

# BEST PRACTICES AND KEY TAKEAWAYS FOR LIBERAL-CONSTITUTIONAL DEMOCRACIES AFTER THE COVID-19 PANDEMIC

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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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### Executive summary

This REGROUP policy paper identifies legal best practices and key takeaways for liberal-constitutional democracies in the aftermath of the Covid-19 pandemic. The Covid-19 pandemic has tested the resilience and adaptability of liberal-constitutional democracies globally. In the European Union (EU) and its Member States, different policy responses with different impacts on constitutional democracy could be observed and have been analysed in several REGROUP research papers. This policy paper will use these findings to provide six best practices and key takeaways for policymakers, legal practitioners, and scholars. Therefore, the policy paper analyses the impact of the Covid-19 pandemic on liberal constitutional democracies by assessing the responses of EU Member States and formulates actionable policy recommendations. The goal is to enhance the EU's effectiveness in responding to future crises, strengthen its resilience, and preserve the EU's liberal-constitutional democracy.

The Covid-19 pandemic has shaken the foundations of liberal-constitutional democracies globally. From a research perspective, it turned out to be a rigorous stress test of liberal-constitutional values and rights. The EU's initial response was fragmented and diverged among the Member States. Only later, coordinated efforts such as the Next Generation EU (NGEU) recovery plan and the COVAX initiative for global vaccine distribution came into being. Therefore, the EU is a fascinating case-study of 27 different constitutional democracies responding to a global health crisis. Plus, the EU's response, as a constitutional democracy itself. As governments responded to this unprecedented public health crisis, several legal and constitutional shortcomings emerged, highlighting the need for best practices.

This policy paper present six policy recommendations on the different branches and levels of government. The first three focus on the three branches of government: executive, legislative, and judicial. The next three focus on three different levels of government: national, EU, and international.

- **Maintaining Transparency and Accountability in Executive Measures:** Transparency and accountability are crucial in maintaining public trust during emergencies. Therefore, governments should provide transparent and timely information about the rationale and evidence behind emergency measures. Independent oversight bodies should monitor and report on the implementation of these measures.

- **Ensuring Proportionality in Emergency Measures via the Legislative Branch:** Emergency measures must be proportionate to the threat faced and should not unreasonably restrict fundamental rights. Thus, regular review and ongoing oversight through parliaments are essential. Therefore, governments should enact emergency legislation that includes precise, time-bound limits and requires periodic review.
- **Protecting Fundamental Rights and Freedoms via the Judicial Branch:** During emergencies, the protection of fundamental rights and freedoms must be upheld as far as possible. Therefore, any emergency measures should be designed to infringe upon fundamental rights as minimal as possible. Courts must continue operating to safeguard these rights by providing avenues for judicial review and redress.
- **Strengthening Public Health Legislation on the Member State Level:** Comprehensive and adaptable public health legislation is essential for an effective crisis response. The pandemic has shown that public health laws must be regularly updated, ensuring they can handle various scenarios and threats. Therefore, Member States should update their health legislation including lessons from the Covid-19 pandemic.
- **Enhancing Coordination on the European Level:** Effective crisis management requires coordination and cooperation between different levels of government. Thus, the EU should establish clear frameworks for intergovernmental cooperation between the Member States. This enables streamlined responses and reduces conflicts between European, national, and local authorities.
- **Promoting Collaboration on the International Level:** Pandemics are global challenges that require international cooperation and solidarity. Therefore, the EU should engage in international organisations, frameworks, and agreements to share information, resources, and best practices. Participation in global health initiatives and critical compliance with international health regulations are crucial.

The Covid-19 pandemic has underscored the importance of legal preparedness and resilience. By adopting these best practices and learning from the key takeaways outlined above, Member States and the EU can enhance their legal frameworks and better protect public health while safeguarding fundamental rights and democratic principles. The lessons learned during this crisis should inform future legal and policy reforms to ensure that liberal-constitutional democracies are well-equipped to face future public health emergencies.

**Keywords:** constitutional democracy, emergency measures, state of emergency, fundamental rights, rule of law



# Introduction

The Covid-19 pandemic was a watershed moment for liberal-constitutional democracies globally. While protecting lives was the primary objective of many decision-makers, it came with the significant cost of restricting civil liberties, constitutional guarantees, and, ultimately, fundamental rights. “[...], at least in liberal democracies based on the rule of law, Covid-19 containment measures still resulted in the widest interference with human rights ever experienced in recent history.”<sup>1</sup> Therefore, a holistic analysis of the impact of those restrictions is warranted and has been carried out within the REGROUP project.

