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Discretion without Boundaries? The Expanding Power of Public Administration in Governance

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L'espansione della discrezionalità amministrativa durante le emergenze è diventata una caratteristica distintiva della governance contemporanea, sollevando questioni cruciali sull'equilibrio tra efficienza e accountability. Questo studio esamina come i governi facciano sempre più affidamento sugli organi amministrativi per esercitare ampi poteri discrezionali durante le crisi, come i conflitti armati, la pandemia da COVID-19 e le migrazioni di massa. L'indagine centrale esplora come questa dipendenza metta in discussione i principi di legalità, proporzionalità e controllo democratico. Utilizzando una metodologia qualitativa, l'analisi si concentra sui quadri giuridici, sui decreti esecutivi e sulle azioni amministrative che legittimano, attuano o non limitano la discrezionalità in situazioni di emergenza. I risultati rivelano una tendenza persistente verso la normalizzazione dei poteri eccezionali, spesso accompagnata da un controllo giudiziario o parlamentare limitato. Questa tendenza compromette la prevedibilità del diritto, indebolisce le libertà civili e erode la responsabilità istituzionale. Lo studio si conclude con la richiesta di garanzie procedurali e limiti chiaramente definiti per garantire che la discrezionalità rimanga uno strumento legittimo di governance piuttosto che un meccanismo di elusione delle norme.

The expansion of administrative discretion during emergencies has become a defining feature of contemporary governance, raising crucial questions about the balance between state efficiency and legal accountability. This study examines how governments are increasingly relying on administrative bodies to exercise broad discretionary powers during crises, such as armed conflict, the COVID-19 pandemic, and mass migration. The central inquiry explores how this reliance challenges the principles of legality, proportionality, and democratic oversight. Employing a qualitative methodology, the analysis focuses on the legal frameworks, executive decrees, and administrative measures that legitimise, implement, or fail to constrain

discretion in times of emergency. The findings reveal a persistent trend toward normalising exceptional powers, often accompanied by limited judicial or parliamentary scrutiny. This tendency undermines the predictability of the law, weakens civil liberties, and erodes institutional accountability. The study ends by urging the need for rules and clear boundaries to make sure that discretion is used properly in government instead of being a way to circumvent the law.

Summary: 1. Introduction.- 2. Theoretical Foundations and Legal Boundaries of Administrative Discretion.- 3. Crisis Governance and the Expansion of Discretion: Case Studies and Comparative Analysis.- 4. Risks, Challenges, and Normative Implications for Democratic Governance.- 5. Conclusions.

1. Introduction

The rise of administrative discretion as a central instrument of governance has become increasingly evident in recent years, particularly in response to emergencies that demand rapid and decisive state intervention. From global health crises to mass migration and security threats, governments have consistently relied on administrative bodies to implement swift and adaptable measures, often bypassing standard legal and democratic procedures. While discretion remains a functional necessity within complex administrative systems, its accelerated use during emergencies raises fundamental concerns about legal certainty, constitutional limits, and democratic oversight.

The shift toward discretionary governance represents more than a temporary response to exceptional circumstances; it signals a deeper transformation in the architecture of public authority. Traditionally, discretion operated within the confines of statutory law and judicial review, grounded in the principles of proportionality, legality, and accountability. Yet, as crises become more frequent and prolonged, discretion is increasingly normalised as a permanent mode of governance rather than an exceptional one. This transformation invites a critical reassessment of how law interacts with power under pressure, and whether the legal frameworks intended to constrain discretion are themselves becoming obsolete or merely symbolic.

Recent legal scholarship warns that emergency-driven discretion often escapes meaningful scrutiny and reshapes institutional norms in ways that persist beyond the crisis period^[1]. Moreover, the proliferation of soft-law instruments, regulatory loopholes, and executive decrees during emergencies has weakened the checks and balances fundamental to democratic governance^[2]. Similar concerns have been raised in comparative constitutional studies, which highlight the tension between the need for efficient governance and the preservation of fundamental rights under states of exception^[3]. These developments demonstrate that administrative discretion is not merely a technical or procedural mechanism but a political and normative tool that must be examined through the lens of constitutional legality and institutional accountability.

It is nevertheless important to clarify that the emergencies examined in this study are not uniform in nature, scope, or constitutional impact. Public health crises, armed conflicts, and large-scale migration movements give rise to distinct forms of administrative intervention and impact various constellations of fundamental rights. Pandemic governance typically involves broad restrictions on freedom of movement, assembly, and private life, justified by the need to protect collective health. Wartime governance, by contrast, often entails deeper and more intrusive limitations on political rights, property, information, and personal liberty, grounded in considerations of national survival and security. Migration governance, while frequently affecting a more limited and identifiable population, raises particularly acute concerns regarding due process guarantees, equality before the law, and compliance with non-refoulement obligations^[4]. Recognising these differences is essential to avoid treating “crisis governance” as a monolithic category.

