

The Impact of Exceptional Governance Measures on Democracy and Legal Systems

Abstract

The exercise of exceptional power has long been at the centre of debate, as the process involves essentially breaking away from normality and giving political leader(s), especially the executive, almost unlimited power. Particularly in periods of constitutionalism and under liberal democracies based on checks and balances, when the principle of the separation of powers is temporarily 'switched off' for the time needed to avert an exceptional event, this leads to significant problems. This paper, after clarifying the theoretical starting points, will discuss in a historical context the authoritarian tendencies inherent in executive power that emerged within the history of ideas and politics in the 20th century in relation to the problem of constitutional dictatorship and which have today taken shape in the transformation of philosophies of government – namely, into a kind of permanent crisis-management philosophy of government. Furthermore, in the context of the COVID-19 pandemic, the literature is reviewed to address the democratic problems associated with exceptional governance. The main question underlying this analysis is whether exceptional governance affects democracy and legal systems and what tools and methods can be used to check the authoritarian nature of the executive in a state of exception.

Keywords: state of exception, exceptional governance measures, democracy, autocracy, executive power, legal systems

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I Introduction

One of the major dilemmas of liberal constitutionalism is whether, in the event of a serious threat to public security, the executive can be endowed with extraordinary powers to act swiftly to deal with it, thereby empowering the government to derogate from and at the same time to limit the legal structures that may ultimately be destroyed by the emergency situation, whose protection may require the introduction of the extraordinary legal order itself.¹ The major challenge of exceptional measures is thus how to preserve the status quo (ie the existing 'normality'; the democracy to be defended), which is to be protected by exceptional means while at the same time granting the executive extraordinary powers. The situation is further complicated by the fact that there may be exceptional situations (eg natural or industrial disasters, war or epidemics) which may require rapid and effective mechanisms to deal with them when there is simply not enough time to operate the normal democratic process of constitutional decision-making. It is to resolve this dilemma that the rules of liberal constitutionalism have been developed to ensure that the rule of law and the system of checks and balances apply even in times of emergency, the basic idea being that the executive, when involved in such a situation, cannot make any definitive constitutional changes during the emergency, the main aim being to manage the dangerous situation and 'rescue' normality.²

The constitutional system of the exercise of exceptional power has been significantly influenced by the Roman legal tradition through republican political thought, as the elaborate Roman legal system incorporated a number of fundamental limits and checks and balances on the executive. On the one hand, this ensured the rights to which Roman citizens were accustomed, but on the other hand, it resulted in a rather cumbersome system of responding to various crises, whereby in the event of an emergency, the Roman Senate could order the consuls to appoint a dictator for a period of six months.³ The Roman legal system was rather conservative since a dictator was entitled to suspend rights and various legal procedures and to deploy military and other forces to avert threats to the republic, but when he had finished this work, he had to resign, and his decrees and their legal effects were terminated ie the original 'normal' state had to be restored. Exceptional legal measures in modern constitutional democracies follow a similarly conservative approach: that is, emergency powers are intended to deal with temporary situations and to create a situation in which a normal constitutional system of rights and procedures can be restored.⁴ As Ferejohn and Pasquino have argued, Niccolo Machiavelli, James Harrington and Jean-Jacques Rousseau constitute the theoretical mediators through which the institution of

¹ John Ferejohn, Pasquale Pasquino, 'The law of the exception: A typology of emergency powers' (2004) 2 (2) *International Journal of Constitutional Law* 210–239, 210, DOI: <https://doi.org/10.1093/icon/2.2.210>

² Ferejohn, Pasquino (n 1) 211.

³ Ferejohn, Pasquino (n 1) 211–212.

⁴ Ferejohn, Pasquino (n 1) 212.

the Roman dictator has grounded debates in modern constitutional and political history about the exceptional exercise of power.⁵ Carl Schmitt plays a key role in this debate, which has resurfaced in the context of the crises of our time after the period between the two world wars since the German constitutional lawyer examined the question of exceptional governance within the framework of sovereignty⁶ and linked it to the unlimited nature of the executive.⁷ For this reason, it is crucial to outline the historical circumstances in which the contingency models introduced in the context of COVID-19 are to be assessed: in the second section of this paper, it is argued that both during the inter-war period and contemporary governance regimes, the practice of governing by extraordinary measures (with its many dangers) came to the fore, and thus, while the onset of the pandemic posed an unexpected challenge to nation-state governments, the extraordinary practices that have been adopted in many places are far from without historical antecedents.

In the context of the pandemic, very significant comparative studies have been launched in the Hungarian literature to summarise the experience of exceptional governance. Of particular importance among these is the project Epidemiology and Jurisprudence and the Resilience of the Post-COVID Legal System, implemented by Fruzsina Gárdos-Orosz at the HUN-REN Centre for Social Sciences Institute for Legal Studies.⁸ The research has produced a number of blog posts, workshop papers and two edited volumes,⁹ which have contributed significantly to a more complete social science understanding of extreme situations. In addition, two edited volumes resulted from the comparative law research carried out within the framework of the Ferenc Mádl Institute of Comparative Law, which also dealt with research on the crises caused by the pandemic, mainly in the field of law, in a comprehensive and comparative manner: *The Special Legal Order and National Regulatory Models*, edited by Zoltán Nagy and Attila Horváth¹⁰ and *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19*, also edited by them.¹¹

⁵ Ibid.

⁶ Carl Schmitt, *Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle* (Polity Press 2014, Cambridge).

⁷ Tom Ginsburg, Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2020) 52 Virginia Public Law and Legal Theory Research Paper, 1503, DOI: <https://dx.doi.org/10.2139/ssrn.3608974>

⁸ See <<https://jog.tk.hun-ren.hu/covid19>> accessed 1 April 2025.

⁹ Fruzsina Gárdos-Orosz, Viktor Olivér Lőrincz (eds), *Jogi diagnózisok. A COVID–19-világjárvány hatásai a jogrendszerre [Legal Diagnoses. The Impact of the COVID-19 Pandemic on the Legal System]* (L'Harmattan Kiadó 2020, Budapest); Fruzsina Gárdos-Orosz, Viktor Olivér Lőrincz (eds), *Jogi diagnózisok II. A COVID–19-világjárvány hatásai a jogrendszerre [Legal Diagnoses II. The Impact of the COVID-19 Pandemic on the Legal System]* (L'Harmattan Kiadó 2020, Budapest).

¹⁰ Zoltán Nagy, Attila Horváth (eds), *A különleges jogrend és nemzeti szabályozási modelljei [The Special Legal Order and National Regulatory Models]* (Mádl Ferenc Összehasonlító Jogi Intézet 2021, Budapest), DOI: <https://doi.org/10.47079/2021.nzha.kulon.4>

¹¹ Zoltán Nagy, Attila Horváth (eds), *Emergency Powers in Central and Eastern Europe: From Martial Law to COVID-19* (Ferenc Mádl Institute of Comparative Law, Central European Academic Publishing 2021, Budapest, Miskolc) DOI: <https://doi.org/10.47079/2022.znah.epicaee.1>

These studies indicate that there is a complex need in the domestic social science literature to assess the impact of the pandemic, and these papers also provide a starting point for examining the impact of emergency governance on democratic institutions (especially electoral systems). At the same time, international comparative research has been launched with the primary aim of examining the impact of emergency models introduced during the pandemic on democracies. The main aim of this paper is to bring these approaches (which can also be understood as a 'stress test' of democracies) into the domestic social science literature in a comprehensive way. Domestic research thus provides an excellent background for presenting and analysing the foreign literature that focuses on the effects of centralised executive power on democracy as a result of extraordinary governmental measures, how the extraordinary measures that unfolded in each regime contributed to authoritarian trends, and which restrictive and control mechanisms worked (or failed) during the pandemic. This paper, therefore, will attempt to summarise the experiences of the international literature.

