

# Lockdown by Press Conference? COVID-19 and the Rule of Law in New Zealand and Austria

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## Abstract

In response to the COVID-19 pandemic, the New Zealand and Austrian governments both imposed lockdowns in early 2020. This paper compares how these two responses were effected, communicated, and challenged. In both New Zealand and Austria, government communications misrepresented the extent of the lockdown, communicating measures more stringent than those legally in place. This divide between law and communications raised concerns for the rule of law, as citizens struggled to understand their legal obligations. In New Zealand, government communications were subjected to effect-based judicial review. In Austria, where the judicial review system has a stronger focus on the form of state action, government communications were not reviewed. The paper finds that the Austrian courts could have provided a similar remedy to that in New Zealand, but only through a novel and contentious approach. Preferably, the legislator should expressly bring crisis (mis)communication into the scope of Austrian judicial review.

## Keywords

judicial review – pandemic – coronavirus – comparative law – public law

## I. Introduction

In early 2020, countries around the world adopted restrictions on free movement. Many governments imposed so-called ‘lockdowns’ to slow the spread of the novel virus COVID-19.<sup>1</sup> At the extreme end, these lockdowns

<sup>1</sup> See generally Sheila Jasanoff, Stephen Hilgartner, J. Benjamin Hurlbut, Onur Özgöde and Margarita Rayzberg (eds), *Comparative Covid Response: Crisis, Knowledge, Politics Interim Report* (Harvard: Harvard Kennedy School 2021) (discussing a cross-national study of the COVID-19 policy responses of 16 countries across five continents); Tom Ginsburg and Mila Versteeg, ‘The Bound Executive: Emergency Powers During the Pandemic’, *I CON 19* (2021), 1498-1535, <<https://doi.org/10.1093/icon/moab059>>.

required people to remain isolated in their homes, only able to leave for specific exceptions.<sup>2</sup> As governments around the world introduced these restrictions, many communicated with their citizens in new ways and at unprecedented levels.<sup>3</sup>

Government communication changes and intensifies during crises, and good communication is essential to crisis management.<sup>4</sup> Rather than serving everyday political purposes such as announcing future policy, government crisis communications provide information about risk, prevention, and cooperation.<sup>5</sup> However, governments may also communicate commands as ‘guidance’, making it unclear (sometimes deliberately) whether their communications have the force of law or not.<sup>6</sup> In the context of COVID-19 lockdowns, many communications fell into this category, often lacking a legal basis<sup>7</sup> or having unclear legal status.<sup>8</sup> Under such circumstances, it can be difficult for citizens to understand their legal obligations and act accordingly. Citizens may even distrust or ignore government messaging if communications are inconsistent or unclear, risking the effectiveness of crisis

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<sup>2</sup> Regarding the lockdown in Spain see e.g. Alicia Betts, ‘A Lockdown Journal from Catalonia’, *Studies in Higher Education* 46 (2021), 75-85 (describing Spain’s lockdown in March 2021 that only allowed people to leave their homes to buy food, walk dogs, or go to essential workplaces).

<sup>3</sup> See e.g. Gaby-Fleur Bøl, ‘The COVID-19 Pandemic: Agile Versus Blundering Communication During a Worldwide Crisis’, *EMBO Reports* 22 (2021).

<sup>4</sup> See e.g. Bøl (n. 3); Peter Bußjäger and Jakob A. Egger, ‘Verfassungs- und verwaltungsrechtliche Grundlagen staatlicher Krisenkommunikation’, *ÖJZ* 8 (2021), 63-71 (63); Magdalena Pöschl, ‘Resümee’ in: ÖAW (ed.) *100 Jahre Bundesverfassung: Die Coronakrise als Jubiläumsgabe* (Wien: VÖAW 2020), 47-55 (52) (discussing the importance of clear communication of norms for crisis management).

<sup>5</sup> See Jenni Hyvärinen and Marita Vos, ‘Communication Concerning Disasters and Pandemics: Coproducing Community Resilience and Crisis Response’ in: Andreas Schwarz, Matthew W. Seeger and Claudia Auer (eds), *The Handbook of International Crisis Communication Research* (Hoboken: Wiley-Blackwell 2016), 96-107 (96); Charles Baubion, ‘Adapting Government Approaches to a New Crisis Landscape’ in: OECD (ed.), *The Changing Face of Strategic Crisis Management* (Paris: OECD Publishing 2015), 15-40 (34).

<sup>6</sup> See Janina Boughey, ‘Executive Power in Emergencies: Where Is the Accountability?’, *Alternative Law Journal* 45 (2020), 168-174 (172); comments in High Court of Ireland, *Ryanair DAC v. An Taoiseach*, (2020) IEHC 461, para. 41; Conor Casey, Oran Doyle, David Kenny and Donna Lyons, *Ireland’s Emergency Powers During the Covid-19 Pandemic* (Dublin: Irish Human Rights and Equality Commission 2021) (discussing that governments frame commands as guidance). On the ambiguity of Austrian crisis communication see Pöschl (n. 4).

<sup>7</sup> See e.g. High Court of Ireland, *Ryanair DAC v. An Taoiseach* (n. 6).

<sup>8</sup> See e.g. United Kingdom Supreme Court, *Financial Conduct Authority v. Arch Insurance (UK) Ltd and others*, (2021) UKSC 1 (examining whether ‘stay at home instructions’ issued by the Prime Minister during the COVID-19 crisis without a legal basis amounted to ‘restrictions imposed’ on businesses by a public authority, which would trigger business interruption clauses in their insurance contracts).

responses.<sup>9</sup> Consequently, crisis communications raise interesting questions about their impact on citizens and their legal status.

Two countries that had initially similar responses to COVID-19 were New Zealand and Austria. As two relatively small states, New Zealand as a common law jurisdiction and Austria as a continental European civil law jurisdiction form an interesting contrast for a comparative analysis of the legal consequences of (mis)communication. While many countries (including Austria) saw judicial review of COVID-19 lockdown measures, New Zealand serves as a useful case study of how communications themselves can be challenged.

New Zealand reported its first case of COVID-19 on 28 February 2020.<sup>10</sup> Austria diagnosed its first two cases of COVID-19 on 25 February 2020.<sup>11</sup> To reduce the infection rate of COVID-19, both New Zealand and Austria implemented strict lockdowns in March 2020. The concept of a 'lockdown' has no agreed legal definition, but this paper uses the term to describe a range of measures introduced by a government to contain COVID-19 that result in significant restrictions on citizens' freedom of movement and association.<sup>12</sup> While measures against COVID-19 continue into 2022 in both countries, this paper focuses only on the initial lockdowns in March/April 2020, as these lockdowns and their associated communications can be most easily charac-

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<sup>9</sup> See e.g. Kenneth Newton, 'Government Communications, Political Trust and Compliant Social Behaviour: The Politics of Covid-19 in Britain', *Pol. Q.* 91 (2020), 502-513; Böll (n. 3); Kristen Malecki, Julie Keating and Nasia Safdar, 'Crisis Communication and Public Perception of COVID-19 Risk in the Era of Social Media', *Clinical Infectious Diseases* 72 (2021), 697-702; Pöschl (n. 4) (discussing unclear communication of legal norms and how this could undermine their acceptance by the population).

<sup>10</sup> See Ministry of Health, 'Single Case of COVID-19 Confirmed in New Zealand', (28 February 2020), <<https://www.health.govt.nz/news-media/media-releases/single-case-covid-19-confirmed-new-zealand>>.

<sup>11</sup> See Peter Kreidl, Daniela Schmid, Sabine Maritschnik, Lukas Richter, Wegene Borena, Jakob-Wendelin Genger, Alexandra Popa, Thomas Penz, Christoph Bock, Andreas Berghaler and Franz Allerberger, 'Emergence of Coronavirus Disease 2019 (COVID-19) in Austria', *Wiener klinische Wochenschrift* 132 (2020), 645-652 (explaining that a woman had COVID-19 symptoms in Austria on 24 January 2020, but tested positive in Germany on 28 January 2020, so was treated as a German case).

<sup>12</sup> See e.g. Thomas Hale, Jessica Anania, Noam Angrist, Thomas Boby, Emily Cameron-Blake, Martina Di Folco, Lucy Ellen, Rafael Goldszmidt, Laura Hallas, Beatriz Kira, Maria Luciano, Saptarshi Majumdar, Radhika Nagesh, Anna Petherick, Toby Phillips, Helen Tatlow, Samuel Webster, Andrew Wood, and Yuxi Zhang, 'Variation in Government Responses to COVID-19', Blavatnik School of Government Working Paper (2021) (introducing the Oxford COVID-19 Government Response Tracker (OxCGRT), which tracks the stringency of different government responses to COVID-19 but does not have a single definition of 'lockdown'. Our paper's definition of a 'lockdown' draws on the indicators of 'containment and closure' used by the OxCGRT).

terised as ‘crisis’ responses: governments reacting to a novel and emerging situation at speed.

In the course of these two lockdowns, both governments communicated similar commands to the public to ‘stay home’. This paper examines communications addressing the general public such as press conferences, social media posts, and text messages from key government decision-makers. In doing so, it maintains a focus on those communications which had the greatest impact on citizens and could be interpreted as having the power of law behind them. These commands did not always match the legal restrictions in place, creating problems for the rule of law.

Despite these similarities, government (mis)communications took place under substantively different judicial review systems and were dealt with differently by the courts. As illustrated in the case of *Borrowdale v. Director-General of Health*,<sup>13</sup> New Zealand has a prototypical effect-based judicial review system.<sup>14</sup> In this case, the New Zealand High Court reviewed government communications about COVID-19 measures (such as statements made in press conferences) as executive acts, focusing on their effect rather than their form. In contrast, government communications were not reviewed in the Austrian courts. Only underlying statutes and regulations or individual fines that appeared to be based on government (mis)communication were subject to review. The absence of cases reviewing communications in Austria is at least partly explained by Austria’s prototypical form-based judicial review system, which revolves around specific types of executive acts.<sup>15</sup> Judicial review of other types of act is also possible, but requires an additional statutory basis authorising review of that act.<sup>16</sup>

Against this background, this paper undertakes a functional comparative analysis<sup>17</sup> to contrast functionally equivalent institutions in New Zealand and Austria’s different legal systems and societies.<sup>18</sup> The two countries’ judicial review systems serve equivalent roles as checks on state power and protectors

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<sup>13</sup> New Zealand High Court, *Borrowdale v. Director-General of Health*, (2020) NZHC 2090 [*Borrowdale*].