Accordingly, this paper adopts a differentiated analytical approach that applies a common evaluative framework, legality, proportionality, accountability, and democratic oversight, while remaining attentive to the specific characteristics of each crisis type. The objective is not to equate the normative permissibility of restrictions across contexts, but rather to assess whether, within each emergency setting, administrative discretion remains legally bounded, institutionally supervised, and temporally limited^[5]. This distinction enables meaningful comparison without obscuring the varying constitutional thresholds that govern emergency action in the domains of public health, security, and migration.

By incorporating this differentiated perspective, the study situates administrative discretion within its concrete legal and societal context, rather than abstracting it from the conditions that shape both its justification and its limits. This approach responds to concerns in contemporary constitutional theory that emergency powers, if analysed without sensitivity to crisis-specific dynamics, risk being either over-normalised or insufficiently constrained. The analysis, therefore, seeks to capture both the functional necessity and the constitutional fragility of discretionary governance across diverse emergency scenarios^[6].

This paper, therefore, critically examines the expanding power of administrative discretion in the context of emergency governance, with emphasis on its legal, institutional, and normative implications. The central research question guiding this study is how the growing reliance on administrative discretion during crises challenges the foundational principles of legality, accountability, and democratic control in public administration. Employing a qualitative and comparative methodology, the paper analyses selected legal frameworks, executive practices, and case studies to explore both the formal structures and the underlying assumptions that legitimise discretionary governance in times of crisis.

The objective is not only to document the evolution of administrative practice but to challenge its legitimacy and propose normative frameworks for reasserting legal and constitutional boundaries. The study aims to contribute to contemporary legal scholarship by offering a reflective and critical approach to the boundaries of public authority and by proposing mechanisms to restore accountability and transparency in administrative governance in the face of ongoing and future crises.

2. Theoretical Foundations and Legal Boundaries of Administrative Discretion

Administrative discretion empowers public authorities to interpret and apply laws in response to complex and evolving circumstances. While essential for responsive governance, discretion, particularly under crisis, poses challenges to legal certainty, accountability, and democratic integrity. Critical demands a layered analysis that interrogates both normative foundations and empirical variations across countries and contexts.

For this analysis, administrative discretion is understood as the legally recognized margin of choice granted to administrative authorities when applying statutory norms to concrete situations characterized by uncertainty, complexity, or urgency. This discretion does not imply arbitrariness, but rather a bounded decision-space structured by legal principles such as legality, proportionality, reasonableness, and accountability. In administrative law theory, discretion emerges where legal norms are open-textured, delegate evaluative judgment, or authorize authorities to balance competing public interests within predefined limits^[7]. The scope and intensity of such discretion vary significantly across legal systems, depending on constitutional traditions, legislative drafting techniques, and the strength of judicial control mechanisms.

It is important to distinguish administrative discretion from closely related but conceptually distinct phenomena, such as executive prerogative or political decision-making at the constitutional level. While emergency governance may activate extraordinary executive powers, this study focuses specifically on discretion exercised within the administrative sphere, including delegated rulemaking, regulatory interpretation, enforcement prioritization, and implementation choices^[8]. Clarifying this distinction is essential for comparative analysis, as legal systems differ in how they allocate decision-making authority between legislatures, executives, and administrative bodies. Without such conceptual precision, cross-national comparisons risk conflating constitutional emergency powers with ordinary administrative discretion expanded under crisis conditions.

Discretion finds its theoretical grounding in legal and political traditions that recognize the limits of rigid statutes. Democratic systems strive to contain discretionary risk through statutory clarity, proportionality, transparency, and judicial oversight. Germany's administrative jurisprudence, for instance, rigorously subjects discretionary acts to proportionality and rights-based review. In contrast, states with weaker legal infrastructures, referred to as hybrid regimes, segmented oversight, and vague statutory grants, tend to yield more unpredictable and politicized outcomes^[9].

Comparative administrative law theory also emphasizes that the scope and legitimacy of administrative discretion are inextricably linked to national legal traditions. German *Verwaltungsrecht* conceptualizes discretion as a legally

structured decision-space tightly embedded in constitutional principles and subject to intensive judicial control. By contrast, common-law approaches, particularly in the United Kingdom, traditionally rely more heavily on political accountability and reasonableness review, which may offer weaker constraints during periods of emergency expansion. Southern European administrative systems, including Italy, have historically combined formal legality with pragmatic executive flexibility, a combination that becomes especially pronounced under crisis conditions. These doctrinal variations help explain why similar emergencies produce divergent discretionary practices across legal systems^[10].

These differences manifest starkly in emergencies, during COVID-19, data show that both robust democracies and autocratic regimes expanded discretion; however, the extent of that expansion correlated more with pre-crisis legal frameworks than with crisis intensity^[11]. In the UK, fragmented legal bases prompted Parliament to spur on ordinary legislation rather than rely on emergency powers under the Civil Contingencies Act^[12]. By contrast, Italy and Bulgaria saw emergency decrees enacted through circulars or subsidiary laws, sidestepping constitutional scrutiny^[13].

Moreover, automated or AI-driven discretion introduces novel risks. In the UK, the Department for Work and Pensions (DWP) algorithm wrongly flagged ~200,000 benefit claims, with two-thirds overturned upon review, revealing systemic bias and a lack of transparency^[14]. The Guardian and others uncovered AI use in welfare, immigration, and policing that disproportionately affected ethnic minorities and functioned with near-total opacity^[15]. These cases challenge the underlying assumptions of human oversight, revealing “algorithmic discretion” as a form of unbounded, inscrutable rulemaking^[16].

