

THE PANDEMIC'S COMPARATIVE IMPACT ON CONSTITUTIONAL CHECKS AND BALANCES WITHIN THE EU

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REGROUP

REBUILDING GOVERNANCE AND
RESILIENCE OUT OF THE PANDEMIC



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Culminating more than a decade of crisis in Europe, the Covid-19 pandemic has opened an important window of opportunity for institutional and policy change, not only at the “reactive” level of emergency responses, but also to tackle more broadly the many socio-political challenges caused or exacerbated by Covid-19. Building on this premise, the Horizon Europe project REGROUP (*Rebuilding governance and resilience out of the pandemic*) aims to: 1) provide the European Union with a body of actionable advice on how to rebuild post-pandemic governance and public policies in an effective and democratic way; anchored to 2) a map of the socio-political dynamics and consequences of Covid-19; and 3) an empirically-informed normative evaluation of the pandemic.



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Abstract

COVID-19 has changed public and private life significantly. Some changes remain permanently. Although COVID-19 is no longer an immediate global health crisis, which has brought healthcare systems in particular close to collapse, the impact on social and economic systems is still being felt. Despite government subsidies, many companies have not survived the effects of the crisis. In addition, many people's working lives and education have changed. Digital tools, such as online meetings and the option to work from home, are now part of everyday life, unlike before the pandemic.

During the pandemic, short-term and fast-acting measures were necessary, which had to be issued by the various powers in special procedures. In most countries, the executive branch took on a central role in order to ensure the ability to act. At the same time, the legislative powers were restricted in their mode of operation. Plenary sessions of the parliaments could only be held to a very limited extent. The measures taken must be reviewed in terms of their effectiveness, but also in terms of their impact on constitutional checks and balances, in order to be able to take more effective, proportionate and constitutional measures for future pandemics.

This research paper thus analyses and discusses the consequences of pandemic crisis measures on constitutional democracy in a number of European countries—in particular Germany, France, the UK, Italy, Sweden—, by examining the effects of Covid-19 measures on constitutional checks and balances, and the relations between the executives and legislatures. With a glimpse over the Atlantic some actions will be compared to those on US federal as well as state level.

Keywords: Covid-19; constitutional checks and balances; executive branch; legislature; courts; European Union; United States of America

Introduction

The COVID-19 pandemic has brought major restrictions in many areas of private and public life, but also permanent changes on a global level. Due to the ongoing lengthy nature of the COVID-19 pandemic, the crisis has evolved over time from an urgent health crisis to a threat for social and economic systems of nation-states and inter-governmental organizations at the global level.¹ Healthcare systems in particular have been faced with profound challenges that have made societies even more aware of the weaknesses of their systems. The same applies to the school system. The working lives of many employees have also changed fundamentally in the course of the pandemic.

Due to the complexity of these challenges, as well as the need for quick political action and the uncertainty surrounding health policy decisions, the pandemic has also had an impact on democratic principles, such as the separation of powers. Parliaments were not able to meet as usual, and political decisions that greatly impacted fundamental rights were taken at a very short notice. The executive branch, in particular, imposed far-reaching restrictions on rights. Have the changes led to a substantial rewiring of the constitutional checks and balances in European states (and the US)? Or did everything 'swing back' to normal?²

Against this background this paper focuses on the constitutional checks and balances within the EU member states and the EU itself. For specific instances this will be compared to actions on US federal as well as state level. First, this paper focuses on the role of the EU and to some extent of the US federal level during the COVID-19 crisis and the competence of the EU and - at appropriate place - at the US federal level concerning health crisis while analyzing the different bodies within multilevel systems. Second, this paper examines the role of the EU member states as well as the US State level when reasonable and the changes within the separation of powers in the context of pandemic response. A particular focus is placed on four criteria: the exercise of State of emergency powers, the use of executive power, legislative authority and COVID legislation and the judicial remedies. Thirdly, the paper compares and analyzes the different approaches of the EU member states and EU institutions, and the US States and Federal Government albeit to a lesser extent. Finally, the results will be assessed. Finally, against the background of the main object of study a brief outlook and policy recommendations will be made on how the EU as well as the member states can be more resilient in dealing with future (health) crises while better preserving constitutional checks and balances.

1. More on the impacts of the crisis: Ettore Greco and others, 'Crisis and Geopolitical Reordering - Covid-19 from a Comparative Perspective' *REGROUP Research Paper No. 1* (13 June 2023) <<https://regroup-horizon.eu/publications/>> accessed 20 November 2023.

2. Cf. Federico Fabbrini, Covid-19, human rights, and judicial review in Transatlantic perspective, *REGROUP Research Paper No. 5*, 2 November 2023, <https://regroup-horizon.eu/publications/human-rights/>

Checks and balances in the EU's and the US Federal pandemic response

Relatively shortly after the rapid spread of COVID-19 in 2020 the EU member states as well as the US states initiated the fight against the COVID-19 and they implemented partly drastic national measures, such as week-long lockdowns and school closures. Within the EU, the measures were limited to the national territory and thus had a particular impact on cross-border deliveries and commuter traffic.³

The conclusion of this in Europe was an increasing call for a unified COVID-19 strategy, which was implemented by the EU and not only the member states.⁴ The EU itself had seen the advantages of a common strategic approach early on:⁵ The Commission called on member states to adopt a coherent COVID-19 strategy back in January 2020. This first attempt unfortunately remained ineffective.⁶ The will for a uniform approach is also evident in the context of the wide-ranging surveys of the population within the EU, which were initiated by the EU Parliament⁷ at the beginning of the pandemic.⁸ The same applies to scholars from different disciplines, who also called for a stronger role of the EU in multinational health crises in an after-crisis review.⁹

3. Doreen Reinhard, 'Gefangen auf der Autobahn' *ZEIT ONLINE* (Hamburg, 19 March 2020) <<https://www.zeit.de/gesellschaft/2020-03/goerlitzer-grenze-coronavirus-stau-autobahn>> accessed 20 November 2023.

4. Karoline Meta Beisel, 'Jedes Land kann machen, was es will' *Süddeutsche Zeitung* (München, 15 March 2020) <<https://www.sueddeutsche.de/politik/rote-linien-in-europa-jedes-land-kann-machen-was-es-will-1.4845440>> accessed 20 November 2023; Markus Becker and others, 'The EU Struggles for Relevance in the Fight against' *SPIEGEL International* (Hamburg, 23 March 2020) <www.spiegel.de/international/europe/corona-the-eu-struggles-for-relevance-in-the-fight-against-coronavirus-a-83052f57-ed42-4a69-85fd-61e6795a4d2> accessed 20 November 2023; Jennifer Rankin, 'Coronavirus could be final straw for EU, European experts warn' *The Guardian International edition* (London, 1 April 2020) <<https://www.theguardian.com/world/2020/apr/01/coronavirus-could-be-final-straw-for-eu-european-experts-warn>> accessed 20 November 2023.

5. Rebecca Forman and Elias Mossialos, 'The EU Response to COVID-19: From Reactive Policies to Strategic Decision-Making' [2021] 59 *Journal of Common Market Studies* 56.

6. *Ibid.*

7. European Parliament and Kantar, 'Uncertainty/ EU/Hope - Public Opinion in Times of COVID-19 - Public Opinion Survey' (2020) www.europarl.europa.eu/at-your-service/files/be-heard/eurobarometer/2020/public_opinion_in_the_eu_in_time_of_coronavirus_crisis/report/en-covid19-survey-report.pdf accessed 20 November 2023.

8. As a part of REGROUP WP4 innovative mini-publics will be upheld (06/2023-09/2023) to examine the "public attitudes to scientific information disorder and knowledge circulation and the impact these have on political trust" looking from the perspective of post-pandemic times. For more details: Benjamin Leruth, 'Designing multi-level mini-publics: the REGROUP experiment on knowledge, information, and trust' *REGROUP Mini-Publics* (26 June 2023) <<https://regroup-horizon.eu/publications/>> accessed 20 November 2023.

9. Eg. Rebecca Forman and Elias Mossialos, (n4); Dionyssi G. Dimitrakopoulos and Georgette Lalis, 'The European Union's Reaction to the COVID-19 Pandemic - a Preliminary Assessment' *EUROPP* (27 March 2020) <<https://blogs.lse.ac.uk/europpblog/2020/03/27/the-european-unions-reaction-to-the-covid-19-pandemic-a-preliminary-assessment/>> accessed 20 November 2023; Anniëk de Ruijter and others, 'Give the EU More Power to Fight Epidemics' *POLITICO* (26 March 2020) <www.politico.eu/article/coronavirus-eu-power-pandemic/> accessed 20 November 2023; Guy Verhofstadt, 'Time of coronavirus shows importance of being European' *euobserver* (17 March 2020) <<https://euobserver.com/opinion/147781>> accessed 20 November 2023; Alessio M. Paccès and Maria Weimer, 'From Diversity to Coordination: A European Approach to Covid19' (2020) 11 *European Journal of Risk Regulation* 292; Kai P. Purnhagen and

ization were made in US, such as by legal scholars, when President Donald Trump, who was initially in power, failed to take centralized action to combat the pandemic.¹⁰ This part of the paper will therefore examine the role that the EU institutions have played in the pandemic response and how this has affected constitutional checks and balances at the EU level of government. This is compared with the measures at the US federal as appropriate.

Principle of conferral of powers and role of the EU and the US Federal level

Due to the principle of conferral of powers, the EU can only act and make decisions for issues within the scope of the formal competences set in Art. 5(2) TEU.¹¹ Within the context of health crises such as pandemics the EU can only impose limited uniform requirements.¹²

The EU has not had competences in the context of health threats for very long.¹³ It was not until the Treaty of Lisbon that combating serious, cross-border health threats was defined as a central objective of the EU, in Art. 6(a) TFEU.¹⁴ This provision defines the EU's scope of action to supporting, supplementing and coordinating measures as assistance to the member states.¹⁵ This has given rise to the open method of coordination, according to which the EU is entitled to adopt legally non-binding guidelines in an area in which it has no/limited competences. In this way - due to constant pressure to act - uniform regulations are to be created step by step in the territory of the Union, which are then implemented in the member states.¹⁶ Art. 4(2)(k) TFEU stipulates that the EU

others, KP Purnhagen et al, 'More Competences than You Knew? The Web of Health Competence for European Union Action in Response to the COVID-19 Outbreak' (2020) 11 European Journal of Risk Regulation 297.

10. Kim L. Scheppele, 'Underreaction in a Time of Emergency: America as a Nearly Failed State', *Verfassungsblog* (9 April 2020) <<https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/>> accessed 20 November 2023; in more detail: Part III.2.e.

11. In more detail: Jürgen Bast in: Eberhard Grabitz and others (eds), 'Grundaussagen zu Normenhierarchie und Verbandskompetenz (Art. 5 Abs. 2 EUV)' *Das Recht der Europäischen Union* (78th edn January 2023), EUV Art. 5 [5-48a]; Rudolf Mögele, 'Die EU und COVID-19: Befugnisse und Initiativen' [2020] *EuZW* 297.

12. N Nielsen, 'Coronavirus: What the EU Can and Can't do', *EUobserver* (25 March 2020) <<https://www.ruobserver.com/coronavirus/147865>> accessed 20 November 2023; Claudia Seitz, 'Schutz der Gesundheit in der Europäischen Gesundheitsunion - Ist die Europäische Union auf zukünftige grenzüberschreitende Gesundheitsgefahren vorbereitet?' [2022] 10 *Zeitschrift für Europarecht* L5; Anja Naumann, 'EU Response to Fighting the Coronavirus - Coordination, Support, Action - Heeding its Citizens' Calls?' in Matthias C. Kettmann and Konrad Lachmayer, *Pandemocracy in Europe* (Bloomsbury Publishing Plc Oxford, 2022) 247; M Guy and W Sauter, 'The History and Scope of EU Health Law and Policy' in TK Hervey, CA Young and LE Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing, 2017) 19.

