to elected branches ignoring a court's decision during a national crisis are often low as elected branches can

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[63] David Pozen and Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 114(4) Am. J. Int'l. L. 608.

[64] Ibid 612-613.

[65] For example, see Gautam Bhatia, 'India's Executive Response to COVID-19' (The Regulatory Review, 4th May 2020) <https://www.theregreview.org/2020/05/04/bhatia-indias-executive-response-covid-19/> accessed 1st January 2021.

[66] *The Federalist No 78* (1788).

[67] Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 Am. J. Polit. Sci. 167, 177.

[68] Kramer (n 3) 19; Cole (n 2) 2570-2571.

have immense support from all sections of the society.[69] For example, during the American Civil War, Chief Justice Roger Taney in *Ex parte Merryman* ruled that President Lincoln's suspension of the writ of habeas corpus was unconstitutional.[70] President Lincoln's Executive Branch and the United States Army simply ignored the ruling.[71] Having their decisions ignored by the elected branches can significantly impact a court's legitimacy and credibility, and hence in such circumstances, a court is incredibly wary of the decisions it renders.[72]

Nonetheless, having their decisions ignored is not even the least of a court's worries during extraordinary times. They might even face threats to their independence. Due to the social-political-economic circumstances during a national crisis, the slightest of slips can result in court curbing measures or create conditions conducive for the same.[73] In 1995, Hungary was on the verge of national bankruptcy. Bowing to pressure by financial institutions such as the International Monetary Fund, the Hungarian Government passed a series of reforms called the 'Bokros Package' to manage their national deficit. This package's reforms included the gradual devaluation of the national currency, welfare benefits cuts, increased monthly tuition fees for students, required contributions for healthcare services, restrictions on maternity support, limited sick leave, etc. The Hungarian Constitutional Court ended up holding several parts of the Bokros package unconstitutional.[74] The Bokros Package decision set in motion a series of actions that ended up with the Hungarian Constitutional Court's independence being curbed.[75] Obviously, the Bokros package decision was not the only reason for curbing the Hungarian Constitutional Court. The Hungarian Constitutional Court was overly activist for an extended period involving itself in every law passed by the government and

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[69] America's President Bush's job approval rating reached 90% in the wake of the attacks on 9/11. This was a sharp rise from 51 percent in the week preceding the attacks. Additionally, the public expressed a broad willingness to use military force to combat terrorism. Similarly, United Kingdom's Prime Minister Tony Blair's approval ratings rose to an all-time high after the 7/7 London bombings. A high level of public support was seen for leaders across the globe in places as diverse as India, Brazil, South Korea, New Zealand, United Kingdom, Israel, etc. during the COVID-19 crisis as well. Not only the public but at times even the opposition parties, which can be a vital check on the elected branches, end up rallying around the incumbents during national crisis – this happened during the world wars, during 9/11 and in many countries during the COVID-19 pandemic.

[70] 17 F. Cas. 144 (1861).

[71] Richard H. Fallon Jr., *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice* (CUP, 2013) 26 ("Lincoln actually defied a ruling by the Chief Justice Roger Taney denying the authority of military officials to hold suspected Confederate sympathizers without bringing them into court and proving them guilty of crimes.").

[72] Vanberg (n 67) 179-182; Kramer (n 4) 19; Cole (n 2) 2570-2571.

[73] Most scholars of judicial politics would support the view that a national crisis is a challenging time for judicial independence. For example, see Georg Vanberg, 'Establishing and Maintaining Judicial Independence' in Keith Whittington and Daniel Kelemen (eds), *The Oxford Handbook of Law and Politics* (OUP, 2008) 103-105; Tom Clark, *The Limits of Judicial Independence* (CUP, 2010) 15-16; Keith Whittington, 'Legislative Sanctions and The Strategic Environment of Judicial Review' (2003) 1 Int'l J. Const. L 446, 446–74; Matthew Stephenson, 'Court of Public Opinion: Government Accountability and Judicial Independence' (2004) 20 J. L. Econ & Org. 379, 379–399; Lee Epstein et al, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 L. & Soc Rev 117,136.

[74] 43/1995 (Alkotmánybíróság) [1995].

[75] Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies' (2015) 53 Colum J. Transnatl L. 285, 297.

invalidating as many as one third of them. Yet, the Bokros Package Decision was the tipping point when it became counterproductive for the elected branches to maintain an independent Hungarian Constitutional Court.[76] Similarly, when the Romanian Constitutional Court decided against government austerity measures, as discussed later in this article, it saw severe measures to have its independence compromised, including death threats against judges.[77] In India, when Justice Hans Raj Khanna gave a dissent against the government in a major case during the emergency of 1975-1977, he was overlooked as the Chief Justice in contravention of norms for appointing the Chief Justice.[78]

As a result of these potential consequences of decision-making during a national crisis (and even otherwise), a court, as part of a larger strategy and over a period of time, generally tries and operates within the elected branches 'tolerance intervals'.[79] [80] To do so whenever necessary, it makes use of avoidance cannons and deferral strategies such as obiters, prospective overruling, justiciability requirements, the 'political question' doctrine, 'unconstitutional but not void' holdings, weak enforcement strategies, keeping a case on its docket and evading deciding it, or denying certiorari petitions, etc.[81] In the Philippines, originally, questions regarding declaring an emergency were outside judicial review's scope.[82] This had given President Ferdinand Marcos unfettered powers to govern his martial law regime, a period during which he shut down the legislature and restricted human rights.[83] When Marcos was finally ousted in 1986, the new government drafted a constitution that bolstered the court's role and accorded to it the power to review emergencies.[84] However, in all the six cases regarding emergencies that arose in the future,[85] the Philippine Supreme Court refused to exercise its power of judicial review,

