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Comparative Emergency Powers: Brazil and the Philippines Under COVID-19

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SUMMARY

1. Introduction

From a local outbreak in Wuhan, China, the novel coronavirus travelled around the world infecting millions and killing thousands of people. In just a couple of months, an epidemic grew into a pandemic, with confirmed cases of COVID-19 in over two hundred countries in every continent on earth. Local governments had to work around the clock to prevent the spread of the virus or risk watching their health systems collapse.

To cope with the novel coronavirus pandemic, many countries invoked their constitutions and declared states of emergency so they could limit the number of international and domestic flights, build field hospitals to deal with the high demand for emergency medical treatment, distribute money to marginalized communities that were hit hard by the consequences of the economic crisis, and enforce local, regional, and even national lockdowns.

As the pandemic gained traction, a new debate emerged in the field of comparative constitutional studies. Different countries responded to the pandemic in different ways. Some countries declared a state of emergency invoking constitutional provisions that allow for the temporary suspension of individual rights and freedoms. Other countries passed new laws and statutes that were designed to deal with the challenges posed by the pandemic. Still a third group of national governments relied on pre-existing legislation to invoke and exercise emergency powers. Furthermore, as this paper will show, some countries relied on all three legal bases at once.

Even though the legal justifications underlying governmental responses to the pandemic may differ from one another, they all lead to the same (or at least a comparable) 'legal destination': the temporary suspension of the constitutional order after the declaration of a state of emergency. Under existing constitutional frameworks, national governments would hardly be able to justify the actions they have taken to cope with the spread of COVID-19, so they need to formally recognize a state of emergency and respond accordingly.

In many settings, emergency powers are indispensable to legally empower local authorities to act quickly and save as many lives as possible, even if that means momentarily curbing people's individual (and sometimes collective) rights and freedoms. The most common example is the right to travel. Under normal circumstances, the government cannot limit a citizen's right to travel from one place to another as she or he sees fit. Nevertheless, during a viral outbreak, traveling freely within one's country, or from one nation to another, can be the difference between life and death for hundreds of people.

In sum, COVID-19 placed almost the entire globe under a *de facto* or *de jure* state of emergency. In this paper, I will offer my contribution to this ongoing

debate in the field of comparative constitutional studies by analysing and comparing the legal bases of COVID-19 responses in Brazil and the Philippines. Both countries were overwhelmed by the coronavirus in the beginning of 2020 (and, in many ways, are still trying to keep the virus under control). Nevertheless, for reasons I will try to explain in this essay, their national governments opted to travel different (and at times opposite) roads when dealing with the pandemic.

This comparison offers a new way to evaluate the role of the national executive during a public emergency. Under a more traditional account, in times of crisis the «Madisonian view» is replaced by the «Schmittian view» of the executive branch of government (Posner & Vermeule, 2009). However, according to data collected by Ginsburg and Versteeg, the pandemic defied the idea that the executive is necessarily 'unbound' during emergencies (Ginsburg & Versteeg, 2020b). Building on this important debate, Brazil and the Philippines emerge as perfect fits for my case study because their national executives responded differently to the pandemic despite the fact that they have similar institutional, historical and political backgrounds. This offers a unique opportunity to analyse what exactly accounts for this surprising distinction.

Thus, I have selected both countries because they are comparable in three main ways. First, they have similar institutional structures at the national level. Both countries have a presidential system with a head of state elected by universal suffrage, a bicameral legislature comprised of a senate and a house of representatives, and a supreme court that oversees the judicial branch and can exercise judicial review of legislation. Nevertheless, there is one significant structural difference that should be highlighted: while Brazil was born a federal state after its independence from Portugal in 1822, the Philippines are a unitary state that underwent an incomplete process of administrative decentralization in the 90s.

Second, both countries are young constitutional democracies. The Philippines experienced the Yellow Revolution in 1986, when Dictator Ferdinand Marcos was ousted from power and Corazon Aquino was installed as President to lead the transition to democracy. In 1987, the new Philippine Constitution was promulgated to limit the powers of the executive branch and re-establish the bicameral legislature. Similarly, Brazil experienced a military dictatorship between 1964 and 1985, when Tancredo Neves was indirectly elected by an electoral college to lead the transition to democracy. As Neves died just days before his inauguration, José Sarney, his VP, was installed as President and oversaw the drafting and promulgation of the 1988 Brazilian Constitution.

Third, both countries are currently governed by populist leaders and have been under the radar of human rights organizations due to recurring (and at times deeply worrying) signs of democratic erosion and human rights violations.

According to Freedom House, Brazil still ranks as a free country, but its overall score dropped from 79/100 in 2017 to 75/100 in 2020 (Freedom House, 2020a). On the other hand, the Philippines ranks as a partly free country and its overall score dropped from 63/100 in 2017 to 59/100 in 2020 (Freedom House, 2020b). In sum, both countries lost four points over a period of four years. This drop can be traced back to the conditions that allowed for the rise of Jair Bolsonaro in Brazil and Rodrigo Duterte in the Philippines.

In 2018, Brazilians elected Jair Bolsonaro as President, a far-right politician who praises the military dictatorship and has a vast collection of controversial statements, ranging from homophobic and racist remarks all the way to anti-democratic (and arguably fascist) sentiments (The Guardian, 2019). In the same vein, Filipinos went to the polls in 2016 to elect Rodrigo Duterte as President, a thug who is not shy about having killed people in the past and is responsible for waging a bloody 'war on crime' across the country (The New York Times, 2017). Moreover, Duterte is an admirer of former Dictator Marcos and vouched for the transfer of his remains to a hero's cemetery in Manila, the country's capital (The New York Times, 2016).

In terms of methodology, this paper uses what Professor Ran Hirschl calls the «most similar cases» logic (Hirschl, 2005, pp. 133-38). The idea behind the logic is to «hold constant non-key variables while isolating the explanatory power of the key independent variable» (Hirschl, 2005, p. 134). In other words, by taking two cases that are similar in a range of different ways – institutionally, historically, and politically –, the «most similar cases» logic makes key independent variables stand out.

Therefore, by using this methodology, my goal is to figure out what is driving the different responses to the pandemic by the executive branch in Brazil and the Philippines. If such differences cannot – at least at first glance – be explained by looking at institutional blueprints, the recent history of democratization, or the foundations of populism in both countries, what exactly accounts for these two divergent responses to COVID-19? What are we missing from the broader picture that may help us make sense of these two drastically different ways of dealing with the pandemic? And, finally, why isn't one of the two executives responding in a way that helps centralize political power as the traditional theory on "unbound executives" would have predicted?

In the South American country, Bolsonaro is resisting calls to declare a nationwide state of emergency and continues to downplay the crisis. According to the *Washington Post*, that makes him one out of four world leaders who are minimizing the pandemic and arguably the worst among them (The Washington Post, 2020a). The President called the coronavirus «a little flu» and is disrespecting the World Health Organization's guidelines to fight COVID-19 (Bloomberg, 2020).

In the Philippines, on the other hand, President Duterte took aggressive measures to prevent the spread of the novel coronavirus and even said that quarantine violators would be killed on the spot. The President claimed that his «orders to the police and the military» are to «shoot them dead» (Foreign Policy, 2020a). On March 8, Duterte issued the Presidential Proclamation No. 922 declaring a state of public health emergency throughout the Philippines. On March 16, Duterte issued the Presidential Proclamation No. 929 declaring a state of calamity throughout the Philippines and imposing an Enhanced Community Quarantine in the island of Luzon.