13. For the development of competence: Oliver Bartlett, 'EU's competence gap in public health', [2016] 5 *Cambridge Journal of International and Comparative Law* 58.

14. In more detail, eg: Christian Calliess in: Christian Calliess and Matthias Ruffert (eds), 'Sachbereiche' *EUV/AEUV* (6th edn 2022) AEUV Art. 6 [5].

15. Claudia Chiara Rombold, 'Die Kompetenz der Europäischen Union zur Bekämpfung grenzüberschreitender Gesundheitsgefahren' *University of Graz* (Graz, March 2023) [24]; Naumann, (n 10) 247.

16. Anne Brunon-Ernst and Arnaud van Waeyenberge, 'Effects of the open method of coordination (OMC)

has shared legislative competence in ‘common safety concerns in public health matters’ for the areas defined in the Union Treaties.¹⁷

Complementary to Art. 6 TFEU, the EU has to ensure a high level of health protection according to Art. 168 TFEU. The standard thus constitutes the concretization of Art. 6 TFEU. It allows for a certain degree of harmonization in various health care areas,¹⁸ such as minimum standards for medical products, devices and substances of human origin. Additionally, the EU can impose ‘incentive measures [...] to combat the widespread serious cross-border diseases’, according to Art. 168(5) TFEU. This includes measures for monitoring, early reporting, but also combating health threats. These primary law provisions show the will of the European member states to attribute powers to the EU for the purposes of strengthening the health of the citizens throughout the territory of the Union.

Next to these direct health related competences, the EU takes measures through broader competences based in other fields. This can be mainly found - even before the introduction of the explicit health competences - within the field of the internal market.¹⁹ The exercise of those powers has generally been accepted by the ECJ.²⁰

However, Art. 6 TFEU does not stipulate an obligation: rather it is defined as an optional provision.²¹ This already illustrates the weak nature of the competence standard under EU law in the area of horizontal health policy in relation to the Member States. Besides, EU measures in this area can only have a supplementary character, must serve narrowly defined EU objectives and cannot replace national legislation.²² This is particularly evident in the explicit exclusion of a possible harmonization of national health care systems. In addition, according to Art. 168(7) TFEU the EU has to respect the responsibilities and autonomy of the Member States’ ‘definition of their health policy and [...] the organization and delivery of health services and medical care’.

The EU has therefore only limited competence within the field of protection of public health. The Member States still remain the main responsible for such matters. They have sole responsibility for the coordination of their national health systems, even in times of cross-border health crisis. This can only be achieved by a general change in the distribution of competences, which was viewed very critically by the Member States - especially the Czech Republic - during the COVID-19 pandemic.²³ Due to the EU’s ability in research and innovation: indirect legislation in EU policy-making?’ [2015] 47 *The Journal of Legal Pluralism and Unofficial Law* 22.

17. Closer hereu: Naumann, (n 10) 247.

18. Naumann (n 10) 247f.

19. In depth: Oliver Bartlett (n 11) 65; Purnhagen and others, (n 8) 300.

20. Eg: Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECLI:EU:C:2000:544 at [78], for more detail: Naumann (n 10) 248.

21. Claudia Chiara Rombold, ‘Die Kompetenz der Europäischen Union zur Bekämpfung grenzüberschreitender Gesundheitsgefahren’ *University of Graz* (Graz, March 2023) [24].

22. Art. 168 (1)(2) TFEU; in more detail: Naumann (n 10) 248.

23. Elena Sánchez Nicolás, ‘[Coronavirus] EU Commission Ready to Play Bigger Role in Health Sector’ *eu-*

to co-determine health issues in the context of other competence titles, a stronger EU role in pandemic response has been urged despite criticism in the context of the COVID-19 pandemic.²⁴

The same applies to the institutions on the US federal level. Under the US constitution public health matters, such as the COVID-19 crisis, are generally considered matters for states, and for counties and cities. Hence, the US states and counties as well as cities are generally the primary responsible actors in public health emergencies.²⁵ The same position is held by the member states of the EU in relation to the EU as mentioned above. But, unlike the EU institutions, within the US, the federal government can intervene when the arising public health issue requires a harmonized federal approach.²⁶ In this respect, the US federal government can, in exceptional cases, take more far-reaching measures since it can define a uniform US federal approach than the EU institutions, which may only intervene in a coordinating capacity. According to the legal academic literature, this special competence is to be assumed in particular when there is an epidemic situation within the US, as has been the case with COVID-19.²⁷ The US federal government thus has much broader statutory powers than the EU institutions in an exceptional case such as the COVID-19 pandemic, in part because the US is a federal state and not a supranational structure.

Analysis of the EU Institutions

The EU's actions during the COVID-19 pandemic thus had to navigate between limited legislative competence and the demand for harmonized action. In the following, the main actions taken by the EU institutions are presented, analyzing whether they respected this tension and how the actions affected the checks and balances between the EU institutions in general. Due to the special position of the EU as a supranational organization compared to its member states as well as the limited legislative competence, the EU institutions are considered in isolation in this section.

The EU was quick to recognize the possibility of a widespread public health crisis in Europe: On January 28, 2020, the EU already activated a limited crisis mechanism and then, in early March 2020, the full crisis mechanism (Integrated Political Crisis Response, IPCR). This involves close coordination meetings between member states as well as EU institutions with stronger executive functions and increased information

observer (15 June 2020) <euobserver.com/coronavirus/148640> accessed 20 November 2023.

24. Purnhagen and others, (n 8) 306.

25. Tom Ginsburg, 'National Report on the United States', in Arianna Vedaschi ed., *Governmental Policies to fight Pandemics: The Boundaries of legitimate Limitations on Fundamental freedoms* (forthcoming 2023).

26. Arianna Vedaschi and Chiara Graziani, 'Post-Pandemic Constitutionalism: COVID-19 as a Game-Changer for "Common Principles"?' [2023] 44 *University of Pennsylvania Journal of International Law* 4, p. 858.

27. Rebecca L. Haffajee and Michelle M. Mello, 'Thinking Globally, Acting Locally – The U.S. Response to Covid-19' [2020] 382 *New England Journal of Medicine* e75.

exchanges.²⁸ Over time, the EU has taken action under the framework of the ‘European Health Union’,²⁹ such as the EU4Health Program³⁰ and the extension of the Emergency Support Instrument³¹ (ESI). In parallel, the EU has played a role in coordinating cooperation among member states, maintaining freedom of travel, joint procurement of medical supplies, and economic measures to stabilize the economy that will be examined in detail in the following.

Commission

The most important role in the limited options for combating the EU’s COVID-19 pandemic has been taken by the EU Commission. The Commission initiated and implemented some actions in various sub-areas of pandemic response.

Beginning of the pandemic

As one of the first steps, the Commission changed its own working methods. For example, early in the crisis, the Commission’s buildings were closed to the public and most employees were sent to home office.³² At the same time, a crisis team was set up around Commission President Von der Leyen.³³ This centralization - prefiguring similar trends in member states - seems justified in light of the increase in decision-making capabilities.

In terms of substantive functioning, the Commission likewise took steps at the beginning of the crisis: In January 2020, the Commission launched a call for proposals through the ‘Horizon Europe’ funding line for medical research on COVID-19.³⁴ In parallel, it worked on a COVID-19 vaccines strategy. It proposed a temporary simplification of the approval process and acceptance guarantees for manufacturers.³⁵

28. Manuel Müller, ‘Die Auswirkungen der Covid-19-Pandemie’ in Werner Weidenfeld and Wolfgang Wessels, *Jahrbuch der Europäischen Integration* (Nomos Baden-Baden, 2020) 59.

29. European Commission, ‘European Health Union’ <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/european-health-union_en> accessed 20 November 2023.

30. For more detail: European Commission, ‘EU4Health programme 2021-2027 - a vision for a healthier European Union’ <https://health.ec.europa.eu/funding/eu4health-programme-2021-2027-vision-healthier-european-union_en> accessed 20 November 2023.

31. For more detail: Emergency Support Instrument <https://commission.europa.eu/strategy-and-policy/coronavirus-response/emergency-support-instrument_en> accessed 20 November 2023.

32. European Commission, ‘Coronavirus: Measures introduced for Commission staff’ <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_445> accessed 20 November 2023.

33. European Commission: ‘Der Corona-Krisenstab der Europäischen Kommission’ <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/european-commissions-action-coronavirus_de> accessed 20 November 2023.

34. European Commission, ‘Coronavirus: Commission boosts urgently needed research and innovation with additional €122 million’ <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_887> accessed 20 November 2023.

35. European Commission, COM (2020) 245 final.

The coordination and supplementation of member state measures required under Article 168 TFEU proved to be more problematic.³⁶ As early as February 2020, member states requested the supply of medical items such as face masks via the EU Civil Protection Mechanism (RescEU). This was ignored by other member states and partly answered with export bans.³⁷ Only sometime later, in particular due to diplomatic measures as well as strong criticism by the EU Commission, the obviously inadmissible export bans were lifted and a common procurement strategy as well as the establishment of a reserve within the framework of RescEU were adopted.³⁸ Similar coordination problems were evident in the context of large-scale border controls and closures within the EU introduced by member states at the beginning of the pandemic. It achieved coordination only partially through non-binding guidelines on border management at the time of COVID-19, which were intended to prevent restrictions on the internal market.³⁹ The same applied to the development of COVID-19 warning apps, which member states initially developed on their own, despite interoperability guidelines from the EU Commission.⁴⁰ In addition, the Commission took many stimulus measures by activating the general escape clause under the Stability and Growth Pact⁴¹ and deeming the flexibility provision of Art. 170(3)(c) TFEU permissible in state aid law in certain cases⁴².

It can thus be seen that the EU Commission, due to its limited powers to act, mainly worked with recommendations and guidelines for the member states. These are not legally binding so that the member states deviated from them in the course of the pandemic and developed their own national solutions. In general, the Commission acted within the scope of its competencies during the first phases of the pandemic and was involved in the pandemic control in particular through investments in research as well as through soft laws such as public criticism or recommendations. It actively tried to fulfill its coordinating role within its possibilities, but the measures were not always rewarded with success.

36. In detail: Manuel Müller, (n 27) 60f.

37. For instance France and Germany, cf. Michael Gassmann, 'Das deutsche Exportverbot ist die Antwort auf Frankreichs Masken-Embargo' *WELT* (Berlin, 4 March 2020) <<https://www.welt.de/wirtschaft/article206324563/Coronavirus-Bundesregierung-verbietet-Export-von-Atemmasken.html>> accessed 20 November 2023.

38. European Commission, 'COVID-19: Commission creates first ever rescEU stockpile of medical equipment' <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_476> last accessed 20 November 2023.

39. European Commission, COM(2020) 1753 final.

40. European Commission, 'Coronavirus: Commission adopts Recommendation to support exit strategies through mobile data and apps' <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_626> accessed 20 November 2023; for further details see: Manuel Müller (n 27) 62.

41. European Commission, COM(2020) 123 final.

42. European Commission, Communication from the Commission: Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, OJ 2020 C 91 I/01.