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[76] Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154(6) U. Penn. L. Rev. 1757, 1782-1786.
[77] Gardbaum (n 75) 298-299.
[78] Belur N. Srikrishna, 'Judicial Independence' in Sujit Choudhry et. al (eds), *The Oxford Handbook of the Indian* (OUP, 2016) 258.
[79] Epstein et. al. (n 73): describing tolerance interval as the zone of decision making within which elected branches are ready to maintain an independent court. This zone is not fixed and is rather dynamic. The size of the zone in a given time and space depends on a number of factors including (1) public support for a court; (2) elected branches desire for an independent court for reasons such as political insurance when it is not in power in the future; and (3) elected branches seeing benefit in a sympathetic independent court which frequently decides in its favor which in turn might help political actors get added legitimacy for their decisions as well as entrench current policies and insulate them from future majorities.
[80] These strategies include (1) limit their decisions against the elected branches to ensure that the latter does not see a net negative in maintaining an independent court; (2) decide as many cases as possible in favour of the elected branches to make it see a value in maintaining an independent court; (3) largely stay in line with majoritarian preferences to avoid public backslash; and (4) issue multiple low-stakes human rights judgements to cultivate popular support. See Sethi (n 41), 18-22; Jack Knight and Lee Epstein, *The Choices Justices Make* (Sage Publications 1998); Epstein et. al. (n 73); Vanberg (n 67) 170-179.
[81] Samuel Issacharoff and Rosalind Dixon, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) 2016 (4) Wis. L. Rev. 683,683-731.
[82] Gatmaytan (n 15) 41-42.
[83] Ibid.
[84] Ibid.
[85] These cases being (1) Integrated Bar of the Philippines v. Zamora [2001] G.R. No. 147780 (2) Lacson v. Perez [2001] G.R. No. 147780 (3) Sanlakas v. Executive Secretary [2004] G.R. No. 159085 (4) David v. Arroyo [2006] G.R. No. 171396 (5) Ampatuan v. Puno [2011] G.R. No. 190259 (6) Fortun v. Macapagal-Arroyo [2012] G.R. No. 190293.

invoking variants of the political question doctrine as grounds to do so.[86] Likewise, in Indonesia, in the 2003 case of Kadir v. Indonesia (also known as the Bali Bombing Case), the Indonesian Constitutional Court struck down the use of emergency laws – but only on a prospective basis.[87] Doing otherwise might have required releasing the attack's perpetrators, which had left more than 200 people dead, and 200 in serious condition.[88] The concern was compounded because detention and interrogation conditions under the emergency laws might have foreclosed the attack's perpetuators' prosecution under ordinary criminal laws.[89] The accused going scot-free could have led to a tremendous backlash against the court. Thus, the Indonesian Court avoided any backlash to its verdict by using the tool of prospective overruling.[90]

However, a court uses avoidance cannons and deferral strategies only when it genuinely does not want to give decisions it believes are wrong or would impact the rule of law in a polity. That is not always the case. A court and its judges are not actors insulated from politics and everyday life. Often judicial appointment mechanisms result in the appointment of judges who are not at great odds with the elected branches on significant issues of politics.[91] Additionally, as Erwin Chemerinsky asserts, judges of the court live in society and thus are likely to reflect its attitudes and values at any point in time.[92] The populace as a whole generally rallies around the elected branches in times of crisis, and a court is likely to do so as well.[93] Judges often cannot rise above the crisis because the threat potentially affects them as well.[94] A perfect example of the judicial reasoning involved as a result of these realities is seen in North Jersey Media Group v. Ashcroft.[95] This case concerned a challenge to the constitutionality of a decision too close to the public immigration proceedings involving detainees labelled 'of special interest to the 9/11 investigation.'[96] During the hearing of the case, the presiding judge remarked, 'We could make a decision here...and people could die. Lots of people ... I saw the second hit during the World Trade Center attack of September 11th, and I can't erase it from my mind'.[97] The aforesaid logic can all said to be extremely pertinent in several famous cases in the comparative context during national crises where courts have sided with the elected

[86] Ibid.
[87] Issacharoff and Dixon (n 81) 700.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] For example, see Daniel Brinks and Abby Blass, *The DNA of Constitutional Justice in Latin America* (CUP, 2018); George Tsebelis, *Veto Players: How Political Institutions Work* (PUP, 2002) 322-360.
[92] Erwin Chemerinsky, *The Case Against the Supreme Court* (Penguin, 2014) 293.
[93] Cole (n 2) 2570.
[94] Ibid 2571.
[95] [2002] 308 F.3d 198
[96] Cole (n 2) 2571.
[97] Ibid.

branches, including Korematsu v. the United States[98], The King v Halliday [99], ADM Jabalpur v Shivkant Shukla[100] etc.

Beyond the possibility that a court might not be ready to rule against the elected branches, there is the question of whether certain types of interventions discussed above are even desirable.[101] A court has several internal institutional capacity deficits that impact its decision making in adverse ways. A court is generally a poor policymaker.[102] It is argued that a court cannot usually study situations and ground recommendations empirically.[103] It is incapable of carrying out investigations regarding the realities of a particular situation on its own.[104] It is also unable to account for even a fraction of the different voices and stakeholders in polycentric debates. This ends up favouring those actors with specific knowledge, better access to, and influence upon the legal system, at the expense of much of the populace who rarely have a voice in matters.[105] This is why a court's intervention in policy questions often sees benefits for elites and the middle class at the general populace's expense.[106] This deficiency has persisted even when a court has tried to remedy its capacity defects by seeking the assistance of amicus curiae, civil society organisations, and instituting expert committees to aid their decision making.[107] More

[98] [1944] 323 U.S. 214 (stating "hardships are a part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is in- consistent with our basic governmental institutions. But when under conditions of modern warfare our very shores are threatened by hostile forces, the power to protect must be commensurate with the threatened.").