Many scholars have analysed constitutional, administrative, European and international legal aspects of state actions during the pandemic.<sup>2</sup> They notably illustrated the challenges to democracy’s principles and the constitutional, federal, and welfare states in crisis management.<sup>3</sup> This is in addition to the significant effects on public health, the area of work, economy, and culture highlighted by scholars.<sup>4</sup> When focusing on the impact within the EU, it is essential to highlight that primarily, Member States were responsible for the crisis response while coordination happened at the European level. Notably, the principle of subsidiarity locates health crisis response at the Member State level. Thus, health policy within the EU is primarily a national competence. The EU has only a supporting competence according to Art. 6 TFEU. A comparative legal analysis of the EU’s response and the response in the Member States have been carried out separately by Federico Fabbrini and by, Caroline Böck and Matthias Kettemann in the REGROUP project.<sup>5</sup> Moreover, Wojciech Burek, Rita Hornok and Natasza Styczyńska analysed Rule of Law Backsliding during the Pandemic in Hungary and Poland.<sup>6</sup> This policy paper builds on these analyses and findings.

This paper primarily analyses Member State responses and uses them to derive legal best practices and policy recommendations. However, in some parts, the EU response will also come into focus to derive policy recommendations, especially when it comes to

1. Federico Fabbrini, ‘Covid-19, Human Rights, And Judicial Review in Transatlantic Perspective’ REGROUP Research Paper No 5, p. 4.

2. See, for example, Matthias C Kettemann and Konrad Lachmayer (eds), *Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19* (Bloomsbury Publishing 2022), Joelle Grogan and Alice Donald, *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge 2022), and Miguel Poiars Maduro and Paul W. Kahn (eds), *Democracy in Times of Pandemic* (Cambridge University Press 2020).

3. For a comprehensive legal analysis of the challenges to the state structural principles of democracy and the constitutional, federal, and welfare states in Germany, see Jens Kersten and Stephan Rixen, *Der Verfassungsstaat in der Corona-Krise*, vol 3 (C. H. Beck 2022).

4. See, for example, Daniele Caramani, Lorenzo Cicchi and Ana Petrova, ‘The Health-Economy Divide: A Structural Analysis of Sectoral Affectedness and Covid-19 Policy Preferences in Europe’ REGROUP Research Paper No 3.

5. Fabbrini, and Caroline Böck and Matthias C. Kettemann, ‘The Pandemic’s Comparative Impact on Constitutional Checks and Balances Within the EU’ REGROUP Research Paper No 9.

6. Wojciech Burek, Rita Hornok and Natasza Styczyńska, ‘Rule of Law Backsliding during the Pandemic: the Case of Hungary and Poland’ REGROUP Research Paper No 13.

enhancing European cooperation and international collaboration. Other papers within REGROUP have reviewed, respectively, the EU's response to the pandemic to increase the EU's resilience,<sup>7</sup> and responses to the pandemic on the international level to imagine a better post-crisis global governance.<sup>8</sup> This policy paper builds also on their analysis and findings. The paper is structured as follows: the next section will provide a macro perspective on the impact of the Covid-19 pandemic on liberal constitutional democracies globally. After that, the paper will focus on the response of Member States and the EU to derive policy recommendations. The final section will present best practices and key takeaways for liberal-constitutional democracies.

## Analysis of the impact of the Covid-19 pandemic on liberal-constitutional democracies

The Covid-19 pandemic has confronted liberal-constitutional democracies with unprecedented challenges, testing the resilience of their legal, political, and social structures. It also exerted considerable pressure on constitutionalism. Some of the restrictions commonly implemented to prevent the spread of Covid-19 raised serious legal questions, even in democratic states with stable political systems grounded in the rule of law and adherence to human rights standards.<sup>9</sup>

One of the pandemic's most immediate impacts was the invocation of emergency powers by governments around the world. These measures often included lockdowns, travel restrictions, and the suspension of regular legislative processes. While such actions were deemed necessary to curb the spread of the virus, they also raised significant concerns about the concentration of executive power and the potential erosion of checks and balances. In several countries, emergency decrees bypassed regular parliamentary oversight, leading to debates about the appropriate limits of executive authority.<sup>10</sup> Specifically, prolonged states of emergency could undermine democratic norms and lead to an overreach of power.<sup>11</sup> This situation underscores the need for clear legal frameworks

7. Philipp Lausberg, Eric Maurice and Laura Rayner, 'Making the EU Fit for the Permacrisis: A Foresight Analysis on Social, Economic and Governance Resilience' REGROUP Foresight Paper No 2.