The inclusion of algorithmic discretion within this section, therefore, requires explicit conceptual clarification. Unlike classic emergency measures adopted in response to discrete crises, algorithmic discretion represents a structural transformation of public administration that is not inherently exceptional or time-bound. Its relevance to crisis governance lies in the way emergency rationales, such as efficiency, risk management, and rapid decision-making, accelerate the deployment of automated systems and embed discretionary choices into routine administrative infrastructures. In this sense, algorithmic discretion

functions as a mechanism of normalisation, translating exceptional governance logics into enduring administrative practices^[17].

From this perspective, the United Kingdom examples discussed above do not constitute emergency governance in the strict constitutional sense. Rather, they illustrate how discretion expanded during crisis periods can persist and intensify through technological mediation. Welfare and immigration algorithms institutionalise discretionary prioritisation, risk assessment, and enforcement choices in ways that are frequently opaque, difficult to contest, and weakly supervised. When introduced following periods of crisis-driven administrative expansion, such systems may entrench emergency-style governance beyond its original justificatory context, blurring the boundary between exceptional and ordinary administration^[18].

The analytical value of algorithmic discretion within this section, therefore, lies not in equating it with pandemic or wartime emergency powers, but in demonstrating how discretionary authority, once expanded, can be stabilised through digital systems that resist traditional forms of legal and democratic oversight. Automated decision-making challenges core assumptions of administrative law, including reason-giving, transparency, and individualised assessment, while simultaneously obscuring discretionary judgment behind technical design choices. This dynamic reinforces concerns that discretion, when coupled with technological opacity, may evade the safeguards traditionally relied upon to constrain administrative power^[19].

Accordingly, algorithmic discretion is treated here as a structural extension of discretionary governance rather than as a discrete emergency regime. Its inclusion alongside pandemic and wartime examples serves to illustrate the long-term implications of crisis-induced discretion, particularly the risk that extraordinary governance logics become embedded within routine administrative processes.

This framing preserves conceptual coherence by situating algorithmic systems within the broader trajectory of discretionary normalisation identified in contemporary public administration^[20].

Table 1. Crisis Governance Comparison

Country	Crisis	Policy Type	Discretionary Mechanism	Oversight Strength
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Germany	COVID-19	Statutory emergency law	Strong judicial review	Temporarily restricted rights; returned to pre-crisis norms
UK	Welfare, immigration AI	Algorithmic risk tools	Weak FOI scrutiny	Mass false flags, public scandal, and inquiry
Italy	Pandemic regulations	Government/ministerial orders	Weak legislative review	Legal confusion; unchecked rights restrictions
Bulgaria	Pandemic regulations	Government/ministerial orders	Weak legislative review	Legal confusion; unchecked rights restrictions
Ukraine	Invasion response	Martial law, digital mobilization	Mixed executive discretion	Civil liberties curtailed; wartime resilience vs rights erosion

Source: Processed from Various Sources, 2025.

Table 1 compares different national responses to crises, focusing on the legal and policy mechanisms used, oversight levels, and resulting outcomes. Germany maintained strong legal oversight, resulting in a return to normalcy. The UK's use of algorithmic tools led to errors and scandals due to weak scrutiny. Italy and Bulgaria both relied on ministerial orders with limited legislative checks, causing

confusion and unchecked rights restrictions. Ukraine, under invasion, implemented martial law and digital tools with executive discretion, balancing national resilience with civil liberty concerns.

Critical inquiry shows that discretion morphs into a default governance mode when statutory safeguards falter. AI systems amplify this risk, they entrench bias and obscure decision-making in “black box” models. Oversight structures, judicial, parliamentary, or automated, lag behind evolving technologies, allowing unchecked administrative control.

Emergency powers, while often necessary to ensure swift and effective governance in times of crisis, carry the inherent risk of distorting the institutional balance fundamental to democratic systems^[21]. Their short-term utility must be weighed against the long-term consequences they impose on legal accountability and institutional legitimacy. The legal design of emergency frameworks requires careful attention to ensure they do not create permanent exceptions under the guise of temporary necessity. Legal criteria for invoking discretionary powers must be narrowly tailored, specifying not only the scope and triggering conditions but also the mechanisms for oversight and revocation. In jurisdictions where emergency declarations were not subject to time-bound review or parliamentary renewal, executive discretion often persisted even after the underlying crisis had subsided^[22].

Judicial institutions fulfil an indispensable role in upholding democratic constraints on discretion.

However, their effectiveness depends on both structural independence and procedural agility. During the COVID-19 pandemic, courts in several democracies struggled to respond quickly enough to rapidly evolving administrative actions, leading to delayed justice or non-review at critical junctures^[23]. To remedy this, judicial systems must be empowered with not only the authority but also the institutional capacity to offer real-time scrutiny of executive decisions, especially when those decisions impact fundamental rights.