Furthermore, on March 24, the Philippine Congress enacted the Bayanihan to Heal as One Act of 2020, «declaring the existence of a national emergency arising from the coronavirus disease […] and a national policy in connection therewith, and authorizing the President of the Republic of the Philippines for a limited period and subject to restrictions, to exercise powers necessary and proper to carry out the declared national policy».[1] Under the new legislation, Duterte was authorized to exercise a list of over thirty emergency powers for the following three months.

Before taking a deep dive into the particularities of the Brazilian and Philippine governments' legal responses to the pandemic, in the next section I advance the theoretical framework that will guide my analysis throughout the paper. My aim is to put forth a catalogue of different questions that one needs to answer when evaluating any national government's legal response to the coronavirus. Most importantly, I focus on two models that have long been explored in the literature of comparative constitutional studies and international legal studies.

After that, I conduct an empirical analysis of COVID-19 responses in Brazil and the Philippines. I have divided this part of the paper in two sections. In the first section of the empirical analysis, I describe the legal and constitutional frameworks that allow for the use of emergency powers in both countries. In the second section, I focus on some particularities that I believe are behind the differences between Brazil and the Philippines, such as the separation of powers at the national level and the system of checks and balances, the relationship between the national government and subnational leaders, and, finally, the political and partisan background in Congress and beyond.

After the empirical analysis, I dive into the question of why in Brazil, as opposed to the Philippines, the national executive did not declare a state of emergency despite the fact that Bolsonaro has expressed time and again his desire

1 The Bayanihan to Heal as One Act of 2020, together with a brief explanation of the previous Presidential Proclamations Nos. 922 and 929, can be found at https://www.senate.gov.ph/Bayanihan-to-Heal-as-One-Act-RA-11469.pdf. For a critical analysis of the Philippine's response to the novel coronavirus, *see* Yusingco, 2020.

to centralize political power, aggrandize the executive branch and abandon the Madisonian system of checks and balances. In other words, why a Schmittian version of an 'unrestrained executive in times of emergency' failed to emerge under Bolsonaro's watch even if the conditions seemed ripe for such a move? Paving the way towards an answer, I discuss whether executive underreach in Brazil may be followed by executive overreach and make a case for why Bolsonaro and Duterte may cross paths somewhere down the road.

In the final section of the paper, I offer some concluding remarks, highlighting the importance of having an independent Congress and Supreme Court when the national government fails to rise to the challenge during a public health emergency. Furthermore, I also stress how federalism is shaping the pandemic response in Brazil, while in the Philippines there was simply not enough administrative devolution to enable local leaders to oppose Duterte's plan of action.

2. States of Emergency: A Comparative Framework

According to Christian Bjørnskov and Stefan Voigt, «some 90 percent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency» (Bjørnskov & Voigt, 2018, p. 101). The emergency constitution – that is, the set of emergency provisions enshrined in a national constitution – has become a common feature of constitutional democracies around the globe. The rationale behind the concept is rather simple, albeit paradoxical.

The Constitution can provide for the suspension of fundamental rights and freedoms in order to preserve the constitutional order in the long haul. In other words, during an emergency, the boundaries of legal 'normality' can be pushed temporarily so the government can exercise 'exceptional' powers to deal with the crisis effectively.

Oren Gross calls emergency regimes «models of accommodation». In his words, «these models recognize that when a nation is faced with emergencies, its legal, and even constitutional, structures may be somewhat relaxed (and even suspended in parts)» (Gross, 2011, p. 334). Therefore, there needs to be an accommodation between the fundamental interest in limiting governmental powers in a democracy and, on the other hand, the exceptional interest in giving the government all powers 'necessary and proper' to respond to different kinds of emergencies, even if that means relaxing or suspending existing constitutional limits for a predetermined period of time.

The basic model of accommodation is the historical (and persistent) institution of the Roman dictatorship. The fundamental idea behind the institution was to allow for the nomination of a dictator who would then be authorized to

exercise emergency powers to defend the Roman Republic from foreign invasions. However, to prevent the potential abuse of these awesome powers, procedural and substantive hurdles were established *ex ante* and enshrined in the Roman 'constitutional' framework itself.

Gross recalls that «the most significant limitations pertained to the exceptional nature of the circumstances that would warrant the appointment of the dictator and to the temporal duration of that extraordinary appointment» (Gross, 2011, p. 335). Furthermore, the dictator was not given the prerogative to change the constitutional order or to promulgate new pieces of legislation during the emergency. He could only exercise his powers to defend the Roman territory from foreign invasion. Anything beyond that (*e.g.*, using the armed forces to invade another country) was deemed illegitimate.

It is possible to extract from the Roman tradition two elementary functions of the state of emergency that are responsible for guiding the design of emergency constitutions to this day. First, emergency powers should be limited in time. The concept of emergency only makes sense when opposed to the concept of normality. Because normality represents the rule in a constitutional democracy, an emergency can only be characterized as a temporary detraction from the norm. If the emergency lasts longer than the constitution allows it to last, there is a significant risk that the emergency will become the «new normalcy» and this would ultimately diminish the constitutional order (Gross, 2011, p. 349).

Second, emergency powers cannot be used to bring innovations into the constitutional framework. In other words, when dealing with an emergency, the government is only authorized to act in ways that lead to the preservation of the constitutional *status quo ante*. Once an emergency is formally recognized and declared following the instructions of the emergency constitution, the constitutional order should be frozen in time and protected from any unwarranted interferences from whoever is exercising emergency powers.

Accordingly, while in 1979 only some 19 percent of national constitutions had provisions that constrained the declaration of states of emergency to a fixed period of time and made any extensions subject to congressional approval, in 2009 this percentage had already jumped to 35.9 percent (Bjørnskov & Voigt, 2018, p. 109). Furthermore, it is common for constitutions to limit what governments can do under a state of emergency, stipulating, for example, «that no constitutional amendment can be passed under a state of emergency or that all decrees issued are only valid until the end of the state of emergency» (Bjørnskov & Voigt, 2018, p. 111). These two trends in the design of constitutional emergency provisions reinforce the two fundamental characteristics of emergency powers described above.

David Dyzenhaus argues that, when it comes to entrenching emergency provisions in a written constitution, countries often will choose between the

«executive model», authorizing the executive branch to declare an emergency and to exercise emergency powers, and the «legislative model», under which the legislative branch is the one responsible not only for declaring the emergency but also for defining the catalogue of emergency powers that will be delegated to the executive branch. Furthermore, where «judicial supervision is given a very large role», Dyzenhaus points to the possibility of a «judicial model» (Dyzenhaus, 2012, p. 442).

Nevertheless, Dyzenhaus believes that, instead of choosing between these three models, countries should focus on the design of a «normative framework for understanding how, in the light of experience, the grip of constitutional principles can be maintained». In other words, the main challenge when defining the boundaries of the emergency constitution is not choosing the branch of government who will lead the legal response to the emergency. Instead, the focus should be on creating incentives for the three branches of government to cooperate and «participate together in a common constitutional project» (Dyzenhaus, 2012, p. 460).

Aside from the classic institution of the Roman dictatorship, there are other models of accommodation that have emerged from the practice of dealing with emergencies throughout the ages. Here I shall focus on a second prominent model that was first identified by John Ferejohn and Pasquale Pasquino. The authors coined the term «legislative model» to refer to the model of accommodation in which, instead of grounding the declaration of emergency directly on the constitutional text, the legislature delegates emergency powers to the executive branch through ordinary legislative means (Ferejohn & Pasquino, 2004). To be sure, there is also the possibility of a «hybrid model», in which the Constitution expressly authorizes the legislature to delegate exceptional powers to the executive during an emergency.