<sup>14</sup> See generally Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’, *Am. J. Comp. L.* 53 (2005), 125-155.

<sup>15</sup> Articles 130, 139 Austrian Federal Constitution (B-VG).

<sup>16</sup> Article 130 (2)(1) B-VG.

<sup>17</sup> See Uwe Kischel, *Comparative Law* (Oxford: Oxford University Press 2019), para. 166.

<sup>18</sup> See Ralf Michaels, ‘The Functional Method of Comparative Law’ in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press 2019) 339-382 (342) (elaborating on institutional equivalence).

of the rule of law.<sup>19</sup> Accordingly, the different judicial responses in New Zealand and Austria to government crisis communications in early 2020 enable examination of how effectively different judicial review systems can fulfil those roles, and contribute to the broader discourse around access to justice and the rule of law in times of crisis. This paper's analysis reveals the advantages of effect-based systems over form-based systems in such times and suggests that the Austrian system should import the possibility of a *Borrowdale*-style case.

This paper first assesses how the March and April 2020 lockdowns in New Zealand and Austria were legally effected, (mis)communicated, and enforced (Chapter II.). It then compares legal elements of the two different judicial review systems and how citizens used these systems to challenge the lockdowns (Chapter III.). The potential strength of both judicial review systems is then assessed by analysing whether the courts *could* have provided more comprehensive judicial remedies for government (mis)communications (Chapter IV.). Finally, the paper discusses the implications of its findings for the rule of law (Chapter V.). It concludes that Austria could have had its own *Borrowdale* case if the (mis)communications were viewed as regulations, but only with considerable effort and creativity in legal reasoning. A preferable approach would involve the federal legislator providing a statutory basis for judicially reviewing crisis (mis)communications.

## II. (Mis)communicating the Lockdowns

### 1. Legal Bases for the Lockdowns

As noted above, both New Zealand and Austria implemented strict lockdowns through executive orders in March 2020. In New Zealand, the Minister of Civil Defence declared a national state of emergency<sup>20</sup> and the Director-

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<sup>19</sup> See Rainer Grote, 'Rule of Law, Rechtsstaat and "Etat de droit"' in: Christian Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (Baden-Baden: Nomos 1999), 269-306 (275) (on the international dimension of the rule of law); Francesca Bignami, 'Comparative Administrative Law' in: Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press 2012), 145-170 (148-153) (on the methodology of comparing different systems of administrative law); Franz Merli, 'Principle of Legality and the Hierarchy of Norms' in: Werner Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing 2015), 37-45 (40) (regarding the rule of law as an instrument to control power).

<sup>20</sup> See Declaration of State of National Emergency by Minister of Civil Defence, New Zealand Gazette (2020-go1435).

General of Health passed two initial orders under the Health Act 1956.<sup>21</sup> The first lockdown order on 25 March 2020 forbade congregation in outdoor places of amusement or recreation and closed all premises in New Zealand.<sup>22</sup> It did not expressly require people to stay at home. The second lockdown order, passed nine days later on 3 April 2020, required all people in New Zealand to be isolated or quarantined by remaining at their current place of residence.<sup>23</sup>

In Austria, the Federal Minister of Health<sup>24</sup> passed a regulation under the newly adopted COVID-19 Measures Act,<sup>25</sup> prohibiting entry into public places generally<sup>26</sup> subject to certain exceptions.<sup>27</sup> It entered into force on 16 March 2020.<sup>28</sup> A key exception allowed entry into ‘public places outdoors [...] alone, with persons living in the same household or with pets’, provided ‘a distance of at least one meter to other persons [is] maintained’<sup>29</sup> (the ‘public places’ exception). When the ‘public places’ exception entered into force, its extent was subject to debate.<sup>30</sup> This paper argues that the measures did not restrict activities in public places, provided a person entered the place alone and maintained physical distance from others. It was legal, for example, to sit in a park or to leave one’s home to visit other people in their homes.<sup>31</sup> There was no requirement to stay at home.

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<sup>21</sup> The Director-General passed several orders under the Health Act 1956 as New Zealand moved in and out of ‘lockdown levels’, but this paper focuses on the first two orders as the content of these orders formed the basis of the cause of action challenging government communications.

<sup>22</sup> Section 70(1)(m) Health Act Order 2020.

<sup>23</sup> Section 70(1)(f) Health Act Order 2020.

<sup>24</sup> Federal Minister for Social Affairs, Health, Care and Consumer Protection (BMSGPK).

<sup>25</sup> COVID-19-Measures Act, Federal Law Gazette I 2020/12.

<sup>26</sup> See § 1 Regulation of the Federal Minister for Social Affairs, Health, Care and Consumer Protection under § 2 (1) Covid-19 Measures Act, Law Gazette II 2020/98 (Regulation-98).

<sup>27</sup> See § 2 Regulation-98.

<sup>28</sup> See § 5 Regulation-98.

<sup>29</sup> § 2 (5) Regulation-98.

<sup>30</sup> See e.g. Nikolaus Forgó, ‘Wenn niemand mehr recht weiß, was Recht ist’, *Wiener Zeitung* (27 May 2020), <<https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2062135-Wenn-niemand-mehr-recht-weiss-was-Recht-ist.html>> (elaborating on the legal consequences of false government communication); Georg Renner, *Twitter* (18 March 2020), <[https://twitter.com/georg\\_renner/status/1240374762129559561](https://twitter.com/georg_renner/status/1240374762129559561)> (interpreting the exception in a way which allowed citizens to enter public places for any purpose as long as a one-meter distance was maintained). But compare Wolfgang Heissenberger, ‘Rechtliche Maßnahmen zur Bewältigung von COVID-19’, *ÖJZ* 57 (2020), 440-447 (443); Reinhard Klaushofer, Benjamin Kneih, Rainer Palmstorfer and Hannes Winner, ‘Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus (I)’, *ZÖR* 75 (2020), 649-771 (699-700) (interpreting the exception in a way which only allowed citizens to enter public places for the reasons in § 2 (1)-(4) Regulation-98).

<sup>31</sup> See Christian Kopetzki, ‘Corona-Ausgangsbeschränkungen – “Freunde besuchen”’, *Recht der Medizin* 27 (2020), 161-164 (161).

## 2. Government Communications

On 21 March 2020, the Prime Minister of New Zealand recorded a statement to the nation to introduce the four-level COVID-19 alert system. The Prime Minister declared that New Zealand was at Level 2 and asked people who were over 70 years old or had compromised immune systems to stay at home.<sup>32</sup> She described Level 4 as ‘where we eliminate contact with each other altogether [...] and we ask everyone to stay at home’.<sup>33</sup>

Two days later, on 23 March 2020, the Prime Minister held a press conference announcing that the country would move to Level 4 on 25 March 2020 for an initial period of four weeks.<sup>34</sup> In this press conference, the Prime Minister said ‘we are all now preparing as a nation to go into self-isolation [...] staying at home is essential’.<sup>35</sup> In the next 48 hours, people would ‘need to go home, be it locally or throughout the country’.<sup>36</sup> She added that the government was ‘now asking all New Zealanders who are outside essential services to stay at home and to stop all interaction with others outside of those in your household’, but stated that ‘you can leave your home’ for solitary exercise and to visit essential services.<sup>37</sup> She included examples of breaking the ‘rules’: seeing a friend at a park or a family member for lunch.<sup>38</sup> Finally, the Prime Minister referred to enforcement, stating that there would be ‘no tolerance’ if anyone failed to ‘play their part’.<sup>39</sup> Enforcement powers would be used if necessary.<sup>40</sup>

The government held press conferences to update the public on COVID-19 almost every day for several weeks.<sup>41</sup> The press conferences were usually led by the Prime Minister, who was often accompanied by the Director-General of Health and sometimes other Ministers or the Police Commissioner. The repeated message during this period was to ‘stay

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<sup>32</sup> Jacinda Ardern, ‘Prime Minister Jacinda Ardern Statement to the Nation on Covid-19’, *YouTube* (21 March 2020), <<https://www.youtube.com/watch?v=AvRuYrH5rjs>>, 04:49-05:02.

<sup>33</sup> Ardern (n. 32), 03:34-03:50.

<sup>34</sup> Jacinda Ardern, ‘Post-Cabinet Press Conference’, *Beehive.govt.nz* (23 March 2020), <<https://www.beehive.govt.nz/sites/default/files/2020-03/Press%20Conference%2023%20March%202020.pdf>>.

<sup>35</sup> Ardern (n. 34), 1.

<sup>36</sup> Ardern (n. 34), 2.

<sup>37</sup> Ardern (n. 34), 2.

<sup>38</sup> Ardern (n. 34), 2.

<sup>39</sup> Ardern (n. 34).

<sup>40</sup> Ardern (n. 34), 3 and 5.

<sup>41</sup> See ‘Covid-19 Updates’, *Beehive.govt.nz* (7 April 2021), <<https://www.beehive.govt.nz/feature/covid-19-updates>>.

home'.<sup>42</sup> Media reporting reflected the content of the press conferences, reporting that everyone needed to stay home from 25 March 2020,<sup>43</sup> even though this was not legally required until the second lockdown came into force nine days later. In a radio interview, the Police Commissioner stated that it was better to stay home 'than be cooling yourself on a very cool bench in a police cell'.<sup>44</sup>

As well as press conferences, communications were repeated through a dedicated website,<sup>45</sup> social media,<sup>46</sup> hard-copy materials,<sup>47</sup> and emergency text messages. For example, a text was sent out through the emergency mobile alert system to all cell phones on 25 March 2020, stating,

'From 11.59pm tonight, the whole of New Zealand moves to COVID-19 Alert Level 4 [...] Follow the rules and STAY HOME [...] Where you stay tonight is where YOU MUST stay from now on.'<sup>48</sup>

Much of this messaging came from the highest levels of government. The Prime Minister regularly reiterated the messages from her press conferences through Facebook Live videos.<sup>49</sup>

<sup>42</sup> E.g. Jacinda Ardern, 'The Prime Minister, Jacinda Ardern, Covid-19 update, March 24', *Facebook* (24 March 2020), <<https://www.facebook.com/RadioNewZealand/videos/the-prime-minister-jacinda-ardern-covid-19-update-march-24/2874494112631568/>>. <<https://www.beehive.govt.nz/sites/default/files/2020-03/240320%20PM%20Daily%20Covid-19%20Press%20Conference.pdf>> ('Other than [exercise and essential services], we do ask people to stay at home'); Mike Bush, 'All of Government Press Conference', *Beehive.govt.nz* (26 March 2020), <[https://www.beehive.govt.nz/sites/default/files/2020-03/All%20of%20Government%20Press%20Conference%2026%20March%202020\\_0.pdf](https://www.beehive.govt.nz/sites/default/files/2020-03/All%20of%20Government%20Press%20Conference%2026%20March%202020_0.pdf)> ('[There is a] requirement to stay home [...] serious breaches and prolific breaches will be prosecuted').