It can be seen from the above that the dilemmas of suspending and, at the same time, preserving legal and political normality in times of objective crises are, in fact, contemporary with the issues of political power and power structures, and sovereignty itself. However, the social, political and public health crises caused by COVID-19 have brought this problematic to the fore once again, and at the same time, questions about how political systems should respond to crises – whether individual or group interests, economic or health considerations should be given priority, and how all this can be decided quickly and effectively by a government – have been substantially reassessed.¹² The key dilemma is what rules of control and accountability should be applied to emergency governance, to what extent and how democratic normality can be suspended, and what the dangers of concentrated executive power are. This paper seeks to present and analyse the literature on exceptional governance measures in a summarised manner, both historically and in the current context of COVID-19. Since without ideo-historical context, contemporary trends can be examined in a one-sided way (since the democratic challenges to exceptional governance can be said to be permanent), the second section will show the role of the executive in the emergence of autocracy based on 20th-century experiences and theories, focusing on the concept of Schmittian constitutional dictatorship and the transformation of contemporary philosophies of government. In the third section, the models of emergency governance will be analysed and how they were applied during COVID-19. The literature and research will be investigated here primarily from the perspective of how the pandemic contributed to anti-democratic and authoritarian threats by facilitating concentrated executive power and the control mechanisms that were encountered in comparison. Finally, in summary (and as a basis for further research), it will address the antidemocratic dangers associated with the emergency strengthening of extraordinary governance. COVID-19 can be considered as a frontier in

¹² Przemysław Tacik, 'The Blizzard of the World: COVID-19 and the Last Say of the State of Exception' (2021) 96 *Acta Universitatis Lodzianensis* 17–32, DOI: <https://doi.org/10.18778/0208-6069.96.02>

terms of emergency governance; however, as Claudio Corradetti and Oreste Pollicino point out, we cannot yet draw conclusions in all regards, as the emergency powers of the executive have been reorganised primarily in relation to public health concerns.¹³ The main objectives of this paper are, therefore, to examine the tradition of emergency governance in the context of pandemics, to present the emergency models introduced by COVID-19 and the related democratic dilemmas, and to explore the implications of emergency governance for basic democratic functioning in the context of preparing for further crises to come.

II The Role of the Executive in the Emergence of Autocracy: Constitutional Dictatorship and Emergency Governance

The 1990s revolved around the paradigm of democratisation, but in contrast, a completely new situation emerged, and the earlier expectations about democratisation have now led to significant disillusionment: a global turn in democratisation has taken place, and we have entered an era of the proliferation of authoritarian regimes defined by global crises.¹⁴ Long before the COVID-19 crisis, it was already evident that the executive plays a key role in authoritarian reversals and democratic regressions.¹⁵ This is significant in the sense that the executive is able to ‘less spectacularly’ centralise power and gradually dismantle institutions that control government.¹⁶ In the following, it will be argued that the most influential 20th-century approach to centralised executive power in the wake of extraordinary periods and crises is the paradigm of ‘constitutional dictatorship’. This concept is crucial because, although one of the main aims of the democracies that were institutionalised after the Second World War was to limit executive power, the crises of our time (in particular, COVID-19) have highlighted that the anti-democratic dangers inherent in exceptional measure of governance (ie the dilemmas of constitutional dictatorship) did not end with the fall of the authoritarian regimes between the two world wars. It also will be pointed out that the use of extraordinary measures of governance and their embedding in democratic institutions transformed the philosophy of governance long before the current pandemic and that such emergency governance is associated with serious dangers.

¹³ Claudio Corradetti, Oreste Pollicino, ‘The “War” Against Covid-19: State of Exception, State of Siege, or (Constitutional) Emergency Powers? The Italian Case in Comparative Perspective’ (2021) 22 (6) *German Law Journal* 1060–1071, 1063, DOI: <https://doi.org/10.1017/glj.2021.48>

¹⁴ Valeriya Mechkova, Anna Lührmann, Staffan I. Lindberg ‘How much democratic backsliding?’ (2017) 28 (4) *Journal of Democracy* 162–169, DOI: <https://doi.org/10.1353/jod.2017.0075>

¹⁵ Milan W. Svobik, ‘Which democracies will last? Coups, incumbent takeovers and the dynamic of democratic consolidation’ (2015) 45 (4) *British Journal of Political Science* 715–738, DOI: <https://doi.org/10.1017/S0007123413000550>

¹⁶ Michael Coppedge, ‘Eroding regimes: What, where, and when?’ (2017) (57) *Varieties of Democracy (V-Dem) Institute Working Paper Series*, <https://www.v-dem.net/media/publications/v-dem_working_paper_2017_57.pdf> accessed 1 April 2025.

1 The Paradox of Extraordinary Measures and Constitutional Dictatorship

Emergency governance is a more indirect means of centralising executive power and building autocracy than elite replacement through an open military coup.¹⁷ It is no coincidence, therefore, that the literature on the legal and political-philosophical aspects of the special legal order early on located the governance of exceptionalism within the concept of ‘constitutional dictatorship’ and expressed the concern that the government undermines democracy by abusing its powers to use exceptional apparatus in an unconstitutional manner. The theory of constitutional dictatorship became intertwined with the state of emergency. It was during the collapse of European democracies between 1933 and 1948 that this became apparent, and the discourse became associated with Carl Schmitt’s unfolding theory of the exceptional state and took shape with Schmitt’s book *Dictatorship*, first published in 1921.¹⁸

Giorgio Agamben explains that the term ‘constitutional dictatorship’ itself originated with German jurists and was used to describe the exceptional power guaranteed to the Reich President by Article 48 of the Weimar Constitution.¹⁹ According to Agamben, these works and authors, while taking a variety of approaches, reflect the influence of Schmitt’s concept.²⁰ However, they are all important, as they provide a serious and first description (with significant experience for pandemic emergency models) of how democratic regimes were transformed by the continuous and radical expansion of executive power and how exceptional governance emerged during the two world wars and the period that followed. These descriptions capture the process by which exceptionalism has not only become the main thrust of governance techniques (ie no longer used only and not primarily in exceptional situations) but exceptional measures as such have been generally accepted. According to Agamben, the above authors and their reflections were the precursors of Benjamin’s thesis²¹ that ‘the state of exception [...] has become the rule of the exception’.²²

As Michael Hoelzl and Graham Ward point out, the debate between Schmitt and Hans Kelsen was at its height regarding the constitution and the sovereign, with the basic question being who should be the guardian of the constitution in a crisis: Who should be given extra-legal powers to save the constitution and to restore public order and security when

¹⁷ Anna Lührmann, Bryan Rooney, ‘When Democracy has a Fever: States of Emergency as a Symptom and Accelerator of Autocratization’ (2019) (85) Varieties of Democracy (V-Dem) Working Paper Series, 9, DOI: <https://dx.doi.org/10.2139/ssrn.3345155>

¹⁸ Schmitt (n 6).

¹⁹ Giorgio Agamben, *State of Exception* (Kevin Attell tr., The University of Chicago Press 2005, Chicago) 6, DOI: <https://doi.org/10.7208/chicago/9780226009261.001.0001>

²⁰ Ibid.

²¹ Walter Benjamin, *Selected Writings. Vol. 4., 1938–1940.* (Howard Eiland, Michael W. Jennings ed, The Belknap Press of Harvard University Press 2003, Cambridge) 257.

²² Agamben (n 19) 6.

the welfare of the people is under threat?²³ Put another way: who is sovereign? According to Schmitt, in the circumstances that give rise to the imposition of a dictatorship, in the specific emergency, it will be the sovereign who decides to impose a state of exception in order to restore normality afterwards.²⁴ It is, therefore, clear (and this has been shown in the literature on the effects of pandemic emergency measures on democratic regimes) that the state of exception, sovereignty and the threat of authoritarian reversals form an inseparable set of phenomena. This implies that governance by extraordinary measures is fraught with inherent paradoxes: on the one hand, normal rule of law is temporarily suspended in order to ultimately ensure the democratic functioning of the society in question once the emergency is averted/resolved; on the other hand, even during the suspension of law and democratic norms, constitutional systems claim some form of democratic control (all these dilemmas can be called ‘the paradox of extraordinary governance’). In fact, Schmitt’s constitutional dictatorship serves to resolve these contradictions.