[99] [1917] A.C. 270 (stating "The statute [construed as allowing preventive detention] was passed at a time of supreme national danger, which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges, etc. had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that an order should be made in suitable").

[100] [1976] A.I.R. S.Ct. 1225 (stating "In periods of public danger or apprehension the protective law which give man security and confidence in times of tranquilly should give way to Interests of the state. ... Neither are (jurists] ... equipped, once an emergency has been recognized, ... to measure the degree to which the preservation of the life of the community may require governmental control of the activities of the individual. Jurists do not have the vital sources of information and advice which are available to the executive and the legislature.")

[101] This is in addition to the point that a court is unable to bring about social change on its own. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (UChicago Press, 1991) 4; Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (UChicago Press, 1998) 3; Michael McCann, 'Litigation and Legal Mobilization' in Whittington and Kelemen (n 73) 529-530; Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change* (University of Michigan Press, 1974) 131. However, perhaps this point is less relevant during a national crisis and hence omitted from the scope of the discussions above.

[102] Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv. L. Rev. 353, 394–95.

[103] Christopher Elmendorf, 'Advisory Counterparts to Constitutional Courts' (2007) 56 Duke L. J. 953,997.

[104] Rosenberg (n 101) 4.

[105] Hirschl (n 22) 214.

[106] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP, 2017); David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harv. Int'l L. J. 189, 209; Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (2011) 89 Tex. L. Rev. 1643, 1660– 61; Virgilio Afonso Da Siliva and Fernanda Vargas Terrazas, 'Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded' (2011) 36 L. Soc. Inq. 825.

[107] Bhuwania (n 106) 59; Landau (n 106) 209.

often than not, its intervention into policy questions opens a pandora's box of predicaments and ends up making a mess of things.

In no recent case was this more evident than the one dealing with migrant workers' rights in India during the COVID-19 pandemic. Curiously, in this case, the Supreme Court of India heard every voice except that of the migrant workers.[108] According to a governmental ordinance, all employers were directed to pay full wages to their employees during the COVID-19 pandemic induced lockdown.[109] In the wake of this ordinance, a petition was filed in India's Supreme Court by a trade union challenging this ordinance's constitutionality.[110] The Supreme Court of India put a stay on this ordinance.[111] With no guaranteed pay and no end to the pandemic in view, several million migrant workers left for their hometowns, often travelling thousands of kilometres on foot. This resulted in a full-blown internally displaced migrant crisis. Later, when the crisis showed no sign of subsiding, the Supreme Court of India passed a *suo motu* order where it asked the government to take urgent steps to resolve the crisis[112] – which the government, from its end it was already doing, in whatever questionable manner, it deemed fit. The Supreme Court of India does not deserve all the blame for the migrant crisis; inadequate and uncoordinated governmental policies were primarily responsible for the crisis. Nonetheless, its initial intervention into the issue did arguably contribute to its worsening.

Likewise, a court's intervention in a financial crisis also frequently aggravates the problems at hand. In facts comparable to the Hungarian Bokros Package case in 1995, in 2010, the Romanian Constitutional Court struck down the government's proposed pension cuts package.[113] This triggered a financial panic that led to a loss of investor confidence in the entire Central and Eastern European region.[114] This even led to the IMF postponing a €20 billion standby loan, which the country desperately needed.[115] The ruling sent credit-default swap prices soaring, and currencies across the region dropped drastically.[116] The Romanian Lei hit a record low of 4.37 to the Euro.[117] After the court handed down its decision, Romania's government decided it's only recourse was to raise the value-added tax by five percent or lose its IMF loan.[118] Coincidentally, though the court had its way in the Bokros package decision and did not allow the government to proceed with all its proposals, even the neutered Bokros package had positive impacts on

[108] Anuj Bhuwania, 'The Curious Absence Of Law In Migrant Workers' Cases' (Article 14, 16 June 2020) <https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases> accessed 24 September 2020.
[109] Government of India – Ministry of Home Affairs [2020] Order No 40-3/2020-DM-I (1).
[110] Hand Tools Manufacturers Association v. Union of India & Ors [2020] Writ Petition (Civil) Diary No(s). 11193/2020.
[111] Ibid.
[112] In Re: Problems and Miseries of Migrant Labourers [2020] Suo Motu Writ Petition (Civil) No(s) 6/2020.
[113] 'Independent Constitutional Courts: One man's joy is another man's pain', (Risk and Forecast, 2nd July 2014) <https://riskandforecast.wordpress.com/2010/07/02/independent-constitutional-courts-one-mans-joy-is-another-mans-pain/> accessed 1st January 2021.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.

the Hungarian economy in the long run.[119] It avoided long term recession, and the economy grew continuously until 2001.[120] Even the state deficit decreased from almost 90 percent of the GDP to 52 percent.[121]

The issue is not that courts got the above decisions wrong (from some lenses, they arguably even got them right). Most of these questions do not have correct answers. Decisions such as those in the austerity cases from Hungary and Romania involved questions that require significant trade-offs and value judgments, and their resolution requires compromises. At times, the tradeoffs, value judgements, and compromises are beyond hurting the sentiments of a group of people but concern how to best apply the government's limited resources in running the nation. Such a balancing of a wide range of values and interests is more suited to be decided in the political arena. As mentioned earlier, a court is often an elitist institution detached from the ground realities and cannot account for all the debate's voices. When such polycentric questions are decided in a court rather than a deliberative forum, the bulk of the citizenry is deprived of the opportunity to shape questions that significantly impact their everyday lives. Often, the benefactors of the decisions are elites or people with better access to the legal system.