The incorporation of algorithmic governance tools further complicates this landscape, many governments have turned to automated decision-making systems for tasks ranging from contact tracing to welfare allocation. While these tools can enhance efficiency, they often operate without adequate transparency or mechanisms for redress. Affected individuals may not understand how or why

decisions are made, and avenues for appeal are frequently absent^[24].

Thus, legal reforms must mandate algorithmic transparency, auditability, and procedural fairness^[25]. Ensuring that digital discretion is not exempt from the principles of administrative justice.

Public participation, another cornerstone of democratic governance, also tends to be marginalized during crises. Accelerated decision-making procedures often bypass traditional consultative mechanisms, excluding civil society actors from deliberative processes. Yet it is precisely during such periods that public engagement is most vital, for legitimizing emergency actions, fostering compliance, and surfacing unintended consequences^[26]. Strengthening participatory infrastructures, even under constrained conditions, should therefore be a key component of democratic resilience.

Ultimately, the expansion of administrative discretion in response to crises demands more than procedural safeguards. It calls for an ongoing recalibration of institutional arrangements that ensures adaptability without forsaking accountability. Democracies must be capable of responding swiftly to emergencies without permitting the normalization of exceptional governance. This requires legal systems to evolve alongside technological and political realities, ensuring that discretion remains a tool of reasoned governance, not a shortcut to unaccountable authority.

3. Crisis Governance and the Expansion of Discretion: Case Studies and Comparative Analysis

Administrative discretion during crises emerges as both a necessary tool and a potential vehicle for entrenched executive power. A critical lens requires us to assess not just how discretion is exercised, but who defines its boundaries, and what mechanisms limit its use post-crisis. Comparing cases across countries reveals a nuanced landscape of formal emergency powers, decentralized administrative practices, and algorithmic governance, each with its distinct risks and oversight challenges.

Before turning to the comparative case studies, it is necessary to clarify how the nature of the crisis itself reshapes the scope, justification, and limits of administrative discretion. Public health emergencies, armed conflict, and

migration-related crises differ not only in intensity but also in the types of rights affected, the expected duration of extraordinary measures, and the institutional standards of oversight deemed acceptable^[27]. Treating these contexts as functionally equivalent risks obscures the specific legal and constitutional logics that govern discretionary authority in each case.

In pandemic governance, administrative discretion is typically exercised through population-wide regulatory measures, including restrictions on movement, assembly, economic activity, and private life.

These measures are generally justified by epidemiological necessity and scientific uncertainty, and they are expected to be temporary, reversible, and subject to continuous reassessment as public health conditions evolve.

Oversight mechanisms in this context tend to emphasise proportionality, evidence-based decision-making, and periodic parliamentary or judicial review^[28].

Wartime governance, by contrast, operates under a fundamentally different constitutional paradigm. Armed conflict is characterised by indeterminate duration, existential threat, and heightened security imperatives, which often justify deeper and more sustained limitations on political rights, freedom of expression, property rights, and personal liberty. In such contexts, administrative discretion is frequently embedded within constitutional or statutory martial law regimes, where oversight expectations are reduced and judicial review may remain formally available but practically constrained by operational realities^[29].

Migration governance represents a third and distinct category.

While not always framed as an emergency in constitutional terms, migration crises often generate prolonged states of heightened administrative discretion affecting a specific and politically vulnerable population. The rights most directly implicated include access to asylum procedures, due process guarantees, equality before the law, and protection against refoulement.

Oversight mechanisms in this domain are frequently fragmented, shared between national and supranational actors, and complicated by operational delegation to agencies or digital systems, which can diffuse accountability and weaken effective remedies^[30].

The comparative analysis that follows, therefore, applies a common evaluative framework, legality, proportionality, accountability, and democratic oversight, while remaining attentive to these crisis-specific distinctions^[31].

The purpose is not to equate the normative permissibility of discretionary measures across different emergency contexts, but to assess whether, within each setting, administrative discretion remains legally bounded, institutionally supervised, and resistant to normalization beyond its justificatory moment. European states, Germany, Italy, the United Kingdom, and Ukraine provide contrasting models of legal containment during the COVID-19 crisis.

Germany relied on formal amendments to the Infection Protection Act (IfSG), grounding exceptional powers in statutory law and reinforcing parliamentary oversight via revisions in November 2020 that mandated Bundestag approval for emergency declarations^[32]. Conversely, Italy adopted a patchwork of decree-laws, ministerial orders, and ordinances; 15 decree-laws, 37 regional ordinances, and 16 prime ministerial decrees between February and July 2020 created a dense ecosystem of executive regulation, largely bypassing Parliament^[33].

The UK deployed the Coronavirus Act 2020, with a two-year expiration and ministerial discretion to extend provisions by six months, but parliamentary scrutiny was uneven and criticised as insufficient by civil rights groups^[34].

Ukraine, under the pressure of a full-scale military invasion in 2022, implemented martial law through constitutional provisions and adopted executive decrees enabling mass mobilization and digital conscription; oversight mechanisms were limited due to wartime exigencies^[35].

