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# States of Emergency, Simultaneous Overreach and Underreach and the COVID-19 Pan(dem)ic

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## Abstract

Previous research has neglected how repeated declarations of states of emergency (SsoE) in response to the same emergency may combine with executive overreach and underreach within a single jurisdiction, undermining the authority of the SsoE as a legal institution and increasing the vulnerability of the constitutional system as a result. This article examines how decision-makers' commitment to a culture of justification is central to avoiding emergency mismanagement via underreach, overreach or their combination. The simultaneous instances of executive overreach and underreach as emergency management failures are studied via the Slovak case, which was celebrated for its initial response to the COVID-19 pandemic but castigated for its failure to contain the subsequent waves. The analysis of the legal framework of the SsoE and the justifications for SsoE declarations uncovers the lack of justifications for the patterns of simultaneous executive underreach and overreach, underscoring the elusiveness of these categories. The limited justifications for the decisions demonstrated by the "government in panic" point to the undermining of the SsoE as a legal institution. The article concludes with highlighting how leaders' role conceptions as democratic emergency managers might be necessary to sustain the authority of the SsoE.

**Keywords:** COVID-19 pandemic; culture of justification; executive overreach and executive underreach; Slovakia; states of emergency

## I. Introduction<sup>1</sup>

In May 2023, the World Health Organization (WHO) declared the end of the global health emergency triggered by the COVID-19 pandemic. The emergency is replaced by a new normality,<sup>2</sup> with the disease continuing to claim lives. The tragedies caused by the pandemic underscore the need to improve governing institutions' and actors' risk preparedness.<sup>3</sup> Yet, even with the data and experiences generated by the pandemic, a blueprint for political leaders' use of formal powers to reduce the harms created by an invisible virus is missing.<sup>4</sup>

<sup>1</sup> All online sources were accessible as of 30 August 2023.

<sup>2</sup> See F Paddeu and M Waibel, "The Final Act: Exploring the End of Pandemics" (2020) 114 *American Journal of International Law* 698, 706.

<sup>3</sup> D Innerarity, "Political Decision-Making in a Pandemic" in G Delanty (ed.), *Pandemics, Politics, and Society* (Berlin, De Gruyter 2021).

<sup>4</sup> As Grogan puts it: "In such a complex, polycentric and multifaceted emergency as the global COVID-19 pandemic, a central question was who should be the dominant decision-maker, and how should decisions be made." J Grogan, "COVID-19, the Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis" (2022) 14 *Hague Journal on the Rule of Law* 349, 352.

(Positive) law, despite being one of the “most important nonpharmaceutical treatments”<sup>5</sup> of the pandemic, does not provide such a blueprint, because its provisions are contested.<sup>6</sup> One of the positive law measures invoked in response to the pandemic have been states of emergency (SsoE). As with all major legal institutions, SsoE carry a “communicative”<sup>7</sup> or “symbolic” dimension, pointing to the urgent need to act<sup>8</sup> despite the discomfort that it might trigger. SsoE might have been observed in various regime types, “illustrating the surface similarities between emergency measures imposed across different regimes”.<sup>9</sup> They have been defended as enabling the government temporarily to take prompt action.<sup>10</sup> Yet, the risks of abuse have been articulated with equal frequency and even deemed inevitable,<sup>11</sup> not least due to increased proneness towards othering<sup>12</sup> and blame attribution to vulnerable segments of the population.<sup>13</sup> For some political leaders, the decision to declare SsoE in the COVID-19 context was driven more by “political attractiveness of gaining substantial discretionary power” than by the effort to address the causes of the emergency.<sup>14</sup> In other words, SsoE may be abused by illiberal leaders who intend to attain power and escape accountability via centralising decision-making practices under the pretext of responding to the emergency.<sup>15</sup> Another risk is that measures enacted by democratic leaders add to a “transnational constitutional pandemic”<sup>16</sup> in the name of effectiveness; they create precedents of misuse of legal regulation in the name of “higher goals” in future, non-pandemic contexts.

Questions of governance and political leadership are central to evaluating the impacts of the SsoE on risk preparedness and capacity to uphold societal well-being.<sup>17</sup> Yet, they have largely been omitted from more doctrinal studies of emergencies.<sup>18</sup> This article

<sup>5</sup> CA Heimer and C Davis, “Good Law to Fight Bad Bugs: Legal Responses to Epidemics” (2022) 18 Annual Review of Law and Social Science 1, 19 and references therein.

<sup>6</sup> PW Kahn, “Democracy and the Obligations of Care: A Demos Worthy of Sacrifice” in MP Maduro and PW Kahn (eds), *Democracy in Times of Pandemic: Different Futures Imagined* (Cambridge, Cambridge University Press 2020) pp 198–200.

<sup>7</sup> For an early account of the significance of public communication, with reference to a broader range of actors (including media), see S Chakraborty, “How Risk Perceptions, Not Evidence, Have Driven Harmful Policies on COVID-19” (2020) 11 European Journal of Risk Regulation 236, 237–38.

<sup>8</sup> A Greene, *Emergency Powers in a Time of Pandemic* (Bristol, Bristol University Press 2020) p 9.

<sup>9</sup> R Uitz, “Constitutional Practices in Times ‘After Liberty’” in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Abingdon-on-Thames, Routledge 2021) pp 451–52.

<sup>10</sup> L Gruszczynski, M Zatoński and M McKee, “Do Regulations Matter in Fighting the COVID-19 Pandemic? Lessons from Poland” (2021) 12 European Journal of Risk Regulation 739.

<sup>11</sup> M Kneuer and S Wurster, “Democratic Health in the Corona Pandemic. The Corona Pandemic as a Trigger or Amplifier of Democratic Erosion or Autocratization?” (2022) 16 Zeitschrift für Vergleichende Politikwissenschaft 615, 616.

<sup>12</sup> S Wamsler et al, “The Pandemic and the Question of National Belonging: Exposure to Covid-19 Threat and Conceptions of Nationhood” (2023) 62 European Journal of Political Research 510.

<sup>13</sup> O Gross, “Emergency’s Challenges” in R Albert and Y Roznai (eds), *Constitutionalism Under Extreme Conditions: Law, Emergency, Exception* (Berlin, Springer 2020) pp 439–43.

<sup>14</sup> C Bjørnskov and S Voigt, “This Time Is Different? On the Use of Emergency Measures during the Corona Pandemic” (2022) 54 European Journal of Law and Economics 63, 74.

<sup>15</sup> P Guasti and L Buštková, “Pandemic Power Grab” (2022) 38 East European Politics 529; K Kovács, “The COVID-19 Pandemic: A Pretext for Expanding Power in Hungary” in J Grogan and A Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Abingdon-on-Thames, Routledge 2022).

<sup>16</sup> S Thomson and EC Ip, “COVID-19 Emergency Measures and the Impending Authoritarian Pandemic” (2020) 7 Journal of Law and the Biosciences lsa064, 32.