According to the authors, «the legislative model permits closer legislative supervision of the executive's use of legislatively created authority, and it provides for a timely ending of that delegation whenever the legislature thinks the emergency is finished» (Ferejohn & Pasquino, 2004, p. 218). The downside of this model is twofold. First, the legislature may not be in the best possible position to act quickly and any delays can prove deadly depending on the nature of the crisis. Second, under the «legislative model» there seems to be a somewhat higher risk that the legislation tailored to deal with the emergency will «become embedded in the normal legal system» for years to come, potentially blurring the line between normalcy and exception (Ferejohn & Pasquino, 2004, p. 219).

After this initial overview of the theoretical framework of emergency powers, we are ready to pinpoint the significant questions that any model of accommodation needs to address in order to be a functional piece within the broader

constitutional (and legal) framework. First and foremost, there needs to be a clear definition of what counts as an emergency. The circumstances that justify the declaration of a state of emergency need to be defined *ex ante*. Ideally, governments should not have the ability to decide what counts as an emergency once the emergency is already underway.

The framers should be the ones who get to decide what is severe enough to justify a declaration of emergency, and this will be reflected on how long the list of possible emergencies turn out to be. For example, in the US, only two constitutional provisions can be said to provide for the exercise of emergency powers. Article I, section 8, clause 15 states that Congress has the power «to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions». Article I, section 9, clause 2, in turn, provides that «the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it».

Nevertheless, the US Constitution is an outlier in terms of emergency provisions. In a comparative perspective, two major trends can be identified in this area. First, the catalogue of circumstances that are severe enough to be deemed as emergencies is growing by the year and includes, for example, external aggressions, national disasters, economic distresses, public health crises, etc. Second, some circumstances are more common than others. Roughly one-third of national constitutions include «any kind of 'national disaster' as a potential justification for declaring a state of emergency», while only 7.73 percent include in their texts «economic emergencies» among the emergency provisions (Bjørnskov & Voigt, 2018, pp. 106-07).

Second, the actor who will enjoy the power to declare an emergency should be selected alongside the actor who will have the prerogative of employing the emergency powers that come bundled with the declaration. Ideally, each prerogative (*declaring* and *employing*) should be assigned to different independent actors to prevent potential abuses. In his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer* (the Steel Seizure case), Justice Black of the US Supreme Court famously said that «emergency powers are legitimate only when their control is lodged elsewhere than in the Executive who exercises them».[2]

Most national constitutional arrangements follow Black's suggestion. Gross notes that «modern constitutions frequently vest the primary authority for declaring a state of emergency in the legislature. At times, such power to declare an emergency is coupled with the provision that parliament will act upon the request or proposal of the government». Furthermore, some constitutions allow the President to act alone and declare an emergency when parliament is unable

2 *Youngstown Sheet & Tube Co. Et Al. v. Sawyer*, 343 US 579, Supreme Court (1952).

to meet or act promptly. If this is the case, a constitutional provision will provide for the need of congressional authorization as soon as possible (Gross, 2011, p. 339).

However, Gross also points to the fact that some countries in Latin America tend to give broad powers to the President, who will often be able to declare an emergency after just consulting with government advisors (Gross, 2011, p. 340). This is in line with what Professor Roberto Gargarella calls the model of «hyper-presidentialism» that became widespread in the region, especially in the aftermath of the military dictatorships in Brazil and Chile in the 1980s (Gargarella, 2013, pp. 148-51; pp. 162-65). This makes the fact that Bolsonaro failed to declare an emergency during the COVID-19 crisis all the more intriguing and I will return to this point towards the end of the paper.

Third, the immediate effects of declaring an emergency should be defined. Constitutions around the world have envisaged different categories that fit under the umbrella of a state of emergency, such as the state of war, the state of catastrophe, the state of siege, and so on. Usually the emergency constitution will define *ex ante* what are the emergency powers that can be exercised under each different category.

Two approaches are noteworthy when it comes to defining the effects of an emergency. In the first, the emergency constitution can adopt a «positive list», defining the rights and freedoms that can be suspended during the emergency. In the second, the emergency constitution can adopt a «negative list», defining the rights and freedom that cannot be violated during the emergency. Of course, some constitutions have opted to 'mix and match' elements of these two approaches (Gross, 2011, pp. 340-41).

Finally, a system of checks and balances should be carefully crafted. Here two questions are paramount: who has the authority to monitor the use of the emergency powers and who holds the final say on whether the emergency should end or be extended? According to Gross, most constitutions stay silent and do not provide a clear answer to these questions (Gross, 2011, p. 342). Nevertheless, Bjørnskov and Voigt show that the proportion of constitutions that limit the declaration of emergency to a time period and provide for the need of legislative approval of an extension is on the rise (Bjørnskov & Voigt, 2018, p. 109).

Furthermore, the role of the legislature in monitoring the declaration of a state of emergency is also becoming a common feature of modern constitutions, especially after the rise of the legislative model. When legislatures are responsible for determining the boundaries of the state of emergency via ordinary law-making, legislators will often establish a joint congressional oversight committee for the specific purpose of monitoring the executive. As we shall see in

the following sections, Brazil and the Philippines fit into this category as both national parliaments have created similar oversight committees to monitor the use of emergency powers during the COVID-19 emergency.

Alongside the role of legislatures in monitoring the emergency, courts can also exercise oversight functions. This will usually happen *ex post*, like when the Supreme Court of the US reviewed the constitutionality of the military eviction order of Japanese Americans from the West Coast in *Korematsu* (Bjørnskov & Voigt, 2018, p. 110).

Courts (and even legislators) tend to be very deferential to a declaration of emergency. Because of the «consensus-generating quality of emergencies», the executive is in the best position to «dictate and dominate the agenda» and «such domination is facilitated further by the realities of party politics» (Gross, 2011, p. 343). Nevertheless, as we will see in the case of Brazil, party politics can also disable the executive under extreme political circumstances and courts can find themselves in a position where they are called upon to not only keep the executive branch at bay, but also to order the executive to act while the emergency is still underway, effectively shaping the national government's response to the emergency.

In the case of COVID-19 specifically, Tom Ginsburg and Mila Versteeg note that there are three «legal bases» for addressing the pandemic. First, some countries have chosen to invoke the emergency provisions enshrined in their national constitutions to declare a state of emergency. Second, other countries are using existing legislation to justify the declaration of a state of emergency, following the «legislative model» identified by Ferejohn and Pasquino. Finally, yet other countries have adopted new emergency legislations to cope with the COVID-19 crisis (Ginsburg & Versteeg, 2020a). As we shall see, the boundaries between these three approaches are not always clear and the Philippines is a noteworthy example of a country that relied on all three legal bases at the same time.

3. Empirical Analysis, Part I: Emergency Constitution, Prior Legislation, and New Legislation

In the preceding section I summarized some of the most important questions related to the design of emergency constitutions in general and emergency powers in specific. After a brief overview of the comparative constitutional law literature on emergency constitutions, I can now propose a theoretical framework that will guide my comparative analysis of the legal response to the coronavirus pandemic in Brazil and the Philippines. All in all, in the next subsections I will try to answer the following questions for each of my case studies:

(1) What counts as an emergency?

(2) Who declares an emergency? Who exercises the emergency powers once the emergency is declared?

(3) What are the immediate effects of declaring an emergency?

(4) Who monitors the emergency? Who can decide whether the emergency should be extended or terminated?