Table 2. Comparative Legal Responses to Crisis Governance in Europe states

Country	Legal Basis for Emergency Powers	Scale & Diversity of Measures	Strength of Oversight Mechanisms	Key Challenge
Germany	Amended IfSG + clear Bundestag approval pathways	Defined restrictions by incidence	Strong judicial and parliamentary control	Risk of marginal executive overreach via BLK dominance

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Italy	Sovereign decrees + ordinances via civil protection code	National, regional, municipal mix	Weak legislative review; judiciary reactive	Decentralised conflict & legal ambiguity (TAR interventions)
UK	Coronavirus Act 2020 + Civil Contingencies Act 2004	Broad health, social limits	Six-month renewal; passive oversight	Vague restrictions; uneven enforcement across nations
Ukraine	Constitutional martial law provisions + executive decrees	National-level digital and civil enforcement	Emergency-centered executive control; limited wartime scrutiny	Balancing civil liberties with urgent defense needs

Source: Processed from Various Sources, 2025.

Table 2 highlights different legal mechanisms used by European countries and Ukraine during major crises. Germany emphasized statutory clarity and parliamentary checks, maintaining judicial oversight. Italy implemented a fragmented set of decrees, generating regulatory ambiguity and regional conflict. The UK enacted broad emergency legislation with insufficient scrutiny, resulting in uneven application. Ukraine's martial law response prioritized rapid mobilization and civil defense under constitutional frameworks, though it limited rights oversight due to the severity of conflict conditions. Together, these cases show a spectrum of balancing emergency power with rule-of-law protections under democratic pressure.

In Italy, regional autonomy complicated the crisis response, and non-specific wording in Decree-Law No. 6/2020 led to regional "competent authorities" issuing divergent measures^[36]. Courts (e.g., TAR Ancona and TAR Catanzaro) frequently intervened to correct both overly lenient and excessively strict local rules, illustrating the tension between speed and consistency in crisis governance^[37]. This decentralised approach highlights the risk of legal

fragmentation when discretion operates without unified guidance. Italian public law scholarship, by contrast, has been markedly more critical of emergency governance practices adopted during the COVID-19 pandemic. Legal commentators have pointed to the extensive use of decree-laws, prime ministerial decrees, and administrative circulars as evidence of an imbalance between executive expediency and parliamentary deliberation. Italian administrative lawyers have argued that the proliferation of soft-law instruments and fragmented regional measures weakened legal certainty and blurred the constitutional boundaries of administrative discretion, generating a “permanent emergency” logic within ordinary governance structures^[38].

The UK’s reliance on the Coronavirus Act granted expansive administrative discretion across public life, from policing to funerals. The six-month renewal cycle was a formal check, but Commons engagement was criticized as perfunctory, and enforcement discrepancies arose, especially across devolved administrations^[39]. The ambiguous concept of “reasonable excuse” during lockdown enforcement fueled inconsistent and potentially discriminatory applications^[40]. In the United Kingdom, the literature on constitutional and administrative law has focused on the erosion of parliamentary scrutiny and the expansion of executive discretion through broad statutory delegations. British scholars have questioned whether traditional doctrines of parliamentary sovereignty and ministerial accountability remain effective safeguards when emergency legislation enables wide administrative latitude with limited ex ante control. Particular concern has been expressed regarding the reliance on secondary legislation and guidance, which often escaped meaningful judicial or parliamentary examination during the pandemic^[41].

Germany’s model, though more legally anchored, still faced oversight concerns. Decision-making through the “Bund-Länder-Konferenz” (conference of federal and state leaders) bypassed legislative debates. While subsequent amendments improved accountability^[42], Constitutional scholars warned that such executive-dominated routines risk normalization beyond the crisis^[43]. In Germany, administrative law theory has long emphasized the binding force of proportionality, legal certainty, and judicial review as structural limits on administrative discretion. German scholars have highlighted that even under emergency legislation, discretionary powers remain subject to strict

constitutional scrutiny, particularly through the Federal Constitutional Court's jurisprudence on fundamental rights and parliamentary responsibility^[44].

In Ukraine, the legal response to the 2022 Russian invasion was shaped by the Constitution and the Law on the Legal Regime of Martial Law. Presidential decrees, ratified by the Verkhovna Rada, enabled sweeping measures, including curfews, property requisitions, and limitations on freedom of movement and expression^[45]. Executive power expanded to ensure territorial defense, while digital platforms such as Diia were adapted for military summonses, aid distribution, and information dissemination^[46]. Unlike the fragmented or parliamentary-led approaches seen in Western Europe, Ukraine's wartime governance prioritized executive centralization over deliberative oversight. Ukrainian legal scholarship situates administrative discretion within the exceptional constitutional context of martial law and national survival. Domestic analyses emphasize that wartime governance necessarily prioritizes executive coordination and rapid decision-making, but they also warn against the long-term normalization of emergency practices. Ukrainian scholars have emphasized the importance of post-war legal review and institutional restoration to prevent discretionary powers exercised under martial law from permanently eroding constitutional guarantees and democratic accountability^[47].