<sup>43</sup> See e.g. Michael Neilson, 'Covid 19 Coronavirus: All You Need to Know About Alert Level 4 Lockdown', *New Zealand Herald* (8 April 2020), <<https://www.nzherald.co.nz/nz/covid-19-coronavirus-all-you-need-to-know-about-alert-level-4-lockdown/DNNANVFFFXS524MM4XNDABTCEE/>>; Susan Strongman, 'COVID-19 Pandemic Timeline', *Radio New Zealand* (23 March 2020), <<https://shorthand.radionz.co.nz/coronavirus-timeline/>>; Michael Neilson, 'Covid-19 Coronavirus: What Will Alert Level 4 Mean for New Zealand?', *New Zealand Herald* (23 March 2020), <<https://www.nzherald.co.nz/nz/covid-19-coronavirus-what-will-alert-level-4-mean-for-new-zealand/7Z4NTSGEPQ6ZMZUU2H7QLR27IM/>>.

<sup>44</sup> *Borrowdale* (n. 13), para. 150; Scott Palmer, 'Coronavirus: What Emergency Powers the Government Will Get', *Newshub* (23 March 2020), <<https://www.newshub.co.nz/home/politics/2020/03/coronavirus-what-emergency-powers-the-government-will-get.html>>.

<sup>45</sup> See New Zealand Government, *Unite Against Covid-19*, <<https://covid19.govt.nz>>.

<sup>46</sup> See e.g. New Zealand Government, 'Unite Against Covid-19', *Facebook*, <<https://www.facebook.com/UniteAgainstCOVID19>>.

<sup>47</sup> See e.g. New Zealand Government, 'Posters', *Unite Against Covid-19*, <<https://covid19.govt.nz/posters>>.

<sup>48</sup> National Emergency Management Agency, 'National Emergency Management Agency Alert' (25 March 2020) (on file with authors).

<sup>49</sup> See e.g. Jacinda Ardern, 'Facebook Live video', *Facebook* (25 March 2020), <<https://www.facebook.com/45300632440/videos/147109069954329/>>.

On 13 March 2020, the Austrian federal government announced that non-essential stores would close and restaurants, cafes, and bars would have restricted hours.<sup>50</sup> Two days later, the Chancellor announced during the National Council's session<sup>51</sup> and on television that more restrictive rules were coming. The Chancellor told Austrians to 'self-isolate',<sup>52</sup> to 'stay at home'<sup>53</sup> and that there would be only three reasons to go outside: 'if you have to go to work, to buy essentials, or to help others in need'.<sup>54</sup> The federal government (including the Federal Minister of Health<sup>55</sup> and the Federal Minister of Internal Affairs<sup>56</sup>) and the President<sup>57</sup> reiterated the message to stay home unless there was a specified reason to go

<sup>50</sup> Sebastian Kurz, 'Pressestatement 13.3.2020 – Informationen über Aktuelles zum Coronavirus', *YouTube* (13 March, 2020), <<https://www.youtube.com/watch?v=Bivks0CMxI4>>, 02:00–04:00. The corresponding regulation, Federal Law Gazette II 2020/97, which contained the mandatory closing time, was replaced after one day.

<sup>51</sup> See 16 of the Supplements to the Stenographic Records of the National Council (BlgNR) Legislative Cycle (GP) 27, <[https://www.parlament.gv.at/PAKT/VHG/XXVII/NRSITZ/NRSITZ\\_00016/A\\_-09\\_14\\_18\\_00213243.html](https://www.parlament.gv.at/PAKT/VHG/XXVII/NRSITZ/NRSITZ_00016/A_-09_14_18_00213243.html)>.

<sup>52</sup> 16 BlgNR 27. GP (n. 51).

<sup>53</sup> Sebastian Kurz, 'Kanzler Kurz verkündet Notbetrieb in Österreich', *Austrian National Television* (15 March 2020), <<https://tvthek.orf.at/history/Politischer-Rueckblick-auf-die-ersten-Wochen/13557947/Kanzler-Kurz-verkuendet-Notbetrieb-in-Oesterreich/14047788>>, 01:30–02:00. See also Carmen Baumgartner-Pötz, 'Kanzler Kurz im TT-Interview: "Es gibt nur noch drei Gründe, sein Zuhause zu verlassen"', *Tiroler Tageszeitung online* (14 March 2020), <<https://www.tt.com/artikel/16752006/kanzler-kurz-im-tt-interview-es-gibt-nur-noch-drei-gruende-sein-zuhause-zu-verlassen>>; Johanna Hager, 'Sebastian Kurz: "Es gibt nur drei Gründe, hinauszugehen"', *Kurier* (14 March 2020), <<https://kurier.at/politik/inland/sebastian-kurz-es-gibt-nur-drei-gruende-hinauszugehen/400781522>>; Martin Fritzl, 'Bundeskanzler Kurz: "Krankheit, Leid und Tod für viele"', *DiePresse* (14 March 2020), <<https://www.diepresse.com/5784951/bundeskanzler-kurz-krankheit-leid-und-tod-fuer-viele>>; Michael Jungwirth, 'Kanzler Kurz im Interview: "Es gibt nur noch drei Gründe, das Haus zu verlassen"', *Kleine Zeitung* (14 March 2020), <<https://www.kleinezeitung.at/international/corona/5784923/>>; Kronen Zeitung, 'Kurz: "Gibt nur 3 Gründe, das Haus zu verlassen"', *Kronen Zeitung* (14 March 2020), <<https://www.krone.at/2117281>>.

<sup>54</sup> Kurz (n. 53).

<sup>55</sup> See e.g. Rudolf Anschöber, 'ANSCHÖBER: Die nächsten vier Wochen entscheiden über die größte Gesundheitskrise der letzten Jahrzehnte', *APA OTS* (16 March 2020), <[https://www.ots.at/presseaussendung/OTS\\_20200316\\_OTS0057/anschober-die-naechsten-vier-wochen-entscheiden-ueber-die-groesste-gesundheitskrise-der-letzten-jahrzehnte](https://www.ots.at/presseaussendung/OTS_20200316_OTS0057/anschober-die-naechsten-vier-wochen-entscheiden-ueber-die-groesste-gesundheitskrise-der-letzten-jahrzehnte)>.

<sup>56</sup> See e.g. Karl Nehammer, 'Nehammer über Ausgangsbeschränkungen: "Nach bestem Wissen und Gewissen gehandelt"', *Facebook* (20 May 2020), <<https://de-de.facebook.com/ZeitImBild/videos/nehammer-%C3%BCber-ausgangsbeschr%C3%A4nkungen-nach-bestem-wissen-und-gewissen-gehandelt/1121800821523579/>>, 00:00–00:32.

<sup>57</sup> See e.g. Alexander Van der Bellen, 'Folgen Sie auch weiterhin dem Aufruf der Bundesregierung', *Facebook* (18 March 2020), <<https://www.facebook.com/alexandervanderbellen/posts/3109613755750312>>; BMSGPK, 'Bleiben Sie zu Hause, denn: So schützen wir uns alle am besten', *Facebook* (17 March 2020), <<https://www.facebook.com/watch/?v=217354536303929>>.

outside in press statements,<sup>58</sup> on social media,<sup>59</sup> and in an information campaign.<sup>60</sup>

The ‘public places’ exception was consistently communicated in a restrictive way.<sup>61</sup> Members of the federal government stressed that short walks around the block were allowed, but did not mention that people were generally allowed to be in public places as long as they kept a distance from others.<sup>62</sup> At one point, the Chancellor stated expressly that visiting others was not allowed.<sup>63</sup> A spokesperson of the Federal Ministry of Health later contradicted this statement,<sup>64</sup> clarifying that private meetings had always been allowed throughout the lockdown.

The government’s restrictive interpretation of the ‘public places’ exception was also illustrated in April, when the Federal Minister of Health revoked the directive instructing district authorities to prohibit large gatherings.<sup>65</sup> The Minister stated that in his view the directive was unnecessary, because the

<sup>58</sup> See e.g. Sebastian Kurz, ‘Die Gefahr durch das Virus ist noch da – Bitte treffen Sie niemanden’, *Bundeskanzleramt Nachrichten* (9 April 2020), <<https://www.bundeskanzleramt.gv.at/bundeskanzleramt/nachrichten-der-bundesregierung/2020/bundeskanzler-kurz-die-gefahr-durch-das-virus-ist-noch-da-bitte-treffen-sie-niemanden.html>>.

<sup>59</sup> See e.g. BMSGPK, ‘Bleiben Sie zu Hause!’, *Facebook* (1 April 2020), <[https://www.facebook.com/sozialministerium/posts/1677323742409765?comment\\_id=1681466611995478](https://www.facebook.com/sozialministerium/posts/1677323742409765?comment_id=1681466611995478)>; Sebastian Kurz, ‘Ausgangsbeschränkungen’, *Facebook* (8 April 2020), <<https://pt-br.facebook.com/sebastiankurz.at/videos/267097284290648/>>.

<sup>60</sup> See e.g. Federal Chancellery (BKA), ‘Bleiben Sie zu Hause!’, *Facebook* (17 March 2020), <<https://www.facebook.com/watch/?v=924167128003743>>; BKA, ‘Bleiben Sie weiterhin zuhause’, *Facebook* (15 April 2020), <<https://www.facebook.com/watch/?v=827555030985687>>.

<sup>61</sup> See ‘Corona und der Rechtsstaat’, *juridikum* (2020), 133-136 (133-134).