IV. WHAT IS THE ROLE OF A COURT DURING A NATIONAL CRISIS?

Before delving into answering the question 'what is the role of a court during a national crisis,' it needs to be acknowledged that not everyone believes they should even have a role to play during a national crisis. Prominent among those are Mark Tushnet and Orin Gross, who recognise that courts seldom rule against the elected branches during a national crisis. Tushnet argues that "it is better to have emergency powers exercised in an extraconstitutional way so that everyone understands that the actions are extraordinary than to have the actions rationalised away as consistent with the Constitution and thereby normalised."[122] Gross also endorses a similar view as Tushnet.[123] Such a view he states is justified "to avoid normalizing the exception". Based on this approach to thinking about a national crisis/emergency, Tushnet and Gross propound that a court should not play a role in restraining the elected branches and it should "be up to the people to decide… how to respond to such actions."[124]

However, despite these approaches' theoretical attractiveness, some underlying predicaments would make removing an essential veto point from the governance system during a national crisis a rather hasty move. First, Tushnet and Gross's suggestions are based on a distinction between emergency/national crisis and normal periods. As David Cole argues, this distinction is hard to sustain in practice.[125] The war on terror, which was

[119] Péter Szegő 'Financial experts reflect on the Bokros package of 1995' (The Budapest Beacon, 12th March 2015) <https://budapestbeacon.com/financial-experts-reflect-on-the-bokros-package-of-1995/> accessed 1st January 2021.
[120] Ibid.
[121] Ibid.
[122] Mark Tushnet, 'Defending Korematsu?: Reflections on Civil Liberties in Wartime' (2003) Wis. L. Rev. 273, 306.
[123] Gross (n 2) 1024.
[124] Ibid 1023.
[125] Cole (n 2) 2587-2588.

the occasion that led to much of these debates, is technically still in operation.[126] Vice President Dick Cheney, one of its chief architects, had mentioned that we should not see the war on terror as an emergency but rather the "new normal".[127] Even with the current COVID-19 pandemic, there is tremendous uncertainty about when this would be over.[128] The pandemic might be over in 2021, or might like the war against terror become the new normal we all have to live with.[129] Beyond these two significant examples, there are many instances where a national crisis is the normal rather than the abnormal. Kumaradivel Guruparan describes how in plurinational states such as Sri Lanka, which have been riddled by conflict and war, a state of abnormalcy is the *de facto* normalcy.[130] This results in long-term centralisation of powers, curtailment of rights and permanent national security laws.[131]

Second, notwithstanding what is mentioned in the previous section, while courts do not have the best record during national crises, this does not mean they are entirely useless. There are several success stories,[132] and as this section will show, a court does have normative value in a national crisis. Third, these suggestions are devised in the American context, and as a frame of reference, using the events surrounding the civil war and the two world wars. While America has seen an erosion of constitutional norms in recent years[133], the time periods these scholars use as a frame of reference were in a political environment where elected leaders played mainly by the rules and genuinely had the nations' best interest in mind. They went outside the rules when they believed it was the only option. The same cannot be said about much of the comparative context that lacks the constitutional culture of America circa 1857-1945 and in an era where elected leaders

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[126] Frank Gardner, 'Will the 'War on Terror' ever end?' (BBC, 24th June 2020) <https://www.bbc.com/news/world-53156096> accessed 1st January 2021.

[127] Bob Woodward, 'CIA Told to Do Whatever Necessary to Kill Bin Laden; Agency and Military Collaborating at Unprecedented Level; Cheney Says War Against Terror May Never End' (Washington Post, 21st October 2001).

[128] Brandi Greenberg, 'When Will the Covid-19 Epidemic End? Here Are the Good, Bad, And Ugly Scenarios' (Advisory, 1st February 2021) <https://www.advisory.com/daily-briefing/2021/02/01/pandemic-end> accessed 10th February 2021.

[129] David Wallace-Wells, 'What If Herd Immunity Is Out of Reach?' (NY Magazine, 5th February 2021) <https://nymag.com/intelligencer/2021/02/what-if-the-covid-pandemic-never-really-ends.html> accessed 10th February 2021.

[130] Kumaravadivel Guruparan, 'Constitution and Law as Instruments for Normalising Abnormalcy: States of Exception in the Plurinational Context' in Roznai and Albert (n 15) 63-81.

[131] Ibid.

[132] For example, see n 154 ; Gustavo Prieto, 'How Ecuador's Constitutional Court is Keeping the Executive Accountable During the Pandemic' (VerfBlog, 24th April 2020) <https://verfassungsblog.de/how-ecuadors-constitutional-court-is-keeping-the-executive-accountable-during-the-pandemic/> accessed 1st May 2021; Bianca Selejan-Gutan, 'Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis' (VerfBlog, 21st May 2020) <https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis/> 1st May 2021; Cole (n 2) 2592 (only in the United States context itself, David Cole explains how he represented thirteen foreign nationals whom the government accused of having ties to terrorist organizations and sought to detain or deport using classified evidence that the foreign nationals had no opportunity to confront or rebut. The government in all cases maintained that the individuals' presence in the United States threatened national security, and that revealing the evidence that proved that contention would itself endanger national security. All thirteen were eventually released without undermining national security, but only when Cole and his team challenged the government's actions in court as a violation of due process.).