Although some judicial review mechanisms remained technically in place, martial law conditions limited their accessibility and efficacy, especially in frontline or occupied areas. Human rights groups have flagged concerns over press restrictions, indefinite detentions, and unclear legal boundaries for emergency actions^[48]. However, many of these constraints have been defended by Ukrainian authorities as temporary and essential for national survival^[49]. Ukraine's case demonstrates the acute trade-offs in legal governance under existential threat, namely, the recalibration of civil liberties to accommodate rapid defense mobilization and institutional resilience in wartime.

Beyond pandemic regulation, migration governance under heightened discretion, such as through algorithmic processes, demonstrates another dimension. In Greece, EUAA officials apply significant operational discretion in asylum processing without corresponding legal clarity or oversight^[50]. Outside Europe, the U.S. employed Title 42 during the pandemic, an obscure public-health law, to fast-track expulsions without judicial scrutiny^[51]. The Biden administration's

use of parole and CBP One appointments reflects executive flexibility, but also underscores administrative discretion's politics, discretion as both control and legitimacy driver in migration reform^[52].

The comparative assessment of national emergency responses must also be situated within the broader legal framework of the European Union, which increasingly shapes how Member States design, justify, and implement crisis measures. Although emergency powers remain formally within national competence, EU law provides a supranational normative environment that constrains administrative discretion through fundamental rights protection, rule-of-law supervision, and regulatory coordination^[53]. National emergency measures adopted during the COVID-19 pandemic, therefore, did not operate in a purely domestic legal vacuum, but interacted continuously with EU constitutional principles, including proportionality, legal certainty, non-discrimination, and effective judicial protection.

In pandemic governance, EU law influenced national discretion both directly and indirectly. While health policy largely remains within Member State competence, emergency restrictions affecting free movement, data protection, and economic activity were subject to EU legal standards and coordination mechanisms. The EU Charter of Fundamental Rights and the jurisprudence of the Court of Justice of the European Union establish binding limits on the permissibility of rights restrictions, even in emergency conditions^[54]. EU-level initiatives, such as joint procurement, digital COVID certification, and regulatory flexibility, encouraged rapid administrative implementation, often reinforcing executive reliance on administrative discretion at the national level.

The migration cases examined in this section further illustrate the relevance of EU law to discretionary governance. In Greece, the operational discretion exercised by EUAA officials occurs within a shared EU asylum system that formally harmonises procedures while allowing significant flexibility in implementation. This hybrid governance structure diffuses accountability between national authorities and EU bodies, complicating judicial review and blurring responsibility for rights-affecting decisions. As a result, administrative discretion in migration governance is shaped not only by domestic emergency rationales, but also by the structural design of EU regulatory delegation and shared implementation^[55].

These dynamics demonstrate that administrative discretion in Europe is increasingly co-produced through national and supranational legal orders. The expansion of discretion during crises must therefore be understood as a multi-level phenomenon, in which EU law simultaneously constrains, legitimises, and, in some cases, indirectly amplifies discretionary authority exercised by national administrations.

Engagement with national administrative and constitutional law scholarship further deepens this comparative analysis. In Germany, legal doctrine has consistently emphasised proportionality, legal certainty, and judicial review as core limits on administrative discretion, even under emergency legislation, with particular attention to the jurisprudence of the Federal Constitutional Court^[56]. Italian public law scholarship has been more openly critical, highlighting how decree-based governance and soft-law proliferation weakened parliamentary deliberation and fostered a logic of permanent emergency^[57]. In the United Kingdom, scholars have questioned whether parliamentary sovereignty and ministerial accountability provide sufficient safeguards when broad statutory delegations enable extensive executive discretion with limited *ex ante* control^[58]. Ukrainian legal scholarship, shaped by the experience of martial law, recognises the necessity of executive centralisation during wartime, while simultaneously warning against the long-term normalisation of emergency practices and emphasising the need for post-war constitutional restoration^[59].

Engaging with these doctrinal debates demonstrates that the challenges associated with discretionary governance are not merely empirical or institutional, but deeply embedded in national constitutional cultures and legal traditions. The extent to which administrative discretion is accepted, contested, or constrained reflects not only the intensity of crisis, but also enduring legal understandings of authority, legality, and institutional balance.

These findings suggest that crises do not simply suspend ordinary governance; they recalibrate it. Exceptional measures introduced under conditions of urgency, whether health decrees, migration protocols, or algorithmic systems, often persist beyond their original context, blurring the boundary between exceptional and ordinary administrative practice.

To prevent such entrenchment, legal frameworks must provide not only clear authorisations but also mechanisms for structured parliamentary debate, judicial

control, and mandatory post-crisis evaluation.

Ultimately, democratic governance under conditions of emergency cannot be assessed solely by the effectiveness of executive responses. Its legitimacy depends on whether discretionary measures can be justified, reviewed, and reversed within a constitutional framework that protects fundamental rights and sustains institutional checks.

4. Risks, Challenges, and Normative Implications for Democratic Governance

The rapid and expansive use of administrative discretion in crisis governance exposes democratic systems to significant risks that challenge foundational principles such as the rule of law, separation of powers, transparency, and public accountability. While discretion is often indispensable for effective emergency responses, the critical issue lies in the scope, duration, and control of such powers once the immediate crisis subsides. Comparative evidence from multiple jurisdictions over the last five years highlights recurring patterns of democratic strain and normative dilemmas that demand rigorous scrutiny.