Multiannual financial framework (2021-2027) and NextGenerationEU

During the COVID-19 pandemic, the EU institutions were obliged to decide on the EU 2021-2027 multi-annual financial framework. Negotiations on the agreement of the Multiannual Financial Framework had already begun before the start of the pandemic and were particularly heated. A consensus was not forthcoming before the outbreak of the pandemic and the start of contact restrictions.⁴³

The outbreak of the pandemic initially interrupted further negotiations, especially as the contact restrictions made negotiations more difficult. At the same time, expectations increased from the countries most affected economically, such as Spain and Italy.⁴⁴ Despite the time pressure and the need to provide assistance to particularly affected member states, the discussions were characterized by particular intensity.⁴⁵

However, there was fundamental agreement among the member states on the establishment of a reconstruction fund, which was to be incorporated into the multi-annual financial framework (2021-2027). Nevertheless, the exact form, and in particular its scope, were highly controversial.⁴⁶ The process since the outbreak of the Pandemic can basically be described as follows: The EU Parliament called for a recovery fund as early as April 2020.⁴⁷ The Commission collected different position statements until May 2020 and then presented its own proposal, which was called NextGenerationEU and should be incorporated into the Multiannual Financial Framework while raising the total amount.⁴⁸ After tough negotiations, the European Council agreed in July 2020 to a compromise, which includes the same total volume, but allows the Commission only a small volume of grants and provides for more loans worth EUR 750 billion.⁴⁹ However, this was not the end of the actual decision. The political compromise also had to be translated into European legislation in difficult trilogue negotiations that lasted several months. It was precisely the rule of law conditionality that stood in the way of a compromise, which led to various blockades. In the end, this only came to fruition in a weakened form.⁵⁰ The technical legislation to set up NGEU was finally approved by the EU Parliament and the Council at the end of 2020.⁵¹

43. Peter Becker, 'Haushaltspolitik' in Werner Weidenfeld and Wolfgang Wessels, *Jahrbuch der Europäischen Integration* (Nomos Baden-Baden, 2020) 257 et seqq.

44. Peter Becker, (n 42) 260.

45. Peter Becker, 'Haushaltspolitik' in Werner Weidenfeld and Wolfgang Wessels, *Jahrbuch der Europäischen Integration* (Nomos Baden-Baden, 2021) 245 et seqq.

46. For the exact course see: Peter Becker, (n 45) 245 et seqq.

47. European Parliament, Resolutions: European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, OJ 2021 C316/01.

48. European Commission, Europe's moment: Repair and prepare for the next generation, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940> accessed 20 November 2023.

49. European Council, Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020), 21 July 2020, EUCO 10/20.

50. Peter Becker, (n 45) 247 et seqq.

51. European Council, 'Multiannual financial framework for 2021-2027 adopted' <<https://www.consilium.europa.eu/en/press/press-releases/2020/12/17/multiannual-financial-framework-for-2021-2027-adopt>>

It authorized the Commission to borrow up to EUR 750 billion on the capital markets to support the reconstruction and resilience plans of particularly financially weak member states. The Commission was able to grant loans and subsidies as long as the member states complied with the submitted national recovery and resilience plans (NRRPs).⁵² As early as June 2021, the EU Commission made the first bonds available, which were in high demand among investors.⁵³ At the same time, the first member states' NRRP were submitted to the Commission.⁵⁴

From the perspective of constitutional checks and balances, it is evident that the EU institutions have complied with any procedures and thus exercised mutual control despite the ongoing crisis. From a procedural point of view, therefore, no points of critique seem apparent. The situation is different when one considers the substantive compromise. The NextGenerationEU fund marked a profound change in the EU constitutional architecture, pushing it into the direction of a fiscal capacity.⁵⁵ Although the legal literature in some member states assumes that NextGenerationEU is clearly compatible due to legal policy considerations⁵⁶ with the ban on fiscal union, there is ongoing debate predominantly in German-speaking countries: The agreement calls into question the hitherto valid basic principles of the union's financial constitution, which, according to Art. 125 TFEU, prohibit a transfer union and thus the EU's taking responsibility for the debts of its member states. This is also true against the background of the unprecedented emergency caused by the COVID-19 situation. A dispute has arisen predominantly in the German legal debate⁵⁷ on this issue, which was decided in Germany by the Federal Constitutional Court at the end of 2022.⁵⁸ The Court decided on the admissibility of the aid bond from a German constitutional law perspective, basing its decision primarily on the exceptional nature of it as well as its concrete case-by-case nature in relation to the serious protracted health crisis. Nevertheless, there are still critical voices that speak of an overstepping of competences and that it is up to the ECJ to decide on the admissibility of the NextGenerationEU fund.⁵⁹ It remains to be seen whether and how

ed/> accessed 20 November 2023.

52. Ibid.

53. Andrea Cünnen, 'Gefangen auf der Autobahn' *Handelsblatt* (Düsseldorf, 25 June 2021) <<https://www.handelsblatt.com/finanzen/maerkte/anleihen/anleihen-nachfrage-ueber-142-milliarden-euro-investoren-reissen-sich-um-eu-megabond/27287822.html>> accessed 20 November 2023.

54. In detail: Peter Becker, 'Der Wiederaufbauplan der Europäischen Union' in Werner Weidenfeld and Wolfgang Wessels, *Jahrbuch der Europäischen Integration* (Nomos Baden-Baden, 2021) 257f.

55. Federico Fabbrini, 'The EU Economic Constitution After Covid-19 and "Next Generation EU"', RE-BUILD Centre Working Paper No. 1 (2022), p. 27 et seq with further evidence.

56. Ibid. p. 26 et seq.

57. Reiner Schmidt, 'Währungs- oder Wirtschaftspolitik?' [2021] *Europarecht* EuR 643, 655f.; Jürgen Schwarze, 'Der politische Wille bei der europäischen Krisenbewältigung und Verfassungsreform' [2023] *Europarecht* EuR 33f.; Renato Giacon and Corrado Macchiarelli, 'A Hamiltonian moment for Europe? Demystifying Next Generation EU and the EU's recovery funds' <<https://growthlab.cid.harvard.edu/blog/hamiltonian-moment-europe-demystifying-next-generation-eu-and-eu%E2%80%99s-recovery-funds>> accessed 20 November 2023.

58. German federal constitutional court, Judgment of 6 December 2022 - 2 BvR 547/21, 2 BvR 798/21.

59. Ibid. Special vote Müller; Peter Becker (n 45); Dirk Meyer, 'EU-Gemeinschaftskredite NextGenerationEU' [2023] *Europäische Zeitschrift für Wirtschaftsrecht* EuZW, 221, 225 et seq.; Matthias Ruffert, '2.0

the ECJ will evaluate this issue in the future especially if there are further financial instruments in the future, such as NextGenerationEU.

European Council and Council of the EU

The same amendments concerning the operating procedure were adopted within the framework of the European Council and the Council of the EU: Deliberations of these institutions took place in digital form at the beginning of the pandemic with immediate effect.⁶⁰

However, the digital deliberations in both institutions faced two problems: On the one hand, due to limited technical equipment, the General Secretariat of the Council which assists the European Council and Council of the EU had to be reconfigured to ensure its ability to act. On the other hand, there were a number of key deliberations on the agenda in 2020 that could only be conducted in the digital framework to a limited extent due to their complexity. These included the adoption of the multi-year budget from 2021 and the ongoing Brexit negotiations in which especially the European Council had played an important role as mentioned above.⁶¹ These negotiations have been particularly influenced by the individual heads of state and government. It was particularly important for individual members of the European Council to hold consultations with each other in person in order to be able to submit a joint proposal to the full European Council.⁶² To guarantee the institution's ability to act effectively, it was agreed in early summer of 2020 that future meetings would again be held in person.⁶³

In substantive terms, the European Council as well as the Council of the EU agreed on some frameworks and recommendations on COVID-19 related issues after heated debates. With respect to the previously described freedom of travel of Union citizens, such were developed in October 2020. However, despite the common framework and recommendation, no unified approach was taken on the freedom of movement of Union citizens in general during the further course of the pandemic. Member states pursued nation-state approaches, particularly during the peaks of the pandemic. For example, Finland closed its borders to protect against new variants of the COVID-19 virus, which caused problems for Estonian commuters working in Finland.⁶⁴ Despite massive

- Zum NGEU-Urteil des BVerfG v. 6.12.2022' in Verfassungsblog of 9 December 2022 <<https://verfassungsblog.de/nikolaus-2-0/>> accessed 20 November 2023; Becker, 'Der deutsche Sozialstaat - Bewährung und Herausforderungen im internationalen Vergleich' [2022] Neue Zeitschrift für Sozialrecht NZS 801, 802 et seq. with further evidence; Heber, 'Europarechtliche Grenzen für den Wiederaufbaufonds' [2021] Europarecht EuR, 416, 422 et seqq.

60. Manuel Müller, (n 27) 60.

61. Ibid.

62. See eg. the press release made by Press and Information Office of the Federal Government: Franco-German initiative for the economic Europe's economic recovery after the coronavirus crisis, 18.5.2020, press release 173.

63. Manuel Müller, (n 27) 60.

64. Andrew Whyte, 'Outgoing foreign minister hits out at Finland COVID-19 travel restrictions' *ERR news*

concerns about possible violations of the right of free movement and the Schengen Regulation⁶⁵ - at the beginning, but also in the further course of the pandemic - EU institutions countered this approach with warnings against individual countries. However, the Commission did not initiate a lengthy infringement procedure according to Art. 258 TFEU.⁶⁶ In the short term, this seems appropriate. In this subject area, which was also co-determined by the European Council, it is appropriate in retrospect to criticize the behavior of the EU Commission: Due to the long duration of the pandemic as well as the strong competence of the EU in the area of free movement, which has been predominantly affected here, the implementation of an infringement procedure seems to be retrospectively necessary to show limits for future crises.

Agreements in the area of infection control were also not reached in the Council of the EU until the course of 2021, although the EU Commission, as previously described, had already advised by means of recommendations in 2020 on the uniform development of an interoperable Covid warning app, the recognition of test certificates, and other harmonizing actions.⁶⁷

EU Parliament

The Parliament implemented measures regarding its own working methods in March 2020, too. For example, the parliament buildings were closed to visitors, most staff and MEPs worked from home and many committee and group meetings were held online.⁶⁸ During plenary sessions, the possibility was opened up to participate in plenary sessions and votes online from within their own offices. This was introduced after the outbreak of the pandemic at the beginning of 2020 due to the lack of physical presence of the MEPs; previously, it was possible to participate in votes only in person.⁶⁹

Similar to the EU Commission, the EU Parliament took action at the beginning of the pandemic, particularly in the context of economic policy measures. The Parliament

(Tallinn, 23. January 2023) <<https://news.err.ee/1608083710/outgoing-foreign-minister-hits-out-at-finland-covid-19-travel-restrictions>> accessed 20 November 2023.

65. Cf. Daniel Schade, 'Crisis-proof Schengen and freedom of movement: Lessons from the Covid-19 pandemic' *Jacques Delors Centre|Hertie School* (Berlin, 25 May 2021) <<https://www.delorscentre.eu/en/publications/detail/publication/crisis-proof-schengen-and-freedom-of-movement>> accessed 20 July 2020

66. Schengen Visa News, 'EU Commission Urges Six Member States to Remove Some of Their COVID-19 Border Restrictions' (24 February 2021) < <https://www.schengenvisa.info.com/news/eu-commission-urges-six-member-states-to-remove-some-of-their-covid-19-border-restrictions/#:~:text=According%20to%20a%20four%2Dpage,EU%20citizens%20in%20their%20territory.>> accessed 20 November 2023.

67. For more details on the Council's agreements, cf. Manuel Müller, 'Die Auswirkungen der Covid-19-Pandemie' in Werner Weidenfeld and Wolfgang Wessels, *Jahrbuch der Europäischen Integration* (Nomos Baden-Baden, 2021) 57.

68. Manuel Müller (n 23) 59f.

69. Voting numbers have dropped from an average of around 120 votes in October 2019 to around 10 per vote in March 2020, cf. European Parliament, 'How Parliament works during a pandemic' <<https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20200408ST076807/how-parliament-works-during-a-pandemic>> accessed 20 November 2023.

approved a EUR 37 billion investment package for companies severely affected by the pandemic.⁷⁰ As far as other legislative proposals were concerned, the Parliament had adopted COVID-19 related proposals of the Commission with mostly united force. For example, the Parliament and Council fast-tracked the Covid-19 certificate proposed by the EU Commission in March 2021, which was to be accepted as proof of vaccination or proof of recovery from COVID-19 by the other member states.⁷¹ In this respect, it can be seen that the controversial discussions within parliament, which are particularly important for a democracy, have turned out to be rather small.