8. Luca Cinciripini, 'The EU's Role in Restructuring Post-Crisis Global Governance' REGROUP Policy Paper No 1.

9. For example, in Poland, see Jakub Jaraczewski, *The New Normal? - Emergency Measures in Response to the Second COVID-19 Wave in Poland (24 März 2021)* (Verfassungsblog.de 2021).

10. Specifically, in Hungary, executive power and authority bypassed parliamentary oversight and were used excessively, see Niels Kirst, *How a Public Health Crisis Became an Aggravation of the Rule of Law Crisis in the European Union (2 April 2021)* (DCU Brexit Institute 2020), and Niels Kirst and David Krappitz, *An Infringement of Democracy in the EU Legal Order (29 March 2020)* (Eulawlive.com 2020).

11. Niels Kirst and David Krappitz, 'Operationalising the Treaties to Protect Democracy in Times of Emergency' in Dolores Utrilla and Anjum Shabbir (eds), *EU Law in Times of Pandemic: The EU's Legal Response to Covid-19* (EU Law Live Press 2021).

that balance the necessity of swift government action with the protection of democratic principles.

The enforcement of public health measures often resulted in substantial restrictions on fundamental rights and freedoms. Rights to freedom of movement, assembly, and privacy were curtailed as governments implemented lockdowns, quarantines, and surveillance measures. While many citizens accepted temporary limitations in the interest of public health, there were also significant pushbacks. Protests erupted in various countries, demanding the restoration of civil liberties and questioning the proportionality of the restrictions.<sup>12</sup> This highlights a crucial tension between collective security and individual freedoms, a balancing act that is central to the functioning of constitutional democracies.

The judiciary's role in reviewing the legality of emergency measures was highlighted during the pandemic. Courts in many countries assessed whether government actions were in accordance with constitutional provisions and human rights obligations.<sup>13</sup> However, the effectiveness of judicial review varied widely.<sup>14</sup> In some jurisdictions, courts upheld stringent government measures, emphasising the exceptional nature of the public health crisis.<sup>15</sup> In others, they struck down executive actions deemed disproportionate or insufficiently justified.<sup>16</sup> This divergence in judicial responses highlights the variability of the robustness of legal frameworks across different liberal-constitutional democracies.

The pandemic also exacerbated existing political polarisation and tested public trust in institutions.<sup>17</sup> In many democracies, the handling of the crisis became a partisan issue, with political factions deeply divided over the appropriate response.<sup>18</sup> This polarisation often hampered coherent policy-making and undermined public compliance with health directives.<sup>19</sup> Moreover, the crisis affected citizens' trust in governmental and interna-

12. See, for example, in Germany Kate Connolly, "Peace, freedom, no dictatorship!": Germans protest against Covid restrictions (25 January 2022)' *The Guardian* (London, United Kingdom).

13. See, for example, in Germany Holger Hestermeyer, *Coronavirus Lockdown-Measures before the German Constitutional Court (30 April 2020)* (2020).

14. See, for example, in the US Kenny Mok and Eric Posner, 'Constitutional Challenges to Public Health Orders in Federal Courts during the COVID-19 Pandemic' 102 *Boston University Law Review* pp. 1729.

15. As, for example, in Germany Christoph Wagner, '*Situation of Extreme Danger*': *German Constitutional Court Deems 'COVID-19 Emergency Brake' Lawful (3 December 2021)* (2021).

16. See, for example, in the US 'Federal Judge Strikes Down Mask Mandate for Planes and Public Transport (18 April 2022)' *The New York Times* (New York City, United States).

17. See Sabine Volk, Léonie de Jonge and Lars Rensmann, 'Populism and the Pandemic: The Politicization of Covid-19 and Cleavage Agency Among Populist Radical Right Parties' REGROUP Research Paper No 7.

18. See, for example, Shana Kushner Gadarian, Sara Wallace Goodman and Thomas B. Pepinsky, 'Partisanship, health behavior, and policy attitudes in the early stages of the COVID-19 pandemic' 16 *PloS One*. Moreover, in the US, this trickled down even into the judicial system, with Republican-appointed federal judges much more willing to strike down COVID-19 measures than Democratic-appointed federal judges (see Mok and Posner).