One of the most pressing risks is the erosion of legal certainty, in countries like Italy and Spain, the proliferation of emergency decrees and administrative orders with overlapping or vague mandates created an environment where citizens and lower administrative bodies faced uncertainty about applicable rules. For example, Italy's extensive use of decrees (over 30 between March and September 2020) created conflicts between national and regional authorities, with courts often resolving disputes reactively rather than proactively. This ambiguity weakens trust in the legal system and can lead to arbitrary or uneven enforcement, undermining democratic legitimacy^[60].

Another major challenge is the weakening of parliamentary oversight. In the United Kingdom, the Coronavirus Act 2020 initially granted broad powers to the executive with limited initial parliamentary scrutiny. Although provisions for six-month renewals existed, parliamentary engagement was often perfunctory. Civil liberties organizations warned that this lack of robust oversight risked executive dominance, effectively sidelining democratic deliberation during an extended emergency period^[61]. Similarly, Hungary's state of emergency laws

allowed the government to rule by decree for extended periods, effectively suspending democratic controls^[62].

The judiciary's role as a check has also faced limitations, in many jurisdictions, courts delayed or narrowly interpreted challenges against emergency measures, citing deference to executive necessity. This judicial restraint, while sometimes justified by the exceptional nature of crises, raises normative questions about the judiciary's role in safeguarding constitutional rights and preventing executive overreach^[63]. The balance between protecting public health and security and preserving fundamental rights remains fragile. Moreover, the rise of algorithmic decision-making in crisis governance introduces a new dimension of opacity and accountability challenges. In the United States and the United Kingdom, government agencies increasingly use AI systems for immigration enforcement, welfare eligibility, and risk assessments. These systems often operate with little transparency or possibility for meaningful public contestation, embedding discretion within "black box" algorithms^[64]. For instance, a recent UK Department for Work and Pensions (DWP) algorithm wrongly flagged 200,000 welfare claims for investigation, disproportionately affecting marginalized groups^[65]. This raises normative concerns about bias, fairness, and due process in administrative discretion. The following figure illustrates the comparative extent of emergency powers' impacts on democratic institutions across selected countries, based on an index constructed by the Democracy and Governance Research Center. The index aggregates parliamentary oversight strength, judicial review frequency, and civil liberties indices during pandemic governance.

Figure 1. Impact of Emergency Powers on Democratic Institutions (2023)

Source: Democracy and Governance Research Center (DGRC)^[66]; Freedom House Reports (2023)^[67]; Venice Commission Opinions^[68]; and Ukrainian Government Decrees (2022–2024)^[69].

Figure 1 illustrates how five countries, Germany, Italy, the United Kingdom, Hungary, and Ukraine, have managed the balance between emergency governance and democratic safeguards. Germany stands out with the highest aggregate score, reflecting strong parliamentary oversight, frequent judicial review, and robust protection of civil liberties, all of which indicate a resilient democratic framework even during crises. In contrast, Hungary scores the lowest, revealing significant democratic erosion due to weak institutional checks and

limited protection of individual rights.

Ukraine, positioned between Italy and Hungary, shows a more complex picture, with an aggregate score of 12. Ukraine's lower performance, especially in parliamentary oversight, is largely influenced by the imposition of martial law during wartime, which has restricted legislative scrutiny and suspended elections. Nevertheless, moderate judicial activity and partial civil liberties protections suggest that, despite the pressures of war, Ukraine retains essential democratic functions. This indicates that while emergency powers have certainly impacted Ukraine's institutional balance, they have not completely undermined its commitment to reform and legal accountability. The overall results demonstrate that countries with established and functioning democratic institutions were better equipped to maintain democratic norms, whereas those facing structural or external challenges experienced deeper disruptions.

A significant normative implication is the risk of "emergency creep", whereby temporary powers become embedded within routine governance structures. This phenomenon undermines the principle that exceptions should be strictly time-limited and transparently justified. Legal scholars argue that without clear sunset clauses and institutionalized review, emergency discretion risks eroding the separation of powers and entrenching executive dominance^[70]. The 2021 European Commission Rule of Law report highlighted that states with weak emergency law frameworks exhibited prolonged executive control with minimal parliamentary input^[71].

The European Union also fulfils a critical role in the normative assessment of emergency governance through its rule-of-law monitoring and supervisory mechanisms. Annual Rule of Law Reports, infringement procedures, and opinions of advisory bodies such as the Venice Commission function as post hoc accountability tools that evaluate the legality and proportionality of emergency measures adopted by Member States^[72]. These mechanisms have been particularly salient in assessing prolonged emergency regimes, executive decree governance, and restrictions on judicial independence introduced during the COVID-19 pandemic.

However, EU oversight operates primarily through ex post evaluation and political pressure rather than direct intervention during emergencies. While this model respects Member State autonomy, it also reveals structural limitations in

the EU's capacity to prevent the normalization of discretionary governance in real time^[73]. The gap between emergency implementation and subsequent rule-of-law assessment allows expansive administrative practices to consolidate before meaningful supranational scrutiny occurs. This temporal mismatch raises normative concerns about the effectiveness of EU supervision in safeguarding democratic accountability during fast-moving crises.