In 1926, Schmitt summed up dictatorship as follows: ‘Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation – in particular, a situation of war and rebellion. Hence, two decisive elements for the concept of dictatorship are, on one hand, the idea of a normal situation that a dictatorship restores or establishes, and on the other, the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship.’²⁵ By examining the history of the regulation of the exceptional state, Schmitt arrives at the conclusion that there are two types of dictatorship. On the one hand, the military (commissarial) dictatorship has legal authority and remains within the constitutional framework; the dictator thus has constitutional authority. In contrast, in a sovereign dictatorship, the entire previous legal system becomes obsolete, and a completely new legal structure is outlined, with state power concentrated in the hands of the dictator. The dictator thus becomes sovereign because he has the power to decide on a state of exception, the aim of which is not to ‘make exceptionalism permanent’ but to create a new legal system: ‘The sovereign’s aim in creating the state of exception is to restore or create the normal state of affairs, the state of exception is the means to this end. The relationship between the normal and the exceptional state is thus characterised by a dualism of end-means [...] The normal state is a rational (predictable) order, while the exceptional state is the irrational (unpredictable) basis of this rational order. These two mutually conditional states of the state are, in the domestic political dimension, the validity of the rule of law or the suspension of the rule of law, and, in the foreign and international political dimension, the state of peace or

²³ Michael Hoelzl, Graham Ward, ‘Introduction’ in Carl Schmitt, *Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle* (Polity Press 2014, Cambridge, x–xxix) xxiii.

²⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2006, Chicago-London) DOI: <https://doi.org/10.7208/chicago/9780226738901.001.0001>

²⁵ Cited by Hoelzl, Ward (n 23) xxiii.

war.²⁶ This legal decisionism becomes a political strategy according to Schmitt, the essence of which is that the sovereign has unlimited and totalitarian power, not only because the principle of separation of powers does not apply since they are concentrated in one hand but also because the separation of powers does not apply in time, since the dictator's power, which had previously lasted for a certain period of time, becomes unlimited.

Returning to the Schmittian theorists of constitutional dictatorship, one should single out Herbert Tingsten, who addressed the problem of the enabling law and examined the unusually great power of the executive in the exceptional state to be given broad regulatory powers to amend or repeal existing laws by decree. It is for this reason that Tingsten concludes that although, in theory, exceptional power entrusted and controlled for a limited period of time may be theoretically compatible with democratic constitutionalism, the systematic exercise of exceptional power results in the liquefaction of democratic frameworks.²⁷ This is why the constant erosion of legislative power, including by the executive governing by decree, is incredibly dangerous. Carl J. Friedrich, in a similar way to Schmitt's typology of commissarial and sovereign dictatorship, distinguishes between constitutional dictatorship (which aims to preserve the constitutional order) and unconstitutional dictatorship (which seeks to overthrow it).²⁸ According to Agamben, Friedrich has not really been able to draw a convincing distinction between the two types of dictatorship since any theory that seeks to justify constitutional dictatorship is faced with the contradictory situation that exceptional rules that are meant to protect the democratic constitution become themselves the cause of the deterioration of democracy.²⁹ The constitutional dictatorship thus struggles with an insoluble internal contradiction, and these dilemmas manifested themselves for the first time on a global scale in the context of the pandemic.

From an ideological and historical point of view, the extraordinary contradictions of exceptional governance become quite evident in Clinton L. Rossiter's approach, which openly sought to justify constitutional dictatorship. He argued that democratic constitutionalism, based on the separation of powers, is appropriate for normal circumstances but that in a crisis, the rules of the game of democratic governance can be changed to any extent temporarily (the government will have more power and the people will have fewer rights) in order to overcome dangers and restore normality.³⁰ Rossiter was aware that constitutional dictatorship, as a state of exception, had, in fact, already become a paradigm of government in the inter-war period and, like Walter Benjamin's observations, he explained that exceptionalism had become the rule: that is, the dictatorship of the executive, legislation

²⁶ András Körösenyi, 'Carl Schmitt állam- és politikaelméleti alapfogalmai' [*Carl Schmitt's Basic Concepts of State and Political Theory*] (2000) 9 (3–4) *Politikatudományi Szemle* 5–24, 13.

²⁷ Quoted and analysed by Agamben (n 19) 7.

²⁸ Agamben (n 19).

²⁹ Agamben (n 19) 8.

³⁰ Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (The Princeton University Press 1948, Princeton).

by administrative means, was far from temporary, but was also widespread in peacetime. Agamben quotes Rossiter, whose words in 1948 foreshadow the increased danger to democracy of the paradigm of the state of exception, which is still relevant today: 'No sacrifice is too great for our democracy, least of all the temporary sacrifice of democracy itself'.³¹ At the same time, Rossiter also recognized the power of the 'genie out of the bottle' and argued that exceptional governance should be confined within constitutional limits (necessity test, time limit).³²

2 The Changing Philosophy of Governance and the Dangers of Post-Madison Governance

From the foregoing, it can be formulated (and the dilemmas related to pandemic emergency models confirm this) that one of the major anti-democratic dangers inherent in the practice of governance by extraordinary measures is that it begins to transform and define the philosophy of governance even in 'normal circumstances' (ie in the absence of an objective emergency). Agamben (even before the COVID-19 crisis in 2016) pointed out that the theory and practice of modern governance were being fundamentally transformed. In his lecture 'From the State of Control to a Praxis of Destituent Power', the Italian philosopher highlighted that modern states and modern governments put security at the centre of their actions (a trait that first appeared in the great absolutist states after the Peace of Westphalia) and therefore seek to deal with the consequences rather than the causes of a socio-political phenomenon, among other things because crisis management is cheaper (and politically more rewarding) than the very often uncomfortable prevention. Modern governance is not a governance of causes but rather of 'consequences'. This paradigm of governance does not conceive of government as the prevention of problems but rather as the ability to manage problems and disasters (that it may have contributed to happening, whether actively or through inaction).³³

This situation unfolded and became distorted in the context of the totalitarian state and concentration camps, where a system was institutionalised that was governed by means of a perpetuated state of exception. It is here that the exception first became the rule³⁴ and it cannot be a coincidence that governance by extraordinary means is embedded in the horrific experiences of the 20th century today. According to Agamben: 'A formal state of exception is not declared and we see instead that vague non-juridical notions – like [...]

³¹ Agamben (n 19) 9.

³² Ginsburg, Versteeg (n 7) 1503.

³³ Giorgio Agamben, 'From the State of Control to a Praxis of Destituent Power' (2014) ROAR Magazine <<https://roarmag.org/essays/agamben-destituent-power-democracy/>> accessed 1 April 2025.