With regard to the second major innovation adopted by the EU institutions in the context of the pandemic, namely the European Health Union, the European Parliament provided the impetus. In July 2020 the European Parliament called for a ‘European Health Union’ to deal with this and subsequent cross-border health crises in the future.⁷² This idea was further taken up in the course of the pandemic and finally adopted. The Health Union, as adopted, is based on several pillars and comprises several regulations. The aim is to pursue a strengthened health policy by enhancing the coordination possibilities permitted under treaty law and by strengthening the role of the EU institutions. This is intended to enable a more resilient, faster and more effective handling as well as the prevention of cross-border health issues.⁷³ Key elements of the Health Union are the redesign of the legal framework for serious cross-border health threats and the strengthening of EU agencies responsible for crisis management. These include the European Medicines Agency (EMA), the European Centre for Disease Prevention and Control (ECDC), and the newly created EU Health Emergency Preparedness and Response Agency (HERA).⁷⁴ However, the member states remain responsible for actual measures.

The COVID-19 pandemic has thus provided a boost to integration in the context of Union health policy.⁷⁵ However, it can be seen that this advance is within the competence structure according to Art. 168 TFEU. The focus is on coordinating measures and raising the general level of health protection, which are explicit competences of the EU. Binding measures are also permissible within the framework of competences under Art. 168

70. European Parliament, ‘Coronavirus: Parliament approves €37 billion crisis response’ <<https://www.europarl.europa.eu/news/en/headlines/economy/20200323STO75617/covid-19-parliament-approves-EU37-billion-crisis-response>> accessed 20 November 2023.

71. Cf. Regulation (EU) 2021/953 of June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, OJ L 211/1.

72. Europäisches Parlament: Pressemitteilung: Parlament will eine Europäische Gesundheitsunion, 10.7.2020, abrufbar unter: <https://www.europarl.europa.eu/news/de/press-room/20200710IPR83101/parlament-will-eine-europaische-gesundheitsunion> (letzter Zugriff: 5.10.2020).

73. Cf. for instance: European Council, ‘European Health Union: protecting Europeans against cross-border health threats’ <<https://www.consilium.europa.eu/en/policies/protecting-against-cross-border-health-threats/>> accessed 20 November 2023.

74. In detail: Claudia Seitz, (n 11) L 20f.

75. Approving: Sarah-Lena Böning and Remi Maier-Rigaud, ‘Gesundheits- und Verbraucherpolitik’ in Werner Weidenfeld and Wolfgang Wessels, *Jahrbuch der Europäischen Integration* (Nomos Baden-Baden, 2022) 246.

(5) TFEU, although the limit of harmonization of laws must not be exceeded.⁷⁶ This does not create new competencies and does not exceed existing ones.

ECJ

In retrospect, the ECJ played a limited role during the pandemic. So far, the ECJ has not revised, much less overturned, any measure or decision of the other EU institutions. This is sometimes due to the long duration of proceedings, although there is the possibility of interim relief and other urgent proceedings. Another reason is the limited jurisdiction of the ECJ, according to which individuals are generally not entitled to file a lawsuit directly and the other types of proceedings are only possible if other member states, EU institutions and courts file actions.⁷⁷ Provided that the other EU institutions are in principle in agreement with each other, as described above, and the member state courts do not submit covid-related preliminary rulings, the ECJ's hands are tied. The ECJ ruled only this year in two package travel disputes during the COVID-19 pandemic. The subject matter was the reimbursement of costs for state repatriation flights and the reimbursement of travel costs in the event of package tour cancellations.⁷⁸ Next to this, the Roos case⁷⁹ should be mentioned, where the ECJ upheld the requirement for member of the EU Parliament to show the COVID-19 certificate while entering the building.⁸⁰

Insofar as the ECJ is presented with further COVID-related cases for decision in the future, the role of the ECJ may change. This is particularly true if, like the German Federal Constitutional Court, it has to rule on the controversial reconstruction fund - but no cases have been referred to the court so far. From today's point of view, it may seem unlikely that the NextGenerationEU funds will be challenged. This will also be partly due to the fact that they are seen as attractive on the financial markets and are therefore viewed positively for the EU and all member states.⁸¹ However, this cannot be seen as an argument for their legal admissibility and it remains to be seen whether the member states will maintain their view that they will refrain from a legal challenge before the ECJ if the funds become less attractive. It also remains to be seen whether NextGenerationEU is an actual temporary individual case or whether, from the point of

76. Cf.: Claudia Seitz, (n 11) L 26.

77. In detail to the possible types of procedures: ECJ <https://curia.europa.eu/jcms/jcms/Jo2_7024/de/#competences> accessed 20 November 2023.

78. ECJ, Judgement of 12 January 2023 - C-396/21 FTI Touristik. |

79. CJ, Joined Cases T-710/21, T-722/21 and T-723/21, Roos and others vs. European Parliament, judgement of 27 April 2022.

80. A further discussion of the case and its human rights dimension can be found at Federico Fabbrini, 'COVID-19, Human Rights and Judicial Review in Transatlantic Perspective' *REGROUP Research Paper No. 5* (2023) <<https://regroup-horizon.eu/publications/>>.

81. On the attractiveness of EU government bonds from NextGenerationEU, cf. Goldman Sachs, 'Can EU bonds rival the German bund?' <<https://www.goldmansachs.com/intelligence/pages/can-eu-bonds-rival-the-german-bund.html>> accessed 20 November 2023.

Two points of criticism concerning the EU's institutional action can nevertheless be identified. One is the Commission's response to the numerous border closures and prolonged travel bans within the EU. Serious violations of the right to free movement, which is at the core of European citizenship, were at stake. In this area, the EU has a strong competence, so that tougher measures from the Commission, such as the initiation of an infringement procedure according to Art. 258 TFEU, would have been appropriate for a strong spillover effect on future crises.

The EU's recovery fund NGEU can also be viewed critically from a constitutional checks and balances perspective. This authorizes the Commission to issue bonds on the financial markets to raise resources and materially support the recovery of member states through grants and loans. This approach is unprecedented in the history of the EU, which is why critical voices fear a violation of Art. 125 TFEU. However, this reconstruction package must be viewed in the context of the serious health crisis and its exceptional nature and its economic necessity as well as its political plausibility. Therefore, a violation cannot be assumed lightly. Here, further control by the judiciary is to be awaited; especially when future financial instruments such as NextGenerationEU are adopted. Against the backdrop of the energy crisis, the war of aggression by Russia and the escalation in the Middle East conflict, this does not seem unlikely.

Overall, it can be seen that no major power shifts have taken place at the level of the EU institutions. Rather, the institutions have attempted to exert a harmonizing influence on the member states within the framework of their limited resources and, in particular, to make financial resources available. The only exception is the controversial reconstruction program under the multi-year financial framework. Its admissibility under the law on competences is disputed and there has been no decision by the ECJ. However, the otherwise critical German Federal Constitutional Court has confirmed its admissibility.

Checks and balances in EU and US States' pandemic responses

As outlined in the first chapter, EU member states have played the central role in European pandemic response. They have the competence to design their health care systems. The EU plays only a coordinating role. Within the pandemic, this has led to member states taking different paths and not adhering to EU recommendations. Some member states, such as Italy, Austria and France, had adopted particularly strict regulations, which led to severe restrictions on fundamental rights. An exception is Sweden, where the course of the pandemic was controlled by mere recommendations.

US States also faced major challenges and were left on their own, especially at the beginning of the pandemic. The result was therefore similar to that within Europe. Scattered regulations were adopted without a uniform approach.

Now that the worst part of the crisis seems to be over, it is time to analyze how the democratic structures of the member states have changed over the course of the pandemic. It is necessary to clarify whether changes in the constitutional checks and balances that emerged during the crisis situation persist or whether - despite Russia's ongoing war of aggression against Ukraine in violation of international law - more order has returned. These questions will be discussed in more detail in the following section.

Exercise of state emergency powers

Within the EU, 17 member states have constitutional State of emergency powers suitable for health crises.⁸⁷ Other member states have State of emergency powers, but these are not suitable for health crises such as pandemics. Finally, there are some Member States, such as Sweden, Italy and Belgium, where neither political, military nor health crisis State of emergency powers are included within the current Constitution. In Italy in particular, this is based on historical concerns. When the constitution was written in 1948, the bad experiences of the Fascist regime in World War II were particularly present.⁸⁸ Member states with pertinent constitutional frameworks can be divided into two categories:⁸⁹ On the one hand, there are constitutional emergency regulations with a general, undifferentiated character, the so-called general clause models. These can be activated regardless of the type of emergency.⁹⁰ These include, for example, the French constitutional provision of Art. 16 of the French Constitution, which dates from 1958. This gives the French president far-reaching powers to act in all crisis situations, such as political emergencies. The president is entitled to take any action he deems necessary to restore proper state of affairs, at his own discretion.⁹¹ The advantage of these regulations is their flexibility. Depending on the crisis situation, the head of the executive branch is allowed to take quick and appropriate measures, including in health crises such as the COVID-19 pandemic. However, their potential for abuse is problematic. In this context, reference should be made to the Enabling Act of 1933⁹² and its

87. Maria Diaz Crego and Silvia Kotanidis, 'States of emergency in response to the coronavirus crisis' *European Parliament Research Service* (December 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU\(2020\)659385_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf)> accessed 20 November 2023.

88. Arianna Vidaschi, 'The marginalization of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in Matthias C. Kettmann and Konrad Lachmayer, *Pandemocracy in Europe* (Bloomsbury Publishing Plc Oxford, 2022) 120.

89. Arianna Vidaschi, 'À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato' (Giappichelli Torino 2007) 266.

90. Arianna Vidaschi (n 73) 119.

91. The constitutional text reads: 'take measures required by these circumstances'; in more detail to this: Estelle Chambas and Thomas Perroud, 'France: Legal Response to Covid-19', in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021).

92. What is meant is the: 'Gesetz zur Behebung der Not von Volk und Reich', Reichsgesetzblatt (Imperial

consequences in the German Weimar Republic, which declared a State of emergency.

Other constitutions belong to the ‘rationalized’ model. These states regulate state of emergency powers in more detail. This group can be divided into various subgroups. There are some countries, such as Sweden,⁹³ where the constitution distinguishes between peace and war. This means that the constitution only knows military States of emergency powers. In addition, there are countries with more detailed rules, such as Germany. Within the German Basic Law State of emergency powers were included in 1968.⁹⁴ Until now the Basic Law has distinguished between internal and externally-induced states of emergencies. In the event of military attacks or similar situations that have an external effect on federal territory, an external State of emergency may be declared. According to Artt. 35, 91 of the German Basic Law, an internal state of emergency is to be declared in the event of a natural catastrophe or other kinds of grave disaster. Health crises, such as COVID-19, are not explicitly mentioned, but are considered to be covered by the scope of the regulation.⁹⁵ The Spanish Constitution is even more differentiated, distinguishing between types of State of emergency (neutral (eg. Pandemics), political, war) and, in addition, different intensities (alarm, emergency, siege) of State of emergency with different legal consequences, cf. Article 116 of the 1978 Spanish Constitution.⁹⁶ In addition, since 1981, the regulations governing states of alarm, emergency and siege have been amended and concretized by Ley Orgánica 4/1981, de 1 de junio. The legal consequences of those provisions differ in each case depending on the type of the State of emergency. This enables more effective measures to be taken that are more adapted to the situation, which is an advantage of these regulations in limiting the power of separate powers.