Moreover, I will also scrutinize the models of emergency powers that have been invoked in each national context. In other words, I will be looking into whether the states of emergency in Brazil and the Philippines fit within the emergency constitution model, the new legislation model, or the existing legislation model. Once I conclude my empirical analysis based on the aforementioned theoretical framework, I hope to show the meaningful differences between the two jurisdictions together with a preliminary hypothesis of what is driving the conflicting legal responses to the novel coronavirus by both national executives.

3.1. Emergency Constitution

In the Philippines, the main constitutional provision regarding the declaration of a state of emergency is Article VI, Section 23(2).[3] The circumstances that justify a declaration of emergency under the constitutional text are very broad: «in times of war or other national emergency». It is up to the Philippine Congress to authorize the President to exercise the powers that are «necessary and proper» to cope with the emergency. The national policy that the President is supposed to enforce will be set by Congress through ordinary legislative means and will be subject to a time limit and to restrictions prescribed by the legislators. Congress can withdraw the declaration of emergency when it sees fit or wait until its expiration under the terms of the sunset provision.

Because the declaration of a state of emergency under the Philippine Constitution depends on Congress enacting a new legislation, Article VI, Section 26 prescribes that «when the President certifies to the necessity of [the] immediate enactment [of the law] to meet a public calamity or emergency», the ordinary legislative procedure set forth by the same constitutional provision can be bypassed.

Under normal circumstances, a bill can only become law after it has passed «three readings on separate days» in either House of Congress. This process can be too cumbersome when an emergency is underway. Taking that into account,

3 *See* the English version of the Philippines's Constitution of 1987 (Constitute Project), in https://www.constituteproject.org/constitution/Philippines_1987.pdf?lang=en

the Constitution provides for an exception, allowing Congress to disregard the ordinary legislative procedure when the President believes that a new law is needed to respond to a war or another national emergency.

Article VII, Section 18 states that the President is the «Commander-in-Chief» of the armed forces and can call them out «to prevent or suppress lawless violence, invasion or rebellion». In the last two cases, the President can suspend the writ of habeas corpus for up to sixty days or place the country under martial law. If the President decides to take such actions, she or he must submit a report to Congress within forty-eight hours, which shall convene and decide by a simple majority if the suspension or proclamation should be revoked.

Congress can also decide on an extension of the suspension or proclamation once the initial sixty days have passed. Finally, any citizen can challenge the actions of the President before the Supreme Court, which will have thirty days to decide on the «sufficiency of the factual basis of the proclamation of martial law or the suspension of the writ or the extension thereof».

Besides the suspension of the writ of habeas corpus and the possibility to place the country under martial law, Article XII, Section 17 of the Constitution provides for the takeover of «any privately owned public utility or business affected with public interest» by the government during the emergency. The American influence over the Philippine Constitution of 1987 is obvious. The document uses terms like «necessary and proper» and provide for the «suspension of the writ of habeas corpus».

Nevertheless, it also brings forward a number of constitutional innovations, including the role of Congress in elaborating a national policy that shall guide the government's response to the emergency (which, as we shall see, is the cornerstone of the Philippine government's response to COVID-19) and the role of the Supreme Court in reviewing the factual basis for the proclamation of martial law or the suspension of the writ of habeas corpus.

In Brazil, on the other hand, Article 84, Section IX grants to the President the power to decree a state of defence or a state of siege.[4] In sum, Brazil has two main modes of emergency, one being the escalation of the other. Article 136 defines the contours of the state of defence. This first mode is reserved to cases of «grave and imminent institutional instability or […] large scale natural calamities» and can be decreed by the President after consulting with the Council of the Republic and the National Defence Council.

The state of defence can last for up to thirty days and may be extended only once. The act should be submitted within twenty-four hours to the National Congress, which will decide on the matter by an absolute majority within ten days.

4 *See* the English translation of the Brazilian Constitution of 1988 (Constitute Project), in https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en

Under a state of defence, the rights of assembly, secrecy of correspondence, and secrecy of telegraph and telephone communication can be suspended.

The state of siege, according to Article 137, is reserved to cases of «serious disturbance with national effects or occurrence of events that show the ineffectiveness of a measure of the state of defense» or «a declaration of state of war or response to foreign armed aggression». Unlike the state of defence, the state of siege can only be decreed by the President after consulting with both councils and being previously authorized by the National Congress.

Usually the state of siege will only last for thirty days, but it can be prolonged as many times as necessary. In case of a war, the state of siege can be decreed for the entire period of the armed conflict. Article 139 defines what are the measures that can be taken against individuals under a state of siege, such as an obligation to remain in a determined place, the suspension of freedom of assembly, and the requisitioning of private property.

The Brazilian Constitution of 1988 also provides for three important safeguards against the abuse of emergency powers. First, the Constitution cannot be amended under a state of defence or state of siege (Article 60, First Paragraph). Second, the criminal and civil immunity of Deputies and Senators «for any of their opinions, words and votes» shall remain under the state of emergency and can only be suspended by a vote of two-thirds of the members of their respective House (Article 53, Eighth Paragraph). Third, the Executive Committee of the National Congress can designate a Special Committee to oversee the state of emergency (Article 140).

Unlike the Philippines, the Brazilian Constitution follows the French and Portuguese traditions of emergency powers and provides for a more detailed constitutional framework for dealing with emergency situations, including an explicit prohibition of amending the document during the state of emergency, which has no parallel in the Philippine Constitution of 1987. It also clearly defines what are the constitutional rights and freedoms that can be suspended or restricted under each mode of emergency. Nevertheless, the Brazilian Constitution is silent about the role of the Supreme Court in reviewing the declaration. The focus of the emergency constitution in Brazil is on the President, which is consistent with the Latin American tradition of «hyper-presidentialism».

During the COVID-19 pandemic, the Philippines invoked Article VI, Section 23(2) to enact the «Bayanihan to Heal as One Act of 2020», which will be covered in subsection 3.3. below. After exhausting the possibilities that were available under pre-existing legislation, President Duterte felt the need to formulate a specific national policy to deal with the spread of the coronavirus. In Brazil, on the other hand, the emergency constitution is still dormant and has not been invoked by the Bolsonaro administration to deal with the pandemic. Instead, the

Brazilian Congress relied on a pre-existing legislation to declare a state of public calamity, which will be covered in subsection 3.2. below.

3.2. Prior Legislation

In the Philippines, President Duterte relied on two pre-existing statutes as the legal bases for his government's initial response to the pandemic. The first one is the «Mandatory Reporting of Notifiable Diseases and Health Events of Public Concern Act» of 2019, which creates a national policy to deal with infectious diseases in compliance with the 2015 International Health Regulations of the World Health Organization.[5] Section 7 of the Act allows the President to declare a state of public health emergency to «mobilize governmental and nongovernmental agencies to respond to the threat». Invoking his Section 7 powers, President Duterte signed the Presidential Proclamation No. 922 on March 8, declaring a state of public health emergency throughout the Philippines due to COVID-19.[6]

The second statute is the «Philippine Disaster Risk Reduction and Management Act of 2010», which adopts a national policy for disaster management in the country.[7] Section 16 of the Act states that «The National Council shall recommend to the President of the Philippines the declaration of a cluster of barangays, municipalities, cities, provinces, and regions under a state of calamity». Furthermore, if the President chooses to declare a state of calamity, the presidential declaration «may warrant international humanitarian assistance as deemed necessary». Invoking his Section 16 powers, President Duterte signed the Presidential Proclamation No. 929 on March 16, declaring a state of public calamity throughout the country for a period of six months.[8] The Proclamation also imposed an «Enhanced Community Quarantine» in Luzon, the largest and most populous island in the country.