19. See Gianluca Grimalda and others, 'The Politicized Pandemic: Ideological Polarization and the Behavioral Response to COVID-19' 156 *European Economic Review*.



tional institutions.<sup>20</sup> Finally, lacking international collaboration has led to an exacerbation of the crisis in Europe and beyond.<sup>21</sup> Effective communication and transparency were critical in maintaining public trust but not always in high supply. Failures in these areas led to scepticism about leaders' competence, further straining the social contract that underpins liberal-constitutional democracies.<sup>22</sup> The following section will focus on the pandemic response of Member States and the EU to highlight which best practices emerged.

## Assessing the Pandemic Responses of the Member States and the EU

When assessing the pandemic response of Member States and the EU in the limited circumstance of this policy paper, only groups of Member States and main EU institutions will be discussed. Member States played the central role in responding to the Covid-19 pandemic due to the limited competencies of the EU in that area.<sup>23</sup> However, their response was fractured at best. As Böck and Kettemann have shown, different groups of Member States followed different crisis responses, which had different impacts on the constitutional democracy in that Member State.<sup>24</sup> On the one hand, a group of Member States adopted particularly strict measures that had a strong impact on constitutional democracy for the sake of protecting lives. "Some member states, such as Italy, Austria, and France, had adopted particularly strict regulations, which led to severe restrictions on fundamental rights."<sup>25</sup> In these Member States, the executive branch of government implemented stringent measures and mostly kept this approach over the duration of the pandemic. In this context, Böck and Kettemann criticise that "[...] strong, non-democratically legitimised 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."<sup>26</sup> Moreover, it is problematic that those strict measures, which potentially infringe on citizens' constitutional rights, mainly were not scrutinised in the aftermath. "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 prece-

20. See, for example, in the US, A. Burcu Bayram and Todd Shields, 'Who Trusts the WHO? Heuristics and Americans' Trust in the World Health Organization During the COVID-19 Pandemic' 102 *Social Science Quarterly* pp. 2312.

21. Cinciripini.

22. See Orkun Saka, *The political scar of epidemics: why COVID-19 is eroding young people's trust in their leaders* (7 September 2021) (The London School of Economics and Political Science (LSE) 2021). Moreover, another Horizon Europe project, Express<sup>2</sup>, is investigating how to build a more inclusive, democratic, and sustainable social contract in Europe after the pandemic.

23. According to Art. 6 TFEU, the protection of human health is a supporting competence. Therefore, the EU can only intervene to support, coordinate or complement the actions of its Member States. Legally binding EU acts must not require the harmonisation of the laws or regulations of the Member States.

24. Böck and Kettemann.

25. Ibid.

26. Ibid.

dent for future measures in the countries.”<sup>27</sup> From a liberal-constitutional perspective, a strict response must always be coupled with the highest standards of transparency and accountability and limit restrictions to the extent necessary and proportionate.

On the other hand, some Member States adopted more moderate measures, such as Germany, and the Netherlands. In those Member States, the executive branch acted in the short term, and legislative action followed. However, this approach also showed its weaknesses, as Böck and Kettemann analysed. “[...], in retrospect, this approach seems very reactive, and no clear strategy is discernible.”<sup>28</sup> Notably, in this case, an ex-post assessment of the executive actions is necessary and was not always carried out. “[...], it seems appropriate to conduct an ex-post crisis assessment in order to develop a balanced crisis strategy for future crises.”<sup>29</sup> In the case of moderate measures in which the executive and the legislative act in lockstep, it is essential that the legislature monitors and ensures the proportionality of all emergency measures.

Finally, some Member States adopted little or nearly no legally binding measure, which, in turn, had a lesser impact on constitutional democracy and civil liberties. Northern European countries such as Denmark, Finland and Sweden form part of this group. “An exception is Sweden, where the course of the pandemic was controlled by mere recommendations.”<sup>30</sup> Naturally, in those countries, the impact on constitutional democracy and civil liberties was less significant. Interestingly, the lack of a Constitutional Court in some Member States did not undermine the crisis response as alternative bodies stepped in. “[...] 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.”<sup>31</sup> These alternative mechanisms to scrutinise executive action can be assessed as a positive and effective crisis response.