Of the countries with constitutional norms from these two groups, 10 member states, namely Bulgaria, Czech Republic, Estonia, Finland, Hungary, Luxembourg, Portugal, Romania, Slovakia and Spain, have already made use of them in the 1st COVID-19 wave in March 2020.⁹⁷ Contrary to these Member States, only a few Member states such

Law Gazette).

93. Julia Dahlqvist and Jane Reichel, ‘Swedish Constitutional Response to the Coronavirus Crisis - The Odd One Out?’ in Matthias C. Kettmann and Konrad Lachmayer, *Pandemocracy in Europe* (Bloomsbury Publishing Plc Oxford, 2022) 148.

94. In more detail: Pierre Thielbörger, ‘Germany - Federalism in Action’ in Matthias C. Kettmann and Konrad Lachmayer, *Pandemocracy in Europe* (Bloomsbury Publishing Plc Oxford, 2022) 98.

95. Caroline Böck, ‘Developments in Germany’ in Böck and Kettmann ‘The Pandemic’s Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives’ 3 *Future Law Working Papers* 20; Pierre Thielbörger and Benedikt Behlert, ‘COVID-19 und das Grundgesetz - Zur (Un)tauglichkeit des verfassungsrechtlichen „Immunsystems“’ *Verfassungsblog* (19 March 2020) <www.verfassungsblog.de/covid-19-und-das-grundgesetz/> accessed 20 November 2023.

96. Gabriel Lecumberri Beascoa and Ignacio Díez Parra, ‘Das Notstandsrecht, eine rechtsvergleichende Perspektive’ *European Parliament Research Service* (April 2020) <[https://www.europarl.europa.eu/Reg-Data/etudes/IDAN/2020/649366/EPRS_IDA\(2020\)649366_DE.pdf](https://www.europarl.europa.eu/Reg-Data/etudes/IDAN/2020/649366/EPRS_IDA(2020)649366_DE.pdf)> accessed 20 November 2023; Arianna Vidaschi (n 73) 120.

97. Maria Diaz Crego and Silvia Kotanidis, (n 72).

as France⁹⁸, Poland (formally)⁹⁹, Germany¹⁰⁰, Malta,¹⁰¹ Austria¹⁰² and the Netherlands¹⁰³ have not declared a constitutional State of emergency in order to combat the pandemic. In Germany, there are two main reasons for that: Firstly, a declaration of a State of emergency is regarded as a measure of last resort because of historical concerns. Secondly, the typical legal consequences of Artt. 35, 91 German Basic Law, such as the sharing of police forces and the use of the military, are unfit for dealing with a pandemic. Only where it reaches an extreme condition, such as the collapse of the entire healthcare system, a part of the legal consequences seem to become relevant.¹⁰⁴ The Netherlands restrained from using constitutional Emergency Powers because existing legislation was considered to be sufficient to address the crisis.¹⁰⁵ The same applies for Malta.¹⁰⁶ In France, the particularly broad constitutional emergency provision described earlier was not activated because of its disproportionality.¹⁰⁷

These constitutional emergency regulations enabled massive restrictions on fundamental rights, such as school closures and curfew rules, in some countries, especially at the beginning of the pandemic. It should be added, however, that the emergency regulations lasted only between ten (Luxembourg) and 90 days (Estonia, Finland and Slovakia), so that the effect of the measures lasted only a short period of time.¹⁰⁸ Thus, only very temporary measures, which were mostly enacted by the executive, were justified, so that in retrospect no particular impact of the constitutional checks and balances within the European member states is evident.

The US constitution, on the other hand, does not provide a State of emergency power explicitly. Only Article I of the US constitution states that the US Congress may suspend the privilege of the writ of *habeas corpus* in cases of rebellion or invasion the public safety.¹⁰⁹ Besides, any changes to the federal or state constitutions were made during

98. Estelle Chambas and Thomas Perroud, (n 72).

99. Valentina Chekharina, State of emergency in Poland: constitutional regulation and “hybrid” nature during the COVID-19 pandemic [2021] *Sravnitelnoe konstitutsionnoe obozrenie* 4/143.

100. Caroline Böck, (n 95) 20f.

101. Vincent A. De Gaetano, ‘Covid-19 - the Maltese Response: Slow at First but Steady and Effective’ *Verfassungsblog* (5 April 2020) <<https://verfassungsblog.de/covid-19-the-maltese-response-slow-at-first-but-steady-and-effective/>> accessed 20 November 2023.

102. Konrad Lachmayer, ‘Austria’s Response to COVID-19’ in Böck and Kettemann ‘The Pandemic’s Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives’ 3 *Future Law Working Papers* 16f.

103. Arjan Kleinhout, ‘Declaring a state of emergency in the Netherlands - what additional powers for government?’ *De Brauw Blackstone Westbroek* (Amsterdam, 29 March 2020) <<https://www.debrauw.com/articles/declaring-a-state-of-emergency-in-the-netherlands-what-additional-powers-for-government>> accessed 20 November 2023; Manon Julicher and Max Vetzo, ‘COVID-19 in the Netherlands: of Changing Tides and Constitutional Constants’ *Verfassungsblog* (22 April 2021) <<https://verfassungsblog.de/covid-19-in-the-netherlands-of-changing-tides-and-constitutional-constants/>> accessed 20 November 2023.

104. Caroline Böck, (n 95) 20f.

105. Maria Diaz Crego and Silvia Kotanidis, (n 72).

106. Vincent A. De Gaetano, (n 86).

107. Estelle Chambas and Thomas Perroud, (n 72).

108. Maria Diaz Crego and Silvia Kotanidis, (n 72).

109. Tom Ginsburg and Mila Versteeg, The bound executive: Emergency powers during the pandemic (2021) *International Journal of Constitutional Law* 1.

the pandemic.¹¹⁰ Unlike in the European constitutions, any executive powers are thus not included. The regulation once activated rather directly restricts the population to assert their fundamental rights. In the US, this is because the founders of the Constitution considered the rights granted in the Constitution for the president as well as the states to be sufficient even in times of crisis.

Use of executive power

In addition, 15 EU member states¹¹¹ adopted statutory public health emergencies at the outset of the pandemic. Later, several more countries within the EU implemented statutory State of emergency Rules. Some states adopted this in addition to the constitutional emergency, others in isolation from it. This was done depending on whether and to what extent the respective legal basis for pandemic measures provided for appropriate legal consequences.¹¹² The same applies to the US. There, too, the executive powers on state level and under the presidency of Joe Biden on federal level were exploited.¹¹³ The member states of the EU, as well as the US and some other non-EU countries, can be divided into five main groups when it comes to the expansion of executive power.¹¹⁴

Substantial use of executive powers

The first group includes those states in which a substantial strengthening of the power of the executive has been perceived without the parliament having empowered or authorized the executive to do so and although the national system does not provide for a presidential government. This is a trend that can be called “hyper-executivization”.¹¹⁵ While this does not mean that there was no legal basis at all, only that it did not contain specific regulations. These include Belgium, Ireland, France and Great Britain, as well as Italy.¹¹⁶ This is all the more remarkable because in Italy and Belgium, as described above, there is no possibility of declaring a constitutional state of emergency, but statutory emergencies have been enacted in these countries, resulting in far-reaching decisions regarding the separation of powers. This statutory law empowered the executive branch to enact massive restrictions on citizens’ fundamental rights to protect the health of the population without first giving Parliament the opportunity to scrutinize the decision.¹¹⁷

110. Lindsay F Wiley and others, (n 76).

111. Those were: Bulgaria, Croatia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Rumania, Slovenia und Slovakia.

112. Lindsay F Wiley and others, (n 94).

113. Ibid.

114. Based on: Arianna Vendaschi and Chiara Graziani, (n 25) 858.

115. Ibid.

116. Ibid.

117. Ibid.

In Belgium, decrees (Arrêté ministériel)¹¹⁸ were issued by the Minister of Health and the Minister of Home Affairs at the beginning of the pandemic, granting the police far-reaching rights and restricting the fundamental rights of the population, although there was no clear legal basis for this.¹¹⁹ The situation was similar in Italy and the other states in this group. There, too, many Head of the Executive decrees were issued that are lower ranked than statutes, did not require prior or ex post examination by parliament and cannot be reviewed by the Constitutional court or other bodies. In addition, the Head of Executive addressed the nation on TV before the launch of each of his measures. This was very unusual in the history of Italian Parliamentarism.¹²⁰

In France, where the President and the Cabinet traditionally have a great deal of executive power due to the semi-presidential system, the existing balance of power was also very strongly exploited. The President as well as the Minister of Health and the Prime Minister each decided on all measures to combat the pandemic on the basis of decrees (arrêtés) based on legislative provisions of the Code de la Santé Publique and Law No. 2020-290¹²¹, even if this was not required by law. This created a three-person executive leadership in France, which was called a “French monarchy” by legal scholars.¹²² Similar results can be seen in the UK. There, the Prime Minister and the Cabinet took all far-reaching decisions themselves, which did not seem unusual in view of the constitutional arrangement within the framework of the separation of powers.¹²³

Due to the massive emergency situation at the beginning of the pandemic, in which the health care systems and the supply of citizens with protective medical materials such as masks and disinfectants could only be inadequately ensured, the strengthening of the executive branch and thus the shift in the area of separation of powers was necessary from an ex post perspective.¹²⁴ In the further course of the pandemic, however, when these initial hurdles had been overcome and medical research had progressed further, there should have been greater involvement of parliament to ensure democratic control processes. This is particularly true in those phases in which the pandemic situation was more manageable due to the subsiding of a wave. These strong, non-democratically

118. E.g.: Arrêté ministériel du 13 mars 2020 portant des mesures d’urgence pour limiter la propagation du coronavirus COVID-19 [Ministerial decree from March 13, 2020 regarding emergency measures aimed to limit the spread of COVID-19], M.B., Mar. 13, 2020.

119. Legal Scholars agree on this, cf. for instance: Patricia Popelier and others in Arianna Vidaschi ed., National Report on Belgium, in Governmental Policies to fight Pandemics: The Boundaries of legitimate limitations on Fundamental Freedoms (forthcoming 2023).

120. Arianna Vidaschi, ‘The Marginalization of Parliament in Facing the Coronavirus Emergency: What About Democracy in Italy?’ in Böck and Kettmann ‘The Pandemic’s Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives’ 3 Future Law Working Papers 9.

121. Loi 2020-290 du 23 mars 2020 d’urgence pour faire face à l’épidémie de covid-19 [Law 2020-290 of March 23, 2020 to deal with the COVID-19 epidemic) Journal officiel de la République Française [J.O.] [official gazette of France], March 24, 2020.

122. Sylvia Brunet, ‘The Hyper-Executive State of emergency in France’ in Matthias C. Kettmann and Konrad Lachmayer, Pandemocracy in Europe (Bloomsbury Publishing Plc Oxford, 2022) 201f.

123. Robert Thomas, ‘Virus Governance in the United Kingdom’ in Matthias C. Kettmann and Konrad Lachmayer, Pandemocracy in Europe (Bloomsbury Publishing Plc Oxford, 2022) 72f.

124. Arianna Vidaschi and Chiara Graziani, (n 94) 819 et seqq.

legitimized measures over the long years of the pandemic are therefore particularly worthy of criticism in that they have caused a strong shift in the area of constitutional checks and balances. The lack of political or legal consequences ex post is also problematic, even if the measures have since ceased to have any effect, as this has set a precedent for future measures in the countries.