In Brazil, similarly, President Bolsonaro relied on the pre-existing Complementary Law No. 101 of 2000 (also known as the Fiscal Responsibility Act) to ask Congress to declare a state of public calamity.[9] Article 60 of the Law allows

5 *See* Republic Act No. 11332, Approved by the Philippine Congress on April 26, 2019, in https://lawphil.net/statutes/repacts/ra2019/ra_11332_2019.html

6 *See* Presidential Proclamation No. 922, Signed by the President on March 8, 2020, in https://www.officialgazette.gov.ph/downloads/2020/03mar/20200308-PROC-922-RRD.pdf

7 *See* Republic Act No. 10121, Approved by the Philippine Congress on May 27, 2010, in https://lawphil.net/statutes/repacts/ra2010/ra_10121_2010.html

8 *See* Presidential Proclamation No. 929, Signed by the President on March 16, 2020, in https://www.officialgazette.gov.ph/downloads/2020/03mar/20200316-PROC-929-RRD.pdf

9 *See Lei Complementar* No. 101, Approved by the Brazilian Congress on May 4, 2000, in http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm

Congress to declare a state of public calamity to suspend ordinary limits on the national government's spending power, but it does not specify under which circumstances such declaration can be made.

Invoking its Article 60 powers, Congress passed the Legislative Decree No. 06 of 2020 on March 20, declaring a state of public calamity throughout the country until December 31.[10] The decree has two distinct effects; «First, it suspends important statutory limitations and allows the government to expend more financial resources to fight the pandemic than it would otherwise be authorized to. Second, […] it creates an oversight committee that will be responsible for tracking governmental expenditure related to the public health emergency» (Archegas, 2020).

Nevertheless, this does not mean that President Bolsonaro is taking the pandemic seriously. He continued to downplay the crisis even after he asked Congress to declare a state of public calamity. On April 16, Bolsonaro fired his popular Health Minister, Luiz Mandetta, over disagreements about the national government's response to the pandemic (Foreign Policy, 2020b). Mandetta was a champion of the guidelines issued by the World Health Organization, which ultimately earned him better approval ratings than the President himself. Bolsonaro, on the other hand, believes that the economy cannot stop to fight the pandemic and seems indifferent to the rising death toll in the country. When Brazil surpassed China's number of coronavirus-related deaths, Bolsonaro said to a reporter: «So what? I'm sorry, but what do you want me to do?» (The Guardian, 2020a).

There is also a more speculative explanation for why Bolsonaro asked Congress to declare a state of public calamity under the Fiscal Responsibility Act of 2000. In 2016, President Dilma Rousseff was not impeached for the corruption scandal in which her party (the PT) was involved. Instead, she was «under scrutiny over arcane fiscal maneuvers her government allegedly used to pump up the economy and disguise a deficit in the public accounts» (Foreign Affairs, 2016). This is known in Brazil as «*pedaladas fiscais*» (Portuguese for 'fiscal pedaling'). Foreseeing that the national government would need to go beyond ordinary spending limits in 2020, Bolsonaro asked Congress to declare a state of public calamity so he would not have to face an impeachment trial for fiscal manoeuvring. Far from a sincere willingness to expend public funds to fight the pandemic, the declaration is closer to a political stunt designed to immunize the President against the 2016 precedent.

10 *See Decreto Legislativo N.º 06 de 2020*, Passed by the Brazilian Senate on March 20, 2020, in http://www.in.gov.br/en/web/dou/-/decreto-legislativo-249090982

3.3. New Legislation

Among the two countries, only the Philippines passed a new law to cope with the novel coronavirus pandemic. Invoking the emergency provisions in the Constitution (specifically Article VI, Section 23(2)), the Philippine Congress enacted the «Bayanihan to Heal as One Act of 2020».[11] The Philippine word *bayanihan* means «mutual cooperation for the public good».[12] The Act has three legal purposes. First, it declares a state of national emergency throughout the Philippines due to the COVID-19 pandemic. Second, it delineates a national policy to deal with the spread of the coronavirus in the national territory. Finally, it delegates to the President all powers «necessary and proper» to carry out the national policy for three months.

In sum, the previous two Presidential Proclamations were deemed insufficient by President Duterte, so he pushed for a new legislation that would grant him emergency powers beyond those that could be exercised under the state of public health emergency and the state of calamity. The Bayanihan Act enumerates some thirty different emergency powers that Duterte will be able to exercise during the state of national emergency, including, among others, the power to expedite the accreditation of testing kits, to provide an emergency subsidy to low income households, to provide a special risk allowance to public health workers, and to ensure that local governments are acting in accordance with the national government's policy.

The Act also created a controversial new crime. Section 6(f) prescribes that people who create, perpetrate, or spread «false information regarding the COVID-19 crisis on social media and other platforms, such information having no valid or beneficial effect on the population, and are clearly regarded to promote chaos, panic, anarchy, fear, or confusion» will be subject to two months of jail time or a fine of ten thousand pesos (up to one million pesos).

Political commentators rightly worried that the new crime would be used by Duterte's administration to intimidate political opponents and send dissidents to jail. Four days after the Act was published, a town mayor was charged by the Philippine National Police under the new crime (CNN Philippines, 2020). In early April, reports emerged that the National Bureau of Investigations had summoned more than a dozen people for allegedly spreading fake news about the pandemic (Inquirer, 2020).

In terms of legislative oversight, the Act establishes a «Joint Congressional Oversight Committee» to monitor the implementation of the national policy and

11 *See* Republic Act No. 11469, Approved by the Philippine Congress on March 24, in https://www.senate.gov.ph/Bayanihan-to-Heal-as-One-Act-RA-11469.pdf

12 *See* the meaning of the work *bayanihan* in the Wiktionary, in https://en.wiktionary.org/wiki/bayanihan

the exercise of the emergency powers that were delegated to the President. Accordingly, it is the President's duty to submit a weekly report to Congress describing the newest developments involving the pandemic and the government's response.

The Act will be in full force for three months after its publication and can only be extended by Congress once the sunset provision expires. In sum, the Bayanihan Act checks all the boxes of the «legislative model» described by Ferejohn and Pasquino. It was approved through ordinary legislative means, it delegates emergency powers to the executive for a limited period of time, and it sets forth a monitoring mechanism.

Nevertheless, it should be noted that Congress's authority to pass the Act is granted by the Constitution itself. Arguably, the Philippine case is an example of a hybrid regime of emergency powers. The Philippine government invoked the emergency provisions enshrined in the national constitution to enact a new national policy through ordinary legislative means. Moreover, the initial response of President Duterte was grounded on pre-existing legislation, which he used to declare a state of public health emergency and a state of calamity. While in Brazil Bolsonaro asked Congress to declare a state of public calamity mostly for his own political convenience, in the Philippines Duterte seized every possible legal and constitutional avenue to concentrate power in the national executive during the pandemic.

4. Empirical Analysis, Part II: Separation of Powers, Federalism, and Political Background

In the previous section, I advanced a comparative analysis of the legal justification for the national government's response to COVID-19 in Brazil and the Philippines. In this section, I will compare the political structure of both countries in hopes of showing what are the significant differences between key institutions that might explain the competing responses to the pandemic by both national executives. First, I will describe the structure of the National Congress in both jurisdictions, emphasizing the role of party politics and recent political developments. Second, I will evaluate the role of courts in checking the national government's response to the pandemic. Finally, I will conclude with some notes on federalism in Brazil and administrative decentralization in the Philippines.

