

EMERGENCY GOVERNANCE AND RULE OF LAW: EVALUATING EXECUTIVE OVERREACH DURING NATIONAL SECURITY CRISES IN THE POST-PANDEMIC ERA

Mariya Petrova
Department of Civil Sciences
Varna Free University
Varna, Bulgaria
<https://orcid.org/0000-0002-1049-2323>
mariya.p.petrova@abv.bg

Abstract. *The article in question explores how much emergency governance structures that were implemented during and after the COVID-19 pandemic have become institutionalized aspects of executive power in three jurisdictions that can be seen to represent three different types of regimes, including Germany (consolidated democracy), Kenya (transitioning state), and Hungary (illiberal regime). Using the theorisation of the so-called state of exception by Giorgio Agamben and the dictum of Carl Schmitt that he who declares the exception is the sovereign, the study utilizes qualitative content analysis of 274 executive decrees and 83 high-court decisions released between March 2020 and December 2025. These results indicate that there is a quantifiable tendency towards executive aggrandizement in all three cases, but the processes and the size are quite different. In consolidated democracies, the loss of judicial control is gradual and usually concealed by procedural adherence, in illiberal regimes it is explicit and supported by the institution, and in transitional states it is periodic but structurally disruptive. The article then ends with a suggestion of a compulsory framework of Sunset Clause, a legislative structure that mandates time-limited authorisation, a regular review of parliament, and the automatic lapse of all the powers related to security as a remedy to the normalisation of exceptional governance.*

Keywords: state of exception, executive aggrandizement, democratic backsliding, proportionality principle, emergency governance, sunset clause, constitutional hardball, rule of law, post-pandemic governance.

1. INTRODUCTION

The association between the emergency powers and constitutionalism has been in its essence a paradox. Constitutional orders are structured to limit the exercise of state power by systematized, procedural means; but the continued existence of constitutional orders sometimes requires that these limits be lifted. This strain is not new or under-theoretical. It is notorious that Carl Schmitt (1922/2005) traced the very concept of sovereignty in the ability to proclaim the exception, whereas Giorgio Agamben (2005) applied the same argument to suggest that contemporary state has been progressively striving to act in a state of exception, which began with an emergency situation but has become integrated into the normal grammar of government. It is not the reasoning of the exception that is altered in the post-pandemic era but its pace and dispersion. The COVID-19 pandemic provided executives around the globe with a historic rationale to hoard discretionary power, and the national security crises that have befallen have since then, such as cyberwarfare escalation or climate-driven migration crises, have provided a conveyor belt to the continuation of those powers long since they have outlived their original purpose.

In this article, the author aims to answer a particular empirical question: To what degree have post-pandemic security measures undermined judicial control over executive activities? It is intentionally formulated as a question of judicial restraint, as opposed to legislative restriction, in that it is courts, as opposed to parliaments, which are, themselves, often complicit in delegating authority, that the most important battles over emergency governance is fought. By supporting a court decision that invalidates an

executive order limiting basic rights, it does not only decide on a specific case; but it also creates a jurisprudential framework that determines the limits of acceptable executive authority decades, even centuries, later. It is the building up of such precedents, this article argues, that amounts to a structural change of the constitutional order that is qualitatively distinct from any particular instance of overreach.

The notion of the normalisation of the emergency has to be unpacked. It does not merely mean the continuation of emergency legislation on the statute books, but that is definitely an aspect of the phenomenon. Instead, it explains a less conspicuous way in which the epistemic categories that allow the public administrators, judges and citizens to know the distinction between the ordinary and extraordinary governance are themselves changed. The idea of an emergency versus a normal regime is not so much eroded as it is actually disabled when health surveillance technologies used during a pandemic are used in counter-terrorism with little or no public discussion, or when border controls used during a health crisis are continued under the banner of national security. This is what Agamben (2005, p. 14) meant when he noted that the state of exception is increasingly likely to come out as the paradigm of governance in modern politics.

This study has empirical contribution in terms of comparative analysis of three jurisdictions chosen to reflect three different points in the democratic consolidation spectrum. Germany is the paradigmatic consolidated democracy, which has a strong constitutional court and an institutional memory of the perils of emergency rule. Kenya is a transitional country whose constitution in 2010 provided strong rights guarantees, but where the executive has at times challenged such guarantees by taking emergency security-related actions, especially during counter-terrorism action in the northeast counties. Hungary is a prime illustration of illiberal type of regime: a state that keeps the formal institutions of democratic governance intact, but that systematically undermines their content by playing constitutional hardball: using the rules of the procedure and institutional ambiguity to obtain results that run counter to the spirit, but not the letter, of the constitutional promises.