Moderate use of executive powers

The second group consists of “medium level executivization” countries such as Germany, Austria, the Netherlands and Spain. In these countries, an interstate balanced approach existed directly or after a period of strong executive action.¹²⁵

Within this group, this paper is going to highlight the German executive response. The legal basis of Germany’s pandemic response is the Infection Protection Act [IPA] (*Infektionsschutzgesetz*)¹²⁶ from 2001, which outlines the federal and state governments’ scope for action during an epidemic. According to the most important norms during the pandemic Section 28, 32 IPA the states (*Laender*) were authorized to issue decrees. Hence, the states’ governments remained the primary actors in charge.¹²⁷ Regular conferences of minister presidents under the leadership of the Chancellor were held in order to enable a coordinated approach within Germany. These resolutions have not been legally binding, which is why some of the states enforced their own regulations. These fragmented regulations led to resentment among the population.¹²⁸ To mitigate this strong executive action, numerous changes were made to the IPA during the pandemic that differentiated the standards, such as the addition of the federal emergency break (*Bundesnotbremse*).¹²⁹ Over time, this strengthened parliament, even though the specifics are based on parts of the previous ministerial decisions. Due to the similar federal structures and the underlying statutory law, the developments in Austria were similar.¹³⁰ This short-term shift in power has thus not led to any lasting changes in the area of constitutional checks and balances. Nevertheless, in retrospect, this approach seems very reactive and no clear strategy is discernible. Rather, executive action had short-term effects, and legislative reaction came later. Therefore, within this group as well, it seems appropriate to conduct an ex-post crisis assessment in order to develop a balanced crisis strategy for future crises.

125. Arianna Vidaschi and Chiara Graziani, (n 94).

126. Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz - IfSG) [Law on the Prevention and Control of Infectious Diseases in Humans (Infection Protection Act - IfSG)], latest changes from 17 July 2023 can be found at BGBl. 2023 I Nr. 190.

127. Caroline Böck, (n 95) 21f.

128. Pierre Thielbörger, (n 79), 99f.

129. Arianna Vidaschi and Chiara Graziani, (n 94).

130. Ibid.; Konrad Lachmayer, ‘Austria’s Response to COVID-19’ in Böck and Kettemann ‘The Pandemic’s Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives’ 3 Future Law Working Papers 16.

Balanced use of executive powers

The third group consists of countries in which the distribution of power between the executive and legislative branches was consistently balanced. In contrast to the second group, there was balanced and more meaningful control by the respective parliaments despite (strong) executive measures. This type of pandemic control was primarily carried out by Northern European countries, such as Denmark and Finland.¹³¹

This paper is going to have a closer look on the Finnish use of executive powers, since scholars agree that the executive powers were used in a particularly balanced way and the principle of legality was given special consideration.¹³² The OECD has also taken a closer look at this approach, describing Finland's response to the COVID-19 crisis as "appropriate, [and] in line with what was necessary", as evidenced by the fact that Finland's GDP fell by the smallest amount by comparison.¹³³ Although Finland's government declared twice a national State of emergency based on the existing statutory Emergency Powers Act,¹³⁴ the role of the Eduskunta (the Finnish unicameral Parliament) remained central, which was mainly due to the constant as well as direct control of executive measures by the parliament.¹³⁵ The Act enabled the government to impose far-reaching restrictions on citizens' fundamental rights. The government used these powers during the pandemic. The measures, meanwhile, were reviewed by Parliament. The Constitutional Committee, which consists of members of parliament, experts and civil servants and is responsible for reviewing decrees and legislative acts for their constitutionality, took center stage.¹³⁶

What is special about the Finnish system is that there is no constitutional court in Finland that exercises ex post judicial review. The Constitutional Committee acts as such in the Finnish understanding, which is not without risk. Unlike an independent court, it consists of members of the legislature. Insofar as they disregard the constitution and straight rule of law principles, this can lead to a weakening of the democratic system in Finland. However, such a trend has not been seen during the COVID-19 pandemic.¹³⁷

Rather, there is a major advantage in the Finnish system, which should be seen as a model for other member states. The Finnish system has succeeded in enabling parliamentary and further control of executive measures by the Constitutional Committee even in times of crisis and, at the same time, in making quick decisions on pandemic

131. Arianna Vedaschi and Chiara Graziani, (n 94) 819 et seqq.

132. Ibid 847.

133. OECD/Statistics Finland, 'Finland: Road to Recovery after COVID-19' *OECD Publishing* (Paris 2021) p. 15.

134. Valtioneuvoston Päätös [Government Decision] VNK/2020/31, 16 March 2020.

135. The central role of the Finnish Parliament is outlined below in Chapter III.3.

136. Finnish NHRI (Human Rights Centre and its Delegation and Parliamentary Ombudsman), 'Independence and effectiveness of the NHRI' <<https://ennhri.org/wp-content/uploads/2020/06/State-of-the-Rule-of-Law-in-Europe-2020-Finland.pdf>> accessed 20 November 2023.

137. Ibid.

control. This guarantee of constitutional checks and balances during the crisis period is thus very positive.

The Swedish use of executive powers

Sweden has taken a special position, even within the Nordic countries.¹³⁸ For the most part, Sweden enacted non-binding legislation regarding COVID-19 control. Rather, the executive branch, primarily the government in cooperation with the Public Health Agency, worked with legally non-binding recommendations. Thus, only minor measures restricting the fundamental rights of the population were enacted. Only at the beginning of the pandemic isolated legislative acts were passed. However, these were based on existing or previously modified legislation, such as restrictions on public gatherings and ensuring social distancing within restaurants and bars.¹³⁹ It was not until 2021 that the Swedish COVID Act¹⁴⁰ was enacted, which was intended to allow the executive branch, particularly the government, to enact more targeted measures. This would have allowed the government to legitimize far-reaching encroachments on fundamental rights. The government largely did not use this option until the law was repealed.¹⁴¹ Sweden's unique approach is also evident in an international comparison: only in Japan can a similar approach be found.

In principle, this method is particularly positive from the standpoint of protecting fundamental rights. This approach can also be seen as a model for other states in the area of separation of powers. It can be seen that both in Japan and Sweden an effective strategy for coping with times of crisis was developed and applied. Although reactions were evident, especially by the executive, these were in balance with the other powers. Nevertheless, even this approach was not entirely beneficial. Rather, Swedish legal scholars criticize the government for relying too much on cooperation with the Public Health Agency and for enacting the COVID-19 Act too late as a legal basis. As a result, it is difficult to determine in retrospect which party was responsible for individual measures.¹⁴²

Strong use of executive powers on the state/sub-central level

The response of the US executive branch is also treated as a separate group in the context of this paper. In the US, during the pandemic and initially under the presidency of Donald Trump, no strong exercise of executive powers was evident, which is unusual

138. Julia Dahlqvist and Jane Reichel, (n 74) 136.

139. Ibid.

140. Lag om särskilda begränsningar för att förhindra spridning av sjukdomen covid-19 [Act on special restrictions to prevent the spread of the COVID-19 disease] SFS 2021:4 Svensk författningssamling [official gazette of Sweden] 9 January 2021.

141. Julia Dahlqvist and Jane Reichel, (n 74) 137f.

142. Julia Dahlqvist and Jane Reichel, (n 74) 137f.

given the strong presidential system even in non-crisis times.¹⁴³ Similar trends were also evident in Australia and Canada.¹⁴⁴ In contrast to the first group within this group of countries, not the central or federal executive branch was the predominant player during the pandemic, but rather the state or sub-central executive branch.¹⁴⁵ This paper is going to have a closer look at the US state response.

As mentioned above, within the US, public health is generally considered a state issue with the option for the federal government to take action if a state response is not sufficient.¹⁴⁶ Just within the first period of the COVID-19 pandemic, during which Donald Trump was President, no groundbreaking uniform strategy was introduced by the federal government to support US states, despite the possibility and the necessity of intervention. President Trump claimed the COVID-19 crisis as “fake news,” for which he was strongly criticized by international health organizations, such as WHO, but also legal scholars.¹⁴⁷ As a result, he questioned their legitimacy.¹⁴⁸

Hence, the main actors in charge were the US state governments, especially the governors themselves, but also local and tribal governments. The US states were free to adopt parallel regulations for neighboring states or not to adopt pandemic control measures at all. The result was a patchwork framework within the US.¹⁴⁹ This is similar to the EU member states’ response in the beginning of the pandemic. The approach of the individual US state executives also differed enormously in terms of content. Yet most of the US States activated pre-2020 existing Statutory Emergency Powers at the beginning of 2020 and subsequently issued particularly strict COVID-19 measures by the executive branch, such as seizing personal property, issuing stay-at-home orders, certain business closing and suspending several statutes.¹⁵⁰ These executive orders, which severely restricted the fundamental rights of citizens, were enacted by the governors without prior and subordinate control by the legislature, which is why a massive shift within the separation of power took place.¹⁵¹ These measures were mostly withdrawn when the respective wave leveled off and reintroduced when the number of new infections rose sharply, with no parliamentary involvement in each case. Overall, the measures tended to become weaker over the course of the pandemic.

143. David E. Pozen and Kim L. Scheppele, ‘Executive Underreach, in *Pandemics and 114 AM. J. INT’L L.* 608 (2020) (calling President Trump politics executive underreach).

144. Arianna Vidaschi and Chiara Graziani, (n 94) 849 et seqq.

145. Ibid..

146. Tom Ginsburg, (n 23).

147. Kim L. Scheppele, (n 9); Arianna Vidaschi and Chiara Graziani, (n 94) 852.

148. Remarks by President Donald Trump, Vice President Mike Pence, and Members of the Coronavirus Task Force in Press Briefing (Apr. 7, 2020) <<https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-april-7-2020/>> accessed 20 July 2020.

149. Rebecca L. Haffajee and Michelle M. Mello, (n 25).

150. Federico Fabbrini, (n 80).

151. Lindsay F Wiley and others, (n 94) Part IV

With the beginning of Joe Biden's presidency this situation changed. He declared COVID-19 a risk for the federal public health and issued several executive orders to fight the pandemic, such as further occupational safety measures.¹⁵² However, the president took these measures, some of which severely limited citizens' freedoms, without any involvement of the legislative branch, meaning Congress.

Overall, the executive response to the COVID-19 pandemic in the US varied at the federal and state levels. Under Donald Trump's presidency, the federal executive played only a little role. Rather, the president completely misjudged the severe health crisis through populist and medically inaccurate information completely neglected the need for a federal government strategy and thus his job.¹⁵³ This is particularly concerning because President Trump was not held accountable for this, setting a precedent for future crises, even though President Biden executed his authority in a correct manner during the second phase of the pandemic. His strong executive response was expected due to the presidential system in the US.

Legislative authority and COVID legislation

As mentioned above, the executive branch held a strong position within most of the EU countries as well as the US after president Biden was elected and some other English-speaking countries. Strong executive powers seem to be very efficient at the beginning of health crises, such as pandemics, since those measures have a rapid effect. In retrospect, such measures were therefore particularly important at the beginning of the COVID-19 pandemic, as there were no cures, as well as vaccinations, in sight, and high rates of infection and mortality were occurring, resulting in an overall very confused situation in most countries.¹⁵⁴ This was compounded by the problem of high contagiousness with COVID-19, which is why social distancing measures were necessary. This posed a particular challenge for the parliaments, which were active on the ground in large numbers. The following section therefore examines the role played by the legislature as a direct control body of the executive in the countries already studied.

It was precisely the basic functioning of parliaments that could no longer be guaranteed with the outbreak of the pandemic. The social distancing measures forced the parliaments to change their working methods, especially during plenary sessions. It can therefore be seen that these were very limited in their activities during the first days of the pandemic in 2020.¹⁵⁵ In this regard, parliaments took several different measures

152. Executive Order, Federal Register E.O. 14042 of Sep 9, 2021, Doc.Cit. 86 Fed. Reg. 50,985 <<https://www.federalregister.gov/documents/2021/09/14/2021-19924/ensuring-adequate-covid-safety-protocols-for-federal-contractors>> accessed 20 November 2023.

153. Mario Patrono & Arianna Vedaschi, Donald Trump and the future of American Democracy: the harbinger of a storm? *EGEA Spa - Bocconi University Press* (Milan, 2023).