4.1. Congressional Structure and Party Politics

Both countries have very similar congressional structures, with a bicameral national legislature divided between a House of Representatives and a Senate. Article VI of the Philippine Constitution establishes a Senate with twenty-four elected members, a number that cannot be changed by law, and a House of Representatives with no more than two hundred and fifty members, unless otherwise fixed by law. Currently, there are a total of three hundred and four elected representatives in the House.

In Brazil, Article 46 of the 1988 Constitution determines that each state shall elect three senators. Currently, Brazil has eighty-one senators, apportioned between twenty-six states and one federal district. The number of members in the House is established by a complementary law, following the determination of Article 45 of the Constitution, and currently stands at five hundred and thirteen deputies.

Notwithstanding their similar congressional structures, party politics in both countries is starkly dissimilar. In the Philippines, there are nine parties with elected representatives in the Senate and twelve parties with elected representatives in the House. In contrast, Brazil has sixteen parties with elected representatives in the Senate and twenty-five parties with elected representatives in the House.

After a landslide victory in the mid-term elections in 2019 (The New York Times, 2019), the ruling coalition in the Philippines ('coalition for change') secured twenty out of twenty-four seats in the Senate and two hundred and seventy-one seats out of three hundred and four in the House. In contrast, Bolsonaro failed to secure a stable coalition in the Brazilian Congress. Bolsonaro's former party (the PSL) won fifty-three seats in the House, losing in size just to the PT (the party of former Presidents Lula and Dilma). Nevertheless, after a series of disagreements with his peers, Bolsonaro left the PSL and announced the creation of a new political party, Alliance for Brazil.

To make things more complex, Bolsonaro is constantly attacking the President of the Senate and the Speaker of the House, and, as a consequence, is losing the little support he once enjoyed in Congress. So far, the Brazilian President attended two protests where demonstrators called for the closing of the Brazilian Supreme Court (STF) and Congress (Reuters, 2020). Some of the protesters even called for a «constitutional military intervention» and a return of «Institutional Act No. 05», an infamous decree that was issued during the military dictatorship in Brazil to order the closure of Congress and the end of party politics throughout the country.

To be sure, Brazil has a strong presidential office and Bolsonaro can still do many things by decree. Nevertheless, Congress is enforcing an important check

on the President during the pandemic and, ultimately, forcing him to act. While Bolsonaro downplays the coronavirus crisis and promotes agglomerations in Brasília, risking the lives of thousands of citizens, Congress is passing key statutes to deal with the consequences of the pandemic.

On April 30, for example, the Brazilian Senate approved the payment of an emergency subsidy to low income households that were negatively impacted by the economic crisis (Senado Notícias, 2020). All in all, while President Duterte is willing to fight the spread of the virus and the Philippine Congress authorized him to exercise all powers «necessary and proper» during the COVID-19 crisis, in Brazil Bolsonaro is unwilling to lead the country's response to the pandemic and Congress became one of the protagonists in the fight against COVID-19.

Aside from party politics, Bolsonaro and Duterte also rely on different populist platforms. Duterte was elected in 2016 to fight criminality in the Philippines and make the country safer for its citizens. He had a controversial résumé to back his campaign promises. When he was the mayor of Davao, a position he held for over twenty-two years and is now under the auspices of his daughter, Duterte waged a bloody war against drug dealers and local communist guerrillas.

He was recently accused by two former allies of heading what was known as the 'Davao Death Squad', a group of «thugs, ex-guerrillas, and out-of-work anticommunist vigilantes who gunned down pickpockets, drug peddlers, and other petty criminals» (Coronel, 2019). When a Senate panel began to investigate President Duterte's past in 2017, Senator Leila de Lima – a major political opponent of the President and chairwoman of the panel – was arrested over charges that she received bribes from drug traffickers (The New York Times, 2020a). Duterte is keeping a tight grip on Congress ever since.

In Brazil, on the other hand, President Bolsonaro was elected in the aftermath of a major corruption scandal. The «Operation Car Wash», a nationwide investigation led by the Federal Police, unveiled a vast web of corruption involving politicians, the Petrobras (Brazil's national oil company), and construction firms (The Guardian, 2017). The scheme was meant to keep PT's ruling coalition in Congress 'up and running'. As a consequence of the investigations, former President Lula was found guilty of corruption charges and sentenced to twelve years in jail (The New York Times, 2018).

This made Bolsonaro look like the only viable option to the Brazilian electorate, a candidate who was not implicated in the Car Wash scandal and could advance a new way of doing politics. During the 2018 elections in Brazil, Bolsonaro promised to oppose the 'deranged elites' in Brasília and said that he would not get involved in the same strategy of coalition building. As a consequence,

he rhetorically equated the practice of forming a ruling coalition in Congress with corruption, which may explain why he is so reluctant to talk to party leaders and prefers to resort to confrontation.

4.2. Courts

The Supreme Court of the Philippines is composed of one Chief Justice and fourteen Associate Justices (Article VIII, Section 4 of the 1987 Constitution). The Justices are appointed by the President from a list of at least three nominees that shall be prepared by the Judicial and Bar Council (Article VIII, Section 9). Appointments to the Supreme Court do not need to be confirmed by the Senate (or any other institution). This is significantly different from the appointment procedure in the US and Brazil, where the Senate plays a determinant role in confirming the President's nominations to the bench. The Justices hold office for good behaviour and must step down when they reach seventy years of age (Article VIII, Section 11).

President Duterte nominated eleven out of fourteen Associate Justices of the Court's current composition. Moreover, in 2017, Duterte pushed for the removal of Chief Justice Maria Lourdes Sereno after the Chief overtly opposed his political agenda and promised to hold the President accountable. Sereno was ousted by an 8-6 decision that involved all her peers in the Court at the time. Her appointment to the bench was rendered «null and void» by the majority. President Duterte moved quickly to nominate someone aligned with his political views to be the country's next Chief Justice. After the decision was rendered and published by the Supreme Court, Sereno denounced the President and said that her ousting «demonstrates the disregard that [his] administration has for the constitution and the rule of law» (Reuters, 2018).

As one might expect, given Duterte's influence over the institution, the Supreme Court of the Philippines does not represent a major check on the President. The 1987 Constitution authorizes the Court to review the factual and legal bases for the declaration of a state of emergency, but the Supreme Court opted to remain silent on the matter so far. There are two noteworthy decisions issued by the Court during the pandemic, but neither of them represents a departure from the national government's political agenda.

On April 20, the Court ordered lower court judges to release prisoners that are at risk of being infected by the novel coronavirus inside the Philippine's overcrowded jails (Rappler, 2020). Acting in pursuance of the Supreme Court's order, lowers courts released almost ten thousand prisoners to address fears over the spread of the virus in the national penitentiary system (Aljazeera, 2020).

Moreover, on September 16, the Court dismissed a petition asking for the issuance of a writ of mandamus to compel the national government to conduct mass testing for COVID-19. According to the Supreme Court Public Information Office, «the High Court held that courts have no authority to issue a writ of mandamus, no matter how dire the emergency, without a demonstration that an official in the executive branch failed to perform a […] duty» (Supreme Court of the Philippines Public Information Office, 2020).