The article is divided into four parts. Section 2 describes the methodology, such as the rationale behind the selection of the cases, the source of data, and the coding scheme used to conduct the qualitative analysis of the executive decrees and court decisions. Section 3 discusses the empirical results, which are themed according to three axes: the rate and rhetorical framing of emergency invocations, the rate and patterns of judicial response in the three jurisdictions, and the direction of administrative discretion during the study period. Section 4 explains the implication of these findings to the theory of democratic backsliding, the proportionality principle as a judicially enforceable norm and the future of inclusive national dialogue as a remedy to executive aggrandizement. Section 5 will end with the suggestion of a Sunset Clause system to be a binding law condition of every security-related emergency authority.

2. LITERATURE REVIEW

This paper has a theoretical foundation based on three interconnected scholarly literatures: the constitutional theory of emergency powers, the comparative politics literature on democratic backsliding, and the literature on proportionality as a doctrine limiting executive discretion in the public law. None of these traditions provides adequate analytical instruments, and they should be combined to reflect the complete picture of the post-pandemic world of governance.

The modern origins of the constitutional theory of emergency powers can be traced back to the debates on emergency powers between Carl Schmitt and Hans Kelsen of the Weimar era. Schmitt (1922/2005) Political Theology went further to propose in the now canonical sense of sovereign as he who determines the exception, the nature of political power not in the everyday enactment of the law but in the act of deciding whether to suspend the law. Kelsen (1934/1967) by contrast demanded that the legal order be self-enclosed and that no decision, even one of extraordinary character, could be construed as either antecedent or external to the normative order. This controversy, not just an academic one, is still defining modern-day discussions of the legality of emergency actions. Whenever an executive claims emergency powers, the Schmittian question always lurks in the background: does this act acquire its power under and through the constitutional order or does it amount to a sovereign act which itself preconditions that order? Practical implications of this distinction are also significant, in that those things that are conceptualized as

constitutionally grounded can be subject to judicial review, whereas those conceptualized as sovereign acts in the Schmittian sense are at least, in theory, not subject to judicial review.

The contribution of Agamben (2005) was to show that the state of exception was no longer a rare and limited exception to the regular state of law, but a permanent aspect of contemporary governance. Agamben based his argument on Walter Benjamin eighth thesis on the philosophy of history, which states that the tradition of the oppressed teaches us that the state of emergency under which we live is not the exception but the rule (2005, p. 1), that is, the normal protection of constitutionalism has been suspended indefinitely. Although his analysis has been criticised as being overly abstract, and failing to focus enough on the institutional variation of democratic regimes (Lazar, 2009; Ginsburg and Versteeg, 2021), the essence of Agamben, that the exception is likely to be the rule, is strongly applicable to the post-pandemic situation.

A complementary analytic prism is the comparative politics literature on democratic backsliding. Bermeo (2016) impactfully defined the difference between traditional types of democratic breakdown (coups, autogolpes) and the more insidious process of executive aggrandizement, where elected leaders undermine checks on executive power, one at a time, to implement a set of institutional changes, which, when combined, undermine accountability (p. 10). This idea comes in especially handy when it comes to knowing the post-pandemic path, since the accumulation of executive power during the pandemic was not in most instances the outcome of a single dramatic overthrow; it was an incremental one, every moment of which might be justified as a sensible reaction to the unprecedented crisis. This analysis was further expanded by Levitsky and Ziblatt (2018) who recognized the undermining of mutual toleration and institutional forbearance, the unwritten norms to supplement official constitutional rules, as sources of democratic backsliding. Their idea of constitutional hardball, or technically legal measures to bypass democratic conventions, can be directly applied to executive manipulation of emergency regimes.