<sup>62</sup> See e.g. Anschöber (n. 55); BMSGPK, ‘Bleiben Sie weiterhin zu Hause’, *Facebook* (24 April 2020), <<https://m.facebook.com/sozialministerium/posts/1699550290187110/>>.

<sup>63</sup> See 16 BlgNR 27. GP (n. 51); Sebastian Kurz, ‘Pressekonferenz über Aktuelles zur Coronakrise’, *YouTube* (6 April 2020), <<https://www.youtube.com/watch?v=d2yM7i4lgZE>>, 51:20-51:40.

<sup>64</sup> BMSGPK, ‘Konkretisierung bezüglich Verkehrsbeschränkungen und Treffen im privaten Bereich’, *APA OTS* (27 April 2020), <[https://www.ots.at/presseaussendung/OTS\\_20200427\\_OTS0146/gesundheitsministerium-konkretisierung-bezueglich-verkehrsbeschraenkungen-und-treffen-im-privaten-bereich](https://www.ots.at/presseaussendung/OTS_20200427_OTS0146/gesundheitsministerium-konkretisierung-bezueglich-verkehrsbeschraenkungen-und-treffen-im-privaten-bereich)>. See also ‘Gesundheitsministerium: Private Treffen sind erlaubt’, *Die Presse* (27 April 2020), <<https://www.diepresse.com/5805999/gesundheitsministerium-private-treffen-sind-erlaubt>>; ‘Diskussion über private Treffen: “Corona-Partys” wegen Lärmbelästigung aufgehoben’, *Kleine Zeitung* (28 April 2020), <<https://www.kleinezeitung.at/politik/5806445/>>; ‘Website geändert: Private Treffen “natürlich” nicht verboten’, *News.orf.at* (27 April 2020), <<https://orf.at/stories/3163467/>>. See also Renner (n. 30).

<sup>65</sup> Rudolf Anschöber, ‘Erlass, § 15 Epidemiegesetz 1950, Verbot von Zusammenkünften, Geschäftszahl: 2020-0.172.682’ (10 March 2020), <[https://www.sozialministerium.at/dam/jcr:f2d9d0c9-059b-4b58-a193-bb94d20585b0/Standardausgang\\_BMSGPK7448.pdf](https://www.sozialministerium.at/dam/jcr:f2d9d0c9-059b-4b58-a193-bb94d20585b0/Standardausgang_BMSGPK7448.pdf)>.

general restrictions on entering public places already rendered events impossible.<sup>66</sup>

### 3. Enforcing the Lockdowns

Despite similar government communications that misrepresented the law actually in place, the enforcement of the March/April lockdowns in New Zealand and Austria occurred quite differently. In New Zealand, police focused on ensuring compliance with the legal orders and other law in place at the time. Until 3 April 2020, internal police guidelines stated that they could prevent gatherings in public places but not in private homes, and generally only had power to intervene where there was ‘significant public risk’ (such as breaking up a gathering where someone had COVID-19).<sup>67</sup> They did not base enforcement on the (incorrect) interpretation adopted in government communications. Accordingly, the risk of any unlawful enforcement during the nine days where the ‘stay home’ commands lacked a legal basis was low. New police operational guidelines that did provide for enforcement of ‘stay home’ commands were issued on 4 April 2020, once the second order was in place.<sup>68</sup> Any convictions were related to lockdown breaches after 3 April 2020,<sup>69</sup> when the divide between law and communication no longer existed.

<sup>66</sup> Anschöber (n. 55); Rudolf Anschöber, ‘Jetzt live: Die Statements von Kurz, Kogler, Anschöber & Nehammer’, *Facebook* (6 April 2020), <<https://www.facebook.com/puls24news/videos/jetzt-live-die-statements-von-kurz-kogler-anschober-nehammer/1286720751520472/>>, 45:10-45:30. See generally Mathis Fister, ‘Kommunikation und Fehlkommunikation von Recht’, *Österreichisches Anwaltsblatt* 257 (2020), 552-554 (552) (on the legal implications of government miscommunication).

<sup>67</sup> New Zealand Police, ‘Operational Policing Guidelines – Alert Level 4, Scenarios for the Frontline’ (27 March 2020) (on file with authors); Sam Sherwood, ‘Coronavirus: Police Lack Power to Truly Enforce Lockdown Rules’, *Stuff* (4 April 2020), <<https://www.stuff.co.nz/national/crime/120785044/coronavirus-police-lack-power-to-truly-enforce-lockdown-rules>>; Sam Sherwood and Jo McKenzie-McLean, ‘Coronavirus: Police Modify Guidelines for Frontline Officers’, *Stuff* (4 April 2020), <<https://www.stuff.co.nz/national/health/coronavirus/120824045/coronavirus-police-modify-guidelines-for-frontline-officers>>; Thomas Manch and Collette Devlin, ‘Policing the Pandemic: The “Unprecedented” Powers Deployed to Keep Kiwis at Home’, *Stuff* (29 March 2020), <<https://www.stuff.co.nz/national/health/coronavirus/120646079/policing-the-pandemic-the-unprecedented-powers-deployed-to-keep-kiwis-at-home>>.

<sup>68</sup> See New Zealand Police, ‘Operational Policing Guidelines – Alert Level 4, Scenarios for the Frontline’, *New Zealand Police* (4 April 2020), <<https://www.police.govt.nz/sites/default/files/publications/operational-policing-guidelines-04-04-2020.pdf>>.

<sup>69</sup> See New Zealand District Court, *New Zealand Police v. Lowery*, (2020) NZDC 17370; New Zealand District Court, *New Zealand Police v. Huber*, (2020) NZDC 17361; New Zealand District Court, *New Zealand Police v. Cooper*, (2020) NZDC 6922; New Zealand District Court, *New Zealand Police v. Spence*, (2020) NZDC 6759; New Zealand District Court, *New Zealand Police v. Scott*, (2020) NZDC 6514. See also New Zealand High Court, ‘Media Release:

In Austria, police issued fines on behalf of the competent administrative authorities. They fined people who were sitting on park benches<sup>70</sup> or visiting other people in their private homes,<sup>71</sup> and ordered people to leave public places.<sup>72</sup> In cases challenging the fines, the authorities argued that the ‘public places’ exception meant that only ‘walks or runs’<sup>73</sup> for the purposes of ‘being outside’,<sup>74</sup> ‘getting fresh air’, or ‘sport’ were allowed.<sup>75</sup>

In summary, the New Zealand government ordered people to stay at home from the start of the lockdown, even though this was not legally required until nine days into the lockdown. Nevertheless, the police acted in accordance with the law at the time despite the government’s communications. In Austria, the federal government communicated that there were only a limited number of reasons to go outside. Like in New Zealand, these communications did not reflect the law, which allowed entry into public places for any reason provided a minimum distance to others was maintained. This divide between law and communication remained for almost the entire duration of the first lockdown (from 16 March until 30 April). In line with the government’s communications, the police issued fines against people whose behaviour was compliant with the law. Accordingly, in both New Zealand and Austria there was a divide between law and communication for at least part of the lockdown. But the consequences for citizens were different: police in New Zealand enforced the law, while police in Austria enforced the communications. While communications limited citizens’ rights in both countries, only Austria saw those communications actually enforced.

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Andrew Borrowdale v. Director-General Of Health And Attorney-General’, Courts of New Zealand (19 August 2020), <<https://www.courtsofnz.govt.nz/assets/cases/Borrowdale-v-D-G-of-Health-Media-Release-19.8.20.pdf>> (stating that ‘there was no specific evidence before the Court as to the potential impact of a finding of illegality on charges laid against individuals in the first nine days of lockdown’).

<sup>70</sup> See ‘Coronavirus – Strafverfahren nach Parkbanksitzen in Wien eingestellt’, *Wiener Zeitung* (4 April 2020), <<https://www.wienerzeitung.at/nachrichten/chronik/wien/2056562-Strafverfahren-nach-Parkbanksitzen-in-Wien-eingestellt.html>>; APA, ‘Strafverfahren nach Parkbanksitzen in Wien eingestellt’, *Salzburger Nachrichten* (4 April 2020), <<https://www.sn.at/panorama/oesterreich/strafverfahren-nach-parkbanksitzen-in-wien-eingestellt-85812604>>.

<sup>71</sup> Administrative Court Lower Austria (LVwG NÖ), decision from 12 May 2020, LVwG-S-891/001-2020; Administrative Court Vienna (VwG Wien), decision from 5 June 2020, VGW-031/047/5718/2020. See also LVwG NÖ, decision from 23 June 2020, LVwG-S-1161/001-2020; VwG Wien, decision from 8 June 2020, VGW-031/092/6228/2020.

<sup>72</sup> See e.g. Bayerischer Rundfunk, ‘Polizei Wien setzt Ausgangssperre in Österreich um’, *YouTube* (20 March 2020), <<https://www.youtube.com/watch?v=ixOfod6YXN0>>.

<sup>73</sup> VwG Wien, decision from 5 June 2020 (n. 71), 3.

<sup>74</sup> VwG Wien, decision from 5 June 2020 (n. 71), 3.

<sup>75</sup> LVwG NÖ, decision from 12 May 2020 (n. 71), 5.

### III. Challenging the Lockdowns

#### 1. Foundations of Judicial Review

##### a) Grounds of Review

New Zealand law requires that decisions made under laws must be made in accordance with those laws, fairly, and reasonably.<sup>76</sup> Under the Bill of Rights Act 1990, every person has the right to apply for judicial review where their rights, obligations, or interests at law have been affected by a determination of any public authority.<sup>77</sup> If a decision appears to have been made unlawfully, unfairly, or unreasonably, the court can provide various procedural remedies, including decisions being ‘un-made’, ordered to be made again, or declared unlawful.<sup>78</sup> The court cannot, however, substitute its decision for that of the decision-maker. Judicial review is ‘inherently discretionary’<sup>79</sup> and takes a flexible and instinctual approach.<sup>80</sup>

Under the Austrian constitution, administrative acts must have a basis in statute law<sup>81</sup> and every statute needs to comply with requirements of the constitution. Accordingly, an applicant may, under certain conditions, challenge administrative acts and statutes where they do not comply with the law or the constitution. Administrative courts and the Supreme Administrative Court can review the legality of some administrative action,<sup>82</sup> but the competence to assess whether regulations comply with their statutory basis and whether statutes comply with the constitution lies with the Constitutional Court.<sup>83</sup> As remedies, the Austrian administrative courts can ‘un-make’ unlawful admin-

<sup>76</sup> See New Zealand Court of Appeal, *New Zealand Fishing Industry Association Inc v. Minister of Agriculture and Fisheries*, (1988) 1 NZLR 544, 552; Philip A. Joseph, *Constitutional and Administrative Law in New Zealand* (Wellington: Brookers 2014), 854.