<sup>17</sup> Tellingly, the first chapter of an early collection on the pandemic discusses the “crisis of democratic leadership” as part of a “crisis of democratic governance” in representative democracies. N Walker, “The Crisis of Democratic Leadership in Times of Pandemic” in MP Maduro and PW Kahn (eds), *Democracy in Times of Pandemic: Different Futures Imagined* (Cambridge, Cambridge University Press 2020).

<sup>18</sup> Eg J Ferejohn and P Pasquino, “The Law of the Exception: A Typology of Emergency Powers” (2004) 2 International Journal of Constitutional Law 210.

contributes to filling this gap by critically engaging with the concepts of “executive underreach” and “executive overreach”, both of which are influential in studying the connection between leadership and emergencies in the COVID-19 context.<sup>19</sup> Its purpose is to examine the applicability of these executive governance failures with respect to state of emergency (SoE) declarations, subjecting the connection between the political decision to invoke SsoE and executive overreach to critical scrutiny. The article utilises original empirical data from Slovakia, which shifted from a “success story” to a “black sheep” in pandemic management between early 2020 and 2021. The analysis of the justifications of invoking the SsoE in connection with the Slovak executive communication shows that SsoE may combine, in various ways, with *both* executive overreach and executive underreach. This underscores the nature of the SsoE, which alone are empty shells that need to be scrutinised alongside the communication of political leaders who may activate them as a regulatory option. The findings carry lessons for decision-making on SsoE,<sup>20</sup> which are of increasing relevance due to the increased salience of societal emergencies (such as war, climate or the artificial intelligence (AI) revolution).

The article, firstly, critically discusses the concepts of executive overreach and underreach and invites thinking of them in a dynamic manner without a necessary connection to declarations of SSoE (Section II). Secondly, it introduces the Slovak case as a key case of pandemic mismanagement, in which the combination of overreach and underreach, even being triggered by the same decision-makers, raises the question of the utility of these categories (Section III). Thirdly, examining the justifications for particular measures to respond to the pandemic shows how the overlapping categories of underreach and overreach may signal a state of “government in panic”, which damages the SsoE as a legal institution and may complicate the regulation and responses to future emergencies (Section IV). Section V concludes.

## II. States of emergency: the threat of overreach, never underreach?

According to Pozen and Scheppele, excessive or illegitimate use of executive power, known as executive overreach, is not the only governance failure associated with executive responses to COVID-19. The *underuse* of such powers, which they call “executive underreach”, can be equally dangerous. The authors emphasise that the assessment of which executive actions count as under- or overreach is relative to the expectations that stem from the existing legal frameworks. Moreover, they submit that not all failures to manage the emergency should count as underreach, but only “situations where an executive sees a significant threat coming, has access to information about what might mitigate or avert the threat along with the power to set a potentially effective plan in motion, and refuses to pursue such a plan”.<sup>21</sup> Thus, they acknowledge that “a minimal level of state capacity [which they define through authority and institutional resources] is a prerequisite [...] reasonably competent and conscientious attempts to address a problem that turn out to be unsuccessful are not willful failures”.<sup>22</sup> Hence, executive underreach, similarly to overreach, requires a degree of malice, or at least ignorance, by the political leaders. Empirical accounts of overreach (in Hungary) and underreach (in Brazil and the USA) illustrate this argument.<sup>23</sup>

<sup>19</sup> DE Pozen and KL Scheppele, “Executive Underreach, in Pandemics and Otherwise” (2020) 114 *American Journal of International Law* 608.

<sup>20</sup> HP Graver, “Baselining COVID-19: How Do We Assess the Success or Failure of the Responses of Governments to the Pandemic?” in J Grogan and A Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Abingdon-Thames, Routledge 2022) pp 223–24.

<sup>21</sup> Pozen and Scheppele, *supra*, note 19, 610.

<sup>22</sup> *ibid.*, 609.

<sup>23</sup> *ibid.* A similar edited volume chapter by the authors is referred to when it provides additional claims. KL Scheppele and D Pozen, “Executive Overreach and Underreach in the Pandemic” in MP Maduro and PW Kahn (eds), *Democracy in Times of Pandemic: Different Futures Imagined* (Cambridge, Cambridge University Press 2020).

Pozen and Scheppele's account has been invoked in several subsequent studies. For instance, Halmai builds on this work by distinguishing underreach and overreach from "underreaction" and "overreaction". The latter, unlike the former, are not dependent on the leaders' motivations and are evaluated only on output-based indicators.<sup>24</sup> Another similar distinction is between "emergency-affirming violence" and "emergency-denying violence". This dichotomy, more sharply than Pozen and Scheppele's, highlights that (executive) *inaction is a form of action*, a matter of choice with consequences that may include discrimination, grief and suffering.<sup>25</sup> Atiles and Whyte, in a similar approach, refer to "criminally negligent policies" and a "regime of permission".<sup>26</sup>

While this article closely follows Pozen and Scheppele, who launched the debate, all of the above dichotomies raise two key puzzles.<sup>27</sup> Firstly, a consistent pattern might not be visible within a single executive, and so combinations of overreach and underreach may occur. Pozen and Scheppele themselves seem to admit this.<sup>28</sup> Secondly, the threshold they propose for underreach (the cases of Trump and Bolsonaro) is very high, which might cause assessments to endorse executive actions that do not blatantly ignore the emergency but yet fall short of commitments to govern.<sup>29</sup> In Ignatieff's words, "[o]ur resigned tolerance for the failures of leaders follows from what we know about ourselves. We are prone to panic at threats that prove harmless, only to be blind-sided by events we should have foreseen."<sup>30</sup> This, however, might result in overly low demands towards executives, where any action that does not blatantly overstep formal powers and signals some minimum degree of care suffices to free the executive from criticism. The second puzzle is particularly acute in regimes where the executives have declared a SoE. A SoE, which centralises executive powers and amounts to constraining democracy in (at best) the name of long-term protection of lives and the regime's sustainability, seems to exacerbate the dangers of executive overreach but minimise the risks of underreach. Yet, alone it is a constitutional instrument that needs to be filled with concrete practices, and it is shaped by political leaders' capacities to respond to the emergency and the societal authority of the legal regulations.<sup>31</sup> Recognising this "empty shell" feature of the SoE invites a more nuanced account of how executive action during a SoE relates to overreach and underreach. Studying regimes in which SsoE were declared but which do not display a clear trajectory of overreach or underreach helps to build such an account.

The utility of such a nuanced account is underscored by Jan-Werner Müller's criticism of Pozen and Scheppele's reading of Trump's executive underreach. In his view, "Trump did display plenty of his authoritarian instincts; he simply had no plan and, at least on this

<sup>24</sup> G Halmai, "The Pandemic and Constitutionalism" (2022) 4 *Jus Cogens* 303, 309.

<sup>25</sup> N Ben-Asher, "The Emergency Next Time" (2022) 18 *Stanford Journal of Civil Rights & Civil Liberties* 51.

<sup>26</sup> J Atiles and D Whyte, "Reproducing Crises: Understanding the Role of Law in the COVID-19 Global Pandemic" (2023) 45 *Law & Policy* 238, 248–49.