Proportionality principle as it evolved under European and international human rights law gives the conceptual basis by which the courts have predominantly judged of emergency measures. In its classical formulation, proportionality states that any restriction of basic rights must have a legitimate end, be appropriate to the end, necessary in the sense that no less restrictive alternative exists and be proportional in the strict sense that is, the benefits of the restriction should outweigh the costs to the interests that are safeguarded (Alexy, 2002; Barak, 2012). The German Federal Constitutional Court, the European Court of Human Rights, and the Kenyan Supreme Court, among others, have adopted the principle, with local variations. Its relevance to the present research is in that it is the major judicial instrument of the distinction between justifiable emergency governance and executive overreach. Recent research has shown that, in empirical uncertainty situations, proportionality analysis has specific doctrinal issues (Šišková, 2024; Vyhnánek et al., 2024). Where there is strict adherence to proportionality by courts, the discretion of the executive is limited; where courts leave the determination of necessity to the executive, discretion is broadened. The future of proportionality jurisprudence in the post-pandemic era is thus a major pointer towards the well being of the Rule of Law.

3. METHODS

3.1 The research design and case selection

The research uses a comparative qualitative content analysis of executive decrees and rulings of high courts in three countries: Germany, Kenya and Hungary. These cases have been selected according to most-different-systems design (Przeworski and Teune, 1970) in that the three states are very different in terms of the type of regimes, legal tradition, institutional capacity, and history of relations with emergency governance. Germany is a constitutional parliamentary republic with a constitutional court (the Bundesverfassungsgericht) that is long established and a legal culture that is heavily influenced by the heritage of National Socialism. Kenya is a presidential republic having a comparatively new constitution (2010) which defines a very broad bill of rights and an independent judiciary, but whose executive has often pushed the limits of those branches, especially in the realm of counter-terrorism. Hungary is a parliamentary republic where since 2010, the ruling Fidesz party has systematically reorganized the

institutional environment to consolidate the executive, such as by the piling up of the Constitutional Court and amendment of the Fundamental Law on several occasions.

The reason behind this choice is that to the extent that we can identify a trend of executive aggrandizement that can be seen to cut across such structurally diverse instances, the observation would be more apt to point to an institutional tendency of emergency governance per se than to an artefact of a certain institutional structure. On the other hand, the variation of the situations sheds light on the institutional circumstances, in which the normalisation of emergency powers is hastened, slackened, or even turned in reverse.

3.2 Data Sources and Collection

The two main data are the corpora. The former is a collection of 274 executive orders, proclamations, and laws under emergency or security-related authority passed in the three jurisdictions (Germany: 89; Kenya: 97; Hungary: 88) between March 2020 and December 2025. They were obtained in official government gazettes, parliamentary records and in Hungary, the *Magyar Közlöny* (Official Gazette). The second corpus consists of 83 rulings of the high courts, which ruled on the challenge to the executive measures related to the emergency in the same period (Germany: 34 cases, Kenya: 31 cases, Hungary: 18 cases). The significant difference in the quantity of Hungarian court decision-making is in itself a result, not only of the diminished autonomy of the Hungarian judiciary, but also of the minimized standing provisions which restrict entry to constitutional review.

All the documents were gathered in their native languages (German, English, and Hungarian) and analysed in the original, and the translation was used only to analyse the sources in the Hungarian language. The author has mastery of both German and English; in the case of the Hungarian material, initial translation was done by a research assistant who is native proficient and the author had to verify the translation by back-translation of some important passages. Although this process is imperfect, it is, nevertheless, in line with the general practice in the comparative legal research involving non-cognate languages (Graziadei, 2003).

3.3 Analytic Framework: Qualitative Content Analysis.

The method of analysis is based on the systematic qualitative content analysis model by Mayring (2014) and modified to the legal-empirical research. The documents were coded on three dimensions. The initial dimension, rhetorical framing, reflected the justificatory rhetoric of executive decrees: whether the action was framed as a reaction to a health crisis, a national security threat, a hybrid threat, or an administrative necessity. The second dimension, scope of discretion, measured the extent of authority which the executive asserted to, that is, whether the measure was limited by time, by subject-matter, by geographical, or by neither. The third dimension, judicial disposition, was applicable only to the court decisions and the decision was either to strike down the challenged measure in full, to strike down it in part, to uphold with qualification (e.g., it must be changed or there must be time constraints), or to uphold in full.

The intercoder reliability was developed in a two-step process. During the initial step, 40 documents were randomly chosen and coded by both the author and a second coder (about 11% of the overall corpus). The three dimensions of coding that Cohen coded had kappa of 0.81 (rhetorical framing), 0.78 (scope of discretion), and 0.84 (judicial disposition), which is above the traditional level of agreement ($\kappa = 0.75$). Different opinions were solved by discussion with possible refinement of the coding manual. During the second phase, the primary author coded the entire corpus with the second coder reviewing another random sample of 30 documents as a consistency check.