When it comes to emergency measures, most Member States resorted to some kind of legally binding emergency legislation during the pandemic. Vivien Schmidt has analysed whether emergency actions in the Member States during Covid-19 can be legitimate and how.<sup>32</sup> A specific kind of emergency measure is the so-called state of emergency, in which a government is empowered to apply policies that it would typically not be permitted to do for the safety and protection of its citizens. According to the German legal philosopher Carl Schmitt, the state of emergency or exception (in German: *Ausnahmezustand*) includes the sovereign’s ability to transcend the rule of law in the name

27. Ibid.

28. Ibid.

29. Ibid.

30. Ibid.

31. Ibid.

32. Vivien A. Schmidt, ‘Power and Legitimacy During Emergency Politics: A Democratic Audit of Responses to the Covid-19 Crisis’ REGROUP Research Paper No 12.

of the public good.<sup>33</sup> Applying the lens of the Covid-19 pandemic to this dictum, it becomes apparent that constitutional rights and civil liberties were restricted in the name of the public good of saving lives. However, from a liberal-constitutional perspective, restricting any constitutionally guaranteed rights must be necessary and proportionate. As former German Constitutional Court Judge Ernst-Wolfgang Böckenförde has stated, an exception-proof minimum of fundamental rights must be in force during a state of emergency.<sup>34</sup> Therefore, it is essential to take a closer look at the use of the state of emergency by Member States.

Ten Member States adopted a constitutional emergency during the first wave of the pandemic. “[...], 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.”<sup>35</sup> These constitutional emergencies allowed for significant restrictions on fundamental rights and liberties, including school closures and curfew rules, particularly at the onset of the pandemic.<sup>36</sup> The length of a constitutional emergency is another factor that needs to be considered. “[...] 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.”<sup>37</sup> However, in other Member States, such as Hungary, they became quasi-permanent without parliamentary oversight.<sup>38</sup> Such drastic measures must be highly criticised from a liberal-constitutional perspective. Finally, another smaller group of Member States did not resort to a constitutional emergency despite being available. “[...], only a few Member states such as France, Poland (formally), Germany, Malta, Austria and the Netherlands have not declared a constitutional State of emergency in order to combat the pandemic.”<sup>39</sup> In these Member States, there were objective reasons not to activate the state of emergency during the pandemic. Only Poland is an outlier, not activating the state of emergency due to political considerations of the ruling party.<sup>40</sup>

When looking at the state of emergency in the Member States, there were two outlier cases. Notably, two Member States that suffered a weakening of their liberal-constitutional democracy already beforehand: Hungary and Poland. Many scholars have detailed the rule of law and democratic backsliding in those two Member States in the last de-

33. Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1921).

34. Mathias Hong, *Böckenförde, the state of emergency and Carl Schmitt: What Böckenförde learned from Schmitt - und what Schmittians should learn from Böckenförde* (9 May 2019) (VerfBlog 2019).

35. Böck and Kettemann p. 20.

36. See, for example, in Spain Paola Tamma, ‘Spain adopts curfew, state of emergency to curb coronavirus (25 October 2020)’ *Politico Europe* .

37. Böck and Kettemann p. 21.

38. “After the pandemic, while European countries returned to normal legal orders, in Hungary, the special legal order (now due to the war in Ukraine) remained, and Hungary found itself in a state of permanent crisis.” See in Burek, Hornok and Styczyńska.

39. Böck and Kettemann p. 20.

40. See Jakub Jaraczewski, *An Emergency By Any Other Name? Measures Against the COVID-19 Pandemic in Poland* (24 April 2020) (Verfassungsblog.de 2020).

cade.<sup>41</sup> Burek, Hornok and Styczyńska, in their research paper on rule of law backsliding during the pandemic, have found that in those two Member States, “[...] the political interests of the ruling parties were more important than public health, not to mention the respect for the rule of law and constitutional norms.”<sup>42</sup> Therefore, the pandemic presented a perfect opportunity for the executive branch in both Member States to entrench their power and advance specific laws and legislation that could have not been passed without the justification of the pandemic. “[...] the pandemic situation increased both the supply and demand for the centralisation of power and autocratic reforms under the guise of protecting citizens.”<sup>43</sup> However, they also found that the success of rule of law backsliding during the pandemic depends on how weakened the democratic system is beforehand. “[...] the success of utilising the pandemic and implementation of the illiberal policies depends on how much the liberal democratic system was weakened before the COVID-19 pandemic.”<sup>44</sup> Therefore, their research shows that (still) independent institutions and participation in a quasi-federal legal order, such as the EU, have an essential bearing on safeguarding constitutional democracy during a pandemic. “The independence of at least some institutions, the activities of civil society, independent media, and the pressure of transnational organisations can only bring results if the political system is not dominated by one actor.”<sup>45</sup> This important lesson needs to be considered and supports the argument for strengthening European cooperation and safeguards.