<sup>27</sup> Two others not addressed here pertain to "underreach" and "overreach" by actors other than executives and the distinction between negative and positive rights. On the latter, Pozen and Scheppele claim that underreach infringes upon positive rights while overreach violates negative rights (Pozen and Scheppele, *supra*, note 19, 614). However, overreach might also violate positive rights – for example, undermining access to education due to rapid transition to digital learning without supplying pupils from disadvantaged backgrounds with the necessary technical infrastructure.

<sup>28</sup> "[E]xecutive responses to COVID-19 do not reflect a clear pattern of either overreach or underreach in the aggregate"; *ibid.*, 611.

<sup>29</sup> Cf. VC Jackson and Y Dawood (eds), *Constitutionalism and a Right to Effective Government?* (Cambridge, Cambridge University Press 2022).

<sup>30</sup> M Ignatieff, "The Reckoning: Evaluating Democratic Leadership" in MP Maduro and PW Kahn (eds), *Democracy in Times of Pandemic: Different Futures Imagined* (Cambridge, Cambridge University Press 2020) p 90.

<sup>31</sup> J Grogan and A Donald, "Lessons for a 'Post-Pandemic' Future" in J Grogan and A Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Abingdon-on-Thames, Routledge 2022) p 473.

occasion, not enough help [...]. Moreover, [...] the Trump administration [...] continued what it had been doing from day one: de-regulate and, in particular, try to reverse as many of Obama's executive orders as possible."<sup>32</sup> In addition, a SoE was declared in the USA.<sup>33</sup>

The tendency of deregulation could be attributed to Bolsonaro as well. This criticism further underscores the difficulties involved in distinguishing between overreach and underreach. Müller's former challenge is addressed by Pozen and Scheppele in that a leader desiring to centralise their powers but lacking the skills to do so may still engage in executive underreach, which might "foster cynicism and distrust of government, diminish state capacity, exacerbate inequality, and stimulate dangerous or inefficient forms of self-help by private actors".<sup>34</sup> Müller's latter challenge is partially addressed by Pozen and Scheppele's claim that overreach and underreach may be "in many scenarios [...] better conceptualized as overlapping and complementary modes of reactionary governance".<sup>35</sup> However, their examples indicate at best a scenario in which overreach and underreach overlap in *different policy areas*.

Slovakia may pose a challenge for such categorisation. As shown below, the choice of the restrictions (and their later lifting at an arbitrary moment in time) has not been justified by the decision-makers. A long line of social thought has emphasised the necessity of democracies to develop a "culture of justification", which is particularly essential in cases of the enactment and amendment of coercive regulations.<sup>36</sup> While debate continues as to how far deliberative mechanisms need to be incorporated into decision-making for its democratic character to be retained and enhanced,<sup>37</sup> the requirement of justification is a more modest one, as it encompasses one-way communication from the government to the public that might still give ground to an obligation to comply.<sup>38</sup> Yet, its absence is clearly pathological, accompanying both overreach and underreach and undermining the possibility of democratic emergency management. The case of Slovakia illustrates the governance failures surrounding such justificatory emptiness.

### III. Regulations encouraging overreach and underreach: the case of Slovakia

The following analysis is based on three sets of data sources: (1) legislation and Slovak Constitutional Court (SCC) decisions on the SsoE in the COVID-19 context; (2) justifications introduced for activating or prolonging SsoE at cabinet meetings; and (3) voting records on

<sup>32</sup> J-W Müller, "Populism versus Democracy during a Pandemic: Some Preliminary Considerations" in MC Kettmann and K Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19* (Oxford, Hart Publishing 2021) pp 323–24.

<sup>33</sup> Heimer and Davis, *supra*, note 5, 13.

<sup>34</sup> Pozen and Scheppele, *supra*, note 19, 614–15.

<sup>35</sup> *ibid.*, 615.

<sup>36</sup> S Chambers, "Theories of Political Justification" (2010) 5 *Philosophy Compass* 893; M Cohen-Eliya and I Porat, "Proportionality and the Culture of Justification" (2011) 59 *The American Journal of Comparative Law* 463; D Dyzenhaus, "What Is a 'Democratic Culture of Justification'?" in M Hunt, H Hooper and P Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford, Hart Publishing 2015) pp 425–27; C Misak, "A Culture of Justification: The Pragmatist's Epistemic Argument for Democracy" (2008) 5 *Episteme* 94.

<sup>37</sup> Eg A Gutmann, "Democracy, Philosophy, and Justification" in C Koggel (ed), *Moral Issues in Global Perspective - Volume 1: Moral and Political Theory* (2nd edition, Peterborough, ON, Broadview Press 2006); D Seedhouse, *The Case for Democracy in the COVID-19 Pandemic* (London, SAGE 2020).

<sup>38</sup> C Holder, "Justification" in A Besussi (ed), *A Companion to Political Philosophy: Methods, Tools, Topics* (Farnham, Ashgate 2012).

endorsing the cabinet decisions in the National Council. Together, and with awareness of the Slovak societal contexts,<sup>39</sup> the data allow us to trace the justifications offered for utilising the SoE as a regulatory measure in response to the pandemic. As such, it aims to combine the attention to legal frameworks, doctrines and local specifics with the more data-driven analytical approaches that had emerged (mainly) in the USA.<sup>40</sup>

During the early stages of the pandemic, Slovak political leaders embraced the logic of “act now, explain later” and implemented stringent restrictions. This approach enjoyed a cross-party consensus, which is particularly significant due to the general elections having been held at the end of February 2020, when news of overwhelmed healthcare systems in northern Italy began to spread. The elections resulted in the victory of an anti-corruption coalition that was poised to replace the government led by the political party Smer-SD, whose chairman has been embroiled in corruption scandals and resigned two years prior after a murder of an investigative journalist and his fiancée due to the journalist’s investigative work shook the political regime.<sup>41</sup>

Despite some “underlying vulnerabilities” in the region,<sup>42</sup> the change of government<sup>43</sup> makes Slovakia a unique case to analyse. The executive that initially decided on the regulations was rationally motivated *against* overreach, as, by engaging in overreach, it would have strengthened the powers of the opposition that replaced it a few weeks later. Furthermore, while neither the outgoing nor the incoming leaders could be seen as particularly committed to democracy, nor did they represent its outspoken opponents (unlike in neighbouring Hungary and Poland).<sup>44</sup>

Slovak political leaders had the option to declare the SoE. Four SsoE can be introduced by a constitutional act (a type of legislation requiring a three-fifths majority in the Slovak parliament (National Council) to be adopted or amended).<sup>45</sup> One of them, confusingly called “state of emergency” as well (SoE, *núdzový stav*), is reserved for natural disasters including pandemics. This SoE may last a maximum ninety days, after which it can be prolonged for forty more days.<sup>46</sup> In spring 2020, the SoE did not have to be validated by another institution, though the SCC had the competence to review its constitutionality *ex post* upon request from an eligible petitioner.<sup>47</sup>

The outgoing executive promptly declared a SoE on 16 March 2020, only for health professionals, extending it to a general SoE three days later as the first substantial

<sup>39</sup> Cf. P Selznick, “‘Law in Context’ Revisited” (2003) 30 *Journal of Law and Society* 177.