[133] Democracy Index 2020 (Economic Intelligence Unit, 2020) 9.

worldwide are using every opportunity available to subvert democracy.[134] As mentioned earlier, the COVID-19 pandemic is a testimony to the same.[135] Fourth, for these 'popular constitutionalism' based suggestions to work without leading to undemocratic outcomes, they require democratic institutions in reasonably good working order, a commitment on the part of most members of the society and most of its officials to the idea of individual rights; and persisting, substantial and good-faith disagreement about rights (i.e., about what the commitment to rights amounts to and what its implications are).[136] This is another facet missing in much of the comparative context[137], and arguably even in the United States of America in 2021.[138]

In addition to these qualifications, perhaps at a more practical level, Tushnet and Gross's suggestion is so far removed from the current worldwide status quo that a scenario without a court exercising its veto power during what is a testing time for any country seems highly unlikely.[139] The era post the third wave of democratisation saw courts playing a more active role in overseeing democratic structure and processes.[140] Courts have held constitutional amendments void,[141] invalidated elections,[142] banned political parties[143], and cancelled political appointments,[144] among other seemingly controversial actions. Furthermore, even courts in the Anglo-American context have become more active in involving themselves in issues they would not have previously.[145] Such roles for a court have garnered both scholarly and popular support, and hence a normative conception of a court's role during a national crisis should not be too detached from reality. This is precisely why even the counter-majoritarian nature of a court as a reason to take a tapered down approach in political life is way past its sell date in the larger comparative context and would not be a significant point of debate in this section.[146]

Proceeding to the question of 'what is the role of a court during a national crisis.' A perusal of the previous sections illustrates that answering this question does not require us *only* to decide which of the contenders (or a combination of a few) for a court's role is the correct one. It also requires us to tackle a few added issues regarding institutional

[134] Scheppele (n 38).
[135] Freedom House (n 43).
[136] Jeremy Waldron, 'The Core of The Case Against Judicial Review' (2006) 115 Yale L. J. 1346, 1359-69 (describing as the conditions under which a model of legislative supremacy might work).
[137] Landau (n 55) 1505-1513.
[138] Democracy Index 2020 (n 133).
[139] Cf Sethi (n 41) 10.
[140] Richard Pildes, 'The Legal Structure of Democracy' in Whittington and Kelemen (n 73) 322.
[141] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP, 2017) 170-226.
[142] Samuel Issacharoff, 'Fragile Democracies' (2006) 120(6) Harv. L. Rev. 1407, 1429-1447.
[143] Ibid.
[144] Sethi (n 41) 39-40.
[145] Rachel R Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 Colum. L. Rev. 237; Aileen McHarg, 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?' (2020) 24(1) Edinburgh L. Rev. 88; Pildes (n 140) 322.
[146] This is not to say that there are a not a few countries globally (such as the United Kingdom, Canada, New Zealand, etc) where still a comparatively moderate role is exercised by courts and the system still operates in a model of legislative supremacy. Similarly, despite what is mentioned above the United States Supreme Court also exercises significant comparative restraint. Nonetheless, these are the exceptions in the comparative context and not the norm. However, in these countries the approach recommended by this article would still work and would accommodate this facet of courts in the aforesaid countries.

capabilities and decision-making strategies. How aggressively should a court perform its role (i.e., should a court be assertive and confront the elected branches, should it exercise restraint, or should it carry on business as usual)? Depending on which choices are made, how exactly does a court go about its role (i.e., the type of remedies it should issue if it decides to be assertive, or the type of strategies it should utilise if it decides to exercise restraint)? The bulk of the existing scholarship has tried to navigate these issues by picking sides for each of these points and justifying them as the right ones (often not even picking sides for all the relevant issues).[147] There is a fundamental problem with this approach.

Thinking of a court as an institution that performs one particular type of role (or maybe even two or three) and in a particular way is too narrow and takes away from several essential roles a court can undertake. For example, looking at a court as an actor that performs a singular function, such as protecting negative human rights (a role most would agree courts can perform),[148] excludes the role a court can play in protecting democracy by policing electoral markets or ensuring the sanctity of the separation of powers. Similarly, thinking of a court as an actor who is to ensure constitutional compliance would preclude a court from being able to check elected branches undertaking seemingly legal actions that ultimately erode democracy – such as passing a procedurally correct constitutional amendment (or several amendments) that has the essence of ultimately overhauling the existing constitutional order.[149]

On the other hand, limiting a court's functions to exclude from its jurisdiction anything with budgetary or policy implications also takes away from a positive role a court can play in those cases. Although it is undesirable for a court to decide whether a country needs austerity measures and the nature of these measures, a court can make a vital contribution in ensuring that these decisions are made properly (and are not a result of panics or populist pressures). A court in such cases could compel the elected branches to appear before it and defend their decisions with reasons. By doing so, a court could promote accountability and ensure that the elected branches have put thought into their decisions. Here we also go back to the role of a court in protecting positive human rights. Let us assume that the national crisis in question arises from a natural disaster, where millions have lost their homes. The constitution, in the hypothetical case at hand, guarantees a right to housing, but for a range of factors, the government has not provided any housing facilities even to point one per cent of those affected. Yes, it would be unwise to ask the court to decide how the housing issue needs to be sorted. Nevertheless, a court can do something else here. Akin to what the South African Constitutional Court did in Grootboom (albeit in ordinary times), a court can utilise weak remedies and not issue any individual relief but can pass a declaratory order holding the government's acts as

[147] To put this in context, this could entail something to this end – deciding that the role of a court is to safeguard democracy during a national crisis and then stating that this role should be carried out with restraint. Likewise, stating that the role of a court is to protect human rights and stating that courts should do so with assertiveness.

[148] For example, see Richard Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 Harv. L. Rev. 1693.