At the same time, EU digital governance initiatives, including data protection enforcement, AI regulation, and interoperability frameworks, introduce new layers of legal control over algorithmic discretion. The emerging EU regulatory approach to automated decision-making seeks to subject digital administration to transparency, accountability, and risk-based oversight. These developments underscore the growing importance of EU law in shaping not only traditional emergency measures but also the technological infrastructures through which discretionary power is exercised and stabilized^[74].

A comprehensive evaluation of emergency governance must consider not only the functional outcomes of discretionary measures but also how such measures recalibrate the institutional dynamics of democratic systems. The normative dimension of this recalibration raises urgent questions about legitimacy, transparency, and accountability. When discretionary authority expands in response to crises, it often alters the balance between executive efficiency and democratic deliberation. This transformation challenges traditional constitutional assumptions about separated powers, legal predictability, and citizen engagement.

One of the central legal dilemmas in this context is how to ensure that frameworks for emergency discretion remain agile yet anchored in principles of accountability. Many jurisdictions still lack clear legal thresholds that differentiate between ordinary and exceptional governance. The experience of France during the COVID-19 pandemic, for example, revealed the tendency of governments to bypass regular legislative channels by relying heavily on decree powers, without sufficient public debate or parliamentary renewal^[75]. To mitigate such democratic drift, legal reforms should incorporate narrowly tailored conditions for the invocation of emergency powers, explicit time limits, and mandatory review mechanisms that require periodic legislative authorization for their continuation^[76].

Judicial oversight is equally vital in maintaining the legitimacy of discretionary action. However, in several cases, including Hungary and Poland, executive dominance over the judiciary has impaired the courts' ability to function as independent checks on emergency rule. The erosion of judicial independence in these contexts highlights the need for robust institutional safeguards that ensure timely and impartial review of discretionary decisions^[77]. Moreover, the judiciary must be equipped with both procedural and technical competence to scrutinize newer forms of governance, particularly those involving algorithmic systems or automated decision-making processes.

Algorithmic discretion presents a new frontier in administrative law, complicating efforts to maintain transparency and individual rights. Digital tools used in health surveillance, welfare allocation, and migration control are often designed and deployed without public consultation or clear avenues for redress. This opacity undermines due process and introduces structural risks of discrimination and exclusion. Scholars have increasingly called for the establishment of AI accountability frameworks that include mandatory disclosure of algorithmic logic, data provenance, and human-in-the-loop review mechanisms^[78]. Such frameworks are crucial for ensuring that algorithmic decisions remain contestable and subject to democratic norms.

Civil society participation is another key component of democratic resilience under conditions of expanded discretion. Crises frequently justify the acceleration of decision-making, often sidelining public consultations or stakeholder engagement. Yet the absence of participatory mechanisms undermines social legitimacy and weakens the social contract. Examples from New Zealand and Canada demonstrate that it is possible to maintain consultative channels even during emergency governance, through virtual town halls, legislative transparency portals, and inclusive policy dialogues^[79]. These practices not only increase trust but also diversify the knowledge base upon which discretionary decisions are made.

The governance challenges posed by administrative discretion during emergencies cannot be addressed solely through doctrinal refinement. They require intentional institutional design that emphasizes procedural integrity, public accountability, and long-term adaptability.

The rapid normalization of extraordinary powers must be countered by built-in

legal restraints, periodic evaluations, and meaningful democratic engagement. Without these safeguards, the exercise of discretion, however well-intentioned, risks becoming unmoored from the constitutional principles it is meant to serve.

5. Conclusions

The expanding scope of administrative discretion in crisis governance presents a complex challenge to democratic systems, requiring a careful balance between flexibility and accountability. While discretionary powers are vital for rapid and effective responses during emergencies, their normalization beyond crisis periods risks weakening legal certainty, democratic oversight, and fundamental rights protections.

This paper has shown that the institutional design and political culture of states critically influence how discretion is exercised and controlled. Countries with robust parliamentary engagement, active judicial review, and transparent administrative practices tend to mitigate the risks of overreach more successfully. Conversely, states with weaker oversight mechanisms are prone to democratic erosion, where emergency powers become instruments of executive entrenchment rather than temporary tools.

Moving forward, it is essential to reimagine the legal frameworks governing discretionary authority, embedding clear limits, mandatory review processes, and sunset clauses to prevent “emergency creep.” Integrating algorithmic governance with explicit accountability measures is equally crucial to safeguard fairness and transparency in an increasingly digital administrative landscape.

Democratic resilience depends not only on institutional checks but also on fostering meaningful public participation, even in times of crisis, to sustain legitimacy and trust. Ultimately, managing the tension between administrative discretion and democratic principles requires continuous critical reflection, adaptive governance, and an unwavering commitment to the rule of law.

Further empirical and comparative research should explore how different governance models can reconcile emergency responsiveness with enduring democratic safeguards, guiding policy reforms that strengthen public administration without compromising constitutional values.

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