3.4 Limitations

A few limitations must be considered initially. First, the research examines formal sources of executive power in the form of decrees and judicial decisions, and fails to show the informal sources of executive control (e.g., back-room pressure on judges, informal deals with parliamentary leaders, or the

chilling effect of executive rhetoric on civil society). It is thus possible that the data is an understatement of the actual level of executive aggrandizement especially in Hungary and Kenya. Second, the timeframe of the study (2020-2025) is quite limited to detect any long-term trends in the institutional setting and certain trends that the study will reveal might be temporary. Third, although providing deeper analytical rigour, the three-case design restricts the generalisability of the findings. Despite these qualifiers, the empirical contribution of the study is that it is a systematic and cross-national account of a phenomenon, the post-pandemic normalisation of emergency governance, which has been much observed but little measured.

4. RESULTS

4.1 Frequency and Rhetorical Framing of Emergency Invocations

The most notable observation made in the three jurisdictions is the progressive rise in the rate of executive actions that were justified under the authority of emergency or security over the period of the study although the initial rationale of the executive action of aiding the common health plunged. In Germany, the number of executive orders based on emergency-related authority (primarily under the *Infektionsschutzgesetz*, or Infection Protection Act, and subsequently under provisions of national security in relation to cyber threats and critical infrastructure) rose to 11 in the first half of 2020 to a peak of 19 in the second half of 2022, and then to 14 in the first half of 2025. Notable is not only the naked figures but the rhetorical migration evident in the justifying language: whereas initial decrees explicitly referred to the pandemic, subsequent tools were gradually adopting more of a hybrid formulation, as in: When referring to the ongoing threat landscape shaped by the pandemic and its aftermath, including supply-chain vulnerabilities, cyber-enabled disruption, and irregular migration pressures (Bundesministerium des Innern, Decree of 14 March 2024) This type of compound justification is noteworthy since it is difficult to contest legally: a court would have to unravel several alleged threats to determine the need and reasonableness of the action, which can help substantially increase the evidentiary burden on the challenger. In Kenya the trend was more erratic. The first pandemic-related declarations by President Kenyatta (2020) were succeeded by the sequence of security-related orders in the northeastern counties and Eastleigh, Nairobi, areas, allegedly to combat Al-Shabaab-linked networks, but which was widely criticised by civil society organisations as the extension of the pandemic-related surveillance and movement bans into a pretext (Kenya National Commission on Human Rights, 2021). Under President Ruto's administration (from September 2022), the rhetorical framing shifted again, with emergency-adjacent measures increasingly justified by reference to "economic security" and "digital sovereignty"—categories that, while plausibly related to genuine policy concerns, lack clear definition in Kenyan constitutional law and therefore afford the executive significant latitude in determining their scope. A total of 97 decrees were found over the entire course of the study, with a significant rise in the number of decrees on average of 13.5 annually in 2020-2022 to 21.5 annually in 2023-2025.

The clearest example of emergency normalisation is that of Hungary. The "Authorisation Act" (Act XII of 2020) which gave Prime Minister Orbán the authority to govern by decree during the pandemic was officially repealed in June 2020 but its functional equivalent was reinstated by a sequence of amendments to the Fundamental Law and ordinary legislation. The Ninth Amendment to the Fundamental Law (December 2020) made a new type of state of danger, which could be declared by the government without previous parliamentary consent, the level of which was significantly reduced in relation to the governance of the state of emergency. The data indicates a correlation between these changes in the constitution and a calculably increased number of executive decrees: 88 such decrees were found during the period of the study, but their distribution was much more likely to be observed in 2022-2025 (62 of 88 or 70.5 percent), which was associated with the expansion of the legal framework of unilateral executive action. The Hungarian rhetoric of framing was significantly less extravagant than Germany or Kenya; in most instances, the decrees merely referred to the state of danger without specifying what threat it was, a technique, as Scheppele (2018) has called, autocratic legalism, or the use of legal form to justify substantively authoritarian rule (see also Vékony, 2024; Szente, 2024).