<sup>77</sup> Section 27 New Zealand Bill of Rights Act 1990.

<sup>78</sup> These remedies emerged from the common law, but are also recognised by statute: see section 16 Judicial Review Procedure Act 2016.

<sup>79</sup> New Zealand High Court, *Martin v. Ryan*, (1990) 2 NZLR 209, 236.

<sup>80</sup> See Philip A. Joseph, ‘Exploratory Questions in Administrative Law’, NZULR 25 (2012), 73-102; Joseph (n. 76), 868.

<sup>81</sup> See Article 18 (1) B-VG. See also Philipp Mörth, *Das Legalitätsprinzip* (Wien: Verlag Österreich 2020). See Konrad Lachmayer, ‘Legitimacy Deficits of Austrian Legal Covid-19 Measures. From Emergency Action to Economic Crisis Governance’, *Law and Economics Yearly Review* 9 (2020), 147-162 (145) (on the principle of legality in Austria’s COVID-19 response).

<sup>82</sup> Articles 130, 133 B-VG.

<sup>83</sup> Articles 89(1), 135(4) B-VG. On the Austrian Constitutional Court see Konrad Lachmayer, ‘The Austrian Constitutional Court’ in: András Jakab, Arthur Dyeve and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press 2017), 75-114 (75).

istrative decisions,<sup>84</sup> order decisions to be made again,<sup>85</sup> substitute their own decisions,<sup>86</sup> or declare acts of order or force unlawful.<sup>87</sup> Alongside reviewing constitutional aspects of administrative courts' decisions,<sup>88</sup> the Constitutional Court cassates unlawful regulations and unconstitutional statutes or declares them unlawful if they are no longer in force.<sup>89</sup> Accordingly, Austrian judicial review may be seen as a more powerful tool than judicial review in New Zealand, as courts have more remedies available when faced with unlawful acts.

## b) What Is Reviewable?

As well as the grounds of review, the scope of reviewable executive action differs between New Zealand and Austria. In New Zealand, judicial review examines the procedural exercise of powers granted under statutes (but not statutes themselves) or body corporate constitutions<sup>90</sup> as well as other powers without a specific basis that carry public consequences.<sup>91</sup> There are two key requirements for a decision to be amenable to judicial review in New Zealand. As the power of judicial review is not prescribed by statute, but an inherent power of the courts,<sup>92</sup> Parliament does not determine these requirements and they have evolved (and continue to evolve) through the common law.

Firstly, the issue must be justiciable: the court must consider that it has institutional competence to decide whether the decision was correctly made. For example, matters of national security may be non-justiciable where the court considers it lacks relevant expertise to decide on the matter (although this will be determined on a case-by-case basis).<sup>93</sup>

Secondly, for the courts to have jurisdiction to intervene, a sufficiently public element must be present: whether in the power being exercised,<sup>94</sup> its conse-

<sup>84</sup> § 28 (4) Federal Act on Administrative Courts' Procedure (VwGVG), Federal Law Gazette I 2013/33, last amended by Federal Law Gazette I 2021/109.

<sup>85</sup> § 28 (3) VwGVG.

<sup>86</sup> § 28 (2)-(3) VwGVG. See also § 28 (7) VwGVG.

<sup>87</sup> § 28 (6) VwGVG.

<sup>88</sup> Article 144 B-VG.

<sup>89</sup> Articles 139 (3)-(4), 140 (3)-(4) B-VG.

<sup>90</sup> Section 5 (1) Judicial Review Procedure Act 2016.

<sup>91</sup> See Judicial Committee of the Privy Council, *Mercury Energy Ltd v. Electricity Corp of New Zealand Ltd*, (1994) NZPC 1, (1994) 2 NZLR 385, 388.

<sup>92</sup> See New Zealand Supreme Court, *Tannadyce Investments Ltd v. Commissioner of Inland Revenue*, (2011) NZSC 158, (2012) 2 NZLR 153, para. 3 (describing judicial review as 'the common law means by which courts hold officials to account'). See also Joseph (n. 76), 853.

<sup>93</sup> See New Zealand Court of Appeal, *Curtis v. Minister of Defence*, (2002) NZCA 47, (2002) 2 NZLR 744, para. 28.

<sup>94</sup> See New Zealand Court of Appeal, *Royal Australasian College of Surgeons v. Phipps*, (1999) 3 NZLR 1.

quences,<sup>95</sup> or the entity exercising it.<sup>96</sup> This requirement has been interpreted widely to include a range of private bodies making public decisions as well as public bodies making decisions with a commercial flavour, although the standard and intensity of review may vary.<sup>97</sup> There are no specific form requirements for reviewable acts;<sup>98</sup> ‘in principle, all exercises of public power are reviewable’.<sup>99</sup> An act is more likely to be amenable to judicial review if it affects individual rights and no alternative remedy is available.<sup>100</sup> Press releases<sup>101</sup> or similar government communications<sup>102</sup> that imply their statements have binding effect have historically been viewed as reviewable acts. Government statements that do not have binding effect, such as the publication of a report, have also been held to be reviewable if the statements stem from a statutory power to make such statements and have ‘important public consequences’.<sup>103</sup>

The Austrian system similarly requires that the state must be acting publicly or in a ‘sovereign capacity’ (rather than privately)<sup>104</sup> for its actions to be reviewable. Furthermore, the Austrian constitution provides for a limited

<sup>95</sup> See Joseph (n. 76), 860.

<sup>96</sup> See Judicial Committee of the Privy Council, *Mercury Energy* (n. 91), 388.

<sup>97</sup> See e.g. Judicial Committee of the Privy Council, *Mercury Energy* (n. 91), 391; New Zealand Court of Appeal, *Attorney-General v. Problem Gambling Foundation of New Zealand Inc*, (2016) NZCA 609, (2017) 2 NZLR 470, para. 30 (establishing that judicial review should not be used as a mechanism to pursue private interests, so commercial contracting decisions by public bodies will normally only be amenable to review where they involve fraud, corruption, or bad faith) and at para. 45 (establishing a further exception where the courts will review commercial contracting decisions that involve ‘substantial public consequences which call for the full panoply of judicial review’).

<sup>98</sup> See Graham Taylor, *Judicial Review: A New Zealand Perspective* (Wellington: Lexis Nexis 2018), 2.23.

<sup>99</sup> New Zealand Supreme Court, *Ririnui v. Landcorp Farming Ltd*, (2016) NZSC 62, (2016) 1 NZLR 105, para. 1.

<sup>100</sup> See e.g. Judicial Committee of the Privy Council, *Mercury Energy* (n. 91), 388.

<sup>101</sup> See New Zealand High Court (then Supreme Court), *Fitzgerald v. Muldoon*, (1976) 2 NZLR 615 (holding that the Prime Minister’s press releases purporting to immediately end the requirement to make payments under the national superannuation scheme were unlawful as they purported to suspend the law without Parliament’s consent, and stating at 623 that ‘it was implicit in the statement, coming as it did from the Prime Minister, that what was being done was lawful and had legal effect’).

<sup>102</sup> See New Zealand Supreme Court, *Quake Outcasts & Fowler Developments Ltd v. Canterbury Earthquake Recovery Authority*, (2015) NZSC 27, (2016) 1 NZLR 1 (reviewing government decisions that advised that rebuilding could not occur in a particularly damaged area following a major earthquake, and holding at para. 280 that it would ‘strain credulity’ to interpret these decisions as providing information only, particularly as they were made against a backdrop of statutory powers that could have compelled compliance).

<sup>103</sup> New Zealand High Court, *University of Auckland v. Tertiary Education Commission*, (2004) 2 NZLR 668, para. 54. See also Karen Yeung, ‘Regulating Government Communications’, CLJ 65 (2006), 53-91 (91).

<sup>104</sup> See Walter Antonioli, *Allgemeines Verwaltungsrecht* (Wien: Manz 1954), 11.

number of specific forms that administrative state action can take: regulations ('Verordnungen'), individual administrative decisions ('Bescheide'), and the use of command and force against individual persons ('Maßnahmen').<sup>105</sup> The Austrian judicial review system is modelled around these forms of administrative action,<sup>106</sup> but can also provide legal protection against rights infringements that do not fit into any of these categories ('formfreies Hoheitshandeln') if there is a suitable statutory basis.<sup>107</sup>

'Formfreies Hoheitshandeln' is state action that has a 'close internal and external connection to a specific state administration task',<sup>108</sup> but does not meet the requirements for regulations, individual administrative decisions, or use of command and force against individual persons. For example, the Minister of Health issuing a warning about side-effects of a COVID vaccine would not be a regulation, an administrative decision affecting an individual, the use of command or force, or state inaction.<sup>109</sup> Because actions like a warning would still be an exercise of state power that could have consequences for individuals or entities, the legislator created new ways to subject these actions to judicial review. On the basis of two constitutional amendments in 2012<sup>110</sup> and 2019,<sup>111</sup> a broader scope of administrative action can

<sup>105</sup> See generally Walter Berka, *Verfassungsrecht* (8th edn, Wien: Verlag Österreich 2021), paras 319-320; Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (13th edn, Wien: Facultas 2022), 292-294; Manfred Stelzer, *Grundzüge des öffentlichen Rechts* (4th edn, Wien: LexisNexis 2019), 106-108; Harald Eberhard, 'Handlungsformen und Rechtsstaat' in: Daniel Ennöckl, Nicolas Raschauer, Eva Schulev-Steindl and Wolfgang Wessely (eds), *Festschrift für Bernhard Raschauer* (Wien: Sramek 2013), 65-89 (65); Michael Holoubek, 'Handlungsformen, Legalitätsprinzip und Verwaltungsgerichtsbarkeit' in: Daniel Ennöckl, Nicolas Raschauer, Eva Schulev-Steindl and Wolfgang Wessely (eds), *Festschrift für Bernhard Raschauer* (Wien: Sramek 2013), 181-197 (181).