It is also important to note that the Court did issue a landmark decision in 2006 regarding the limits that must be observed during an emergency. According to the Court, «Congress is the repository of emergency powers». Noting that it is up to the national legislature to delegate emergency powers to the President during a crisis, the Court put forth four major limits: «There must be a war or other emergency. The delegation must be for a limited period only. The delegation must be subjected to such restrictions as the Congress may prescribe. The emergency powers must be exercised to carry out a national policy declared by Congress». The Bayanihan Act of 2020 seems to pass muster under the 2006 decision, but it remains to be seen whether the Philippine Supreme Court will apply the precedent as it currently stands if it ever comes to that.[13]

Bolsonaro, on the other hand, has little to no influence over the Brazilian Supreme Court (*Supremo Tribunal Federal*). The Court is composed of eleven Justices appointed by the President and subject to the approval of an absolute majority of the Senate (Article 101 of the 1988 Constitution). Bolsonaro has only nominated one member to the bench since he took office in January of 2019.

In 2015, Congress approved a constitutional amendment to change the retirement age of Justices of the Supreme Court from seventy to seventy-five years. Known in Brazil as the «Walking Stick Amendment» (*PEC da Bengala*), it was widely regarded at the time as a political manoeuvre to prevent former (and at the time unpopular) President Dilma Rousseff from nominating two more Justices to the Court. If he fails to get re-elected in 2022, Bolsonaro is expected to make just one more nomination in 2021.[14]

In March, as he continued to downplay the crisis, Bolsonaro called for an end to regional lockdown orders, but «governors in 25 of 27 states kept them in place» (Vox, 2020). The President inaugurated a major political crisis between the Union and the several States that were trying to curb the spread of the novel

13 *See* G.R. No. 171396, Published on May 03, 2006, in https://lawphil.net/judjuris/juri2006/may2006/gr_171396_2006.html

14 There have been talks about passing a new constitutional amendment to bring the age of compulsory retirement back to seventy years so Bolsonaro can nominate more justices to the bench, but given the current political composition in Congress that move is very unlikely. *See* CONJUR, 2018.

coronavirus without the support of the federal government. Bolsonaro believed that the States could not act independently on the matter.

The case eventually reached the Brazilian Supreme Court, which issued a provisional order recognizing the competence of States and Municipalities to order regional and local lockdowns without the national government's acquiescence.[15] In sum, the STF is bolstering administrative decentralization in Brazil, empowering local authorities that need to act quickly to prevent the spread of the virus within their communities.

Furthermore, the Brazilian Supreme Court issued another important decision on June 8, compelling the national government to disclose cumulative and comprehensive data on the novel coronavirus in Brazil.[16] Just days before, Bolsonaro ordered the Ministry of Health to stop publishing COVID-19 data (The New York Times, 2020b). The federal government opted to reveal only the number of recovered patients, hiding the total number of infections and deaths from the public.

Invoking the constitutional principle of transparency, Justice Alexandre de Moraes decided that the national government's move was unconstitutional. However, even after the government resumed the publication of the data, media companies in Brazil decided they would come together to independently monitor the spread of the virus in country.

4.3. Federalism and Decentralization

As the last point on the Brazilian Supreme Court shows, federalism is a key component of Brazil's response to the novel coronavirus. While the President denies that COVID-19 is a real threat and, consequently, that it deserves the attention and resources of the federal government, governors, mayors, and other local authorities (such as prosecutors and judges) are hard at work to keep people safe and attenuate the pervasive consequences of the pandemic, which has claimed over 200 thousand Brazilian lives.

On April 30, São Luís, in the State of Maranhão, became the first city in Brazil to be placed under a complete lockdown. A public prosecutor (member of the Brazilian *Ministério Público*) asked a local court to authorize a lockdown order for a minimum of ten days after the city's public health system collapsed. The judge granted the request and issued an order to suspend all non-essential activities in

15 *See Medida Cautelar na Ação Direta de Inconstitucionalidade N.º 6341*, Published on March 24, 2020, in http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6341.pdf

16 *See Medida Cautelar na Arguição de Descumprimento de Preceito Público N.º 690*, Published on June 8, 2020, in http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF690cautelar.pdf

São Luís, limit public gatherings of any kind, and impose a fine on those who do not comply with the guidelines issued by the local public health authority (ABC News, 2020; UOL Notícias, 2020).

On the other hand, in the Philippines the response to the pandemic has been mostly a national one, with almost no perceptible signs of decentralization. Unlike Brazil, the Philippines is a unitary state with territorial and political subdivisions. The local government units (LGUs) are, according to Article X, Section 1 of the Constitution, the provinces, cities, municipalities, and barangays. Although the LGUSs enjoy local autonomy (Article X, Section 2), the President exercises general supervision over local governments (Article X, Section 4). Due to this constitutional design, which places a premium on centralization and offers little to no devolution to local governments, it is common for Filipinos to refer to the national government as the 'Imperial Manila'.

In 1991 the Philippine Congress made its first real attempt at decentralization by enacting the Local Government Code, which gave LGUs an annual allocation of forty percent of national tax collections. This is known as the internal revenue allotment (IRA). After almost three decades, analysts believe that the IRA did not improve life conditions at the local level and that LGUs still depend on the national government to get the financial assistance they desperately need.

According to Benjamin Punongbayan, the Founder of Grant Thornton Philippines, the Code failed for two main reasons. First, the Code is vague on its enumeration of the LGUs responsibilities under the new administrative regime, sparking tensions between the national and the local levels of government. Second, there is no mechanism to hold local authorities accountable for the use of the resources that come attached to the IRA, so the population is just left in the dark about how the money is spent. (Punongbayan, 2019).

5. Can Populism be Advanced by Executive Underreach?

So far, I have analysed the legal bases for the response to COVID-19 in Brazil and in the Philippines. In the previous section of the paper, some key differences between both countries were highlighted. Notably, I indicated how the Brazilian Congress, the Supreme Federal Tribunal and the States were central to curbing the spread of the coronavirus (despite the fact that Brazil remains one of the countries with the highest rates of infections and deaths, surpassed only by the United States) and prompting the national government into action even when Bolsonaro kept downplaying the emergency. Therefore, unlike the Philippines, Brazil is an interesting case where the separation of powers and federalism carried the day during one of the most trying times in the country's history.

In this section, on the other hand, I will address a second question raised by this study: if Bolsonaro is commonly seen as an authoritarian and populist leader who despises the Madisonian system of checks and balances, participates in undemocratic demonstrations alongside his supporters and calls for the closure of Congress and the Supreme Court, why has he failed to take advantage of a moment of crisis to invoke his constitutional emergency powers? As I have noted above, following the Latin American tradition of hyper-presidentialism, the Brazilian Constitution grants very broad powers to the president, especially in moments of emergency, which makes the fact that Bolsonaro opted to ignore the coronavirus – unequivocally allowing other institutions to operate under the spotlight – all the more intriguing.

The Brazilian case challenges the idea of an unbound executive in times of emergency. In a 2009 law review article, Eric Posner and Adrian Vermeule famously argued that «political conditions and constraints, including demands for swift action by an aroused public, massive uncertainty, and awareness of their own ignorance leave rational legislators and judges no real choice but to hand the rains to the executive and hope for the best» (Posner & Vermeule, 2009, p. 1614).

For the authors, a «Schmittian view» is more appropriate to explain how the government operates during an emergency than a «Madisonian view» (Posner & Vermeule, 2009, pp. 1614-15). Although the article is mainly based on the events that unfolded in the US after the 9/11 terrorist attacks and the 2008 financial crisis, the authors further developed their conclusions into a more general theory on the functioning of the modern administrative state when they published «The Executive Unbound» just a few years later (Posner & Vermeule, 2011).