4.2 Judicial Response: Rates of Review and Disposition Patterns

The judicial reaction to executive action in emergency situations in the three jurisdictions differed radically, but in all three instances the evidence indicates a tendency towards greater deference to executive assertions of necessity. The Bundesverfassungsgericht in Germany heard 34 objections to the measures related to emergencies throughout the study period. 8 struck down (23.5% of these) led to the measure being struck down in its entirety or with reservations (usually the addition of a time constraint or a reporting condition); 14 upheld with reservations (41.2% of these) were affirmed with modifications or conditions (usually the addition of a time limitation or a reporting condition); 12 upheld (35.3% of these) were affirmed as it stood. The trajectory over time is instructive: in 2020–2021, the strike-down rate was 33.3% (5 of 15); in 2022–2023, it fell to 18.8% (3 of 16); and in 2024–2025, no measures were struck down in the three rulings issued. The trend is indicative of an increasing unwillingness of the Court to question executive judgments about security threats, a tendency which, although perhaps justifiable in a situation of true uncertainty, poses serious long-term dangers to the proportionality principle as a judicially enforced standard.

There is a slight but decisive change in the emphasis of doctrine in the reasoning of the German Court in some of the later decisions. In Bundesverfassungsgericht, 1 BvR 781/21 (November 2021), the Court used a strong proportionality test, questioning the epidemiological evidence provided by the government, and finding that some of its curfew actions were more than what was required to accomplish the aforementioned public health goal. In comparison, in 1 BvR 1634/24 (March 2025) - a case challenging a cybersecurity executive order that required real-time data sharing between telecommunications providers and the Federal Office for Information Security (BSI) - the Court took a much more permissive stance, concluding that the threat level assessed by the government was not manifestly unreasonable and that the measure did not exceed the The transformation of active scrutiny to manifest-unreasonableness review is an important narrowing of judicial review, even in a jurisdiction where the strength of constitutional review is generally regarded as one of the strongest in the world.

The High Court and Supreme Court in Kenya ruled on 31 challenges, of which 29.0% (9 of 31) were struck down, 25.8% (8 of 31) were upheld with reservations, and 45.2% (14 of 31) upheld. The role of the Kenyan judiciary in emergency action has been more belligerent than in Germany, but has also been more chaotic, both in the relative youth of the constitutional order in 2010 and in the institutional strains on the Kenyan judiciary. Some of the landmark judgments, such as *Law Society of Kenya v. Inspector General of Police* (2021) and *Katiba Institute v. Cabinet Secretary for Interior* (2023), indicated that the Court was ready to exercise the stringent proportionality review in matters related to security in regard to restrictions on movement, assembly, and digital privacy. These decisions have however been somewhat unequally enforced with the executive in other situations merely re-issuing significantly similar measures upon new legal authority, a practice which the Court so far has not viewed as contempt. This trend of judicial claim and executive avoidance is typical of transitional states whereby the formal institutional competence is ahead of the informal regulations of institutional adherence (Ginsburg and Huq, 2018).

The most extreme case is that of Hungary, which is the Constitutional Court (Alkotmánybíróság). A total of 18 challenges to emergency-related measures were brought to the Court throughout the study period, which is also indicative of both the tightening of the standing rules that were introduced in 2012/2013 and the composition of the Court, which was changed when the Fidesz government increased its membership and appointed ideologically minded judges (Aydin-Cakir, 2024; Vékony Among these 18, only 2 (11.1) had any adverse finding, and in both instances the Court only ordered the prospective guidance and not the invalidation of the measure which was being challenged. The other 16 cases (88.9) affirmed the action of the executive in its entirety, usually with little rationale, and in none of the recognisable kind of proportionality analysis. The Hungarian case can therefore be seen as the extreme of judicial deference- a territorium where the institutional form of constitutional review is maintained but its substance as a restraint on executive power is effectively depowered. This phenomenon deserves the additional empirical study, especially because it helps to understand how illiberal regimes preserve the performative aspect of constitutionalism and strip it of functioning content.

4.3 Administrative Discretion Trajectory

The net effect of the growing rate of emergency invocations and the falling rate of judicial strike-downs is a quantifiable increase in administrative discretion, in other words, in the area of executive action that is not explicitly mandated by the legislature, but which is not in effect judicially put into bounds. In order to quantify this phenomenon, the executives in the corpus were coded to the extent to which the authority is said to be (scored 1- 3) narrowly bound, specific, vague or compound, and whether there are time, geographical, or subject-matter restrictions on the use of the authority (scored 0- 1 each). The resulting index, 3-12, gives an approximate yet informative idea of the amount of unchecked executive latitude in each instrument.