³⁴ Amy O'Donoghue, 'Sovereign Exception: Notes on the Thought of Giorgio Agamben' (2015) Critical Legal Thinking <<http://criticallegalthinking.com/2015/07/02/sovereign-exception-notes-on-the-thought-of-giorgio-agamben/>> accessed 1 April 2025.

security reasons – are used to install a stable state of creeping and fictitious emergency without any clearly identifiable danger.³⁵ Thus, the modern government, even in the absence of an objective crisis situation which employs extraordinary means, is in a perpetual state of exception, a perpetual state of ‘coup d’état’: it manages crises of its own making and passively tolerates itself. In other words, ‘by placing itself under the sign of security, the modern state has left the political zone and entered a no-man’s land whose geography and borders are still unknown’.³⁶

Lührmann and Rooney also argue, in the context of their research in Varieties of Democracy (V-Dem), that the experience of when and what emergency measures a state is forced to adopt also includes the experience of exceptional measures that fundamentally transform the traditional order.³⁷ Exceptional measures further highlight the extraordinary threats to democratic order and national survival. It also follows from Lührmann and Rooney’s analysis that exceptional governance provisions are fundamentally premised on the external nature of the threats that arise in relation to the nation-state framework, all of which suggests that the paradigm of exceptional governance is related to the instability of the international order.³⁸ The authors also point out that ‘exceptionalism’ and its reality in political communication reduces the political costs for political leaders of rewriting democratic rules (which may be very painful in the normal state) since, in such situations, the expansion of executive power becomes a kind of social expectation.³⁹ However, all this should not necessarily be accompanied by an undemocratic and authoritarian risk that, once the crisis is over, the functioning of the state, and in particular of the executive, will not return to institutional normality. On the basis of Lührmann and Rooney’s approach, we can thus speak of the possibility that, in the context of an emergency, leaders may extend the constitutional and political limits of their power beyond the limits of the extraordinary exercise of power (substantive abuse of exceptional governance) or extend the duration of the emergency (temporal abuse of exceptional governance).⁴⁰ In general, the underlying goals of power concentration may be to regulate political opponents, neutralise obstacles and counterweights to power (including constitutional counterweights and the administration), and eliminate various accountability and accountability options.

Comparing this with what has been said about constitutional dictatorship, we can see that for the proponents of constitutional dictatorship, the non-partisanship (in content and/or time) of extraordinary government is not a problem but rather an opportunity. Those who worry about the strengthening of executive power in emergency situations point out that democratic and constitutional legitimacy can paradoxically be distorted into a means

³⁵ Agamben, ‘From the State...’ (n 33).

³⁶ Agamben ‘From the State...’ (n 33).

³⁷ Lührmann, Rooney (n 17).

³⁸ Lührmann, Rooney (n 17) 6.

³⁹ Lührmann, Rooney (n 17) 10–11.

⁴⁰ Lührmann, Rooney (n 17) 11.

of undermining democracy since it can justify, on the surface, a concentration of power that may indeed be needed with a certain content and duration, but it is precisely this uncertainty that the authoritarian leader exploits.⁴¹

The V-Dem research (before the COVID-19 pandemic) showed that there is a positive correlation between an undemocratic (authoritarian) turn and governance by extraordinary measures: countries affected by emergency measures are 59% more likely to experience regression than those without.⁴² The authors, therefore, proposed to view the state of emergency 'as a potential symptom and accelerator of autocratization processes. Like a fever, they are a strong warning sign that something maybe wrong with the state of democracy and that autocratization might be under the way.'⁴³ In other words, exceptional governance measures and the special legal order can be both a cause and a consequence of democratic decline.⁴⁴ This makes it important to examine the intentions of the leader of the executive when judging the use of exceptional measures of governance and for the public to monitor them continuously so that they do not exceed their mandate in terms of either substance or timing. Further, to use exceptional means genuinely to defend the democratic order (to restore it) and not to reinforce their own position authoritatively.

However, this exceptional form of governance is not only accepted in the context of constitutional dictatorship but also in contemporary contexts: the 2011 joint publication of Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, summarises their theory of the 'unbound executive' in the United States context and situates crisis governance in a neo-Schmittian, post-Madisonian framework.⁴⁵ '[T]hey believe that the Madisonian scheme of checks and balances, wherein different branches and levels of government have the incentives to keep each other in check, fails to operate under such circumstances'.⁴⁶ For the United States, it has been argued that the Madisonian constitution, based on the separation of powers, has now given way to an administrative state headed by the president, over which the courts, the member states and even Congress itself have only slight control.⁴⁷ Posner and Vermeule's argument is formulated in the context of the United States after 11 September 2001, and the global economic and financial crisis of 2008, but Posner sought to develop it further in the context of the pandemic.⁴⁸ According to this post-Madisonian thesis, the key to exceptional governance is necessity since only the government has the resources and flexibility to deal with the situation (and to balance security and civil

⁴¹ Ibid.

⁴² Lührmann, Rooney (n 17) 16.

⁴³ Lührmann, Rooney (n 17) 18.

⁴⁴ Lührmann, Rooney (n 17) 19.

⁴⁵ Eric A. Posner, Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2011, Oxford-New York) DOI: <https://doi.org/10.1093/acprof:osobl/9780199765331.001.0001>

⁴⁶ Ginsburg, Versteeg (n 7) 1499.

⁴⁷ Posner, Vermeule (n 45).

⁴⁸ Eric A. Posner, 'The Executive Unbound, Pandemic Edition' (2020) Lawfare Blog <<https://www.lawfaremedia.org/article/executive-unbound-pandemic-edition>> accessed 1 April 2025.

liberties): in an emergency, the judicial and legislative branches transfer huge amounts of power to the executive, thereby abdicating powers and invalidating Madison's notion of separation of powers.⁴⁹ In a crisis situation, immediate and rational action is needed, which the court is not able to provide because its procedure is slow (although every minute counts), public (although national security often requires secrecy), and it lacks the necessary political legitimacy. The lack of information and speed also means that the legislature is not able to act, nor does it have direct control over the executive's apparatus of violence, but the executive can be given prior authority to take extraordinary measures.⁵⁰ However, Posner and Vermeule argue (and this is where the idea that governance by extraordinary measures and its impact on democracy can have an effect essentially without an objective crisis comes in) that the US case shows that the phenomenon of unfettered executive power is by no means limited to emergencies and that in modern administrative and complex governance systems, the system of checks and balances has become formalised.⁵¹ As we saw in the V-Dem study, the issue of the 'unboundedness' of executive power highlights a number of critical aspects, and this is also true of Posner and Vermeule's approach since the unfettered government in emergency situations can, in fact, be understood as an abuse of power. Bruce Ackerman, for example, accepts the approach that the US executive is unfettered but argues that this has severely undermined and plunged the republic in the United States into crisis.⁵²

As can be seen from the above, there is by no means unanimity on the state of exception in modern legal and political theory: its case-specific necessity is accepted, but it is also sharply criticised as it can lead the democratic establishment in an authoritarian direction. These dilemmas have only been exacerbated by the outbreak of the COVID-19 pandemic, which has, at the same time, provided an opportunity to examine the dilemmas of democracy in relation to exceptionalism in a global context.

III Emergency Models and COVID-19

The World Health Organisation declared a pandemic caused by COVID-19 on 11 March 2020. The scale, rapid spread and unknown nature of the pandemic demanded a rapid response from nation-state governments to protect lives, prevent the overloading of health systems and ensure continuity of governance. The year 2020 is, therefore, a significant one in the history of emergency law and emergency governance, as it has forced nation-state governments around the world to implement emergency measures at an unprecedented

⁴⁹ Ginsburg, Versteeg (n 7) 1504.

⁵⁰ Ibid.

⁵¹ Posner, Vermeule (n 45) 4.

⁵² Bruce Ackerman, *The Decline and Fall of the American Republic* (The Belknap Press of Harvard University Press 2013, Cambridge-London).

scale. As Tom Ginsburg and Mila Versteeg point out, the emergency measures that accompanied COVID-19 forced democratic governments to restrict the freedoms of their citizens, which they had previously taken for granted, in ways and to an extent never seen before: nationwide stay-at-home measures, curfews imposed by the military, the suspension of religious services, monitoring of mobile phones, closure of schools and suspension of other public services, travel restrictions and censorship of the news.⁵³

All this has provided an opportunity to study the various responses to emergency governance in a global emergency. However, in the context of a pandemic that threatened human lives and health, the functioning of democratic political and legal systems was also at risk: the constitutionality of the emergency legal frameworks put in place by governments was called into question, as it became common practice for governments 'to disable some ordinary (democratic) procedures and set aside standard political and legal accountability mechanisms part of their Covid-19 response'.⁵⁴ In other words, COVID-19 has highlighted one of the major dilemmas of emergency governance outlined in the history of ideas: the regimes that use them neither fully foresee the long-term effects of the measures on democratic governance nor what the precise intentions of the executive might be beyond the management of a given crisis by extraordinary measures.⁵⁵ As emergency governance is bound by several strands to the legal and political order within which it is established and whose protection it is designed to protect, it is worthwhile expanding on the various emergency models before examining the dilemmas of emergency governance and democracy in relation to the COVID-19 crisis.