<sup>40</sup> R van Gestel, H-W Micklitz and EL Rubin, “Introduction” in R van Gestel, H-W Micklitz and EL Rubin (eds), *Rethinking Legal Scholarship* (Cambridge, Cambridge University Press 2016).

<sup>41</sup> L Bušítková and P Baboš, “Best in Covid: Populists in the Time of Pandemic” (2020) 8 *Politics and Governance* 496, 502–03; M Pažma and P Harďoš, “Capturing Populist Elements in Mediated Discourse: The Case of the 2020 Slovak Parliamentary Elections” (2023) 9 *Intersections. East European Journal of Society and Politics* 23.

<sup>42</sup> D Bohle and E Eihmanis, “East Central Europe in the COVID-19 Crisis” (2022) 38 *East European Politics* 491, 501–02; T Popic and AD Moise, “Government Responses to the COVID-19 Pandemic in Eastern and Western Europe: The Role of Health, Political and Economic Factors” (2022) 38 *East European Politics* 507.

<sup>43</sup> S Henčeková and Š Drugďa, “Slovakia: Change of Government under COVID-19 Emergency” (*Verfassungsblog*, 22 May 2020) <<https://verfassungsblog.de/slovakia-change-of-government-under-covid-19-emergency/>>.

<sup>44</sup> M Orzechowski, M Schochow and F Steger, “Balancing Public Health and Civil Liberties in Times of Pandemic” (2021) 42 *Journal of Public Health Policy* 145; G Hajnal, I Jeziorska and ÉM Kovács, “Understanding Drivers of Illiberal Entrenchment at Critical Junctures: Institutional Responses to COVID-19 in Hungary and Poland” (2021) 87 *International Review of Administrative Sciences* 612; G Bobba and N Hubé (eds), *Populism and the Politicization of the COVID-19 Crisis in Europe* (London, Palgrave Macmillan 2021) chs 7, 9.

<sup>45</sup> Constitutional Act on State Security at the Time of War, State of War, State of Exception, and State of Emergency No. 227/2002 Coll.

<sup>46</sup> Art 5 sec 2 of the Act.

<sup>47</sup> Art 129 sec 6 of the Constitution.



experience of the regime with the SoE since its establishment in 1993. The SoE gave the executive enhanced powers to restrict certain human rights but did not abolish judicial review options. Despite these aspects, leaders opted for harsh restrictions on the freedom of movement, including a mandatory state quarantine for returnees from abroad,<sup>48</sup> which the SCC later unanimously declared unconstitutional given the violations of human dignity and equal treatment.<sup>49</sup> These early measures have been considered as conducive for generating an “atmosphere of compliance”<sup>50</sup> that helped keep cases low in spring 2020 but was to backfire later.

The mandatory state quarantine is clear-cut executive overreach rather than a conscious “stringency strategy”<sup>51</sup> upon consultation with experts, who were often not taken seriously by decision-makers.<sup>52</sup> Missing is a clear reason for its adoption. With the centralisation of powers out of question due to the looming government change and expert opinions not corroborating the mandatory state quarantine, the option of a “state in panic” remains.<sup>53</sup> In this circumstance, the lack of a “culture of justification” manifests, even beyond the SoE. In fact, the SoE does not *oblige* the executive to take action; it merely enables the exercise of powers if the executive so *chooses*, and it may increase the perception that it can restrict rights more than even the special regime allows (as demonstrated by the invalidation of the mandatory state quarantines by the SCC).

In June 2020, the executive made a U-turn by not prolonging the SoE and lifting virtually all restrictions,<sup>54</sup> with no credible explanation given for this shift. A reason may have been the backlash against executive overreach resulting in human rights violations due to the prior restrictions.<sup>55</sup> Yet, the U-turn resulted even in measures representing limited intrusions into people’s lives (such as social distancing) being determined not to have been required. The communication of key political leaders, notably Prime Minister (PM) Igor Matovič, even after the reintroduction of a SoE on 1 October 2020 due to the exponential rise of cases, did not display consistency and credibility.<sup>56</sup> Matovič even blamed “the people” for the rise of cases instead of accepting that he had erred.<sup>57</sup> At most,

<sup>48</sup> M Steuer, “The Extreme Right as a Defender of Human Rights? Parliamentary Debates on COVID-19 Emergency Legislation in Slovakia” (2022) 11 *Laws* 17.

<sup>49</sup> PL. ÚS 4/2021 (8 December 2021). “[...] isolation outside home environment (in a healthcare facility or other designated facility) amounts to deprivation of personal freedom” (sec 182).

<sup>50</sup> See J Nemeč, I Maly and T Chubarova, “Policy Responses to the COVID-19 Pandemic and Potential Outcomes in Central and Eastern Europe: Comparing the Czech Republic, the Russian Federation, and the Slovak Republic” (2021) 23 *Journal of Comparative Policy Analysis: Research and Practice* 282.

<sup>51</sup> JHC Wong, “Government Emergency Responses During the COVID-19 Pandemic in the Context of Health Emergency and Disaster Risk Management: A Comparative Study” in SXB Zhao et al (eds), *COVID-19 Pandemic, Crisis Responses and the Changing World: Perspectives in Humanities and Social Sciences* (London, Palgrave Macmillan 2021).

<sup>52</sup> See, eg, L d’Andrea and A Declich, “Covid-19 and Science: Italy and Late Modernity” in JN Pieterse, H Lim and H Khondker (eds), *Covid-19 and Governance: Crisis Reveals* (Abingdon-on-Thames, Routledge 2021).

<sup>53</sup> M Steuer, “Slovak Constitutionalism and the COVID-19 Pandemic: The Implications of State Panic” (*IACL-IADC Blog*, 9 April 2020) <<https://blog-iacl-aidc.org/2020-posts/2020/4/9/slovak-constitutionalism-and-the-covid-19-pandemic-the-implications-of-state-panic>>.

<sup>54</sup> D Klimovský, J Nemeč and G Bouckaert, “The COVID-19 Pandemic in the Czech Republic and Slovakia” (2021) 29 *Scientific Papers of the University of Pardubice, Series D: Faculty of Economics and Administration* 1; M Kovanič and M Steuer, “Fighting against COVID-19: With or without Politics?” (2023) 337 *Social Science & Medicine* 116297, 3.

<sup>55</sup> Henčeková and Drugda, *supra*, note 43; Steuer, *supra*, note 53.

<sup>56</sup> J Jalan and A Sen, “Containing a Pandemic with Public Actions and Public Trust: The Kerala Story” (2020) 55 *Indian Economic Review* 105.

<sup>57</sup> J Grędzzińska et al, “Four Cases, the Same Story? The Roles of the Prime Ministers in the V4 Countries during the COVID-19 Crisis” (2022) 18 *Transylvanian Review of Administrative Sciences* 28, 36–39.

the SoE served as an argument to show that the executive was “doing something” and taking the situation seriously.