In a comprehensive and global study on how several national governments responded to the coronavirus pandemic, Tom Ginsburg and Mila Versteeg pushed back on the idea that the «Schmittian view» necessarily overshadows the «Madisonian view» in times of emergency, rebuking some of the arguments advanced by Posner and Vermeule. According to the data they collected in 2020, «85% of the countries surveyed have a detailed emergency regime in their constitutions» but, surprisingly, «just 36% […] declared a state of emergency» and, more surprisingly still, «in no more than 81% of the countries […] did we observe either legislative involvement or judicial enforcement or resistance from subnational units» (Ginsburg & Versteeg, 2020b, pp. 23-24).

Brazil, therefore, is no outlier in comparative terms. Yet, something is still missing from the picture. Brazil remains an odd case of a country ruled by a *populist* leader who, astoundingly, did not declare a state of emergency. Although the data amassed by Ginsburg and Versteeg makes for a strong empirical argument that the «Madisonian view» can still operate under the harsh circumstances

of an emergency like the COVID-19 public health crisis, it stops short of offering a convincing explanation for why a populist leader would not use the very same circumstances to her or his advantage to replace the «Madisonian view» for a Schmittian one. But to pave the way towards an exploratory solution to this paradox, first I need to clarify what I mean by populism.

While I do acknowledge that populism is a highly controversial concept and that there is no consensus around a single definition in the literature, here I will focus on one influential theory to guide my discussion. According to Jean-Werner Müller, populism is a «moralistic imagination of politics» that is both anti-elitist and anti-pluralist. Populism not only «opposes a morally pure and fully unified […] people to small minorities, elites in particular», but it also claims to hold the monopoly over the «moral representation» of the «authentic people» (Müller, 2017, p. 593).

This is why, once in power, populists will try to establish what Müller calls «populist constitutionalism», an attempt at constitutionalizing their idea of what the «morally pure people» looks (or should look) like. This will usually be accomplished by aggrandizing the executive branch and undermining constitutional mechanisms of horizontal accountability, namely the Madisonian system of checks and balances (Müller, 2017, pp. 598-600). In other words, only the populist leader has the necessary legitimacy to act on behalf of the «real people».

Similarly, Nadia Urbinati reasons that populists will often advocate for the will of the people to remain unmediated and, therefore, that no intermediary institution can be placed between the citizens and their rightful leader. After all, the leader herself is the embodiment of the will of the people. Consequently, the idea that the leader should somehow be held accountable through the work of intermediary bodies is discarded by the populist movement (Urbinati, 2019, pp. 164-69).

Although it is important to note that populists have an incentive to dismantle independent checks on their power, this does not mean that they will necessarily advocate for democratic institutions like Congress and the Supreme Court to be terminated or permanently snuffed. After all, «populists are only against specific institutions – namely those which, in their view, fail to produce the morally […] correct outcomes […]. Populists in power will be fine with institutions – which is to say: *their* institutions» (Müller, 2017, p. 598).

Building on this idea, David Pozen and Kim Scheppele assert that populist leaders like Jair Bolsonaro and Donald Trump can advance their political agendas not only by declaring an emergency and keeping a tight grip on democratic institutions, but also by exercising «executive underreach» and using the crisis to disparage journalists, scientists, judges, international institutions and many others. According to Scheppele and Pozen, executive underreach is defined «as

a national executive branch's willful failure to address a significant public problem that the executive is legally and functionally equipped (though not necessarily legally required) to address» (Pozen & Scheppele, 2020, p. 02).

In other words, having the capacity and the legal means to effectively address a national emergency, the government comes to the understanding that its political interests are better served by deliberate inaction. This may happen for a number of reasons. In Brazil, Bolsonaro used the pandemic not as an opportunity to concentrate power or test the limits of the national executive – which was Duterte's preferred course of action –, but instead as an excuse to blame his political opponents for the economic crisis that he knew would be inevitable after an international calamity like the coronavirus pandemic. He then used the Supremo Tribunal Federal's decision that legally empowered States and Municipalities to act as an excuse to outsource blame for his wilful failure to address the crisis to the many governors and mayors across the country.

He also seized the opportunity to attack China and the World Health Organization, which is in line with the populist rhetoric he imported from Trump's America. Finally, Bolsonaro took advantage of the pandemic to sow division and create confusion among the populace. He repeatedly called the pandemic 'fake news' and a 'media trick' (The Guardian, 2020b) and suggested that those in favour of lockdown orders are 'unpatriotic'. Therefore, it is interesting to note how populism can be advanced by both executive underreach and overreach.

Bolsonaro's wilful failure to address the COVID-19 pandemic may lead him to the same destination reached by his Philippine counterpart, albeit through different means. Only time will tell if executive underreach may give place to overreach in Brazil, but there is a possibility that Bolsonaro and Duterte will cross paths somewhere down the road.

Remarkably, in the beginning of 2021, people infected with the virus in Manaus, the capital of the State of Amazonas, were dying of asphyxiation after the city ran out of oxygen tanks. In the wake of the crisis, Bolsonaro's supporters started to call for a declaration of a state of defence not to curb the spread of the virus in the region, but to delegate more powers to the president whose inaction is to blame for the situation in Manaus in the first place (bbc, 2021; cnn, 2021). Just as Pozen and Scheppele predicted, «executive underreach may tend to foster executive overreach by creating conditions of precarity or unrest that will then be addressed through more legally questionable means» (Pozen & Scheppele, 2020, p. 13).

6. Conclusion

From my analysis, it seems plausible to conclude that the different responses to COVID-19 in the Philippines and Brazil can be explained mainly by differences in party politics and in the populist rhetoric of Bolsonaro and Duterte. While the Philippine President controls an absolute majority of both houses of Congress, his Brazilian counterpart lacks congressional support and tied his own hands by equating coalition building to corruption. Consequently, Duterte seized the opportunity offered by the pandemic to concentrate more power in the national executive, while Bolsonaro struggled to keep Congress, the Supreme Court, and Governors on his side – and has mostly failed at that.

My analysis also underlines the importance of having an independent Supreme Court and a decentralized administration capable of acting even when the national government downplays the crisis and the country falls prey to the President's inaction. Although Bolsonaro failed to rise up to the challenge posed by COVID-19, the Brazilian Supreme Court issued two important decisions, one enabling subnational leaders to declare local and regional lockdown measures despite the federal government's position and another compelling the Ministry of Health to publish cumulative and comprehensive data on the novel coronavirus, empowering citizens with information they can use to assess the true extension of the crisis. Following this second decision, media outlets teamed up to monitor the number of infections and deaths in the country to neutralize any distortions coming from the national government.

As Ginsburg and Versteeg noted, «Madisonian checks can protect both against central executive over-reach [and] against rights abuses that take the form of under-reach. […] A system of checks and balances among government institutions can help determine the right balance between the individual interest at stake and broader social concerns» (Ginsburg & Versteeg, 2020b, p. 53). This is exactly the case of Brazil. Although the Bolsonaro administration chose to travel down the road of executive underreach, risking the lives of thousands of citizens in the process, independent institutions like Congress, the Supreme Court and the press helped protect Brazilians against some forms of rights abuses during the pandemic.

However, as I argued in the last section of the paper, Bolsonaro's wilful failure to address the coronavirus pandemic can advance his populist agenda just like Duterte's ominous power grabs have. Scholars should not jump to the conclusion that Bolsonaro's failure to control the virus in Brazil is a sign of the president's political demise. Quite the contrary, by using the pandemic to exercise executive underreach and disparage independent institutions and political opponents, Bolsonaro may have just started to pave his way towards executive

overreach in the future – and it is no coincidence that his supporters are now calling for a declaration of a state of defence almost a year into the pandemic.

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