<sup>106</sup> Articles 130 (1), 139 B-VG. See also Ulrike Giera and Konrad Lachmayer, 'The Principle of Effective Legal Protection in Austrian Administrative Law' in: Zoltán Sente and Konrad Lachmayer (eds), *The Principle of Effective Legal Protection in Administrative Law: a European Comparison* (London: Routledge 2017), 73-90 (78); Magdalena Pöschl, *Die Zukunft der Verfassung* (Wien: Sramek 2010), 55-58 (generally discussing the form-based judicial review system); Manfred Stelzer, *The Constitution of the Republic of Austria: A Contextual Analysis* (Oxford: Hart Publishing 2011), 192-203.

<sup>107</sup> Article 130 (2)(1) and (4) B-VG.

<sup>108</sup> Supreme Court (OGH), decision from 14 October 1997, case no. 1 Ob 303/97 h; OGH, decision from 17 February 1982, case no. 1 Ob 49/81; OGH, decision from 23 February 2011, case no. 1 Ob 208/10 k. See also Alrun Cohen, 'Amtshaftung bei schlichter Hoheitsverwaltung' JBl 136 (2014), 163-170 (165-167).

<sup>109</sup> See Sebastian Scholz, 'Produktwarnungen im Medizinrecht', *Recht der Medizin* 24 (2017), 13-17 (15) (on medical warnings in general).

<sup>110</sup> Federal Law Gazette I 2012/51. See 1618 BlgNR 24. GP, 13, <[https://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01618/fname\\_238643.pdf](https://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01618/fname_238643.pdf)>.

<sup>111</sup> Federal Law Gazette I 2019/14. See 301 BlgNR 26. GP, 5, <[https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I\\_00301/fname\\_714489.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVI/I/I_00301/fname_714489.pdf)>. See also Benjamin Kneis, 'Beschwerden, Streitigkeiten oder Anträge in sonstigen Angelegenheiten – Art 130 Abs. 2 Z 4 B-VG', JBl 143 (2021), 2-13 (2).

now be reviewed by administrative courts, provided that the legislator adopts a specific statutory basis that authorises review of the administrative action in question.<sup>112</sup>

The New Zealand system is therefore more inherently flexible than the Austrian system, as it does not require executive acts to meet legislated form requirements. However, the Austrian system has the potential to expand its range of reviewable acts through legislative amendment.

## 2. Challenges

New Zealand saw several legal challenges to the lockdown.<sup>113</sup> However, the High Court case of *Borrowdale*<sup>114</sup> was the only case to directly challenge the legality of government communications. Mr. Borrowdale alleged that public announcements and communications made by members of the government telling people to ‘stay home’ amounted to restrictions on the public without a corresponding legal basis.<sup>115</sup>

The Court reviewed the executive statements during this period<sup>116</sup> and concluded that the statements carried clear orders to ‘stay home’ (using words like ‘must’ and ‘rules’)<sup>117</sup>. Especially in relation to statements made by the Prime Minister, the statements carried the ‘full authority of her office and the State’ and were commands on the public.<sup>118</sup> The Court found that these statements were inconsistent with the legal situation under the Health Act until 3 April 2020. The first order only required all premises and outdoor places of amusement or recreation to be closed. It did not require people to stay within their homes and stop interactions with all people outside their

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<sup>112</sup> See article 130 (2)(1) and (4) B-VG; the Austrian legislator has done so for example (based on article 130 (2)(1) B-VG) for certain types of police action that are neither an administrative decision nor the use of command or force: § 88 (2) Federal Act on the Organisation of the Security Administration and the Exercise of Security Police (SPG), Federal Law Gazette 1991/566, last amended by Federal Law Gazette I 2021/148. See generally Martin Lenzbauer, ‘Rechtsschutz gegen schlichte Hoheitsverwaltung: Die typenfreie Beschwerde und ihre Verwandten’, *Juristische Ausbildung & Praxisvorbereitung* 24/25 (2014/2015), 20-25 (20-21).

<sup>113</sup> See New Zealand High Court, *Christiansen v. Director-General of Health*, (2020) NZHC 887; New Zealand Court of Appeal, *Nottingham v. Ardern*, (2020) NZCA 144; New Zealand High Court, *Prescott v. New Zealand Government*, (2020) NZHC 653.

<sup>114</sup> *Borrowdale* (n. 13).

<sup>115</sup> *Borrowdale* (n. 13), para. 140. The other (failed) causes of action did not relate to government communications.

<sup>116</sup> *Borrowdale* (n. 13), paras 140-173.

<sup>117</sup> *Borrowdale* (n. 13), para. 184.

<sup>118</sup> *Borrowdale* (n. 13), para. 187.

household. For example, the wording of that order did not prohibit visiting other people at a private home.<sup>119</sup>

The government argued that the communications were merely informative guidance, rather than commands.<sup>120</sup> Alternatively, it sought to argue that the communications were a form of oral order to ‘stay home’ under the Health Act.<sup>121</sup> However, only the Director-General would be empowered to make such an order, rather than the Prime Minister or other executive actors, and evidence suggested that the Director-General had no intention of making such an order before his written order on 3 April 2020.<sup>122</sup> Analysis of the Director-General’s public statements at the relevant time found they were only of an ‘encouraging’ nature.<sup>123</sup>

Overall, the Court concluded that government communications telling the public to ‘stay home’ from 25 March 2020 were not prescribed by law until the second order was passed. The Court provided the remedy of a declaration of inconsistency with the Bill of Rights Act:

‘By various public and widely publicised announcements [...] members of the executive branch of the New Zealand Government stated or implied that [...] all New Zealanders were required by law to stay at home and in their “bubbles” when there was no such requirement. [...] While there is no question that the requirement was a necessary, reasonable and proportionate response to the COVID-19 crisis at that time, the requirement was not prescribed by law and was therefore contrary to the New Zealand Bill of Rights Act.’<sup>124</sup>

In Austria, key provisions of the regulation restricting access to public places were declared unlawful by the Constitutional Court.<sup>125</sup> Further, the

<sup>119</sup> See Section 70(1)(m) Health Act Order 2020 (expressly providing that it did not apply to any premises used solely as a private dwelling house).

<sup>120</sup> *Borrowdale* (n. 13), para. 178.

<sup>121</sup> *Borrowdale* (n. 13), para. 203.

<sup>122</sup> As a medical officer of health under section 70 Health Act 1956.

<sup>123</sup> *Borrowdale* (n. 13), para. 210.

<sup>124</sup> *Borrowdale* (n. 13), para. 292.

<sup>125</sup> Constitutional Court (VfGH), decision from 14 July 2020, case no. V 363/2020, para. 8. See also Mathias Eller and Daniel Wachter, ‘Die Rechtsprechung des VfGH zu den “Corona-Regelungen” der Bundesregierung: Eine Analyse ausgewählter Entscheidungen’, *ÖJZ* 75 (2021), 12-19 (15-18); Helmut Hörtenhuber and Stefanie Dörnhöfer, ‘Entscheidungen des VfGH – Juni- und Juli-Session 2020’, *ÖJZ* 75 (2021), 249-255 (252-253); Kerstin Holzinger, ‘Die Covid-19-Judikatur des VfGH – eine verfassungsrechtliche Analyse’, *Zeitschrift der Verwaltungsgerichtsbarkeit* 7 (2020), 344-352 (348-349); Dominik Prankl, ‘COVID-19: Sind die Ausgangsbeschränkungen gesetzwidrig?’, *Zeitschrift für Gesundheitsrecht* 5 (2020), 58-67; Karl Stöger, ‘Allgemeines Betretungsverbot von öffentlichen Orten Gesetzwidrig: Besprechung von VfGH 14.7.2020, V 363/2020’, *JBl* 142 (2020), 563-569; Michael Denk, Kapitel 19: ‘Ausgewählte Erkenntnisse des VfGH zur COVID-19 Gesetz- und Verordnungsgebung’ in: Reinhard Resch (ed.), *Corona-Handbuch*<sup>1,02</sup> (Wien: Manz 2021), paras 31-38.

administrative courts cassated unlawful fines (which took the reviewable form of ‘Bescheide’) issued by police on an overly narrow reading of the ‘public places’ exception.<sup>126</sup> However, the federal government’s press conferences or other communications themselves have not been challenged in court.

In some cases, courts did note the discrepancies between government communications and the law. But they did not appear to consider this conflict as a legal problem: the Administrative Court of Vienna stated that it was ‘legally irrelevant that the [Federal Minister of Health] has voiced differing opinions in press statements’.<sup>127</sup> The Administrative Court of Lower Austria also noted that there was no restriction to a specific purpose in the ‘public places’ exception, ‘even though “getting fresh air” or “sports” were portrayed as the only permissible purposes by the media’.<sup>128</sup>

To summarise, in New Zealand, all executive actions are in principle reviewable regardless of their form. In contrast, the Austrian system takes a form-based approach to judicial review, where only certain types of executive action are reviewable without a special statutory basis. In the context of the COVID-19 lockdowns in March/April 2020, both New Zealand and Austrian citizens challenged different aspects of the lockdowns as unlawful. However, the two judicial review systems dealt with government communications differently. Communications that misrepresented the lockdown rules were reviewed as commands on the public and declared unlawful in New Zealand. In Austria, although the courts did discuss the communications, they held them to be legally irrelevant because they lacked the form requirements of any type of reviewable legal act.

## IV. Could the Courts Have Done More?

While indicative, the New Zealand and Austrian challenges described do not reflect the full extent of each system’s ability to review communications. Which further judicial review remedies could the New Zealand and Austrian courts have provided for misleading crisis communications? While the effect-based New Zealand system could have provided a more decisive remedy, Austria could have used the form-based system more creatively.

<sup>126</sup> LVwG NÖ, decision from 12 May 2020 (n. 71); VwG Wien, decision from 5 June 2020 (n. 71). See also Kopetzki (n. 31), 161-164. On the interpretation of public space and whether it includes private vehicles, see LVwG NÖ, decision from 23 June 2020 (n. 71). On the legal situation after some restrictions were eased, see VwG Wien, decision from 8 June 2020 (n. 71).

<sup>127</sup> VwG Wien, decision from 5 June 2020 (n. 71), 6.

<sup>128</sup> LVwG NÖ, decision from 12 May 2020 (n. 71), 5.