The assessment of pandemic responses allows to identify some best practices. Considering the executive branch, transparency and accountability should be the main features of executive actions during a pandemic. “In many EU member states [...], the executive greatly expanded its power and minimised parliamentary control as a result of statutory emergency regulations passed by the parliaments.”<sup>46</sup> Emergencies are the hour of the executive. However, ensuring that executive measures are reviewable, even after the pandemic, is essential. Therefore, transparency and accountability should be lodestars of executive action during a public health crisis. All executive actions should be widely publicised, and the reasons for taking them should be made public. This also helps to maintain public trust in institutions, which is crucially important.<sup>47</sup> Regarding the legislative branch, parliaments are the checks and balances of the executive. During a pandemic, their review of government actions is crucially important. Foremost, the

41. Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done’ 51 *Common Market Law Review* 59, and R. Daniel Kelemen, ‘Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union’ Vol. 22 *Government & Opposition* pp. 211.

42. Burek, Hornok and Styczyńska.

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. Böck and Kettemann p. 32.

47. See Ryan P. Badman and others, ‘Trust in Institutions, Not in Political Leaders, Determines Compliance in COVID-19 Prevention Measures within Societies across the Globe’ 12 *Behavioral Science* pp. 170.

national parliament should assess and scrutinise executive action and, thus, ensure the necessity and proportionality of emergency measures. Therefore, parliaments must remain functioning by meeting (virtually) and rendering decisions (virtually) during a pandemic. Thus, parliaments should establish committees to identify weaknesses that emerged and develop strategies to ensure robust parliamentary participation in future health crises. Finally, considering the judicial branch, courts must be able to protect fundamental rights and freedoms during a pandemic. They must come into play when parliamentary oversight is limited or not possible. As Fabbrini has highlighted, “[...] in liberal constitutional democracies based on the rule of law, the judiciary is the primary guarantor of human rights.”<sup>48</sup> Therefore, courts must continue to review and scrutinise state action during a pandemic. Hence, technical capabilities to conduct hybrid or online proceedings are required. National legal frameworks should authorise courts to review ad-hoc executive measures. Courts are specifically crucial in reviewing constitutionally guaranteed civil liberties. “[...] in jurisdictions endowed with written constitutional texts, which entrench human rights and are subjected to more burdensome amendment procedure than ordinary law-making, courts (and especially supreme, constitutional courts) perform the critical task of keeping a check on executives and legislatures, making sure they do not undermine human rights.”<sup>49</sup> Therefore, courts are the last resort for citizens to protect their constitutionally guaranteed rights, and they must remain able to do so during a pandemic.

The response at the European level differed from that at the national level. In retrospect, the main weakness was the fracturedness and lack of solidarity in the initial phase of the pandemic. Considering the response by the EU’s executive branch, the European Commission (Commission), Böck and Kettemann point out: “[...], 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 fulfil its coordinating role within its possibilities, but the measures were not always rewarded with success.”<sup>50</sup> The Commission tried to take the lead on the European level. However, it was hampered by the limited competence it has when it comes to health policy under Art. 6 TFEU, which, in turn, led to a fractured policy response. “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.”<sup>51</sup> This hampered the European policy response.

48. Fabbrini p. 4, and see also Andras Sajó and Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press (OUP) 2017).

49. Fabbrini p. 5, and see also Dieter Grimm, *Constitutionalism: Past, Present, Future* (Oxford University Press (OUP) 2016).

50. Böck and Kettemann p. 10.

51. Ibid.

Notably, in the later phases of the pandemic, the Commission failed to use its power under Art. 258 TFEU in case Member States infringe on the EU Treaties, which they did to a considerable extent during the pandemic, for example, by closing borders.<sup>52</sup> Therefore, the Commission neglected its role as Guardian of the Treaties, according to Art. 17 TEU.<sup>53</sup> Overall, the Commission's later initiatives, such as the Health Union<sup>54</sup> and European Health Emergency Response Authority (HERA)<sup>55</sup> point in the right direction and argue for further enhancing European cooperation to prepare for future pandemics.

Member States pursuing national approaches significantly hampered the response by the European Council and the Council of the EU. “[...], 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.”<sup>56</sup> However, that measure, specifically regarding guaranteeing the freedom of movement within the EU and the Schengen area, was disregarded by the Member States during the height of the pandemic. “Member states pursued nation-state approaches, particularly during the peaks of the pandemic.”<sup>57</sup> This development has been criticised by scholars, in the light of EU citizenship.<sup>58</sup> Overall, the pandemic exposed weaknesses and cracks in a united European response and weakened the principles of the Schengen area.