1 Emergency Models

There are several possible ways of triggering governance by emergency measures: one main solution is when the constitution itself sets up the extraordinary regime and its limits ('constitutional model'); the other main solution is when the executive itself sets in motion the processes leading to extraordinary powers by setting the legislature in motion ('legislative model'); finally, a separate discussion will be needed of cases where extra-legal solutions lead to extraordinary governance ('extra-legal model').⁵⁶

The 'constitutional model' is the most common, as more than 90 per cent of the world's constitutions today contain provisions for the introduction of various types of extraordinary

⁵³ Ginsburg, Versteeg (n 7) 1499.

⁵⁴ Sean Molloy, 'Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes' (2021) International Institute for Democracy and Electoral Assistance 7, <<https://www.idea.int/sites/default/files/publications/emergency-law-responses-to-covid19.pdf>> accessed 1 April 2025, DOI: <https://doi.org/10.31752/idea.2021.24>

⁵⁵ Ginsburg, Versteeg (n 7) 1499.

⁵⁶ Ginsburg, Versteeg (n 7); Ferejohn, Pasquino (n 1).

legal regimes.⁵⁷ In these cases, the constitution itself empowers the executive, in the event of various emergencies (eg war, natural disaster, insurrection or other situations of public danger), to take extraordinary measures, to govern by decree, or, in these cases, the constitution provides for the suspension of certain freedoms in the manner and to the extent required by the emergency. In the constitutional model, the constitutional arrangement itself suspends the system of checks and balances and temporarily grants the executive power to exercise the powers of other branches of government (in particular, the legislature or, in the case of a federal state, the member states), which may give the executive power very broad options that may be open to abuse.⁵⁸ At the same time, as Ginsburg and Versteeg point out, constitutional provisions not only empower but also, on the basis of historical experience, seek to limit the temporary overreach of government: one of the most important of these guarantees, the limited safeguard on the operation of checks and balances in extraordinary circumstances, is the requirement that parliament declare a state of emergency (Ginsburg and Versteeg's analysis of existing constitutions shows that various constitutional systems have also institutionalised further limitations: for example, during a state of emergency, parliament cannot be dissolved or the constitution cannot be amended; many constitutions specify the length of time for which emergency government can last and its extension is subject to parliamentary approval; constitutions may also list situations that allow for the introduction of emergency measures at all). In addition to the legislature, the judiciary may also exercise control over the implementation of extraordinary measures by continuously monitoring the extraordinary powers and whether the (fundamental rights) restrictions imposed were necessary and proportionate.⁵⁹

Of course (and in very many cases), governance by extraordinary means need not have any constitutional mandate or limitation at all since the executive can be empowered by the legislature itself to take emergency measures, a solution that Ferejohn and Pasquino call the 'legislative model' of exceptional governance, which they argue '[...] handles emergencies by enacting ordinary statutes that delegate special and temporary powers to the executive. This practice implies that emergency powers are to be understood as exceptional to the ordinary operation of the legal system and that, once the emergency subsides, there will be a return to ordinary legal and political processes. In principle, therefore, legislative emergency powers are temporary. They are also aimed at restoring the prior legal constitutional status quo and so, in that sense, are conservative, as is the neo-Roman mode'.⁶⁰ This solution can also be used as a framework for the control of the legislature, which can constantly monitor the exercise of emergency powers, decide to extend them or suspend them if the circumstances that gave rise to them no longer exist, and also has the option of adopting

⁵⁷ Ginsburg, Versteeg (n 7) 1506; Christian Bjørnskov, Stefan Voigt, 'The Architecture of Emergency Constitutions' (2018) 16 (1) *International Journal of Constitutional Law* 101–127, 101, DOI: <https://doi.org/10.1093/icon/moy012>

⁵⁸ Ferejohn, Pasquino (n 1) 218.

⁵⁹ Ginsburg, Versteeg (n 7) 1507.

⁶⁰ Ferejohn, Pasquino (n 1) 217.

the law activating the emergency. Ferejohn and Pasquino argue that the legislative model can achieve more complete control over the executive, with continuity of legislative and judicial control, and further, that parliament can ultimately terminate the government's authority if the reasons and conditions for imposing emergency government no longer exist.⁶¹ With regard to the legislative model, Ginsburg and Versteeg note that the delegation of executive power by the legislature is possible before the occurrence of the extraordinary events that triggered it (*ex-ante*) or after the occurrence of the objective crisis events themselves (*ex-post*). The controlling and constraining nature of the legislature is most effective in the case of *ex-post* solutions, which ensure that the legislature is continuously involved alongside the government in dealing with emergencies.⁶²

Finally, it is also worth referring to aspects beyond constitutional and legislative models, as various crises can encourage unauthorised or even over-empowered action. This model assumes (which was also key to the concept of constitutional dictatorship) that it is, in fact, preferable for the executive to act explicitly without a legal basis (ie without any constitutional or legal constraints) since emergency situations involve a transfer of powers and a restriction of citizens' freedoms, and are therefore inherently illegitimate and more appropriately evaluated after the objective emergency has passed.⁶³ Oren Gross has argued in the context of the terrorist attacks of 11 September 2001 that the traditional solutions to emergency governance (the 'business as usual' model) may not always be the right choice, either from a theoretical or a practical point of view.⁶⁴ Gross has noted the fundamental dilemma that we have seen in the traditional Schmitt-Kelsen controversy ('the paradox of governance by extraordinary means'): how to resolve the contradiction between respecting and going beyond the rule of law in the case of extraordinary governance. In the context of the terrorist attacks in the US, he referred to the contradiction that while terrorists operate outside the sphere of legal principles and norms, democratic governments must be careful not to fight terrorism by illegitimate means. Otherwise, defeating terrorists can only be achieved at the cost of losing the democratic character of the society they are fighting to protect.⁶⁵ Gross explained that in his proposed model of 'extra-legal measures', those exercising public power are explicitly empowered to use extra-legal measures if they feel it is necessary to protect the nation and its population (ie according to Gross, the common good), provided that they openly and publicly acknowledge the nature of their actions.⁶⁶ According to Gross, the only limit to the extraordinary government can be *ex-post*, and that is the potential need to hold society accountable: 'commitment to the

⁶¹ Ferejohn, Pasquino (n 1) 217–218.

⁶² Ginsburg, Versteeg (n 7) 1508.

⁶³ Ginsburg, Versteeg (n 7) 1509.

⁶⁴ Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 (5) The Yale Law Journal 1011–1134, 1021, <<https://www.yalelawjournal.org/article/chaos-and-rules-should-responses-to-violent-crises-always-be-constitutional>> accessed 1 April 2025, DOI: <https://doi.org/10.2139/ssrn.370800>

⁶⁵ Gross (n 64) 1021.