Nevertheless, the SoE remained a fallback option for political leaders for the months ahead for as long as until May 2021. Because of an ensuing legal dispute on whether the regulation allows for the repeated declaration and subsequent prolongation of SsoE beyond the single forty-day interval, the executive initiated a legislative change of the constitutional act<sup>58</sup> to introduce a new SoE subtype named “pandemic state of emergency”. This SoE explicitly allows indefinite extensions, provided that legislative consent to the prolongation is given within twenty days of the executive decision. As such, and similarly to several other jurisdictions,<sup>59</sup> it could be seen as representing a possibility for overreach, but, counterintuitively, it could equally amount to underreach, as the SoE says little about the executive’s actual intentions and practices in managing and communicating about the emergency.

#### IV. The executive in panic and undermining states of emergency as a legal institution

Was there executive overreach or executive underreach in Slovakia during the SsoE declared due to the COVID-19 pandemic? This section demonstrates that both governance failures have occurred simultaneously, with the measures marked by the absence of coherent justifications for their implementation. Consequently, the SsoE became empty shells with fragile public authority and relevance, since they neither correlated with more effective management of the emergency nor resulted in more justified restrictions.

Some of the measures (particularly the mandatory state quarantine facilities and the quarantining of Roma settlements) point to executive overreach. The initial SoE from March 2020 with a limited scope to healthcare providers was adopted at an extraordinary sitting with an “oral justification” only, lacking any written proposal.<sup>60</sup> Its extension, adopted at the second to last sitting of the outgoing cabinet, contains a written resolution but without any accompanying justification.<sup>61</sup> Also missing is the justification for *ending* the SoE in June 2020<sup>62</sup> and for declaring it again in October 2020, with the initial proposal suggesting a ninety-day period but the final binding version reducing it to forty-five days,<sup>63</sup> ultimately being extended to ninety days in November.<sup>64</sup> These “autumn SSoE” were initiated by the PM himself rather than by the ministries of health or of interior, which have more expert resources to evaluate the social contexts and provide an informed assessment of the need for an SoE.

<sup>58</sup> Act No 414/2020 Coll.

<sup>59</sup> V Anghel and E Jones, “Riders on the Storm: The Politics of Disruption in European Member States during the COVID-19 Pandemic” (2022) 38 East European Politics 551, 562–63.

<sup>60</sup> Government of the Slovak Republic, “Návrh na vyhlásenie núdzového stavu UV-5965/2020 [Proposal to Declare a State of Emergency]” (15 March 2020) <<https://rokovania.gov.sk/RVL/Material/24589/1>>.

<sup>61</sup> Government of the Slovak Republic, “Návrh na rozšírenie núdzového stavu UV-6124/2020 [Proposal to Extend the State of Emergency]” (2020) <<https://rokovania.gov.sk/RVL/Material/24597/1>>.

<sup>62</sup> Government of the Slovak Republic, “Návrh na skončenie núdzového stavu UV-12317/2020 [Proposal to End the State of Emergency]” (2020) <<https://rokovania.gov.sk/RVL/Material/24954/1>>.

<sup>63</sup> Government of the Slovak Republic, “Návrh na vyhlásenie núdzového stavu UV-20941/2020 [Proposal to Declare a State of Emergency]” (2020) <<https://rokovania.gov.sk/RVL/Material/25338/1>>.

<sup>64</sup> Government of the Slovak Republic, “Návrh na zmenu času trvania núdzového stavu UV-24360/2020 [Proposal to Change the Duration of the State of Emergency]” (2020) <<https://rokovania.gov.sk/RVL/Material/25473/1>>.



The initial SoE lasted ninety days and ended in June 2020. The next series of SsoE was not initiated until October 2020, prompted by the rising number of cases. As the situation did not improve before the expiration of the SoE at the end of 2020, the governing coalition decided to amend the legislation, introducing the “pandemic state of emergency” (see Section III above).

The governmental inaction during the summer of 2020 is an example of executive *underreach*. Following Pozen and Scheppele, there was reasonable access to information as well as competences in place to prepare for the next wave of the pandemic (eg by signalling to the population the need to brace for another wave, the increase of hospital capacities, the preparation of alternative effective scenarios for digital education, etc.). Yet, the executive, led by PM Igor Matovič, “went on a summer vacation”<sup>65</sup>: it reneged on its duty to prepare during a “breather” in the summer months for the rise of cases while also alienating a portion of the population that detested the overextension of rights restrictions in the early stages of the pandemic.

In the autumn, some of the stringent measures were reintroduced, and the flagship project of mandatory testing of the whole population – PM Matovič’s own idea – was implemented, contrary to expert advice.<sup>66</sup> This testing, an example of *overreach*, was introduced by the PM with a claim that it alone would suffice to “defeat” the virus.<sup>67</sup> The (expected) failure of the testing to have a noticeable effect on the number of cases may have contributed to further erosion of trust in the executive.<sup>68</sup> Along with this instance of *overreach*, *underreach* simultaneously occurred when schools remained closed despite permission being given to hold various cultural and religious (in practice, mainly Christian) gatherings. Moreover, no strategies to address the needs of pupils from disadvantaged populations were implemented.<sup>69</sup> Executive *overreach* surfaced again via the foray of PM Matovič into supporting the purchase of a large supply of the Russian Sputnik V vaccine; this decision was taken by him unilaterally,<sup>70</sup> disregarding expert advice concerning the ineffectiveness of this vaccine, not to mention the diplomatic repercussions of Slovakia undermining the collaboration on vaccine supplies in the

<sup>65</sup> Scheppele and Pozen (supra, note 23, 39) note that leaders going on holidays during a time of imminent threat is an indicator of executive *underreach*.

<sup>66</sup> E Holt, “COVID-19 Testing in Slovakia” (2021) 21 *The Lancet Infectious Diseases* 32; see also MD Jensen, K Lynggaard and M Kluth, “Comparing 31 European Countries’ Responses to the Covid-19 Crisis” in K Lynggaard, MD Jensen and M Kluth (eds), *Governments’ Responses to the Covid-19 Pandemic in Europe: Navigating the Perfect Storm* (Berlin, Springer 2023) p 461; K Staronova, N Lacková and M Sloboda, “Post-Crisis Emergency Legislation Consolidation: Regulatory Quality Principles for Good Times Only?” (2023) *European Journal of Risk Regulation* doi:10.1017/err.2023.69, 7.

<sup>67</sup> R Ižip, “Pyrrhovo víťazstvo Igora Matoviča, v ktorom stratil to najcennejšie – dôveru [Pyrrhic Victory of Igor Matovič in Which He Lost the Greatest Value – Trust]” (*Trend*, 31 October 2020) <<https://www.trend.sk/nazory-a-komentare/pyrrhovo-vitazstvo-igora-matovica-ktorom-stratil-to-najcennejsie-doveru>>. The PM referred to those (experts, activists, journalists) questioning his decisions in a denigratory manner (“wisdom-shitters”).