Although the New Zealand High Court found that government commands lacked a lawful basis in *Borrowdale*, the Court weighed up whether it should provide a remedy at all and considered its decision to provide a declaration as ‘finely balanced’.<sup>129</sup> It stated that it was important to keep its finding ‘in perspective’,<sup>130</sup> given the extraordinary context and that the restrictions were unlawful for only nine days. Although it was not argued that the limits on rights were unreasonable, the Court also made sure to clarify that it viewed the limits as reasonable, necessary, and proportionate.<sup>131</sup> The Court’s judgement was accordingly a less decisive and more deferential check on the government than it could have been.<sup>132</sup>

Further, the declaration was not a wide indictment of government commands without a lawful basis. Instead, it was focused on the fact that the government communications limited rights contained in the Bill of Rights Act, which requires any breach of *that Act* to be prescribed by law.<sup>133</sup> But the Bill of Rights Act does not contain an exhaustive list of rights<sup>134</sup> or limits on what the government may do. For example, the declaration in *Borrowdale* would not necessarily provide comfort to an applicant seeking to review government communications purporting to infringe on a customary right<sup>135</sup> or a property right not included in the Bill of Rights Act.<sup>136</sup>

The Court’s declaration is reasonable. The Court could not have ‘struck down’ the communications, given the timing of the judgement and the constraints of the New Zealand system. A broader declaration that the government’s communications were unlawful simply because they exceeded the law at the time would, however, have been preferable. As Geddis and Latu argue, such a declaration would have been a ‘clear general pronouncement about the limits on governmental power to legislate by proclamation’.<sup>137</sup> Given the Court’s acknowledgement of its constitutional role to keep ‘a weather eye on

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<sup>129</sup> *Borrowdale* (n. 13), para. 290.

<sup>130</sup> *Borrowdale* (n. 13), para. 226.

<sup>131</sup> *Borrowdale* (n. 13), para. 226.

<sup>132</sup> See Claudia Geiringer and Andrew Geddis, ‘Judicial Deference and Emergency Power: A Perspective On *Borrowdale v Director-General*’, PLR 31 (2020), 376-383 (critiquing the Court’s deference).

<sup>133</sup> Section 5 Bill of Rights Act 1990.

<sup>134</sup> Section 28 Bill of Rights Act 1990.

<sup>135</sup> E.g. customary rights protected under section 15 Te Takutai Moana Act 2011.

<sup>136</sup> Andrew Geddis and Alex Latu, ‘Unlawful Commands, Bills of Rights, and the Common Law’, NZLJ December (2020), 393-398 (396) (describing as ‘regrettably deficient’ the High Court’s decision to cast the government’s statements as ‘unlawful *only* because of inconsistency with the NZBORA’).

<sup>137</sup> Geddis and Latu (n. 136), 396.

the rule of law',<sup>138</sup> a broader declaration would have more decisively held the government to account.

Austria's form-based judicial review system appears to prevent courts from doing more to address government (mis)communications in the absence of legislative amendment. However, government speeches and statements made in press conferences could possibly have been classified as administrative acts, specifically in certain circumstances as regulations.<sup>139</sup>

To qualify as a regulation in Austria, acts need to meet certain minimum requirements: (1) they must be issued by an authority that can in principle issue administrative acts, (2) they must be published, and (3) their content must be normative.<sup>140</sup> The authority does not necessarily need to be competent to pass the specific regulation in question.<sup>141</sup> The Chancellor and the Federal Minister of Health are administrative authorities generally competent to issue regulations<sup>142</sup> and would therefore fulfil the first requirement.

Secondly, regulations passed by a Federal Minister must be published in the Austrian Federal Law Gazette.<sup>143</sup> However, the Constitutional Court considers ungazetted regulations to be legally effective (until cassated for invalidity) if they reach a minimum level of publicity.<sup>144</sup> This threshold has been reached when documents have been published, for example, on the homepage of the Austrian Economic Chamber<sup>145</sup> or on the internet.<sup>146</sup> Therefore, communications such as the Chancellor's speech on national television during prime-time Austrian news<sup>147</sup> would achieve this minimum level of publicity.

<sup>138</sup> *Borrowdale* (n. 13), para. 291.

<sup>139</sup> On the characteristics of regulations see generally Bernhard Raschauer, *Allgemeines Verwaltungsrecht* (6th edn, Wien: Verlag Österreich 2021), paras 724-771; Arno Kahl and Karl Weber, *Allgemeines Verwaltungsrecht* (7th edn, Wien: facultas 2019), para. 393.

<sup>140</sup> See Kahl and Weber (n. 139), para. 392.

<sup>141</sup> See Raschauer (n. 139), para. 734.

<sup>142</sup> See VfGH, decision from 26 June 2020, collection no. VfSlg 20.391/2020; VfGH, decision from 7 December 1990, collection no. VfSlg 12.574/1990.

<sup>143</sup> § 4 (2)(1) Act on the Federal Law Gazette, Federal Law Gazette I 2003/100, last amended by Federal Law Gazette I 2020/24.

<sup>144</sup> See VfGH, decision from 28 June 2017, collection no. VfSlg 20.182/2017. See also Heinz Mayer, Gabriele Kucsko-Stadlmayer and Karl Stöger, *Bundesverfassungsrecht* (11th edn, Wien: Manz 2015), para. 602; Anna Katharina Struth, '(Nicht-)Anwendung fehlerhaft kundgemachter Verordnungen im behördlichen und gerichtlichen Verfahren', *Recht & Finanzen für Gemeinden* 7 (2019), 26-32 (30).

<sup>145</sup> See VfGH, decision from 21 June 2008, collection no. VfSlg 18.495/2008.

<sup>146</sup> See VfGH, decision from 13 March 2003, collection no. VfSlg 16.853/2003.

<sup>147</sup> 2.68 million people saw the news that day. See 'Mediennutzung, Quoten & mehr', *ORF.at*, <[https://zukunft.orf.at/show\\_content2.php?blog\\_mode=single&blog\\_id=273&sid=176&s2id=333&blog\\_group=2](https://zukunft.orf.at/show_content2.php?blog_mode=single&blog_id=273&sid=176&s2id=333&blog_group=2)>.

Finally, regarding normativity, most Austrian legal scholars are sceptical that government public relations acts are normative.<sup>148</sup> The assessment of normativity, however, must be carried out on a case by case basis. Similarly to the Court's assessment in *Borrowdale*, the language used plays a major role in determining the normativity of a statement.<sup>149</sup> A statement phrased in an imperative way<sup>150</sup> or that carries subjective rights and obligations<sup>151</sup> is more likely to be considered normative than one that merely references or repeats existing law. The Chancellor's lockdown announcement<sup>152</sup> and associated communications<sup>153</sup> were worded imperatively: 'stay at home'.<sup>154</sup> Moreover, the Chancellor's statement that 'there are only three reasons to go outside'<sup>155</sup> did not merely reference or repeat the content of Regulation-98.<sup>156</sup> Rather, the Chancellor appeared to be issuing a different set of rules. Such statements could likely be considered normative.

<sup>148</sup> See Rudolf Feik, *Öffentliche Verwaltungskommunikation* (Wien: Springer-Verlag 2007), 168; Stefan Karkulik, 'Rechtsschutz gegen die Öffentlichkeitsarbeit der Verwaltung nach der Verwaltungsgerichtsbarkeits-Novelle 2012', *Journal für Rechtspolitik* 22 (2014), 169-186 (172) (stating that public administrative communication lack normativity); Iris Eisenberger, 'Gegenstand der Maßnahmenbeschwerde' in: Iris Eisenberger, Daniel Ennöckl and Wolfgang Helm (eds), *Die Maßnahmenbeschwerde* (2nd edn, Wien: Verlag Österreich 2016), 1-29 (16) (stating that reminders, instructions, warnings, and notices lack normativity); Maximilian Blafnig, 'In Zeiten der Infodemie', *juridikum* 31 (2020), 433-442 (440) (stating that press conferences lack normativity); Michael Schilchegger, 'Staatliche Information als impliziter Imperativ?' in: Sebastian Schmid, Veronika Tiefenthaler, Klaus Wallnöfer and Andreas Wimmer (eds), *Auf dem Weg zum hypermodernen Staat* (Wien: Sramek 2011), 81-109 (84-85) (stating that public administrative information lacks normativity); Nicolas Raschauer, 'Investorenwarnungen im Finanzmarktaufsichtsrecht', *ÖZW* (2008), 95-102 (99) (stating that warnings lack normativity); Nicolas Raschauer, 'Staatliche Warnungen – rechtsstaatliche Grenzgänger?' in: Georg Lienbacher and Gerhart Wielinger (eds), *Öffentliches Recht Jahrbuch 2009* (Wien: NWV-Verlag 2009), 271-293 (281); Scholz (n. 109), 16; Sidar Yaylagül, 'Staatliche Warnungen: Funktion – Rechtsqualität – Rechtsschutz', *juridikum* 31 (2020), 498-506 (502-504).

<sup>149</sup> See Raschauer (n. 139), para. 765; Doris Hattenberger, 'Zur Grenzziehung zwischen Verordnung und Nicht-Verordnung: Zugleich ein Beitrag zur Lehre von der absoluten Nichtigkeit von Verwaltungshandeln', *ZfV* 24 (2001), 546-570 (546); Magdalena Nemeth, 'FAQs in Krisensituationen: eine verwaltungsrechtliche Einordnung' in: Michael Bajlicz, Sophie Bohnert, Theresa Ganglbauer, Christoph Gärtner, Daniela Petermair, Maximilian Ponader, Markus Tilzer, Sarah Werderitsch (eds), *Tagungsband der Österreichischen Assistentinnen und Assistenten des Öffentlichen Rechts (ÖAT) 2021* (Wien: Sramek 2022), 245-263 (255).

<sup>150</sup> See VfGH, decision from 9 December 1993, collection no. VfSlg 13.632/1993. See also Raschauer (n. 139), para. 765; Hattenberger (n. 149), 558-559.

<sup>151</sup> See VfGH, decision from 2 July 1994, collection no. VfSlg 13.836/1993. See also Hattenberger (n. 149), 558.

<sup>152</sup> See Kurz (n. 53).

<sup>153</sup> See e. g. Baumgartner-Pötz (n. 53); Fritzl (n. 53); 16 BlgNr 27. GP (n. 51).