⁶⁶ Gross (n 64) 1023.

violated principles and values. The acting official may be called to answer, and make legal and political reparations, for her actions. Alternatively, the people may act to approve, *ex post*, the extra-legal actions of the public official'.⁶⁷ Such a conception of the extra-legal model thus implies an antecedent commitment that popular sovereignty can legitimise governmental abuses in the course of extraordinary governance. It also follows from this model that courts should refrain from ruling on emergency measures because decisions upholding them may, in hindsight, legitimize the problematic use of emergency powers. In other words, the power-limiting mechanisms, the system of checks and balances, should be temporarily suspended during the emergency and then be fully re-enforced once the emergency has passed.⁶⁸ Uncertainty is also a feature of emergencies in general, and this is heightened in this model, as the executive is put in a situation where it is not immediately certain that it can be legally justified, and this model is precisely the opportunity for the government to buy time to prove its legitimacy.⁶⁹ Gross cautions, however, against confusing this approach with political realism, as realists often argue that democracies must give up their legal and constitutional legitimacy in violent crises. In contrast, the extra-legal means model aims to preserve and control normativity in the long term, and in this, temporary 'small mistakes' help the 'greater good' of maintaining constitutional order. As the model seeks to enforce political and social responsibility and morality and emphasises publicity and honesty over executive action, Gross argues that it can present a suitable barrier to the concentration of government power and authoritarian tendencies.⁷⁰

2 Emergency Governance in Pandemic: Democracy and Institutional Resilience

The pandemic resulting from COVID-19 has thus provided an opportunity to analyse the emergency approaches and models that have been studied previously, as well as the contradictions between democracy and exceptional governance, for the first time in world history in a global context (it is precisely this scale and comparative nature that makes the research discussed here important for the domestic literature). In the following comparative section, country studies will be analysed that provide a complex picture of how the emergency models discussed earlier were applied in the context of COVID-19. The main aim of the study is to gather lessons that can help us understand how and according to which models emergency governance instruments can be applied in future emergencies in an appropriate and democratic way.

One of the most comprehensive studies was conducted by Ginsburg and Versteeg, who compiled a substantial database and collected information on the pandemic response in

⁶⁷ Ibid.

⁶⁸ Ginsburg, Versteeg (n 7) 1509.

⁶⁹ Ibid.

⁷⁰ Gross (n 64) 1024.

some 106 countries until mid-July 2020.⁷¹ The authors examined emergency governance in the context of the pandemic basically in the framework of the emergency models presented above, and one of the main aspects was the state of legislatures and courts during the pandemic. The authors found that the most common response to a pandemic was the use of an element of the legislative model, with 52% of the countries they studied relying on legislation in their response to a pandemic. These include, among others, large democracies such as Germany, France, the Netherlands, Switzerland, Austria, the United States, Australia, Belgium, Taiwan, South Korea, South Africa and Japan.⁷² The vast majority of the countries surveyed by Ginsburg and Versteeg, 89%, have detailed constitutional emergency legislation, while only 43% have declared such a constitutionally based emergency (compared to 40% of the total sample), including Spain, Hungary, the Czech Republic, Armenia, Sierra Leone and Senegal.⁷³ Ginsburg and Versteeg's data collection also highlights another interesting aspect: the activation of emergency provisions in constitutions is not primarily dependent on whether the regime is authoritarian, as 42% of democratic regimes and 33% of authoritarian regimes have made use of this option.⁷⁴ However, there have also been cases (China, Cuba, Cameroon, Belarus, Saudi Arabia, Sudan, Cambodia, Rwanda, Laos and Tanzania) where emergency governance was based solely on executive measures and the legal basis for the measures taken was not clarified.⁷⁵

The investigations were also an opportunity to assess the checks and balances on the executive during the emergency period, namely the legislatures, the courts and the sub-national (eg local officials, municipalities, member states of federal states) checks and balances. In 64% of the countries studied by Ginsburg and Versteeg, the legislature was directly involved in the management of the pandemic (a state of emergency was declared or extended, and new legislation was adopted). In 75% of the countries responding under the constitutional model, the legislature had to declare or extend a state of emergency, while in 45% of the countries responding under the legislative model, the legislature passed new laws to deal with the pandemic, but in 72% of these countries the laws were temporary and only applied to COVID-19.⁷⁶ The strength of democratic controls and institutional resilience is demonstrated by the fact that in 52% of the countries studied, legislatures were continuously involved in the fight against the pandemic (68% in democratic countries, but even 30% in authoritarian regimes) and thus in counteracting the executive.⁷⁷ In 41% of the countries studied by Ginsburg and Versteeg, the judiciary was directly involved in the response to the pandemic. The courts were involved in 55% of democracies and 27%

⁷¹ Ginsburg, Versteeg (n 7) 1513.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ginsburg, Versteeg (n 7) 1517.

of authoritarian regimes:⁷⁸ such control included ensuring compliance with procedural requirements; in the case of disproportionate and unnecessary violations of fundamental rights, the courts could take the initiative to prevent or lift the blockade; further, the courts could call for concrete action by the executive to fulfil its constitutional obligation.⁷⁹ In 34% of the countries surveyed, countervailing forces against extraordinary measures appeared at the sub-national level and even at all three levels (legislative, judicial, sub-national), as one or more of these countervailing factors appeared in 82% of the countries.⁸⁰

A study by Sarah Engler and colleagues focused on European perspectives⁸¹ and looked at the relationship between the quality of democracy in a country and government responses to COVID-19. They focused on emergency measures that impact the values protected in liberal democracies but can be restricted in the event of an emergency. Based on a study of 34 European countries, they found that the state or quality of democracy that is suspended has a significant impact on the quality of emergency governance, as governments in countries where the quality of democracy is higher in times of no emergency were reluctant to adopt measures that potentially run counter to democratic principles.⁸² Research has shown a strong correlation between constitutional protection and effective respect for individual freedoms and a government's reluctance to restrict these freedoms as part of the fight against COVID-19.⁸³ Researchers have also shown that even in a global crisis, country-specific factors are important in determining policy responses.⁸⁴ Stronger democracies were slower to respond to the pandemic because accountable decision-makers were reluctant to make swift public health interventions that violated civil liberties (here, of course, we are faced with the dilemma that adherence to democratic ways of doing things comes at the price of failing to effectively stop the spread of the pandemic), but the authors also saw this as a vindication of the earlier perception that the pandemic could reinforce existing authoritarian tendencies: Namely, where there was already a history of democratic decline, the pandemic opened up an opportunity for power-seeking leaders to further concentrate power.⁸⁵ The authors do not hide the fact (especially in the light of the Swedish experience) that the preservation of democratic procedures and controls is associated with many problems in the field of epidemiology, but they also argue that the involvement of citizens and the maintenance of some kind of democratic normality are crucial for the social

⁷⁸ Ibid.

⁷⁹ Ginsburg, Versteeg (n 7) 1518–1526.

⁸⁰ Ginsburg, Versteeg (n 7) 1517.

⁸¹ Sarah Engler, Palmo Brunner, Romane Loviat, Tarik Abou-Chadi, Lucas Leemann, Andreas Glaser, Daniel Kübler, 'Democracy in times of the pandemic: explaining the variation of COVID-19 policies across European democracies' (2021) 44 (5–6) *West European Politics* 1077–1102, DOI: <https://doi.org/10.1080/01402382.2021.1900669>

⁸² Engler et al. (n 81) 1095.

⁸³ Ibid.

⁸⁴ Engler et al. (n 81) 1096.

⁸⁵ Ibid.

acceptability of and compliance with prevention policies, ie the quality of democracy is, in their view, a necessary tool for managing the pandemic.⁸⁶

Massart and his co-authors draw attention to another important aspect of the dilemmas of extraordinary governance and democracy: their research differs from most approaches that start from the restrictions imposed during the period of emergency. In their interpretation, democratic compensators are decisions that grant exceptional rights to individuals, sub-national or nation-state political institutions, and non-governmental actors to compensate for the negative effects of emergency measures on civil liberties and the rule of law (eg, the temporary nature of emergency decisions and the decision by parliament to incorporate them into the normal legal order, social control over emergency governance).⁸⁷ Massart and his colleagues argue that countries with weak and limited countervailing powers are more vulnerable to violations of democracy and human rights than those with a properly functioning system of checks and balances in normal situations; they also argue that strengthening the resilience of democracies to crises may entail strengthening countervailing powers at the parliamentary and local levels.⁸⁸

Examining governance by exceptional measures during a pandemic, as well as democratic checks and balances, is also key to knowing how we can ensure the institutional resilience mentioned above in preparation for future crises,⁸⁹ of which democratic checks and balances are an important component in an emergency period. Gabriele De Angelis and Emellin de Oliveira have also suggested that, in addition to institutions, we should also include in future investigations the personal and party-political factors that may bias emergency governance in an authoritarian direction.⁹⁰

3 Authoritarian Tendencies and the Pandemic

The V-Dem Institute, which monitors democracy and constitutionalism in Europe and globally, has been particularly interested in examining the broad impact of COVID-19 on the functioning of democracies and how such crises affect the strengthening of autocracies. Maerz and his colleagues looked at the trends highlighted by the first wave of the pandemic in a comprehensive study.⁹¹ The illustrative starting point of the V-Dem

⁸⁶ Engler et al. (n 81) 1096–1097.