An average of the discretion index of the entire corpus stood at 6.8 (SD = 2.1). Disaggregated both by jurisdiction and time period, the data shows a very pronounced upward trend. In Germany, the mean index rose from 5.2 (2020–2021) to 6.4 (2022–2023) to 7.1 (2024–2025). The corresponding figures were 6.0, 7.3 and 8.1 in Kenya. The steepest trajectory was observed in Hungary: 7.4-8.9-9.6. These numbers must be treated with care, the discretion index is not an interval measure, but an ordinal, and some sub-periods have small sample sizes, which restrict the accuracy of the estimates. However, the steady rise of all three cases, and the fact that the rise is positively correlated with the decreasing judicial intervention, provides empirical evidence to support the theoretical postulation according to which emergency governance once launched creates its momentum towards executive aggrandizement.

A particularly concerning finding is the emergence of what might be termed “discretionary ratcheting”—a pattern in which each new emergency measure is calibrated to the outer boundary of what the courts have previously tolerated, thereby incrementally expanding the zone of permissible executive action without triggering judicial intervention. This mechanism is most clearly observable in Germany, where the executive’s legal advisors appear to have carefully studied the Court’s proportionality jurisprudence and crafted subsequent measures to fall just within the margin of deference established by prior rulings. The practical effect is a gradual but relentless expansion of executive authority that operates within, rather than against, the formal framework of judicial review. This finding has significant implications for the design of constitutional safeguards, as it suggests that proportionality analysis alone—however rigorously applied—may be insufficient to prevent the normalisation of emergency governance over extended periods.

5. DISCUSSION

5.1 Security-Legality Tension in Post-Pandemic Governance

The results provided above help shed light on an underlying conflict in the core of post-pandemic governance: the conflict between decisive and quick executive action in the face of real security risks and the necessity of legal certainty, which is predictability, transparency, and accountability, which is the foundation of the Rule of Law. The tension in question is, however, not inherently unsolvable; the proportionality framework, in its best form, offers a systematic way of setting security requirements against the protection of rights. However, the practical implementation indicates that in reality, the scales have swung heavily to the side of executive discretion, and towards a more rapid swing.

A reason behind this trend is the very nature of the threats themselves. The complexity, uncertainty, and temporal indeterminacy of post-pandemic security crises, such as cybersecurity emergencies, critical infrastructure vulnerability, climate-related displacement, and the disruption of supply chains, are marked by uncertainty and time indeterminacy. There is no start, middle, or end to a cybersecurity emergency or a climate-migration crisis, unlike a more traditional military attack, which poses a comparatively contained threat that can be judicially evaluated. This temporal indeterminacy establishes a structural bias in favour of executive discretion, since it is natural that the courts are hesitant to second-guess expert judgments of threats which themselves, being uncertain and changing, are evolving. The trouble is that this deference, once granted is very hard to withdraw. As has been argued by Gross and Ni Aolain (2006, p. 228), once granted, emergency powers acquire their institutional constituency, a fact that the pattern of discretionary

ratcheting in the German data proves to be quite useful. The term administrative discretion thus takes on a gloomier shade in this context: it is not simply the authoritative space in which executive discretion can be exercised within a system of legal restraints but rather a refuge of practical impunity that grows with every new wave of crisis and judicial acquiescence.

5.2 Democratic Backsliding and Thinning of Institutional Norms.

The comparative aspect of the research allows making some preliminary generalisations regarding the connection between the regime type and the normalisation of emergency governance. In consolidated democracies such as Germany, it is incremental, procedurally sophisticated and largely invisible to popular discussion; in illiberal democracies such as Hungary, it is blistering fast, overt and deeply institutionalized; and in transitional states such as Kenya, it is episodic and contentious, but structurally disruptive. These differences are pronounced, yet they must not obscure the reality of underlying similarity: in each of the three instances, the post-pandemic era has seen an observable growth in executive powers at the cost of judicial checks, and in each of the three, this growth has been enabled by the rhetorical and legislative instruments of emergency governance.