<sup>68</sup> In December 2021, the PM claimed that he does not “manage the coronavirus. The coronavirus manages us.” Z Paráková, “Matovič: Bez podpory prezidentky nemám silu pretláčať ďalšie testovanie [Matovič: Without the President’s Support I Have No Strength to Push Further Testing]” (*Správy RTVS*, 7 December 2020) <<https://spravy.rtv.slovakia.sk/2020/12/matovic-bez-podpory-prezidentky-nemam-silu-pretlacat-dalsie-testovanie/>>.

<sup>69</sup> M Steuer, “Slovakia’s Democracy and the COVID-19 Pandemic: When Executive Communication Fails” (*Verfassungsblog*, 26 February 2021) <<https://verfassungsblog.de/slovakias-democracy-and-the-covid-19-pandemic-when-executive-communication-fails/>>.

<sup>70</sup> P Guasti and J Bílek, “The Demand Side of Vaccine Politics and Pandemic Illiberalism” (2022) 38 *East European Politics* 594, 606–07.

European Union (EU) and threatening the quality of immunity-building of its population. Even though this Slovak episode of “departure from well-established risk regulatory principles and frameworks”,<sup>71</sup> leading to Matovič’s resignation due to the widespread disapproval of his actions, is sometimes cited as a reference in support of “institutional guardrails” operating in Slovakia,<sup>72</sup> the SoE was not one of these guardrails; indeed, it allowed simultaneous overreach (the purchase of the Sputnik V vaccines) and underreach (the belated investment into alternative, reliable vaccine types).

Other factors than leaders’ limited role conceptions as democratic emergency managers justifying their choices are likely to have contributed to these failures. For example, the resistance of the opposition, particularly the conspiracy narratives of the extreme right, constrained governmental capacity to implement restrictive measures and induced non-compliance.<sup>73</sup> Nevertheless, an overarching endogenous deficit in relation to measures signalling *both* underreach and overreach is the lack of justifications provided for the decisions and choices made by the executive.<sup>74</sup> This cannot be excused by the “state of panic” in which the executive faced limited information and serious pressure to act. As Greene points out, “the requirement for justification should not be abdicated. [It] need not hamper an expedient response. The necessity of emergency powers must continue to be a live issue not simply at the moment of their enactment but also when the powers are already in existence.”<sup>75</sup>

The justificatory lacunae manifest in the requests for the prolongation of the SoE. Three of these were submitted by the executive to the parliament after the enactment of the amendment of the constitutional act allowing the extension of the SoE provided that the parliament endorses it (Table 1). However, they considerably differ from each other. The first request, approved in January 2021, consists merely of two pages.<sup>76</sup> The executive listed medical conditions, such as the increase of the number of cases during the Christmas holidays and the emergence of new variants of the virus, the overwhelming of hospitals and the need for ventilators. The necessity is justified so that, *among others*, job duty, the mandating of hospitals to prioritise COVID-19 cases as well as restrictions on the freedom of movement can be sustained. The economic mobilisation generated the establishment of emergency medical centres for vaccination of the population.

This brief justification (1) provides only an indicative list of restrictions instead of listing them in detail, leaving the government’s intentions “in the shadows”; (2) indicates concerns regarding the spread of the virus associated with the lack of planning and preparation for alternative scenarios, which was primarily the executive’s duty, and indirectly confirms executive *underreach* during the previous period; and (3) does not

<sup>71</sup> A Alemanno, “Taming COVID-19 by Regulation: An Opportunity for Self-Reflection” (2020) 11 *European Journal of Risk Regulation* 187, 194.

<sup>72</sup> Guasti and Buštková, *supra*, note 15, 543.

<sup>73</sup> M Vavřík and S Qin, “Politicization of Anti-Pandemic Measures in Europe: Cleavage Politics and Divided Publics” in SXB Zhao et al (eds), *Comparative Studies on Pandemic Control Policies and the Resilience of Society* (Berlin, Springer 2023) p 196; on the narratives of the far right, see also Steuer, *supra*, note 48.

<sup>74</sup> Pozen and Scheppele list Sweden as an example where, despite the non-implementation of many restrictions considered legitimate and necessary elsewhere, there was no underreach. They point out that the decisions of the authorities were “all justified in a deliberative fashion – under constraints imposed by the Swedish constitution” (*supra*, note 19, 612).

<sup>75</sup> A Greene, “Emergencies and Illiberalism” in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Abingdon-on-Thames, Routledge 2021) p 568.

<sup>76</sup> National Council of the Slovak Republic, “Návrh vlády na vyslovenie súhlasu NRSR s predĺžením núdzového stavu [Executive Petition for Parliamentary Consent to the Prolongation of the State of Emergency]” <<https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=380>>.

**Table 1.** Summary of selected descriptors of the executive state of emergency (SoE) prolongation requests and their processing by the parliament.

Request no.	Executive approval date	Submission date to parliament	Parliament decision date	Parliament vote (for/against/abstained/not voted) <sup>77</sup>	Document length
1	29 December 2020 <sup>78</sup>	8 January 2021	12 January 2021	83/25/0/0	2 pages
2	5 February 2021 <sup>79</sup>	19 February 2021	26 February 2021	83/35/0/0	6 pages + a 7-page appendix
3	17 March 2021 <sup>80</sup>	31 March 2021	1 April 2021	78/15/3/0	11 pages

Note: The fourth executive prolongation, from 26 April 2021,<sup>81</sup> never made it to the parliament, as the SoE was lifted on 15 May 2021, before the expiration of the twenty-day limit for parliamentary approval. The last pandemic SoE was introduced on 25 November 2021 for ninety days<sup>82</sup> and ended on 22 February 2022.

Source: Author, based on data from the National Council website.

demonstrate the extent to which, for economic mobilisation, the SoE is also necessary (these are two different legal regimes in Slovakia, with economic mobilisation not amounting to a SoE).

In the second request from February 2021,<sup>83</sup> the executive highlights that its resolution on the prolongation of the SoE could have been challenged before the SCC, but it was not. This, in its view, serves as a source for indirect legitimation of the resolution. Next, it expresses its recognition of the “sole constitution-making and legislative body of the Slovak Republic”, as it considers parliamentary scrutiny to be “essential for democracy, essential for the rule of law and for not giving up discussion even in pandemic and crisis times”.<sup>84</sup> Furthermore, the executive refers to the continuously high number of cases, the lack of hospital capacity and the spread of new variants. This is supplemented by more data and references to expertise in epidemiology than in the previous proposal. Thus, the resolution is, according to the executive, an articulation of its “legitimate and rational effort” to address the pandemic. Unlike in the first proposal, there is a brief discussion of

<sup>77</sup> The remaining deputies (out of 150) did not participate at the voting.

<sup>78</sup> Government of the Slovak Republic, “Návrh na predĺženie času trvania núdzového stavu UV-27966/2020 [Proposal to Prolong the State of Emergency]” (2020) <<https://rokovania.gov.sk/RVL/Material/25610/1>>.