⁸⁷ Tom Massart, Thijs Vos, Clara Egger, 'The Resilience of Democracy in the Midst of the COVID-19 Pandemic' (2021) 3 (2) *Politics of the Low Countries* 113–137, 116, DOI: <https://doi.org/10.5553/PLC/000018>

⁸⁸ Massart et al. (n 87) 132–133.

⁸⁹ Gabriele De Angelis, Emellin de Oliveira, 'COVID-19 and the "state of exception": assessing institutional resilience in consolidated democracies – a comparative analysis of Italy and Portugal' (2021) 28 (8) *Democratization* 1602–1621, DOI: <https://doi.org/10.1080/13510347.2021.1949296>

⁹⁰ De Angelis, Oliveira (n 89).

⁹¹ Seraphine F. Maerz, Anna Lührmann, Jean Lachapelle, Amanda B. Edgell, 'Worth the Sacrifice? Illiberal and Authoritarian Practices during Covid-19' (2020) 110 V-Dem Working Paper Series <https://v-dem.net/media/publications/wp_110_final.pdf> accessed 1 April 2025.

study is precisely that violations of democratic norms by several governments (the excessive use of extraordinary powers and restrictions on media freedom) are raising concerns that the COVID-19 epidemic could ‘infect’ democracy itself.⁹² However, this process fits in with the global trend towards autocratisation linked to the zeitgeist of populism. This raises further dilemmas and contradictions, as the authors also point out that those who violate democratic norms of governance by extraordinary means often do so on the grounds of protecting human life, suggesting that in times of crisis, normative preferences for life take precedence over the democratic rules of the game.⁹³ It is at this point that Maerz and his colleagues note the dilemma that is, in fact, the most important dilemma of modern-day extraordinary-means governance and extraordinary law: in the context of the pandemic, the comparison between autocracies and poorly performing democracies such as the United States raises the question of whether democracy is not a handicap in times of pandemics and similar crises.⁹⁴ Indeed, to quote José Antonio Cheibub and his colleagues, when the threat of death became severe enough, many democracies resorted to the same measures as autocracies.⁹⁵

V-Dem’s research on respect for democratic norms and the turn towards autocracy draws on the approach of UN experts who, at the start of the pandemic, called for government responses to be ‘proportionate, necessary and non-discriminatory’.⁹⁶ This approach is based on the International Covenant on Civil and Political Rights (ICCPR),⁹⁷ adopted by the UN at its 21st session on 16 December 1966. According to Article 4 of the Covenant, ‘In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.’ Derogation is, therefore, a legal obligation, a suspension, derogation or termination of commitments to respect political and civil rights. The ICCPR also imposes clear limits on such derogations, including that they must be proportionate and non-discriminatory and that the derogation must be notified to the UN Secretary-General. It follows that, under

⁹² Maerz et al. (n 91).

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Jose Antonio Cheibub, Ji Yeon Jean Hong, Adam Przeworski, ‘Rights and Deaths: Government Reactions to the Pandemic’ (July 7, 2020), DOI: <http://dx.doi.org/10.2139/ssrn.3645410>

⁹⁶ United Nations Experts, ‘COVID-19: States should not abuse emergency measures to suppress human rights’ 2020 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722LangID=E>> accessed 1 April 2025.

⁹⁷ International Covenant on Civil and Political Rights, adopted 16 December 1966, General Assembly resolution 2200A (XXI) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>> accessed 1 April 2025.

international human rights law, emergency measures can only alter democratic institutions, rights and procedures within certain limits.

While the response to COVID-19 may permit physical restraint by restricting freedom of movement and assembly, it cannot violate certain non-derogable rights, such as the right to life or freedom from torture. According to Maerz and his colleagues, derogations from or restrictions on the right to freedom of movement or assembly (eg lockdowns, closure of schools and workplaces) cannot be considered a violation of democratic standards unless such measures are disproportionate, discriminatory or abusive. V-Dem researchers also do not count the postponement of elections as a violation of democratic norms, as it is not always clear how elections and campaigns can or should be organised safely during a pandemic.⁹⁸ The authors argue that authoritarian and illiberal practices can occur in all types of regimes,⁹⁹ which is precisely how the bad practices of democracies and autocracies become captured. Maerz and colleagues, citing Marlies Glasius, argue that two overlapping categories are necessary for analysis because authoritarian practices harm democracy by impeding access to information and thus sabotaging accountability, a fundamental element of democracy, and illiberal practices are primarily a human rights problem because they violate personal autonomy and dignity. Any practice that both undermines accountability and violates personal autonomy and dignity is located at the intersection of the two categories.¹⁰⁰ Maerz and his colleagues set up an analytical model for examining the democratic risks of using extraordinary means of governance. They identified the following as illiberal practices: discriminatory measures, derogations of rights that cannot be limited, and abusive enforcement. Autocratic practices were defined as the time-limited use of extraordinary measures, limitation of legislation and launching misleading government campaigns. The common intersection was seen as the restriction of the media.¹⁰¹

Based on these theoretical and methodological principles, V-Dem created the Pandemic Democratic Violations (PanDem) database and index, which analysed the experience of governance by extraordinary means in response to COVID-19.¹⁰² Maerz and colleagues found that violations of democratic norms were fairly widespread, with 83 of the 143 countries surveyed having at least some level of violations.¹⁰³ Governments in 11 countries had seriously violated democratic norms. Of these, several had violated human dignity through illiberal practices, including discrimination against minorities in Oman, Serbia and Sri Lanka; violations of inalienable rights in El Salvador, the Philippines and Sri Lanka; and abusive enforcement in Uganda. Others include authoritarian practices that have sabotaged

⁹⁸ Maerz et al. (n 91) 3.

⁹⁹ Marlies Glasius, 'What authoritarianism is... and is not: a practice perspective' (2018) 94 (3) *International Affairs*, 515–533, DOI: <https://doi.org/10.1093/ia/iiy060>

¹⁰⁰ Maerz et al. (n 91) 3.

¹⁰¹ Maerz et al. (n 91) 4.

¹⁰² Maerz et al. (n 91) 6.

