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Chapter 10

Immediacy, *potentia* and constraining emergency powers

Bas Schotel

Introduction

One of the fundamental challenges for public law is how to enable authorities to take effective measures in times of emergency and by the same token put legal constraints on those same emergency powers. It seems that the enabling and constraining functions of law are reverse proportionate: the more emergency powers are effective the less effective are the constraints. Experts of public law have pointed out various causes for the problem of putting effective legal constraints on emergency powers.[1] In his contribution to this volume on law and time, Marc de Wilde singles out an additional cause, namely the temporal assumption underlying emergencies. Often emergencies are presented as an unprecedented future justifying very comprehensive emergency powers and giving some of these powers an almost permanent character in the normal legal order. Taking cue from this temporal dimension, I will explore how the tendency of emergency powers becoming permanent is reinforced by another temporal dimension, namely immediacy. Immediacy refers to the capacity of authorities to perform actions *without intermediary* and *immediately*. When authorities perform directly factual actions – do physical things – they act immediately. *Potentia* represents the capacity to perform factual actions.

The paper will start by a brief schematic explanation of how public law enables and constrains public power in times of normality, i.e. when emergency powers do not apply.[2] The enabling and constraining functions are linked to law's normal temporal categories of *ex ante* and *ex post*. Emergencies tend to elude these temporal categories, catering to more permanent emergency powers. This chapter will then discuss the nature of factual actions, *potentia* and immediacy. It will become clear how already in times of normality, factual actions and *potentia* defy law's normal constraints and temporal categories. The final section explores how the combination of *potentia* and emergency produces a logic of permanent immediacy, which in turn makes it difficult to put legal constraints on emergency powers.

1 See below footnotes 3–7.
2 I hereafter use 'law' as to mean 'public law', unless explicitly stated otherwise.

Emergency powers, legal constraints and time

The starting point for this chapter is one of the perennial challenges of public law: the tension between the effective exercise of public power, democratic legitimacy and individual legal protection. On the one hand, the public expects its government to have the means to effectively pursue legitimate public goals (e.g. security, health). On the other hand, precisely taking measures that are effective may hamper individual legal protection. The law mirrors this tension by both enabling and constraining public authorities. So the law grants powers to public authorities enabling them to take measures. By the same token, the law constrains the authorities as they can only act within limits of these powers. In terms of time, this legal mechanism operates *ex ante* or forward looking. Apart from an *ex ante* constraint, public law also enables and constrains the exercise of public power *ex post* or backward looking. So when officials exercise their powers (granted *ex ante*) their actions are subject to judicial review. Judicial review is both a constraint and enabler of executive action as it determines what actions are legally permitted. Though temporally separated the *ex ante* and *ex post* mechanisms continuously inform each other: the *ex ante* powers inform the decision *ex post* and actors rely on *ex post* decisions to determine the scope of their *ex ante* powers. The challenge for law is that too much enabling compromises the constraining function, and vice versa. Similarly, when *ex ante* powers become too comprehensive and broad they compromise the *ex post* constraints. In other words, the challenge for public law is how to keep the enabling and constraining function in check. Likewise from a temporal perspective, the *ex ante* and *ex post* mechanisms must be kept in balance.

This perennial tension between effectiveness (law's enabling function) and legal protection (law's constraining function) is magnified in the context of emergency powers. If the competences granted to the authorities for dealing with emergencies are defined too restrictively and exhaustively, executive authorities may lack the power to take effective measures. By contrast, if competences are formulated too open ended then judicial protection and democratic checks by parliament may come under pressure. Accordingly, legal scholars often call for using existing (or introducing new) constitutional possibilities to put limits on such wide discretion in terms of time, space and subject matter. By the same token, scholars disagree about the desirability and even possibility of regulating emergency powers. At one end of the spectrum emergency powers are just an extension of the 'normal' regime. In other words, they simply highlight the fundamental tensions already present under 'normal' conditions: the state of exception is always everywhere.[3] At the other end of the spectrum, emergency powers do pose a categorically different problem for the normal legal order. They point to the limits of the normal

3 Ontologically: Giorgio Agamben, *State of Exception* (trans. K. Attell) (Chicago: The University of Chicago Press, 2005); in administrative law: Adrian Vermeule, 'Our Schmittian Administrative Law', *Harvard Law Review* 122 (2009), 1095–1149; practically Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010).