<sup>79</sup> Government of the Slovak Republic, “Návrh na opakované predĺženie času trvania núdzového stavu UV-2412/2021 [Proposal for a Repeated Prolongation of the State of Emergency]” (2021) <<https://rokovania.gov.sk/RVL/Material/25719/1>>.

<sup>80</sup> Government of the Slovak Republic, “Návrh na opakované predĺženie času trvania núdzového stavu UV-4890/2021 [Proposal for a Repeated Prolongation of the State of Emergency]” (2021) <<https://rokovania.gov.sk/RVL/Material/25827/1>>.

<sup>81</sup> Government of the Slovak Republic, “Návrh na opakované predĺženie času trvania núdzového stavu UV-7447/2021 [Proposal for a Repeated Prolongation of the State of Emergency]” (2021) <<https://rokovania.gov.sk/RVL/Material/25934/1>>.

<sup>82</sup> Government of the Slovak Republic, “Návrh na vyhlásenie núdzového stavu UV-27117/2021 [Proposal to Declare a State of Emergency]” (2021) <<https://rokovania.gov.sk/RVL/Material/26625/1>>.

<sup>83</sup> National Council of the Slovak Republic, “Návrh vlády na vyslovenie súhlasu NRSR s opakovaným predĺžením núdzového stavu [Executive Petition for Parliamentary Consent to the Repeated Prolongation of the State of Emergency]” <<https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=430>>. Eighty-three of the 108 MPs present (out of 150) endorsed the prolongation. This proposal, unlike the other two, was also reviewed by parliamentary committees (on constitutional affairs and on healthcare) but without any substantive remarks emerging from this review.

<sup>84</sup> Government of the Slovak Republic, *supra*, note 79, 1–2.

human rights (especially the positive obligation to protect the right to health, with a reference to the SCC's case law<sup>85</sup>).

Though declaring a commitment to protect human rights beyond the right to health, the proposal interprets the “prolongation of the SoE as, in a certain sense, a kind of verification or recognition of the factual situation [ . . . ], in which it is meaningful to have specific means of resolution of a given crisis situation at hand”.<sup>86</sup> Several further references to “rationality” as well as to proportionality appear in the text, alongside a note on the government’s awareness of the need to regularly re-evaluate the situation from the perspective of the necessity of the continuation of the SoE.<sup>87</sup> At the same time, the executive contradicts itself on this point by claiming that the SoE needs to continue until “collective immunity” is reached,<sup>88</sup> which it does not support with evidence. It also discusses the mechanism of the “COVID automat”, which set out the restrictions depending on the epidemiological situation in individual districts of the country; yet, this mechanism was introduced by the executive and could not offer external scrutiny.

This time, the proposal is accompanied by supplementary material prepared by the ministry of justice. The document provides further arguments for the prolongation, including with references to the “legality, legitimacy and necessity” of the SoE, as well as empirical data and prognoses on the pandemic. Referring to the SCC decision from autumn 2020, which unanimously affirmed the executive’s SoE declaration from October 2020,<sup>89</sup> it argues for a reduced proportionality test when evaluating the constitutionality of the adopted measures. The supplementary material goes further in acknowledging the executive’s responsibility to act during a pandemic, thus echoing fear of “underreach” more than of “overreach”. A separate section<sup>90</sup> provides illustrations of what actions would be suspended within the framework of economic mobilisation without a SoE, a justification that was missing from the earlier (January) proposal.<sup>91</sup>

The last request records only one day between submission (31 March 2021) and approval (1 April 2021).<sup>92</sup> This extremely short interval is partially explained by waiting for the SCC to decide on its constitutionality, because, unlike with the previous two requests, the opposition members of parliament and the attorney general requested the Court to invalidate it. The SCC delivered its verdict on 31 March 2021,<sup>93</sup> in which it refused to invalidate the SoE prolongation, and the request was submitted to the parliament on the same day.

The proposal consists of eleven pages, which include information presented in an appendix to the second proposal. Certain segments of the wording (eg the conclusion) are copied from the previous proposal without changes (even with grammatical errors). This repetitiveness is particularly clear when the implications of not prolonging the SoE for the operation of hospitals, private healthcare providers and the provision of medical supplies are discussed,<sup>94</sup> while highlighting that the competences granted to executive by the SoE

<sup>85</sup> PL. ÚS 10/2013 (10 December 2014).

<sup>86</sup> Government of the Slovak Republic, *supra*, note 79, 3.

<sup>87</sup> *ibid.*, 3–4.

<sup>88</sup> *ibid.*, 4.

<sup>89</sup> PL. ÚS 22/2020 (14 October 2020).

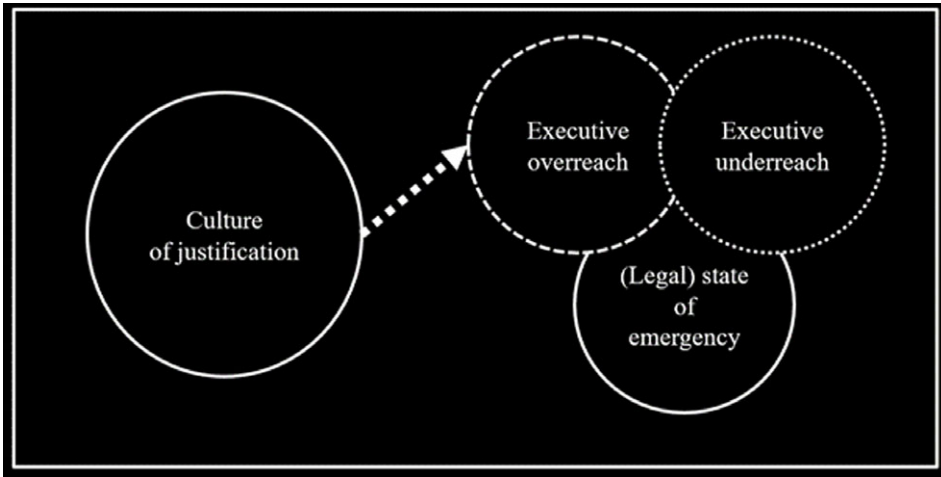
<sup>90</sup> Government of the Slovak Republic, *supra*, note 79, 4–5.

<sup>91</sup> It is unclear why this was not included in the main proposal. It seems as if the supplementary material was prepared by the ministry of justice, hence avoiding the endorsement requirement by the PM. Time constraints might also have played a role, as indicated by the number of grammatical errors in the material by the ministry.

<sup>92</sup> National Council of the Slovak Republic, “Návrh vlády na vyslovenie súhlasu NRSR s opakovaným predĺžením núdzového stavu [Executive Petition for Parliamentary Consent to the Repeated Prolongation of the State of Emergency]” <<https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=488>>. Seventy-eight of the ninety-six MPs present (out of 150) endorsed the prolongation.

<sup>93</sup> PL. ÚS 2/2021.

<sup>94</sup> Government of the Slovak Republic, *supra*, note 80, 2.



**Figure 1.** The Slovak case of dissociation of the decisions relating to the COVID-19 state of emergency from a culture of justification. Its absence (signified by the dotted arrow) always amounts to overreach, even if simultaneously actions of underreach occur.