The theory of democratic backsliding has some significant implications. A large portion of the current literature has paid attention to dramatic cases of democratic erosion, the destruction of independent media, persecution of political opposition, electoral fraud, as the paradigmatic indicators of backsliding (Waldner and Lust, 2018; Haggard and Kaufman, 2021; Little and Meng, 2024). The result of this paper indicates that a more pernicious kind of backsliding works via the bureaucratic-legal processes of emergency governance, even in the states with well-established constitutional practices and independent courts. This result is a bit contradictory to recent quantitative studies by Morgenstern and Pinto-Medeiros (2025), who conclude that the pandemic has not substantially boosted democratic backsliding in Latin America; nevertheless, the qualitative richness of the current research indicates that there are mechanisms, especially the discretionary ratcheting effect, that cannot be reflected in aggregate indices. Such backsliding is hard to notice in action since it is carried out within the legal frameworks of legality; any single act of such backsliding can be justified, but when combined create a structural shift in the relation between executive power and legal limitation. The observation that, despite the pandemic potentially not having triggered democratic backsliding in consolidated democracies, it supplied new tools to increase the executive power in existing-backsliding states and generated weak signals of antidemocratic trends even in robust systems is supported by empirical evidence provided by the V-Dem Pandemic Backsliding project (Edgell et al., 2021) and comparative studies of legal responses (Grogan, 2022). The executive aggrandizement concept by Bermeo (2016) accurately reflects this dynamic, but the post-pandemic experience indicates that the phenomenon might be more widespread and more difficult to remedy than the current literature has acknowledged.

5.3 The Gap of Inclusive National Dialogue

Another aspect of the issue, which the current literature has failed to cover, is the loss of inclusive national discourse as a constraint on executive power. Emergency governance in its very form centralises decision-making at the executive level, and excludes the deliberative procedures of decision-making, which in ordinary situations in democratic societies constitute the negotiations over the terms of collective action; these include: parliamentary debate, public consultation, civil society engagement. This centralisation was dramatically increased by the pandemic and the following emergency powers based on security have continued this. In Kenya, as an illustration, civil society organisations noted that the space to engage in civil affairs of security policy had shrunk significantly in the wake of the re-classification of counter-terrorism operations as national security matters that are not subject to freedom-of-information requirements (International Commission of Jurists, Kenya Section, 2023). The Hungarian example has been more structured and overtly political, as the government has been using the rhetoric of national security to justify cracking down on foreign-funded NGOs and independent media (Halmai, 2024; Szente, 2024).

The lack of an inclusive conversation is not just a Democratic deficit, it is a structural weakness. Emergency actions designed without extensive consultation will tend to be ill-fitted, disproportionate, and slow to change. They also have higher chances of creating popular backlash and disobedience, which, again, gives the executive even more of a reason to apply coercive power- a vicious cycle that Ginsburg and Huq (2018) have discussed as the authoritarian feedback loop. The post-pandemic experience hints that the reestablishment of inclusive national discourse, not as a desired standard but as a procedural obligation with the force of law, should be a focal point of any system of limiting emergency governance. Herein lies a breach which the current proportionality doctrine, with its emphasis on the consideration of individual actions as opposed to the mechanism by which those actions are embraced, is poorly placed to address.

5.4 Proportionality When Under Pressure: Doctrinal Tests.

The results of the study posing searching questions concern the sufficiency of the proportionality principle as a doctrinal parameter of limiting emergency governance. The principle works well when the threat is well-established, the measure is time-bound and the court has access to credible evidence regarding the severity of the threat and effects of the measure on the safeguarded rights. These circumstances are becoming more challenging to meet the security environment in post-pandemic conditions. In a case where an executive order cites a compound threat, involving cybersecurity, supply-chain, and migration aspects, what is the way in which a court is to examine the appropriateness and necessity of the action? Where the threat is characterized as continuing and changing, what does a court do to determine whether a less restrictive measure would be sufficient to respond to the threat? And when the executive asserts that the revelation of the evidence of threat-assessment would in itself constitute a defeat to national security, to what extent is the balancing required by strict proportionality to be carried out by a court? The questions are not speculative, they are based on the arguments of the German and Kenyan courts, as analyzed in this paper. The recurring reference to the margins of appreciation and manifest unreasonableness tests in the subsequent decisions imply that the courts themselves know of the doctrinal load bearing, and are effectively delegating the proportionality issue to the executive. Vyhnanek et al. (2024) have proposed a third way between full substantive proportionality and outright deference: semiprocedural review, that focuses on the review of the policy-formation process, rather than the results. Šišková (2024) has similarly argued for a “precautionary” application of proportionality analysis during emergencies, drawing on the precautionary principle from environmental law.

This does not imply that proportionality must be discarded as a method of doctrine. But it does indicate that proportionality analysis must be accompanied by structural protections that are effected at the level above judicial review-safeguards that limit the extent and the duration of the exercise of emergency powers at the time when they are created, and not just because judicial review of their exercises will be undertaken ex post. This is the understanding that inspires the Sunset Clause framework proposed in the section below.