constitutional order that is otherwise sufficiently capable of dealing with the constitutional challenge under normal conditions. Accordingly, it means that some matters are ultimately beyond the reach of the law.[4] Alternatively the constitutional regime itself must be re-designed in order to bring truly exceptional emergency powers under the normality of the law.[5] Or, the traditional checks and balances should be applied more vigorously albeit *ex post* (primarily through judicial review).[6] Another suggestion combines traditional checks and constitutional re-design and calls for a legalized regime of emergency powers that might be relatively easily mobilized but each time with limited scope. The upshot of this proposal is that emergencies are still governed by law without emergency powers becoming permanent and perverting the ordinary constitutional regime.[7] Still, these attempts to legally capture emergency powers cannot fundamentally address the tension between effective emergency measures and effective legal constraints. Moreover, often elements of the emergency powers tend to endure even if strictly speaking the emergency situation ceases to exist.

One reason why it is so difficult to put effective legal constraints on emergency powers has been pointed out by Marc de Wilde in his contribution. He argues that often emergency powers are created against the backdrop of a highly problematic temporal assumption that emergencies are inherently unprecedented.[8] Emergency powers are called for to cope with events that may threaten the nation but that have not occurred before. In concrete terms, the next terrorist attack is not like just any other future event. Neither do we know *when* a horrible event will occur, nor do we know *what* danger to expect which will cause the next emergency. Emergency has become a matter of radical uncertainty: an unknown-unknown.[9] In terms of legal constraints, unprecedented future eludes the temporal categories of normal law *ex ante* and *ex post*. Since the emergency is unprecedented it cannot be provided for *ex ante*. Similarly, the emergency measures escape *ex post* judicial check because there are simply no standards for evaluating the actions of the authorities for lack of precedence. And if authorities were to be held accountable *ex post* they may be reluctant to take effective measures next time when confronted with an unprecedented emergency. In a way, the law's normal legal

4 E.g. Owen Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' *The Yale Law Journal* 112 (2003), 1011–1134.

5 E.g. Bruce Ackerman, 'The Emergency Constitution', *The Yale Law Journal* 113 (2004), 1029–1091.

6 E.g. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

7 Henk Kummeling, 'Recht in nood', in *Crises, rampen en recht*, ed. E. R. Muller et al., Handelingen Nederlandse Juristen-Vereniging 144 (2014), 291–298.

8 Marc De Wilde, 'Uncertain Futures and the Problem of Constraining Emergency Powers: Temporal Dimensions of Carl Schmitt's Theory of the State of Exception', in this volume.

9 For an in depth study on the uses and meaning of unprecedented future and the notion of 'unknown-unknowns', see Claudia Aradau and Rens van Munster, *Politics of Catastrophe. Genealogies of the Unknown* (Abingdon/New York: Routledge, 2011).

constraints and temporal categories are put out of order. The perverse upshot of this logic is that it paves the way for making the absence of effective legal constraints on executive power a permanent feature of public law.

The perversion of law's normal temporal categories and the permanence of emergency powers is powerfully illustrated by Karin Loewy's discussion of the 1999 Israeli Supreme Court decision on the illegality of torture.[10] The Supreme Court held that torture is illegal, even in times of emergency. As a result, security agents who tortured suspects are criminally liable. So at the face of it, the Supreme Court resisted the perversion of law's normal constraints and temporal categories. Yet, the Court also said that under particular conditions the agents could invoke the necessity defence. By the same token, according to the Court it was up to the Attorney General to 'establish Guidelines regarding circumstances in which investigators shall not stand trial if they claim to have acted from necessity.'[11] The combination of an *ex ante* prohibition on torture and the availability of an *ex post* necessity defence is in keeping with law's normal constraints and temporal categories. By contrast, the Guidelines stipulating detailed procedures for investigators if they want to successfully invoke the necessity defence amount to an *ex ante* legalization of torture. Thus, in the end under pressure of the logic of emergency, the normal temporal *ex post* and *ex ante* categories are compressed making exceptional emergency measures – that are normally illegal – permanently legal.

In the next two sections I will argue that the perverse temporal effects on the law's capacity to constrain emergency powers are reinforced by the use of factual actions and *potentia*.

Factual actions, *potentia*[12] and time

When legal scholars discuss emergency powers, they rarely distinguish between the types of the powers involved. However, from the perspective of law's constraining function it matters to distinguish between measures that consist of issuing directives and measures that constitute factual actions. For example, in the context of

10 Karin Loevy, *Emergencies in Public Law. The Legal Politics of Containment* (Cambridge: Cambridge University Press, 2016), 234–243.