[149] See Roznai, *Unconstitutional Constitutional Amendments* (n 142).

violative of the constitution.[150] While critics might call such decisions symbolic, Michael McCann describes how such a decision helps translate a claim into a legal right, providing civil society with the coordination points to mobilise around.[151]

Similarly, thinking of a court as an actor that can do everything fails to recognise that a court has significant limitations to what it can do, and in some cases, their interventions might make things worse. The previous section took up the usual suspects' cases, but there are more complicated ones. As mentioned above, a court protecting negative human rights is a relatively uncontroversial and an institutionally possible role for a court. However, there are instances of negative human rights obligations that arise during a national crisis that a court cannot perform. Adam Chilton and Mila Versteeg highlight the case of torture.[152] Torture tends to take place in secret, behind closed doors, and in violation of legal rules.[153] When it comes to cases dealing with alleged instances of torture, the government can easily suppress evidence because of the nature of the situations in which torture occurs.[154] Therefore, a court might find itself helpless here, even if it wanted to solve this issue. Is this a simple exception, or is this something more?

Moreover, there are still questions about the level of assertiveness and strategies with respect to the same that need to be answered. As far as the former is concerned, going with the standard answer, and stating that a court should exercise restraint during a national crisis, discounts the possibility that there might be conditions even during a national crisis where a court does not need to exercise restraint.[155] There is always the possibility that the elected branches do not have popular support, as was President Trump's case during the COVID-19 pandemic.[156] There might also be the probability that the executive and legislature are not on the same page, allowing the court with the room to act as both the branches would not collude to curb a court.[157] It cannot be discounted that there can be significant political competition in a particular society, and the opposition is not ready to rally behind the government.[158] It could even be the case that a

[150] Cf Government of the Republic of South Africa and Others v Grootboom and Others [2008] CCT11/00, 18.
[151] Michael McCann, 'Litigation and Legal Mobilization', in Whittington and Kelemen (n 73) 523, 529– 30.
[152] Adam Chilton and Mila Versteeg, 'Courts' Limited Ability to Protect Constitutional Rights' (2018) 85(2) U. Chi. L. Re. 293, 322.
[153] Ibid.
[154] Ibid.
[155] For example, see Castillejos-Aragón (n 23) describing how in El Salvador the Constitutional Chamber played a major role in "functioning as a guiding beacon to President Bukele's executive actions" and efficiently managed (over a period of time) the "Executive's response to the pandemic, balancing both public health measures vis-à-vis fundamental rights" as well as preventing "fraud on the constitution". For a more detailed explanation of how courts have managed to check the elected branches during the pandemic see Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2020) U of Chicago Public L. Working Paper No. 747 <https://ssrn.com/abstract=3608974> accessed 1st February 2021'. For an interesting theoretical when courts do not need to exercise restraint, see Sergio Verdugo, 'How Can Judges Challenge Dictators and Get Away With It?' (2021) 59(3) Colum J. Transnatl L. 101.
[156] John Whitesides, 'Trump's Handling of Coronavirus Pandemic Hits Record Low Approval: Reuters/Ipsos Poll' (Reuters, 9th October 2020) <https://www.reuters.com/article/us-usa-election-trump-coronavirus-idUSKBN26T3OF> accessed 1st January 2021.
[157] Kramer (n 3) 21.
[158] For example, see 'Slovenia Opposition Submits No-Confidence Motion Against Government' (Reuters, 15th January 2021) < https://www.reuters.com/article/us-slovenia-government-idUSKBN29K1WM> accessed 1st February 2021.

court has such significant popular support that its decisions cannot be ignored or that its independence cannot be touched.[159] All these are paradigms of instances when a court can act without restraint.[160] Conversely, stating that a court should carry on business as usual, or rather get assertive, ignores the challenges a court might face such as threats to its legitimacy, credibility, and independence – which are real in many instances.

Even if we are miraculously able to figure out a court's role during a national crisis and the level of assertiveness it should show, we still are left with the question of strategies it should adopt in performing its role with whatever chosen degree of assertiveness. For the sake of argument, let us consider a court's role is to protect democracy, but in a particular political climate, it must perform this role with restraint. Should the court keep the case lying on its docket and evade it, or should it take an approach such as prospective overruling or the political question doctrine? Are one of these approaches better than the other? Is the right answer providing a matrix for which case requires which strategy on the part of a court?

The reality is that it is impossible to come up with a unified normative theory that can adequately answer the question of 'what is the role of a court during a national crisis' which works in every given situation. Consequently, to answer the question regarding a court's role during a national crisis and not fall into the trap a lot of existing scholarship on the topic has fallen into, I suggest an alternative way to think about a court's role during a national crisis. Rather than answering the question of 'what is the role of a court during a national crisis?' by devising a unified normative theory using a combination of the different factors described above (and picking sides), this question should be answered by asking a secondary question. Consequently, it should be asked – 'what can a court realistically do in a given time and space without negative consequences?'. Thus, during a national crisis, a court's role is not a singular straightforward answer but is instead – 'whatever it can realistically do in a given time and space without negative consequences.' This approach to constitutional decision-making during a national crisis will guide a court's operation in two stages – First, during the entire duration of a national crisis and second, in a particular case at hand during the moment of confrontation.[161] Answering a question with another question might seem like a paradox, but such an approach to addressing this fundamental dilemma can allow us to think of a court during a national crisis in a way that does not suffer from the practical shortfalls of unified normative theories and that is thought to work across a range of situations and contexts. It can also stand the test of time and account for scenarios not envisioned or a future where the extent of a court's capabilities might be viewed differently.