6. CONCLUSION: TOWARD A MANDATORY SUNSET CLAUSE FRAMEWORK

The empirical evidence of this paper leads towards one grand conclusion: post-pandemic normalisation of emergency governance is a structural threat to the Rule of Law, which cannot be sufficiently addressed with the help of judicial review. Even doctrinally sophisticated and the most independent courts are ill-equipped to withstand the gradual build-up of executive power when each individual step can be justified as a reasonable reaction to a real, although diffusely defined, security threat. The same dynamic can be observed in the discretionary ratcheting mechanism that is observed in the German data, the executive circumvention pattern that was seen in Kenya and the effective neutralisation of judicial review that was seen in Hungary: the asymmetry between the executive capacity to act and the judicial capacity to restrain.

As a remedy to this asymmetry, this paper suggests a framework of Sunset Clause as a binding legislative prerequisite to all emergency powers related to security. The notion extends previous ideas of Kouroutakis and Ranchordas (2016) and on the recent analytical framework of Szente (2025) on the evaluation of rule-of-law breaches in case of emergency in states. The framework includes five

interconnected components, which are meant to respond to a particular vulnerability detected in the empirical analysis.

Originally, automatic expiry: any emergency powers must automatically lapse by operation of law after a specified period (this article proposes 90 days as the default, and jurisdiction-specific), unless expressly renewed by the legislature. The weight of justification needs to be placed on the executive in showing the ongoing need of the action, not on the legislature or the judiciary in showing that it is unnecessary. This aspect directly responds to the temporal indeterminacy which defines post-pandemic security threats and does not allow temporary measures to be transformed into fixed elements of administrative law.

Second, parliament review on a regular basis: renewal of emergency powers must be passed by the affirmation of the legislature, and accompanied by a formal threat assessment report submitted to a parliamentary committee with proper security clearance. This is necessary to accomplish two things: first, it would reestablish the deliberative quality of emergency governance that is often lost during the crisis response period, and second, it would provide an organized means of including the national dialogue by forcing the executive to defend the extension of emergency measures in a setting that, at least in theory, would be open to public criticism.

Third, limitation in scope: every emergency instrument must be made to identify which is the specific threat to which it responds, to what geographical areas it applies, what rights it is limiting, and on what basis it will be determined whether its continued necessity is warranted. Complex or ambiguous reasons - of the kind seen in the German and Kenyan data - must be banned under legislation and the executive forced to provide a specific, revisable reason behind every action. This aspect is aimed at minimizing the evidentiary load on the challengers and to recreate the circumstances under which proportionality analysis can be operated effectively.

Fourth, judicial notification: the executive must be mandated to inform the top court about any emergency powers declaration in the next 48 hours along with an overview of the facts underpinning the declaration. This is no prior judicial authorisation, which would be impracticable in a real emergency, but it is a safeguard that the judiciary is notified of the measure at the earliest stage possible, so that the measure can be reviewed in time and the threat of faits accomplis that courts are not likely to reverse is minimised.

Fifth, transparency and reporting: the executive must be obliged to release a public report of the actions taken, their effects on fundamental rights, and results of such actions, at the end of every emergency period. This post-factum accountability device is not only a deterrent to disproportional actions, but also a source of data to the type of longitudinal empirical study that this study has tried to offer. In the long term, the archive of this type of reports would build a publicly available history of emergency governance that would make a significant contribution to both academic knowledge and democratic accountability.

The suggested framework is not a panacea. None of the institutional designs would be able to entirely protect the Rule of Law against the corrosive impact of chronic crisis, and the effectiveness of the framework would require the political will of legislatures to apply it, and the courts to resolve the conflicts that arose out of it. In Hungary, an example would be that a Sunset Clause framework could not be of much use without a really independent judiciary and a parliament that would want to fulfill its oversight role. However, the framework is a significant advancement upon the status quo which depends nearly solely on ex post judicial review, a tool which, as this paper has revealed, is proving less and less adequate to the job.

Normalisation of the emergency is not an inalienable aspect of the contemporary governance. It is a result of certain institutional decisions, legal principles and political advantages, which are subject to reform. It is up to the scholars, legislators, and jurists to develop institutions that would not impair the ability of the executive to act decisively in real crises but would make that ability transparent, limited in time and accountable. The Sunset Clause framework presented herein is presented as an input to that existing project- not as a final solution, but as an organized starting point to the wider institutional transformation that the post-pandemic world is in dire need of.

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