11 Ibid., 237.

12 The following discussion is a summarized version of a part of a broader inquiry into the connection between factual actions, potentia and potentia. Bas Schotel, '*Potentia* and Public Law. Legal protection and the buildup of *factual* public power' (forthcoming). That paper draws for the notion of *potentia* on Michael Oakeshott, 'The Character of a Modern European State', in *Lectures in the History of Political Thought*, Michael Oakeshott (Exeter: Imprint Academic, 2006), 369–371; Michael Oakeshott, 'On the Character of a Modern European State',' in *On Human Conduct*, Michael Oakeshott (Oxford: Clarendon, 1975), 194–195 (not calling it *potentia*); Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 164–171, 407–434; (indirectly) Christopher Hood and Helen Margetts, *The Tools of Government in the Digital Age* (Palgrave Macmillan, 2007) References have been omitted in this summarized version. The notion of immediacy is not discussed in that paper.

an emergency, authorities may impose a curfew prohibiting citizens from entering certain public spaces. This measure is a form of issuing norms or decrees. Simultaneously, in order to effectively implement the curfew and to prevent people to enter certain public areas officials may take factual actions, e.g. building road blocks, patrolling, detaining citizens, etc. In our example, the factual measures are of a rather coercive nature. To be sure many factual actions taken in the context of an emergency need not be coercive as such, e.g. building extra IT protection, installing secure communication lines, gathering information, recruiting new intelligence employees, training security personnel, building new safe-houses, etc.

For want of a better word in English,[13] factual action means an action (or deliberate inaction) that has a tangible effect in physical reality. For example, building a road, placing a surveillance camera, teaching children, driving a bus, putting someone in a prison. The difference between factual action and *potentia* is that the latter is the *capacity* or *power* to perform such factual actions.[14] Probably, the most important form of *potentia* or factual capacity is the corps of loyal, trained, equipped officials (civil and military), as well as tactical and strategic assets (real estate, logistic, information technology and communication infrastructure, and natural resources). I distinguish factual power from the power to issue directives. The latter includes instances whereby authorities set, confirm or apply norms and decisions. So it covers laws, regulations, standards, judgments, decisions, instructions, orders, etc. Typically, under public law doctrine such acts are characterized as legal acts.

From a practical and even theoretical perspective the distinction between factual actions and issuing directives is not watertight. Any form of issuing directives involves factual actions, and any factual action implies a legal or normative background that either authorizes or at least makes epistemic sense of the factual action.[15] Yet, the distinction is meaningful from the perspective of legal constraints on executive power. For example, a typical legal *ex ante* constraint such as competence works relatively effectively when constraining the public power to issue directives. For the effectiveness of a directive depends largely on its perceived authority, legality being an important element in this respect. To ensure the effectiveness of their directives, officials may need the legitimacy bonus that comes with showing respect for the rule of law, e.g. the principle of legality. Precisely because the power of a directive relies partially on its capacity to be obeyed, it matters whether or not the authorities were competent to issue the directive. As a

13 In French administrative law: acte matériel. In German administrative law: Tathandlung.

14 *Potentia* means not only the capacity to do things but also the capacity not to do it. For purposes of this chapter I concentrate on situations where the *potentia* will be exercised and how *potentia* that is too strong makes it difficult to put legal constraints on factual actions.

15 So understanding a phenomenon as a form of 'agency' already presupposes a whole normative background of attributing intentions and actions to agents.

result, a directive that is issued ultra vires is more likely to be simply discarded by norm subjects. Or to say the same from the perspective of legal protection, norm subjects can mount effective legal challenges against the power to issue directives, by simply disobeying in the name of the law ('you are not authorized to issue this directive, so I will not obey it. If you have a problem with it, sue me'). By contrast, when it comes to factual actions, it is more difficult for competence to constrain public authorities when they have simply the 'physical ability to act directly'. For sure, when performing factual actions, officials may have an interest in showing they respect the rule of law in order to avoid resistance and obstruction by subjects. But what if in certain domains the factual power is so strong and well organized that resistance and obstruction are very unlikely? Under such conditions officials can afford to act purely factually without the authority of the law. As a result basic rule of law principles such as legality and proportionality have little constraining force.[16]