Source: Author.

are used only exceptionally and upon review of their necessity in each individual case. The executive voices its conviction that the extension of the SoE “can be evaluated as a public law action comparable to the action of a caring manager (bonus pater familias; man on the Clapham omnibus)”.<sup>95</sup> The latter phrasing offers further evidence of the executive’s growing self-perception as chiefly responsible for managing the pandemic, even embracing a paternalist narrative.<sup>96</sup> Beyond that, however, it rehearses several points from the previous proposal, including on the significance of the parliamentary review, the spread of the pandemic, the “COVID automat”, the right to health and the legitimate position as well as responsibility of the executive to act. Instead of “collective immunity”, it places more emphasis on widespread vaccination as a condition for lifting the SoE.

All in all, it is only in the second and third (very similarly worded) proposals – both produced more than a year after the COVID-19 outbreak – that signs of an executive in panic, bundling signals of its *overreach and underreach at the same time or one closely following the other*, are less obvious and at least some justifications for the policy choices are provided. Thus, it took at least a year for the executive to be able to *embrace its role* as a key institution in managing the pandemic in Slovakia and offer at least some more scrupulous justifications for the policy choices it had been making. Figure 1 visualises the dissociation between a culture of justification and the invocation of the SoE in Slovakia. To dissociate the SoE from the pathologies of both overreach and underreach it would need to be read as embedded in a culture of justification.

## V. Conclusion

This article has examined the interaction between two forms of executive governance failures during emergencies and the legal institution of the SoE. The Slovak case shows

<sup>95</sup> *ibid.*, 7.

<sup>96</sup> This is evidenced by the gendered terms of “pater” and “man” in the concepts that the executive opted to invoke in this context, both referring to the (also gendered) “reasonable man” standard from English common law.

that: (1) both types may combine not only within one jurisdiction but even in relation to the same emergency and concurrently in time, with the executive adopting disproportionate rights restrictions in some areas while neglecting its positive duties in others<sup>97</sup>; (2) the (legal) SoE is but an empty shell within which both executive overreach and executive underreach may occur<sup>98</sup>; and (3) executive underreach may become a response to backlash against previous executive overreach. Methodologically, the article supplements the analytical framework of executive overreach and underreach by giving attention to the justifications for policy measures. This is because the lack of justification itself amounts to a form of overreach that may combine with underreach when justifications for *ending* a previously declared SoE are missing.

The analysis supports Pozen and Scheppele's normative claim that, instead of formal legal standards, the prevention of executive overreach or underreach requires changes at the level of "legal culture".<sup>99</sup> This requires building a "culture of justification" before and beyond the rise of an actual emergency. Several questions arise, however, amidst prospects for other current and future emergencies.<sup>100</sup> The role of actors other than executives in fostering or preventing overreach or underreach comes to the fore, in two ways: the potential expansion or addition of the categories of *legislative* and/or *judicial* overreach/underreach<sup>101</sup> (and criteria thereof) to *executive* overreach/underreach, not neglecting the "culture of justification" in adjudicative practice<sup>102</sup>; and the role of these actors in shaping the potential for and limits of executive overreach and underreach. The former question is largely a *tabula rasa*, while the latter one has so far been discussed mainly through the supervisory and control function of parliaments and courts, primarily at the domestic level and less so at regional and global levels,<sup>103</sup> with little focus given to how these institutions might enable or even facilitate overreach or underreach. A second set of questions may be asked regarding the extent to which institutions and actors need to embrace a "role conception" of emergency managers to avoid a state of panic arising, which may easily trigger overreach or underreach. Limited existing evidence and discussion point to the significance of such role internalisation.<sup>104</sup>

Emergencies have become ubiquitous in contemporary societies, not least due to the widespread declarations of a "climate emergency" since 2019.<sup>105</sup> Scholars such as Pozen and Scheppele have helpfully emphasised that they may lead not only to the abuse but also

<sup>97</sup> This duality is indirectly embraced by Pozen and Scheppele when they refer to the two functions of constitutions identified by Hannah Arendt: limiting power and constituting "effective power". Scheppele and Pozen, *supra*, note 23, 47–52.

<sup>98</sup> Emergency becomes more "a state of mind"; it can affect thinking in different directions, not just towards acceptance or endorsement of more restrictions on individual freedoms. H Vogt, "Covid-19 and Freedom" (2021) 60 *Social Science Information* 548, 552. See also Bjørnskov and Voigt, *supra*, note 14, 15: "[U]nderreach is not necessarily equivalent with the decision not to declare a state of emergency."

<sup>99</sup> Pozen and Scheppele, *supra*, note 19, 616–17.

<sup>100</sup> Atilas and Whyte, *supra*, note 26.

<sup>101</sup> The latter has a potential equivalent in existing scholarly discourse: judicial activism and judicial deference. The affinities and differences between these conceptual categories need further study.

<sup>102</sup> K Möller, "Justifying the Culture of Justification" (2019) 17 *International Journal of Constitutional Law* 1078.

<sup>103</sup> Eg F Cafaggi and P Iamicelli, "Global Pandemic and the Role of Courts" (2022) 1 *Legal Policy & Pandemics: The Journal of the Global Pandemic Network* 159; EPN Meyer, ULS dos Reis and BB de Castro, "Courts and COVID-19: An Assessment of Countries Dealing with Democratic Erosion" (2023) 5 *Jus Cogens* 85.

<sup>104</sup> C Ansell, E Sørensen and J Torfing, "The COVID-19 Pandemic as a Game Changer for Public Administration and Leadership? The Need for Robust Governance Responses to Turbulent Problems" (2021) 23 *Public Management Review* 949; S Bergner, "The Role of the European Union in Global Health: The EU's Self-Perception(s) within the COVID-19 Pandemic" (2023) 127 *Health Policy* 5; J Boswell et al, "The Comparative 'Court Politics' of Covid-19: Explaining Government Responses to the Pandemic" (2021) 28 *Journal of European Public Policy* 1258.

<sup>105</sup> LH McHugh, MC Lemos and TH Morrison, "Risk? Crisis? Emergency? Implications of the New Climate Emergency Framing for Governance and Policy" (2021) 12 *WIREs Climate Change* e736.



to the underuse of public powers when addressing them. As this article shows, the same is true for the SoE as a *legal institution*, which is typically invoked by the executive. Even though this institution concentrates and extends the use of public powers per definitionem, in practice it may coincide with overreach as well as underreach, even simultaneously. Moreover, under the conditions of a SoE, the absence of justifications for political decisions amounts to overreach *even if* it is coupled with the executive *not acting* when, by all reasonable performance standards,<sup>106</sup> it ought to act. In the end, unjustified decisions on emergencies hamper the possibility to perceive the actors behind them as democratic, with the authority of the legal mechanisms they used suffering as a result and complicating the response to the next emergency.

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<sup>106</sup> See P Norris, *In Praise of Skepticism: Trust but Verify* (Oxford, Oxford University Press 2022) p 7.