The way this would play out in practice is – take, for example, an executive unilaterally declaring a six-month emergency without following the rules laid down to do so in the

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159 For example, see Julio Faundez, 'Democratization Through Law: Perspectives from Latin America' (2005)12 Democratization 749, 758 (noting that the Colombian Constitutional Court has generally had above 50 percent approval rating which is very high compared to the approval ratings of the government).
160 Vanberg (n 67) 176-179.
161 This claim does not exclude that a similar consideration could also guide the role of a court outside contexts of national crisis, but those include other factors that require discussion as well which is beyond the scope of this article. These could be issues like whether too much judicial involvement can lead to negative consequences such as citizens estrangement from constitutional politics, or the government shirking its duties in the hope that the court would take it up.

constitution. The constitution in this hypothetical requires any emergency declaration to get a stamp of approval from the legislature. The court in such a case could first decide whether it is in a position where it can even hear the case (let alone render a decision). At times, how the political system thinks of a court in the separation of powers scheme could impact this decision of the court, as an extra-legal intervention might significantly affect a court's position in the elected branches' 'tolerance interval' as well as take away from its 'reservoir of goodwill.'[162] If the answer to this question is in the negative, the court could leave the case on its docket or choose to not even list it on its docket and hence evade hearing it (if these options of docket control are available to the court). If the court feels it can hear the case, it must then decide whether it can hold against the executive without its decision being ignored or its independence being put under stress. If the court does not feel safe to go ahead with the case, it could invoke the political question doctrine and evade adjudicating upon the case. Likewise, if it is not safe to go ahead and stop the executive, but there is some room for the court to operate, the court could utilise the strategy of prospective overruling and hold that such an emergency is unconstitutional, but the decision does not apply to the case at hand. This could help create a useful precedent for the future and not normalise the situation.

If the court feels safe to go ahead with the case, it could merely rule that the emergency is unconstitutional, and that is the end of the story. However, If the court feels a milder strategy would be necessitated in a given social-political-economic environment, it could, without ruling the emergency unconstitutional, instead order the legislature to vote on the emergency's extension. If an even more timid approach would be required, the court could request the executive to negotiate with the legislature. There is another innovative option that a court could utilise here. The court might feel that it could intervene in this case, but the case is not that high of a stake for one to waste its 'reservoir of goodwill' on it.[163] It could pre-empt the need for interventions in more critical cases in the coming days. These become incredibly relevant in cases of those national crises which go on for extended times. In such an instance, it could decide to evade this case, with a long-term view of acting aggressively in the coming days in a more important case. Obviously, this is contingent on the court knowing that the said decisions in the future would not be ignored by the elected branches or would not impact its independence. But this is a judgement call for a court to take based on the social-political-economic realities in a given country.

The aforesaid was an example of a case where a court had institutional capabilities to perform the role. What about cases where it does not have the institutional capabilities to decide, and in deciding the case could make things worse. If a country's social-political-economic environment does not allow a court to intervene, this question becomes moot.

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[162] n 79; n 163-164

[163] Diana Kapiszewski et. al, 'Of Judicial Ships and Winds of Change' in Diana Kapiszewski et. al (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP, 2013) 493. (Explaining how elected branches deference to judicial authority is not contingent on the immediate outputs of the case at hand but rather the support elected branches and the people have on it in the long run – also called its reservoir of goodwill. A court without a reservoir of goodwill, they suggest, may be limited in their ability to defy the preferences of the majority or the elected branches. A court can build its reservoir of goodwill by deciding in favour of majorities, popular minorities, or the elected branches over time. Conversely it can take away from its reservoir of goodwill by doing the contrary.)

However, what if it can intervene? In such a case, we go back to accessing what can a court do realistically here. One option certainly on the table is the previously discussed one where a court in such cases could compel the elected branches to come before it and defend their actions with reasons (both acts of omission and/or commission). If it is not satisfied with the reasoning, it could request the elected branches to justify its actions with more evidence. In cases dealing with acts of commission (say passing an austerity measure), if the elected branches fail to do so, the court could potentially veto the decision based on whatever are the best legal grounds available to it in a particular case.[164] A case on point here is the example of the earlier cited case from the Colombian Constitutional Court of 2003, where the court held the national security law invalid because it did not fulfil the procedures required to pass such a law.[165] If it is an act of omission (such as lack of fulfilling a positive duty such as the right to health during a pandemic), the court could hold the government to be a violation of the right in question and take the Grootboom approach of passing a weak remedy.

Two major points critics might raise regarding the approach suggested in this section are necessary to address. First, critics might point out that the approach suggested in this section is vague, not straightforward, and barely provides guidance to judges (especially in turbulent times). Nevertheless, the approach suggested by this article to envision the role of a court during a national crisis is precisely what successful courts world over adopt during constitutional decision-making.[166] Constitutional decision-making is not and has never been a simple task. It requires careful consideration, extreme caution, and critical thinking. Furthermore, it is not unrealistic to expect judges to engage in such an exercise, especially given their rigorous educational training and professional/academic careers before joining the bench. Scholars might be tempted to provide a mechanical process to guide a court during a national crisis. It is impossible to define an almost mechanical process since it would be quite contrary to the very art that goes into deciding constitutional disputes successfully. This is precisely why 'What-if Algorithmic Loops' have not replaced human judges.