The European Parliament's (EP) response, i.e., the legislative branch, must be assessed positively, given its flexible approach. “The Parliament implemented measures regarding its own working methods in March 2020, too. [...] During plenary sessions, the possibility was opened up to participate in plenary sessions and votes online from within their own offices.”<sup>59</sup> Thus, the EP ensured it could continue working and taking decisions despite the pandemic.

The Court of Justice of the European Union (CJEU), i.e. the judicial branch, played a limited role during the pandemic. “[...], the ECJ has not revised, much less overturned,

52. See Luisa Marin, ‘The COVID-19 Crisis and the Closure of External Borders: Another Stress-test for the Challenging Construction of Solidarity Within the EU?’ 5 *European Papers* pp. 1071.

53. According to Art. 17 TEU, the Commission monitors whether EU laws are applied correctly and on time. Therefore, the Commission is referred to as the ‘Guardian of the Treaties’.

54. In October 2020, during the State of the European Union Speech, Commission President Ursula von der Leyen called for the creation of a “European Health Union.” See Ursula von der Leyen, *State of the Union Address 2020: Building the World We Want to Live in: A Union of Vitality in a Modern World* (European Parliament Press Service 2020), and Martin McKee and Anniek de Ruijter, ‘The path to a European Health Union’ 36 *The Lancet*.

55. HERA is an EU biomedical research and development agency established by the Commission in September 2021. See *Communication from the Commission: Introducing HERA, the European Health Emergency preparedness and Response Authority, the next step towards completing the European Health Union (COM(2021) 576 final) (16 September 2021)* (Official Journal of the European Union 2021).

56. Böck and Kettemann p. 13.

57. *Ibid.*

58. See Stefan Salomon and Jorrit Rijpma, ‘A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship’ *German Law Journal* pp. 1.

59. Böck and Kettemann p. 14.

any measure or decision of the other EU institutions.”<sup>60</sup> The main reason is the CJEU’s limited jurisdiction, which generally does not allow individuals to file lawsuits directly; proceedings can only be initiated if they are brought by Member States, EU institutions, or Member State courts. The analysis in this section leads to six concrete policy recommendations for the future.

## Policy Recommendations

As the previous section revealed, the pandemic response was highly diverging among the EU and the Member States. In some Member States, the response to the Covid-19 pandemic was stringent. In others, nearly no legally binding measures were implemented at all. In some Member States, the legislature adopted comprehensive new health regulations. In others, the legislature was muted during the pandemic. Moreover, 27 different national judicial systems were tasked to scrutinise executive and legislative actions. On the European level, the response fluctuated between coordination and divergence. Finally, on the international level, cleavages and the disparagement of international institutions emerged. Taking these responses into account, allows to identify and formulate concrete policy recommendations tailored to the EU’s multi-level legal architecture.

The following policy recommendations focus on the different branches and levels of government. The first three focus on the three branches of government—executive, legislative, and judicial—and the following three on the three different levels of government—national, EU, and international.

**Maintaining Transparency and Accountability in Executive Measures:** Ex-ante transparency and ex-post accountability are two crucial features for executive measures during a pandemic. First, Member States that coupled evidence-based executive actions with transparent communication strategies were more successful in maintaining public trust.<sup>61</sup> This finding is confirmed by research in the United States (US). “Results of an online survey of American citizens show that during the early stage of COVID-19, information substantiality by state governments and health institutes (e.g., the Centers for Disease Control and Prevention) increases publics’ trust, which positively influences their perceived risks, behavioural control and subjective norms.”<sup>62</sup> Therefore, transparency is crucial in maintaining public trust during emergencies. Hence, governments should provide transparent, accessible and timely information about the rationale and

60. Ibid.

61. See George W. Warren and Ragnar Lofsted, ‘Risk communication and COVID-19 in Europe: lessons for future public health crises’ 25 *Journal of Risk Research* pp. 1161.

62. Yeunjae Lee and Jo-Yun Queenie Li, ‘The role of communication transparency and organizational trust in publics’ perceptions, attitudes and social distancing behaviour: A case study of the COVID-19 outbreak’ 29 *Journal of Contingencies and Crisis Management* pp. 368.

evidence behind emergency measures.