154. Arianna Vedaschi, (n 73) 125.

155. Stefan Marschall, 'Parlamente in der Krise?' *Bundeszentrale für politische Bildung* (11 September 2020) <<https://www.bpb.de/shop/zeitschriften/apuz/315241/parlamente-in-der-krise/>> accessed

with regard to their functioning in order to minimize the risks of contagion for members of parliament while at the same time ensuring that parliaments are able to act. Many parliaments had already shortened plenary sessions at the very beginning, thus curtailing the right of members to speak.¹⁵⁶ In several states, such as Spain¹⁵⁷ and the UK,¹⁵⁸ distance voting procedures were enacted on federal level. In order to simplify parliamentary resolutions in Germany, the quorum, which specifies how many parliamentarians must be present for a resolution to be adopted, was lowered.¹⁵⁹ Moreover, in most member states, the composition of parliament and its committees was minimized.¹⁶⁰ Especially in France¹⁶¹ and the US, on federal as well as state level,¹⁶² so called proxy-votes were introduced, which meant that only a few parliamentarians were allowed to attend meetings in parliament and vote on behalf of their caucus members when votes were taken. Elsewhere, online voting and online parliamentary as well as committee meetings were introduced. This was not the case in Italy, for example. There, due to the literal interpretation of constitutional provisions affecting parliament, digital discussions or votes were not held at any time. When parliament was in session, it was only in person in parliament.¹⁶³ In the meantime, the regulations have been lifted again in the states and the parliaments are once again in session and in full session.¹⁶⁴

In addition, the EU member states as well as the US States parliaments, as mentioned above, during the first wave of the pandemic adopted the Statutory State of emergency rules. Those rules formed the basis for interfering with the standard rulemaking process, thereby accelerating the legislative process and delegating rulemaking authority to the executive branch or certain agencies, such as health departments. Those measures therefore granted the executive branch far-reaching powers.¹⁶⁵ All states in the US enacted such measures.¹⁶⁶ In Croatia, the Civil Protection Authority - a committee consisting of representatives of the government and national civil protection units -

20 November 2023.

156. Eg. in Spain plenary sessions were suspended for some weeks at the beginning of the pandemic: Dolores Utrilla and others, 'Spain: Legal Response to Covid-19' in Jeff King and Octávio LM Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (OUP 2021).

157. Ibid.

158. Alice Lilly, 'The UK Parliament and Coronavirus' *Institute for Government* [18 March 2020] <www.instituteforgovernment.org.uk/explainers/uk-parliament-coronavirus> accessed 20 November 2023; Robert Thomas (n 107) 74.

159. *Beschlussempfehlung und Bericht des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung* (1. Ausschuss), BT-Drs. [Materials of the German Bundestag] 19/18126 of 25 March 2020.

160. Elena Griglio, 'Parliamentary oversight under the Covid-19 emergency: striving against executive dominance, *The Theory and Practice of Legislation*' [2020] 8 *The Theory and Practice of Legislation* 6.

161. Proxy voting is supported in France by art 62 of the Rules of Procedure of the National Assembly, recalling the conditions set by Ordonnance no 58-1066 of 7 November 1958.

162. Arianna Vidaschi and Chiara Graziani, (n 25) 854et seqq.

163. Arianna Vidaschi, (n 109) 9.

164. See eg. Swedish Riksdag in Julia Dahlqvist and Jane Reichel, 'Swedish Constitutional Response to the Coronavirus Crisis - The Odd One Out?' in Böck and Kettmann 'The Pandemic's Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives' 3 *Future Law Working Papers* 12.

165. Maria Diaz Crego and Silvia Kotanidis, (n 72) 25.

166. Arianna Vidaschi and Chiara Graziani, (n 25) 858.

had been authorized to issue direct measures to combat the pandemic.¹⁶⁷ The same applies to the US states. In Germany, this at least partially interfered with the distribution of competences between the federal state and the states.¹⁶⁸ However, in some states, even more far-reaching and, from a democratic point of view, very problematic measures were made possible: For example, the Bulgarian Parliament, the majority of which belonged to the party of the President, passed the particularly far-reaching Law on the Measures and Actions during the State of emergency on 23 March 2020¹⁶⁹, which, among other things, made it possible for law enforcement agencies to halt court proceedings and intervene in telecommunications law.¹⁷⁰ In the other states with strong executive measures, such as France, Italy and the UK, parliament had also co-decided on a Statutory Emergency, which greatly weakened their own position.¹⁷¹ With the exception of Hungary, where the crisis was used to continue the constitutional change already underway, parliaments had retained their legislative prerogatives. In the course of the pandemic, parliaments had therefore converted executive measures into statutory law and, in some cases, passed emergency laws proposed by the government.¹⁷² In Germany, this led to the IPA being almost completely amended to include very explicit pandemic response measures.¹⁷³ Nevertheless, it is evident that the parliamentary debate, which is so important for a democratic state, was often kept very short and that it was precisely the rights of the opposition that were curtailed.¹⁷⁴ This is particularly true in those countries where proxy votes were introduced because the minority parties were not represented here. In addition, it is particularly problematic that the informal discussions between parliamentarians, which are otherwise important for parliamentary debate, took place only to a very limited extent. Unlike constitutional emergencies, statutory emergencies have been active for a very long time in most countries, so they have had a strong impact on constitutional checks and balances during that time.¹⁷⁵

167. Nika Bačić Selanec, 'Croatia's Response to COVID-19: On Legal Form and Constitutional Safeguards in Times of Pandemic', *Verfassungsblog* (9 Mai 2020) <<https://verfassungsblog.de/croatias-response-to-covid-19-on-legal-form-and-constitutional-safeguards-in-times-of-pandemic/>> accessed 20 November 2023.

168. Maria Diaz Crego and Silvia Kotanidis, (n 72) 25.

169. Закон за мерките и действията по време на извънредното положение, обявено с решение на Народното събрание от 13 март 2020 г <<https://dv.parliament.bg/DVWeb/showMaterialDV.jsp?id-Mat=147150>> accessed 20 November 2023.

170. Radosveta Vassileva, 'Bulgaria: COVID-19 as an Excuse to Solidify Autocracy?' *Verfassungsblog* (10 April 2020) <<https://verfassungsblog.de/bulgaria-covid-19-as-an-excuse-to-solidify-autocracy/>> accessed 20 November 2023.

171. In more detail: Sylvia Brunet (n 106); Robert Thomas (n 107); Arianna Vendaschi, (n 73).

172. Elena Griglio, (n 160) 6.

173. Caroline Böck, (n 95) 20f.

174. Pierre Thielbörger (n 79) with reference to Germany; Antonios Kouroutakis, 'Abuse of Power and Self-entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and People' in in Matthias C. Kettmann and Konrad Lachmayer, *Pandemocracy in Europe* (Bloomsbury Publishing Plc Oxford, 2022) 33 et seqq.

175. Polish Press Agency, 'Poland to end state of epidemic amid few COVID-19 cases' <<https://www.pap.pl/en/news/news%2C1567825%2Cpoland-end-state-epidemic-amid-few-covid-19-cases.html>> accessed 20 November 2023.

As explained earlier, this does not apply to the Swedish Parliament. There, the parliament had continued to exercise strong control despite limited opportunities. The *Coronacommission* and a parliamentary committee set up there to review the pandemic are also particularly noteworthy, as they have closely examined the institutions' response to the pandemic and made concrete policy recommendations.¹⁷⁶

Judicial remedies

With the separation of powers doctrine, courts play the role of guardians of the law as well as of the Constitution, such as fundamental rights.¹⁷⁷ Thus, when it comes to policing strong executive actions that restrict citizens' fundamental rights, such as freedom of movement, in a public health crisis, courts are particularly important in a democracy. Especially, testing the reasonableness and proportionality of political and legislative measures taken by courts is of particular importance in a constitutional state.¹⁷⁸ Hence, this paper considers the role of courts in the structure of constitutional checks and balances during the pandemic.

The responses of the courts can also be divided into different groups. On the one hand, a group of countries can be identified in the area of judicial remedies in which constitutional review had taken place only to a very limited extent. and Switzerland, where executive measures are largely not subject to review by the courts. Moreover, courts in these countries faced technical hurdles, as hybrid or online court proceedings could often not be carried out due to a lack of technical resources, thus making no or only delayed judicial review possible. Furthermore, no or only limited individual complaints by citizens against measures restricting fundamental rights have been possible in the countries.¹⁷⁹ This development must be evaluated particularly critically, since these countries also had particularly strong executive measures and a marginalization of parliaments. Here, it is particularly necessary to accelerate court proceedings and enable judicial review of the measures.

Several other countries can be classified as countries with effective court decisions during the pandemic. Within those countries technical equipment as well as a legal basis for hybrid or online court hearings were accessible from the beginning of the pandemic. Besides, individual complaints, expedited procedures, preliminary injunctions and reviews of non-primary acts were possible, which enabled particularly fast and effective judicial reviews. This was the case in the common law countries US, UK, Ireland and Canada, as well as in the European countries Germany, Austria and Spain.¹⁸⁰

176. Julia Dahlqvist and Jane Reichel, (n 148) 12f.

177. Andras Sajó and Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017); Federico Fabbrini (n 133).

178. Arianna Vidaschi and Chiara Graziani, (n 25) 897.

179. Ibid 882.

180. In more detail: Ibid 882.

In the US legal system is that the actions of the executive branch, especially governors, described above are subject to review by the legislative branch. However, there is also the possibility of review by the judiciary through individuals. Individuals have the right to bring individual lawsuits against these actions. This has happened in numerous forms, especially in the first phase of the pandemic, especially since President Trump had just encouraged the population to do so through social media.¹⁸¹ The US federal supreme court firstly upheld most of the governors' orders which imposed COVID-19 restrictions but with the replacement of Ruth Bader Ginsburg the approach changed and several measures were invalidated.¹⁸² Looking at the numbers: US jurisdiction especially the US Federal Supreme Court thus played a stronger role compared to some EU member state courts eg. in Hungary, Poland, Luxemburg, Malta and Sweden as well as the ECJ where fewer or no judgments have appeared. However, if one compares the rulings throughout the EU with those of the US federal and state constitutional courts, one sees a clear majority overall within the EU. This is due to individual states that have issued many judgments in their own right (France, Belgium, Germany, Austria).¹⁸³

Finally, it can be seen that in countries with no Constitutional Court, such as Finland and Denmark, alternative bodies, such as Ombudsman and Constitutional Committees, have used their rapid as well as effective review capabilities to measure executive actions against the Constitution. An extensive examination of judicial review, with particular attention to human rights review, is found in the REGORUP paper 'Covid-19, Human Rights and Judicial Review in Transatlantic Perspective' of Federico Fabbrini, so the analysis of the different court rulings has been made shorter here.

Assessment

The analysis shows that a large number of member states declared a Constitutional State of emergency already at the beginning of the pandemic. This had a marginal effect on the constitutional checks and balances in the member states due to its temporary nature. In other countries, no such measures were taken because the legal consequences of the constitutional norms would not have ensured effective measures to combat the pandemic such as in Germany, or the constitutional text does not provide for a constitutional state of emergency, as in Italy and the US.

Nevertheless, some shifts in the division of powers have become apparent, especially in the US. This applies in particular to the executive branch. In many EU member states as

181. Donald Trump, Tweet 18 April 2020 <https://twitter.com/realDonaldTrump/status/1251181563506757632?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1251181563506757632%7Ctwgr%5E856b705f484e08489ed2ee1ce73a2c3f218eaa29%7Ctwcon%5Es1_c10&ref_url=https%3A%2F%2Fwww.faz.net%2Faktuell%2Fpolitik%2Fvon-trump-zu-biden%2Fauf-twitter-heizt-trump-proteste-gegen-ausgangssperren-an-16730651.html> accessed 20 November 2023.