In short, when the exercise of emergency powers consists of factual action it is more difficult for the law to constrain *ex ante*, especially when the capacity to perform such factual actions is significant. For sure, there is still the *ex post* check of, for example, judicial review. However, in a fundamental way factual actions escape even *ex post* judicial constraints. The very nature of factual actions in a way defies law's normal temporal categories of the *ex ante* and *ex post* constraints. Factual actions are a matter of immediacy. Immediacy has two meanings here: without intermediary and immediately. Factual actions take place *without the intermediary* of non-officials. Rather than governing through issuing legal directives to citizens, officials intervene directly and simply do the things themselves. And factual actions take place *immediately*, i.e. in the presence without delays. Precisely this immediacy in tangible reality makes factual actions elude the *ex ante* and *ex post* constraints.

Legal scholars have paid little to no attention to how factual actions pose a fundamental challenge for legal protection.[17] Even a legal scholar such as Carl Schmitt, who was very much preoccupied with the concrete and factual, only spends a few words on the matter. Still, these very brief snippets do get to the core of the problem. So when Schmitt seeks to show that under the Weimar constitution the *Reichspräsident* can suspend virtually all articles of the constitution under the state of exception, he spends some time on the legal nature of executive measures.[18] In this respect he states that such executive measures may include

16 To be sure even when powerless in constraining factual actions, the rule of law can still function in such circumstances as a critical standard for voicing indignation and disapproval (similar to human rights in international politics), but it loses its juridical function.

17 Elsewhere, I trace the historical reasons for this lack of attention in Schotel, '*Potentia*'.

18 Carl Schmitt, 'Die Diktatur des Reichspräsidenten nach Art. 48 der Weimarer Verfassung', *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer* (1924), reprinted in *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedanken bis zum proletarischen Klassenkampf*, Carl Schmitt, 6th ed. (Berlin: Duncker & Humblot, 1994).

factual actions.[19] And in a similar discussion some years later he explicitly points out the force of such *factual* emergency measures (e.g. armed intervention and shooting people). Though the ordinary legislator (the democratically elected parliament) may invalidate the emergency measures, the factual measures are a *fait accompli*.[20] More importantly, the factual measures themselves cannot be invalidated or their legal force cannot be cancelled.[21] In effect, one of the strongest constraints on legal acts is the mechanism of validation and invalidation, which corresponds with law's normal temporal categories of *ex ante* and *ex post*. When it comes to factual actions legal validity of the legal act authorizing the factual action may be important, but what really matters is the ability to physically do it, i.e. *potentia*. In terms of time, law's normal temporal categories reflect on acts in the future or in the past, while *potentia* makes it possible to act in the immediacy.

Potentia, emergency and permanent immediacy

By their very nature factual actions and *potentia* elude law's normal constraints and its temporal *ex ante* and *ex post* categories. This insight may provide an additional explanation for why law has difficulties constraining emergency powers. Factual actions and *potentia* reinforce the permanency of emergency powers. The starting point is the need for effective measures. In normal times effective government requires not only measures consisting of legal directives but also measures that constitute factual actions. Allegedly, the need for factual actions is even greater in times of emergency. Precisely their immediacy is what make factual actions particularly effective.

In order to actually take factual action immediately, authorities must have the capacity to perform factual actions, i.e. *potentia*. Authorities must be battle ready, if not they will be too late. The question is how much *potentia* is needed when and for how long. Here, the logic of *potentia* meets the temporal assumption that emergencies are unprecedented. Since we do not know what new emergency to expect there is in theory no limitation to the *potentia* needed. So we could never be too much prepared. Also since the emergencies are a matter of an unprecedented future and we never know when the next emergency will occur, there cannot be any time limits on *potentia*. In short, this temporal logic associated with emergencies paves the way for an unlimited *potentia*.

Furthermore, the need for immediacy associated with factual actions and *potentia* reinforces the permanence of emergency powers. This may be illustrated if one thinks through the brief discussion of the Israeli Supreme Court case on the torture. The Court established a general prohibition on torture but would accept

19 'unmittelbare Aktion', '*vi armata*', 'bloss faktische Vorgehen', 'rein tatsächliche Massnahmen' all at Schmitt, 'Diktatur des Reichspräsidenten', 246.

20 'vollendete Tatsachen schaffen' Carl Schmitt, *Legalität und Legitimität* (1932) 8th ed. (Berlin: Duncker & Humblot, 2012), 67.