¹⁰³ Maerz et al. (n 91) 7.

government accountability, including the absence of empowerment deadlines in Brazil, Oman and Uganda; restrictions on the role of the legislature, such as dissolution or suspension, in India and the DRC; and disinformation campaigns, such as in Brazil, Algeria, Serbia, Mexico and the DRC. In these cases, the government's response to the pandemic has also resulted in severe restrictions on the media.¹⁰⁴ Maerz and his colleagues also pointed out that among the illiberal practices observed in 10 countries were explicitly unlawful discriminatory measures and, in 6 cases, derogations from rights that should not have been restricted.¹⁰⁵

The research also shows that the use of illiberal and authoritarian practices has been diffuse, involving both democracies and non-democracies. In fact, authoritarian practices are quite widespread. Twenty-seven countries have used emergency government measures without formal deadlines, covering most major geopolitical regions and including democracies and autocracies (eg Bosnia and Herzegovina, Cambodia, Côte d'Ivoire and the United States). In Eritrea and Zambia, for example, parliament was adjourned without a timetable for resuming session; in other cases, such as Hungary and Ghana, new legislation gave the executive broad powers to govern by decree, which, because of vague wording, could be used in areas not directly related to the pandemic. Finally, there are 14 cases of active government disinformation campaigns, including high-profile cases such as Donald Trump in the US and Jair Bolsonaro in Brazil.¹⁰⁶ As we have seen in the analytical model regarding the intersection of illiberal and authoritarian practices, in terms of the violations of democratic norms on emergency measures, the most frequent is restrictions on media: in quite a large number of countries, 66 serious violations were recorded due to restrictions on the flow of information or harassing journalists.¹⁰⁷

Although violations of democratic norms through emergency measures during the COVID-19 pandemic occurred mostly in autocracies, many democracies were also affected. This suggests that authoritarian and illiberal practices are more prevalent, even if temporarily, in times of crisis. Maerz et al. found no evidence that restrictive and potentially disproportionate emergency measures are needed to achieve better public health outcomes: pandemic-related violations of democratic norms in the name of human life are unjustified and empirically unsound. Governments that violate democratic norms do not appear to fare any better in terms of COVID-19-related mortality when demographic factors are taken into account. Rather, these violations need to be monitored closely, as crisis-driven violations of democratic norms can have long-term effects on the quality of democracy.¹⁰⁸ Since autocracies have not performed better according to research on pandemic-related public concerns, Maerz and colleagues caution against the security techniques deployed

¹⁰⁴ Maerz et al. (n 91) 8.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Maerz et al. (n 91) 9.

¹⁰⁸ Maerz et al. (n 91) 1.

in these regimes.¹⁰⁹ This is because, in weak democracies and hybrid regimes, violations of democratic norms can be a harbinger of autocratisation, as leaders can exploit the exceptional circumstances of a pandemic to consolidate power, marginalise opposition and silence critics.¹¹⁰

In another V-Dem study, Michael Bayerlein and colleagues examined how populist governments have responded to the complex challenges posed by COVID-19.¹¹¹ The researchers' findings, supported by econometric models based on a sample of 42 countries, were that populist governments adopt less far-reaching policies to combat the pandemic, reduce citizens' efforts to combat the pandemic, and are worse affected by the pandemic from a public health perspective.¹¹² The most important finding of the V-Dem research was that the excess mortality associated with populist governments is 10 percentage points (100%) higher than the excess mortality in traditional countries. Bayerlein and colleagues believe that their results have important implications for evaluating the performance of populist governments in general and for anti-epidemic measures in particular, as they provide evidence that opportunistic and inappropriate policy responses, as well as the spread of misinformation and the downplaying of the pandemic, are closely associated with increases in COVID-19 deaths.¹¹³ V-Dem's research has also highlighted the reasons why populist forces perform worse in managing crises.¹¹⁴ Populist governments are less inclined to implement long-term and unpopular policies but are more inclined to short-term, quick fixes, and they influence citizens' behaviour not only through specific policies but also through the means of communicating the severity of the pandemic. Bayerlein et al. argue that populist governments have taken anti-scientific positions and underestimated the severity of the pandemic, making exposed citizens less likely to take the virus seriously and comply with public health regulations.¹¹⁵

IV Conclusion: Dilemmas Regarding the Emergency Strengthening of Executive Power and Its Anti-Democratic Impact

In times of emergency, ecological, public health and social crises, the strengthening of executive power is, therefore, a natural phenomenon, both historically and politically, as is the (constitutional) desire of legal and political systems and communities to limit the use of

¹⁰⁹ Maerz et al. (n 91) 13.

¹¹⁰ Ibid.

¹¹¹ Michael Bayerlein, Vanessa Alexandra Boese-Schlosser, Scott Gates, Katrin Kamin, Syed Mansoob Murshed, 'Populism and COVID-19: How Populist Governments (Mis)Handle the Pandemic' (2021) (121) V-Dem Working Paper Series, DOI: <http://dx.doi.org/10.2139/ssrn.3849284>

¹¹² Bayerlein et al. (n 111) 2.

¹¹³ Bayerlein et al. (n 111) 30.

¹¹⁴ Bayerlein et al. (n 111).

¹¹⁵ Ibid.

extraordinary means of governance. It follows that, in modern constitutional systems, the temporary suspension of normality of the constitutional normal state cannot, in principle, be considered undemocratic since the purpose of this drastic step is precisely to protect the status quo. As we have seen from the literature review, in any objective emergency (especially in the case of a pandemic that is in many respects uncertain and gives rise to doubts), the question of whether governance by extraordinary means is democratic is a very difficult one. All the more so since there can be legitimate disagreements between societies and within societies about the balance between civil liberties and public health, I believe that COVID-19 (and the embedding of emergency models in the ideological and historical debates of the 20th century and beyond) has highlighted the need to fundamentally rethink the paradigm of exceptional governance and that we can by no means rely on unambiguity. In other words, the concentration of executive power is not anti-democratic in principle, but it can easily become so without active (and, of course, extraordinary compared to the normal state of affairs) controls.

As we have examined, before the pandemic, the authors of the V-Dem analysis, Anna Lührmann and Bryan Rooney, found that exceptionalism is not only the cause but also the consequence of the decline of democracy.¹¹⁶ At the same time, as an examination of the exceptionalist rule of law introduced during the pandemic has shown, both democratic and authoritarian regimes have used exceptionalist means of governance, and democracies have generally been able to operate various control mechanisms. With that said, in both Lührmann and Rooney and the studies on COVID-19,¹¹⁷ one of the most important conclusions is precisely that it is not worth starting from the undemocratic effects of exceptional governance alone, but that the first step of the analysis should be to examine the regime in which the strengthening of executive power is applied: that is, the potentially undemocratic strengthening of governance by exceptional means is strongly dependent on the regime in which the exceptional measures are introduced, the democratic quality of the normal state thus strongly determining the exceptional situation.

It is also promising for democratic controls that Ginsburg-Versteeg's studies have shown that despite the exceptional and pervasive nature of the pandemic, executive power in democratic systems has not become unconstrained and that the various interactions between the branches of power and the constraints presented here show the operation of Madisonian, horizontal and vertical mechanisms of power sharing.¹¹⁸ The authors argue that (with their complexity and contradictory nature) the extraordinary governance regimes introduced in the context of COVID-19 have demonstrated that a system of checks and balances between government institutions and mutual cooperation between the branches

¹¹⁶ Lührmann, Rooney (n 17) 19.

¹¹⁷ Ginsburg, Versteeg (n 7); Engler et al. (n 81); Massart et al. (n 87); De Angelis, Oliveira (n 89).

¹¹⁸ Ginsburg, Versteeg (n 7) 1533.

of power can help to determine the right balance between individual interest and broader societal concerns, although of course there is no single, objectively correct solution.¹¹⁹

However, it is also clear from these experiences that complex checks on the executive are necessary to sustain the democratic legitimacy of governance by exceptional means, as the state of emergency functions as a 'predisposing' factor for authoritarian reversals. Lührmann and Rooney have explained that reversals in authoritarian directions are almost 60% more likely to occur in years when a state of emergency is declared.¹²⁰ However, it is also worth noting that the state of emergency cannot be seen as the main cause of authoritarian turnarounds *per se*, as emergency government instruments are a convenient structure through which leaders may dismantle democratic institutions and reduce resistance to authoritarian turnarounds. That is, they are not necessarily the trigger or cause of autocratisation or even democratic breakdown.¹²¹ It is important to draw attention to all of this in the era of the ecological and climate crises because we are faced with more and more profound and overlapping crises, and the (political) historical and contemporary experience of extraordinary governance in the context of COVID-19 shows that it is necessary and possible to find a way back to the original objective of extraordinary governance: namely, to protect the democratic status quo. But this presupposes the effective operation of extraordinary checks on the executive beyond the normal state of affairs.

¹¹⁹ Ginsburg, Versteeg (n 7) 1534.

¹²⁰ Lührmann, Rooney (n 17) 18.

¹²¹ Ibid.