182. See for in-depth analysis of the content of US case law Federico Fabbrini, (n 80).

183. See for an extensive examination Federico Fabbrini, (n 80) Annex.

well as in the US, the executive greatly expanded its power and minimized parliamentary control as a result of statutory emergency regulations passed by the parliaments. One of the few counterexamples to this is Sweden. There, the executive branch enacted only a few special COVID-19 measures and always had them reviewed by parliament.

With regard to parliamentary control, the picture during the pandemic was similar in the majority of EU member states and in the United States. Overall, parliaments played a rather marginal role. However, the control function was not completely absent in most countries, since at least attempts were made to achieve more parliamentary codetermination, especially over the long course of the pandemic. As a result, heavily modified health protection laws have emerged in some countries that can be used for future health crises.

Furthermore, parliaments should continue to initiate a stronger review process of the pandemic by identifying what weaknesses there were, as Sweden is doing. A COVID-19 committee or commission that evaluates the shift within the constitutional checks and balances after the crisis would be helpful to strengthen the position of parliaments and to limit the strong executive power in future health crises. It should be the goal of parliaments, despite the ongoing crisis caused by Russia's war of aggression against Ukraine, to develop a strategy on how to deal more resiliently with strong parliamentary power in future health crises.

With regard to the role of the courts, it can be noted that some deficits have been showing as well. This is due in particular to the fact that courts in some EU member states are not equipped with the technical means to hold hybrid or online proceedings. In addition, the national legal situation does not entitle them to review executive measures, which during the pandemic brought severe restrictions on fundamental rights without parliamentary control. These are particular deficits that should be reviewed in the countries concerned, as they are likely to endanger the democratic rule of law.

EU's institutions actions within the constitutional checks and balances

EU Commission	EU Parliament	EU Council	ECJ
Most important role	Rather subordinate role	Rather subordinate role	Subordinate role
<ul style="list-style-type: none"> At start coordination problems due enactment of non-binding rules NextGenerationEU: borrow EUR billions on capital markets to support member states, but violation of Art. 125 TFEU? 	<ul style="list-style-type: none"> Small controversial discussions Fast-tracked legislative process Impetus for initiatives (Health Union) 	<ul style="list-style-type: none"> Heated debates No uniformed approach or infringement procedure after possible violations 	<ul style="list-style-type: none"> Not overturning of measures of the other EU institutions Some cases are still pending

Principal of Conferral, Art. 5 (2) TEU

- Art. 6 TFEU: combating cross-border health threats is a central objective
- EU's scope of action: supporting, supplementing and coordinating
- Member states: sole responsibility for national health systems

State of Emergency

Constitutional

- 10 MS made use (eg. Bulgaria)
- Massive restrictions on fundamental rights
 - Lasted only between 10 - 90 days
- No particular impact of the constitutional checks and balances

Statutory

- 15 MS made use (eg. Malta)
- Partly strong restrictions on fundamental rights and lasted long time (Poland 3 years)
- Partially strong impact of the constitutional checks and balances

Member Actions within the Constitutional Checks and Balances

Executive Power

Strong

- Eg. France
- Strong use of decrees without specific legal basis and no revision through other bodies
- Massive restrictions on citizens' rights

Moderate

- Eg. Germany
- Moderate use of decrees
- Over time more parliamentary control due to revision of specific statutory law

Balanced

- Eg. Finland
- Strong Parliament due to direct control of executive measures
- Quick decisions

Unique

- Sweden
- Non-binding legislation
- Protecting fundamental rights
- In retrospect difficult to determine responsible actors

Legislative Authority and COVID-19 legislation

- Strength of legislative authority dependent on power of executive branch
- In the majority rather minor role
- Often creation or adaptation of laws for health crises

Judicial Remedies

Limited

- No technical equipment for online court hearings
- No/limited complaints by citizens or parties and review of acts
- Lack of judicial power

Effective

- Technical equipment for online court hearings
- Access to complaints, preliminary injunctions and reviews of acts
- No lack of judicial power

Recommendations

The Covid-19 pandemic has significantly impacted multi-level governance in Europe, centralizing power at the domestic level and diminishing the roles of international and sub-national entities. This centralization has raised concerns about the erosion of democratic oversight and the need for stronger parliamentary review. The EU faced challenges in managing the crisis due to a lack of competence in health policies and a focus on national interests over European solidarity, which undermined the EU's potential for coordinated action. Sub-national entities experienced pressure from central governments, with varying impacts on federal systems across different countries. The crisis revealed both the strengths and weaknesses of federal approaches to governance, sparking debates on potential reforms.

The pandemic has revealed a backlash against multi-level governance, with a reversion to national-level governance and a decline in democratic dimensions at other levels. The crisis underscored the need for cooperative federalism and international collaboration to effectively address such challenges, highlighting the shortcomings of a nation-state approach.

The pandemic posed a severe test to European democracies, exacerbating existing challenges posed by populism, illiberalism, and authoritarianism. While there was a necessary shift of power towards governments, this often led to disproportionate challenges to the separation of powers. The crisis revealed a lack of preparedness to maintain democratic processes during emergencies, with a focus on empowering governments rather than fostering parliamentary engagement and upholding citizens' rights. Moving forward, there is a call for a democracy-based approach to crisis management that promotes cooperation between different state powers and multilevel networks to ensure the preservation of democracy. This approach would counter the spread of populism and authoritarianism, emphasizing the role of parliaments, the public, and a collaborative network in crisis governance.

After a detailed analysis of the constitutional checks and balances at the EU level, among the EU member states and within the U.S., some recommendations for future crises can be identified, which are presented below.

First, within the relationship between EU institutions and member states, it has become apparent that recommendations and frameworks are not crisis-proof, as member states nevertheless pursue their own interests and deviate from short-term recommendations. This should be avoided in future health crises by applying existing mechanisms, such as infringement procedures, when violations of the Schengen Agreement and the core of EU citizenship - the right to free movement - are at stake, as was the case during the COVID-19 pandemic.¹⁸⁴

184. In more detail fore Schengen and the freedom of movement: Daniel Schade, (n 57).

Furthermore, the EU institutions should use the so-called open method of coordination from Article 6 TFEU to draw up differentiated guidelines for harmonized, effective and resilient handling of health crises in the member states. Although guidelines drawn up according to this method are not legally binding, legal scholars agree that such guidelines create a de facto pressure to act.¹⁸⁵ Rather, they lead to an adjustment of national policies.¹⁸⁶ This would be of particular importance in the bloc in view of the global nature of health crises and, unlike the short-term recommendations during the pandemic, could be implemented gradually and over the long term.

In order not to be too dependent on soft law, the EU institutions should make greater use of the potential of Art. 168 TFEU and the other health competences of the EU treaties for future health crises. On the one hand, the exceptions to the ban on harmonization in Art. 168 (4) TFEU could be supplemented by “measures to prevent, control and combat communicable diseases with pandemic potential” to give the EU a concrete framework for action.¹⁸⁷ This would be particularly important in view of the global nature of pandemics. It would also be in line with the will of the European people if the EU had stronger harmonizing competences in this area, as the studies at the beginning of this paper have shown. However, such an adaptation of the treaty is very difficult to implement.

On the other hand, the creation of more concrete secondary legislation would be conceivable, as it has already begun.¹⁸⁸ This includes, in particular, the implementation of a stress test as laid down in existing secondary legislation, as in the area of banking law, which was designed to create more resilience and could serve as the basis for a directive on minimum standards for high-quality health care systems. Such stress tests can at the same time serve to monitor the implementation of Union law in retrospect.¹⁸⁹ Such changes in secondary law and amendments to primary law, which took place in the area of health law at the EU level even before the pandemic, are an example of a “failing forward”¹⁹⁰, which promotes European integration in the long term and thus strengthens

185. Martin Nettesheim, ‘Die Kompetenzordnung im Vertrag über eine Verfassung für Europa’ [2004] 39 *Europarecht EuR* 511; Jürgen Schwarze, ‘Das wirtschaftsverfassungsrechtliche Konzept des Verfassungsentwurfs des Europäischen Konvents - zugleich eine Untersuchung der Grundprobleme des europäischen Wirtschaftsrechts’ 15 *Europäische Zeitschrift für Wirtschaftsrecht EuZW* 135.

186. Christian Calliess in: Christian Calliess and Matthias Ruffert (eds), ‘Die Rolle der sog. Offenen Koordinierung im Rahmen des Art. 6 AEUV’ *EUV/AEUV* (6th edn 2022) AEUV Art. 6 [13].

187. In more detail: Claudia Seitz (n 11) L 31.

188. Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU, OJ L 314/26.

189. This has already been demanded by Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (S&D Group), ‘A European Health Union. Increasing EU competence in health - coping with COVID19 and looking to the future’ (12 May 2020 Brussels) <<https://www.socialistsanddemocrats.eu/position-papers/european-health-union-increasing-eu-competence-health-coping-covid19-and-looking>> accessed 20 November 2023.

190. The phenomenon describes a protracted European integration process that arises when intergovernmental agreements to solve an existing unional problem contain only patchy minimum requirements that lead to further problems in the future. These future crises, in turn, require unional solutions that force deeper integration, more specifically in the health sector: Markus Frischhut, ‘Eine Europäische Gesund-

the competences of the EU.

Some recommendations can also be made at the member state level. At the member state level, with the exception of Sweden, it had been shown that very strong executive action was taken even after the pandemic had lasted for a long time, which more or less marginalized parliaments. In principle, it is not unusual and also proportionate to take strong executive actions during health emergencies, such as COVID-19. Over the course of three years, this no longer seems justified from the perspective of constitutional checks and balances. Instead, the role of parliaments should be strengthened by optimizing legislative processes, as in Sweden, in such a way that parliamentary control of the executive is possible in a timely manner. At the same time, a concept must be developed for how parliamentary work on infectious health diseases can be carried out in a democratic manner. On the one hand, the stronger and at the same time sensible use of technical solutions should be discussed.¹⁹¹ On the other hand, rules should be established to determine what other venues for parliamentary meetings might be feasible, including distance arrangements. If such measures are not sufficient, rules should be implemented on how to reduce the size of parliament without disproportionately curtailing the rights of the opposition and other minorities, while allowing for important informal discussions among parliamentarians. In some countries, the COVID-19 pandemic has led to revisions in statutory law related to public health crises, such as in Germany.

It has also been shown that in some member states the constitutional regulations do not provide for health emergencies. Here, it would make sense to think about introducing such regulations. This should not be done to ensure even more far-reaching restrictions on fundamental rights, but rather to limit the measures to a necessary minimum and to emphasize the exceptional nature of such measures. Approaches in Germany or Spain can serve as examples.¹⁹²

For future health crises, comprehensive strategies must be developed that strengthen the role of both parliaments and the courts by making executive measures reviewable in a timely manner. This can be done, as in Sweden, by setting up commissions with wide-ranging review powers to evaluate pandemic response measures from the perspective of constitutional checks and balances.

Another area that member states should shed light on is the use of (social) media when introducing public health crisis measures. It has been shown that publicizing disputes about the usefulness of some measures has led to less acceptance among the population. This was not the case in Malta, for example, where there was broad acceptance of the measures introduced.¹⁹³

heitsunion -Historische Ideen, aktuelle Pläne und Werte für einen resilienten Wiederaufbau' [2023] 78 Zeitschrift für öffentliches Recht 177.

191. Disagreeing: Arianna Vidaschi and Chiara Graziani, (n 25) 855.

192. Pierre Thielbörger (n 79) 114.

193. Vincent A. De Gaetano, (n 86).

In conclusion, health crises of the magnitude of COVID-19 cannot be satisfactorily addressed at the national, European or US levels. Such crises are global in nature. Therefore, the task at every level of policy-making in future crises is to strive to resolve health crises on as global a scale as possible in order to safeguard the lives and health of the world's people. This can be achieved through greater international solidarity.