21 So the shooting of people cannot be 'ausser Kraft gesetzt werden', Schmitt, *Legalität*, 67.

necessity as a defence in individual cases provided the investigators followed the detailed Guidelines issued by the AG. If we look at this arrangement from a European human rights law perspective the problem of immediacy and *potentia* becomes clear. In the famous GDR Border Guard cases the ECtHR looked at the issue of the killings by GDR border guards of people trying to illegally cross the border from East to Western Berlin.[22] German criminal courts condemned the senior officials who designed the shoot to kill policy and the border guards who did the killings. The ECtHR held that these criminal condemnations did not constitute a violation of the ECHR. Interesting, for purposes of this contribution is that the Court treated the senior officials who designed the policy and the border guards in separate cases. The Court found rather easily that the criminal liability of the policy makers was compatible with the ECHR. Yet the question whether the border guards could use the shoot to kill policy as a defence was more complicated. For example a dissenting judge found that they could have relied on this policy.[23] According to his view the senior officials could be held liable while the individual rank and file could be excused. The Court ruled differently and found that the criminal liability of the border guards was also compatible with the ECHR: there was no retroactive application of criminal laws.

Now, both the European Court's majority decision and the dissenting opinion run counter to the Israeli solution. The Israeli Court exempts both policy makers who design the infrastructure that violates the prohibition on torture (in this case the AG[24]) and the agents committing the actual torture. In the European human rights setting the designer of the policy and/or the agents should be held liable if the prohibition on torture is taken seriously. Yet, precisely the concept of immediacy explains the alleged expediency of the Israeli solution. If the individual agents would be held liable then the government would lack the efficacy of having its own agents directly doing the interrogations with torture. In other words, the authorities would lack immediacy in terms of acting *without intermediary*. If the designers of the policy would be held liable then, there would not be an infrastructure in place that makes the interrogations with torture possible when you need it. So, the authorities would lack immediacy in terms of acting *immediately*. The upshot is a kind of permanent immediacy.

A key feature of this permanent immediacy is the amount of *potentia* built up by the authorities. The challenge from the perspective of law is that there are hardly any legal mechanisms available that put constraints on the build-up of *potentia*. The most important constraint is the right of budget. It is the legal right of parliament to vote the budget and thereby determining the allocation of resources to the government. Yet the exercise of the right of budget is a matter of political

22 K.- H.W. v. Germany, 2001 Eur. Ct. H.R. (Mar. 22), hereafter *K.- H.W. v. Germany* (case of the border guards); Krenz et al. v. Germany, 2001 Eur. Ct. H.R. (Mar. 22) (case of the policy makers).

23 Judge Cabral Barreto, para. 1 of partly dissenting opinion under *K.- H.W. v. Germany*.

24 If the AG has immunity then the department under which the office of the AG falls should be held liable.

democracy, not juridical constraints. Moreover, in the context of emergencies the normal democratic constraints resulting from differences in political platforms and factions vanish with the tendency to 'rally behind the flag'.[25]

Finally, *potentia* is very difficult to unwind. There are legal mechanisms in place that can effectively constrain emergency powers that pertain to issuing legal directives. They basically limit those competences in time. This can be done on forehand, sunset clauses. Or by making it easy to withdraw the competences later on. In fact, the emergency power to issue legal directives can be removed in a split second. And even when for example the parliamentary or legislative procedures for ending emergency powers do not offer sufficient constraint, courts can easily cast doubt on legal validity of legal directives issued on the basis of alleged emergency powers, even if it is contested whether the courts are competent to do so. Again, the power to issue legal directives is a matter of legal authority which can be contested and constrained by making legal counter claims. By contrast, when already available *potentia* cannot be easily withdrawn, precisely because *potentia* is a matter of human resources and equipment. Unlike legal competence, you cannot make people and infrastructure disappear with just words. The examples of provisional infrastructure (e.g. camps) becoming permanent are innumerable. But also it is very difficult to de-mobilize large groups of people that have been trained and employed for certain tasks (e.g. armies). So even when times of normality have returned, emergency powers have been withdrawn and officials have discarded the rhetoric of emergency, *potentia* as a permanent power of immediacy remains.

Conclusions

This chapter started from one of the fundamental challenges for public law: how to enable governmental authorities to act effectively and by the same token put legal constraints on them. The connection between effective measures and effective legal constraints seems reverse proportionate: the more governmental powers are effective the less effective are the legal constraints. This challenge is present in times of normality but becomes most evident in times of emergency. The chapter claims that this challenge is reinforced by a temporal dimension that has received little attention by legal scholars, namely immediacy.