<sup>154</sup> Kurz (n. 53), 01:40-01:55.

<sup>155</sup> Kurz (n. 53), 01:30-02:00.

<sup>156</sup> But compare Blafnig (n. 148), 440.

Accordingly, some government communications *could* have been qualified as regulations and judicially reviewed, albeit only on the basis of a suitable application. However, even if a suitable case had been brought, this approach would be contentious because it would strain the established meaning of regulations and previous extensions of the form-based system in Austria have been achieved through legislative amendment.

Overall, despite the remedy provided in *Borrowdale*, the New Zealand High Court did not as decisively censure the state's unlawful acts as it could have. Although a declaration was the appropriate remedy, it downplayed its own declaration<sup>157</sup> and considered not providing one at all, despite finding that the government had made unlawful commands on the public. Further, it limited its declaration to stating that the government commands were inconsistent with the Bill of Rights Act, rather than more broadly stating that they simply lacked a legal basis. In Austria, the courts (and applicants) could have classified communications as a form of reviewable act. This would have been a novel approach to communications under the judicial review system, and could possibly have paved the way for access to justice through a *Borrowdale*-style judgement and remedy in Austria. However, arguing this case under the current statutory framework in Austria would be a novel use of the form-based system and likely to meet with resistance. As a result, the opportunities for a *Borrowdale*-style judgement in Austria are limited, unless the legislator itself chooses to provide a legislative basis for review.

## V. Concluding Remarks from a Rule of Law Perspective

Despite taking different forms in New Zealand<sup>158</sup> and Austria,<sup>159</sup> the rule of law is generally accepted as a doctrine that requires that laws are clear,

<sup>157</sup> See *Borrowdale* (n. 13), para. 226. Also see Marcelo Ferrere, '*Borrowdale v Director-General Of Health: An Unlawful But Justified National Lockdown*', PLR 31 (2020), 234-240.

<sup>158</sup> For various attempts to define the rule of law in New Zealand see Joseph (n. 80); Sian Elias, 'Judgery and the Rule of Law', Otago L. Rev. 14 (2016), 49-60; New Zealand Court of Appeal, *Petrocorp Exploration Ltd v. Minister of Energy*, (1991) 1 NZLR 1, 38 per Cooke P; New Zealand Supreme Court, *Hansen v. R.*, (2007) NZSC 7, (2007) 3 NZLR 1, para. 101; in the context of emergency law, see Dean R. Knight, 'Government Expression and the Covid-19 Pandemic: Advising, Nudging, Urging, Commanding', PLR 31 (2020), 391-397 (advocating for a new conception of the rule of law that does not focus merely on black letter law but reflects the web of coercive tools and powers that make up the emergency legal framework) and Edward Willis, 'Borrowdale and Executive Power', NZLJ December (2020), 397-398.

<sup>159</sup> See Article 18 (1) B-VG. See also e.g. VfGH, decision from 11 December 1986, collection no. VfSlg 11.196/1986; VfGH, decision from 29 June 2001, collection no. VfSlg 16.245/2001. On the rule of law generally see Merli (n. 19); Mörth (n. 81), 5-176.

certain, and universally applicable,<sup>160</sup> that the government acts in accordance with properly enacted laws and does not have arbitrary power,<sup>161</sup> and that fundamental rights may only be overridden by specific parliamentary intent.<sup>162</sup>

By the time *Borrowdale* was heard, the March/April 2020 lockdown in New Zealand was over and a new law had been passed to address COVID-19 (although subsequent lockdowns would follow).<sup>163</sup> Nevertheless, the declaration was an important remedy for people who had been compelled to stay home due to government commands. While the government did *have* the power to pass the order that would have isolated people in their homes, it did not exercise this power until 2 April 2020, nine days after verbally ordering New Zealanders to stay home. This situation breached the rule of law's requirements that laws are clear and understandable, that citizens are able to ascertain and follow the law, and that the government acts only in accordance with the law. Overall, the New Zealand courts' ability to review government communications as executive acts provided access to justice and a declaratory remedy for citizens.

The New Zealand case also illustrates further benefits of subjecting government communications to judicial review. In publicly holding the government to account for its communications,<sup>164</sup> the High Court's declaration may have contributed to a better (or, at least, more conscious) executive culture in matching communications to the law. After *Borrowdale*, government communications more clearly demarcated between what citizens were advised to do (guidance) and legally obliged to do (commands). For example, at the end of August 2020, a mask-wearing obligation came into force.<sup>165</sup> The Prime Minister said that the government (emphasis added):

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<sup>160</sup> See Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press 2009), 115; *Borrowdale* (n. 13), para. 291; Joelle Grogan and Julinda Beqiraj, 'Rule of Law as a Perimeter of Legitimacy for COVID-19 Responses', *Verfassungsblog* (17 April 2021), <<https://verfassungsblog.de>>.

<sup>161</sup> On the rule of law in New Zealand see Ryan Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (Montreal and Kingston: McGill-Queen's University Press 2017), 16; Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan and Co. 1915), 120; King's Bench, *Entick v. Carrington*, (1765) EWHC J98; Joseph (n. 80), 154.

<sup>162</sup> United Kingdom House of Lords, *R v. Secretary of State for the Home Department, Ex Parte Simms*, (1999) UKHL 33, (2000) 2 AC 115.

<sup>163</sup> See COVID-19 Public Health Response Act 2020.

<sup>164</sup> See Dean R. Knight, 'New Zealand: Rendering Account During the COVID-19 Pandemic', *Verfassungsblog* (19 April 2021), <<https://verfassungsblog.de>>.

<sup>165</sup> COVID-19 Public Health Response (Alert Level Requirements) Order 2020 (as at 6 September 2020).

‘continue[d] to ask everyone who is on public transport and planes to wear a mask or face covering. [...] Cabinet has decided to move to *mandating* the wearing of face coverings on public transport for level 2 and above. These new orders will come into force from Monday.’<sup>166</sup>

A clear distinction was drawn between the date of the announcement, where the government could only ask people to wear a face covering, and the date of the new order, where it could require it. Further, when a community outbreak occurred in February 2021, the Prime Minister stated that before the government could initiate a lockdown, it needed to ‘get our orders in place so that we can actually mandate what we’re asking the New Zealand public to do’.<sup>167</sup> Here, the Prime Minister acknowledged that the government could not make commands without a lawful basis.<sup>168</sup> These examples show that while rulings like *Borrowdale* focus on specific administrative acts, they can provide opportunities and insights for future government decision-making that may not arise if those acts are not reviewable.

The New Zealand Court’s approach upheld the rule of law by incorporating crisis communications into the legal system. The effect-based judicial review system’s view that all executive acts are in principle reviewable regardless of their form enabled the court to review acts of communication as executive acts without needing to classify them further. In doing so, the court achieved a differentiated approach to government communications that did not dilute their importance or usefulness to the crisis response but acknowledged their real impacts on citizens’ lives.

In Austria, the mismatch between government communications and the law lasted for almost the entire one and a half months of lockdown in March and April 2020. Even though an exception clause permitted Austrians to leave their homes for any reason, government communications consistently reduced the scope of this exception. Consequently, the police issued unlawful

<sup>166</sup> Prime Minister Jacinda Ardern, ‘Post-Cabinet Press Conference’, *Beehive.govt.nz* (24 August 2020), <<https://www.beehive.govt.nz/sites/default/files/2020-08/240820%20PM%20press%20conference.pdf>>.

<sup>167</sup> Prime Minister Jacinda Ardern, ‘COVID-19 Media Conference – 7pm, 14 February 2021’, *Unite Against Covid-19* (14 February 2021), <<https://covid19.govt.nz/news-and-data/latest-news/covid-19-media-conference-7pm-14-february-2021/>>.

<sup>168</sup> But see Elle Hunt, ‘New Zealand Urged “Don’t Let Virus Divide You” As Covid Frustration Builds’, *The Guardian* (2 March 2021), <<https://www.theguardian.com/world/2021/mar/02/new-zealand-urged-dont-let-virus-divide-you-as-covid-frustration-builds>>; The Detail, ‘Rules, Messages, Covid And Confusion’, *Radio New Zealand* (5 March 2021), <<https://www.rnz.co.nz/programmes/the-detail/story/2018786106/rules-messages-covid-and-confusion>> (discussing criticism of the government for uncertain communications around lockdown orders directed at specific individuals in March 2021, which were a notable exception to the general improvement in communications).

finances against people who were visiting friends or sitting on park benches. In contrast to the effect-based review system in New Zealand, the Austrian form-based approach failed to produce any challenges that directly targeted government acts of communication. This absence of a challenge to (mis)communications in Austria left citizens without a remedy where they obeyed the government's communications and stayed indoors because they thought they were otherwise breaking the law.<sup>169</sup>

Communications are a key part of the relationship between state and citizen. Citizens today access information through a range of sources with varying levels of reliability, while governments themselves communicate more rapidly and directly with citizens. Simultaneously, other crises such as climate change demonstrate the urgent and growing need for good crisis management. In the face of these developments, government communications will continue to have a pivotal role in the public understanding of the law in the decades to come.

To uphold the rule of law's key function of 'transforming power into law'<sup>170</sup> – ensuring that state actions remain within the scope of law – courts need to be able to review government crisis (mis)communications.<sup>171</sup> Currently, form-based systems struggle to adequately review acts of communication that effectively shape a government's crisis response but lack certain formal requirements to be amenable to review by the courts. This gap also means that governments miss an opportunity for judicial input into crisis responses. In contrast, effect-based systems can readily review a wider range of executive acts.

To provide the same level of protection as effect-based judicial review systems, form-based systems must adapt. Applicants and courts in form-based systems could take an innovative approach to legally classifying executive acts in order to rationalise (mis)communication. However, this approach is contentious and would be a novel court-led approach under the form-based system. Where the options for applicants and courts run into limitations of statutory law, the legislator is called upon to bring communications back into the scope of judicial review and truly transform power into law.

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<sup>169</sup> See Blafnig (n. 148), 436. See also Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *Verfassungsblog* (28 April 2020), <<https://verfassungsblog.de>>.

<sup>170</sup> Kahl and Weber (n. 139), para. 462.

<sup>171</sup> On the identity of law and state see generally Hans Kelsen, *Reine Rechtslehre* (2nd edn, Wien: Verlag Österreich 1960), 289-320.