Second, while this article envisions a role for a court during a national crisis that is more muted than many comparative constitutionalists would advocate for, critics might still raise the objection that the framework proposed by this article gives a court heightened powers that violate the traditional scheme of separation of powers and suffers from the

[164] A court's ability to block a change from status quo, depends in large part on the legal options in front of it. In cases where there is no explicit law that would help a court block a change from status quo, it makes it harder for a court to act. Doing so could perhaps put more strain on its reservoir of goodwill and impact its place within the elected branches 'tolerance intervals'. Thus, as a purely strategic decision a court might be better served to act at a constitutional level rather than a sub constitutional level. Perhaps the place such behaviour is most noticeable in moments of crisis is when populist leaders who have been elected on the back of an institutional crisis try to usher in constitutional change as a tool for recovery (though they also use these opportunities to consolidate power as well). In such situations, courts have been better able to act when they have had legal grounds to do so rather than invoking extra-legal rules. For example, see David Landau, 'Courts and Constitution Making in Democratic Regimes' in Gabriel Negretto, *Redrafting Constitutions in Democratic Regimes* (CUP, 2020) 80-100.

[165] See text body accompanying n 60.

[166] Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7(1) Int'l J.Const.L. 106; David Landau, 'Substitute and Complement Theories of Judicial Review' (2017) 92 Indiana L. J. 1283; Jack Knight & Lee Epstein, *The Choices Justices Make* (PUP, 1998).

counter-majoritarian difficulty. However, considering how a court's role has evolved in the comparative context, a strict separation of powers model is archaic and anachronistic.[167] A court in the modern-day context undertakes several functions that might be classified as executive or legislative – even in jurisdictions where the traditional separation of powers model still has weight.[168] This article acknowledges democracy concerns regarding some issues (especially during a national crisis) being better suited to be decided by the legislature (such as budgetary questions) or by the executive (such as national security questions). Further, this article also recognises that there are few countries where separation of powers concerns still have a sting (even as it is eroding in those very countries) and would preclude certain interventions this article thinks are appropriate. However, these considerations form a significant bedrock of the approach recommended by this article. A court is still an institution without the purse or sword's power and with major institutional limitations, and these factors would play into deciding what is realistic for a court in a given time and space. Yet, the duty of policing these boundaries does not lie in the hands of a theory/approach/conception of judicial role but rather in the forces of politics. A court should be viewed as essential veto points in the democratic system whose scope of operation is limited because of practical reasons. This is a factor that a court (and those advocating for a court to save the day every time) needs to realise, for if they do not, a court will suffer an inevitable undesirable fate. This is what happened with the Hungarian Constitutional Court that arguably stepped its bounds for way too long and involved itself with every law passed by the government (including during a national crisis).[169]

V. CONCLUSION

This article argued that considering the range of factors at play in a national crisis, it is impossible to conceive a unified normative theory of a court's role during a national crisis. No singular theory can answer the question of 'what is the role of a court during a national crisis' adequately in a way that would apply to different scenarios and across different countries. Nonetheless, it has suggested an alternative way to think about this role. This could be done by asking the question - 'what can a court realistically do in a given time and space without negative consequences?' Doing so can help better address the range of factors at play. Such an approach can also stand the test of time and account for possibilities not envisioned. It also prevents picking sides and justifying picking those sides in a debate that does not necessitate picking sides.

At the same time, this article, at best, provides a template that needs to be substantially expanded on and customised in more detail for different jurisdictions in the comparative context. Scholars can potentially use this article's suggestive approach and combine it with a particular country's social-political-economic factors during a national crisis, such as popular support for a court and elected branches, level of political competition, legal culture and laws, range of problems, etc. to lay down the range of actions a court can perform and should perform. Beyond just using this article's suggestive approach and build on it for individual situations, further research could also be carried out on

[167] Aileen Kavanagh 'The Constitutional Separation of Powers' in David Dyzanhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP, 2015) 222.
[168] Ibid.
[169] See text body accompanying n 74-77.

understanding the different actions a court can successfully undertake during a national crisis, what remedies should be given in what situations, what avoidance cannons and deferral strategies should be used when and where.

This article's approach to thinking about a court's role during a national crisis could even provide guidance for judges and members of the public approaching courts during a national crisis. When it comes to members of the public (such as civil society organisations and public-spirited individuals), thinking about courts in the way advocated for by this article can help them strategise their moves better. If civil society organisations and public-spirited individuals know that it is unlikely that a court will rule against the elected branches, they could instead concentrate their energies on alternatives like protests or lobbying.[170] They could similarly follow the same approach if they know that a court might rule in their favour, but the elected branches are unlikely to enforce such a decision. Besides, thinking of courts in the way this article suggested would help civil society organisations, and public-spirited individuals better understand what they can get out of courts. If it is unlikely that courts could adequately resolve a question concerning, say, social and economic rights, the aforesaid actors might still choose to approach a court for a declaratory relief which could then, as earlier stated, assist them to translate a claim into a legal entitlement. This could then aid the process of mobilisation for a particular demand.

Additionally, as far as judges are concerned, if they go about their job using the approach suggested by this article (assuming in some cases they do not), they could position themselves in ways that would help them to act how the El Salvador Constitutional Commission, The Ecuador Constitutional Court, The Romanian Constitutional Court, among others did during the COVID-19 pandemic.[171] In situations such as the one the Indonesian Constitutional Court found itself in during the Bali Bombing Case, they could follow the approach suggested here and lay down a good precedent for the future but avoid comprising their legitimacy, credibility, and independence. In several cases, judges follow the approach suggested by this article. In cases they do not, thinking along these lines would go a long way in ensuring that a court can best contribute during a national crisis.

Perhaps this article and the approach it suggests would leave those seeking answers about what can (and should) a court do during a national crisis wanting, particularly in these COVID-19 times. It might also not pacify those who hope to see courts save the day in the most challenging times. Though these may indeed be true, it is hoped that the discussions above helped move this topic's dial in the right direction – even if by a very minuscule amount.

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[170] Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (OUP 2020) 40 (arguing how these can be better strategies than litigation in achieving results).
[171] n 132; n 155.