In the context of emergency powers, the difficulty of putting effective legal constraints on governmental powers is partially caused by the temporal assumptions underlying emergency powers. Increasingly authorities call for emergency powers in order to cope with events that may threaten the nation but that have not occurred before, i.e. an unprecedented future. The notion of unprecedented future constitutes a challenge for effective legal constraints because it defies the

25 Marc De Wilde, 'Uncertain Futures',, with reference in fn 3 to Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' *Harvard Law Review* 118 (2005), 2678.

normal temporal *ex ante* and *ex post* categories of law. When an emergency is presented as unprecedented it paves the way for a *carte blanche* authorization compromising the possible constraining effect of *ex ante* powers. By the same token, the emergency measures elude *ex post* judicial checks because there are no concrete standards for evaluating the actions of the authorities for lack of precedents. Holding the authorities accountable *ex post* allegedly would make them reluctant to take effective measures next time when confronted with an unprecedented emergency. Apart from the temporal category of unprecedented future, emergency powers also have the tendency of compressing law's normal *ex ante* and *ex post* temporal categories into a single temporal category of permanency. This was illustrated by the Israeli Supreme Court ruling on torture.

In this chapter I have argued that the fundamental challenge of putting legal constraints on emergency powers is reinforced by the temporal category of immediacy. To be effective, not only must authorities issue special or exceptional legal directives (e.g. special laws, regulations, decrees, orders, decisions, etc.). They must also perform physical or factual actions (e.g. surveillance, arresting suspects). These physical acts must be carried out in the immediate presence and often they are to be carried out without intermediary, i.e. by the officials themselves. But in order to act immediately authorities need to have on forehand the capacity to perform the factual actions. Only when they have the capacity to perform factual actions, i.e. *potentia*, can they act immediately when needed.

Combined with the logic of permanency and unprecedented future, the need for *potentia* creates a paradoxical temporal category of permanent immediacy. In order to respond effectively and immediately to any unprecedented emergency authorities allegedly need a theoretically unlimited *potentia*. *Potentia* and the temporal category of immediacy pose an additional challenge for public law's capacity to constrain emergency powers for three reasons. Firstly, public law has more difficulties constraining the exercise of *potentia* than constraining the exercise of legal authority. For it is easier to mount effective legal challenges against measures that consist of legal directives than against measures that consist of physical actions. Secondly, the most important constraint on the build-up of *potentia* is the parliamentary right to budget. Yet, precisely in the context of emergencies the tendency 'to rally behind the flag' significantly compromises the constraining effect of the right of budget. Finally, emergency powers that consist of issuing legal directives can be easily countered and withdrawn by legal interventions. By contrast, when already available *potentia* cannot be unwound by simply issuing a new statute or legal order: unlike legal competence, you cannot make people and infrastructure disappear physically by just changing the law.

This is not the place to discuss how lawyers may increase public law's capacity to constrain emergency powers in light of *potentia*[26] and the temporal category of immediacy. Yet, bearing in mind the theme of this volume, I believe the notion of

26 Elsewhere I provide concrete suggestions how to organize legal constraints on the buildup of potentia, Schotel, '*Potentia*'.

immediacy and *potentia* may point legal scholars to at least three areas of further inquiry. Firstly, we may want to get a more thorough understanding of the distinction between measures that consist of issuing legal directives and measures that consist of physical actions. With a view to legal protection, scholars should examine afresh to what extent the doctrinal categories of public law and especially administrative law capture this distinction. Secondly, scholars may explore the various ways public law can (and cannot) constrain the build-up of *potentia*. In this respect, they may draw on areas of public law where there is quite some experience in constraining the build-up of factual capacity such as environmental law and competition law – albeit factual capacity of private actors, and not public authorities. Finally, the temporal category of immediacy may have close links with the legal institution of the writ of execution under administrative law. The privilege of the writ of execution for public authorities is a key feature of administrative law in general and crucial in the context of emergency powers. Yet, legal scholarship seems to take this legal institution for granted: there is little legal scholarship examining the doctrinal, historical and normative aspects associated with the administration's writ of execution. In short, the temporal category of immediacy may help us better understand basic features of public law that have been either overlooked or taken for granted, in both times of emergency and normality.

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