Second, accountability is essential to ensure the legality of all executive actions during an emergency. This accountability can only be attained by ensuring that independent bodies keep an oversight of executive actions and measures. Ideally, independent oversight bodies should monitor and report on the implementation of executive measures. After the emergency has faded, “[...], it seems appropriate to conduct an ex-post crisis assessment in order to develop a balanced crisis strategy for future crises.”<sup>63</sup> Review committees and enquiry commissions can be suitable instruments to conduct such an ex-post review of executive actions and measures.

**Ensuring Proportionality in Emergency Measures via the Legislative Branch:** When enacting emergency measures, most Member States implemented sunset clauses and regular parliamentary reviews to maintain the balance between public safety and civil liberties.<sup>64</sup> In Germany, for example, the *Epidemische Lage von nationaler Tragweite* (Epidemic situation of national importance), which gave the government wide discretionary powers, had to be reaffirmed by the German parliament every six months.<sup>65</sup> Thus, regular review and ongoing oversight through parliaments are essential. Therefore, governments should enact emergency legislation that includes precise, time-bound limits and requires periodic review by the legislature to ensure that measures remain necessary and proportionate.

Moreover, ensuring proportionality of emergency measures is key to not unduly restrict fundamental rights and freedoms. In many Member States, emergency measures led to exaggerated measures with marginal positive effects on public health, such as prolonged curfews.<sup>66</sup> Emergency measures must be proportionate to the threat faced and should not unreasonably restrict fundamental rights and freedoms. This can be ensured by thorough parliamentary review, even during times of pandemic. Therefore, parliaments need to keep operating (even virtually, such as the EP) during a pandemic to fulfil their constitutionally assigned task of executive and legislative control.<sup>67</sup>

**Protecting Fundamental Rights and Freedoms via the Judicial Branch:** Courts in several Member States played a critical role in reviewing the legality and proportionality of restrictions on freedoms of movement, assembly, religion and business.<sup>68</sup> Looking

63. Böck and Kettemann p. 24.

64. Notably, Hungary failed to do so and enacted emergency legislation that allowed the government to rule by decree, see Kirst.

65. See press release *Bundestag verlängert epidemische Lage von nationaler Tragweite (25 August 2021)* (Deutscher Bundestag 2021).

66. See, for example, in Spain Tamma, and ‘Taste of freedom as Spaniards celebrate end of Covid state of emergency (9 May 2021)’ *Euronews* (Madrid, Spain) <<https://www.euronews.com/my-europe/2021/05/09/taste-of-freedom-as-spaniards-celebrate-end-of-covid-state-of-emergency>> .

67. *How Parliament works during a pandemic (16 April 2020)* (European Parliament 2020).

68. See, for example, the the German *Bundesverfassungsgericht* in Wagner, and the analysis of Hestermeyer.



across the pond, this judicial scrutiny was even higher in the US when it comes to *facere* measures, as Fabbrini has shown in his research.<sup>69</sup> In the EU, courts engaged in a balancing exercise between individual and collective interests, as Fabbrini has pointed out. “[...], European courts have assessed the proportionality of Covid-19 measures by seeking to better reconcile individual and collective interests.”<sup>70</sup> Generally, the protection of fundamental rights and freedoms must be upheld as far as possible. However, there is also the collective interest that needs to be considered. Therefore, emergency measures should be designed to infringe as minimal as possible upon individual rights while safeguarding the collective interest of public health.

Another factor is that restrictions should be regularly reassessed by courts as the situation evolves. Pandemics are constantly evolving situations. Therefore, courts should mandate regular reassessment of restrictions to ensure they remain justified as the situation evolves. During the Covid-19 pandemic it could be observed that each wave was different and required a different degree of restrictive measures. Therefore, emergency measures should not be more restrictive than necessary and should be lifted as soon as they are no longer essential.

**Strengthening Public Health Legislation on the Member State Level:** Member States with comprehensive, flexible and up-to-date public health legislation were able to respond more swiftly and effectively to the evolving pandemic. Böck and Kettemann have “shown that in some member states the constitutional regulations do not provide for health emergencies.”<sup>71</sup> This was a pitfall for those Member States, as they had issues to react to the emergency adequately. Member States that do not have such regulations yet, should consider introducing them.

A second factor is that public health legislation in the Member States should be regularly updated to incorporate lessons learned from past pandemics. The Covid-19 pandemic has shown that comprehensive and adaptable public health legislation that can handle various scenarios and threats is essential for effective crisis response. Therefore, Member States should review and eventually update their health legislation incorporating lessons from the Covid-19 pandemic.<sup>72</sup>

**Enhancing Coordination on the European Level:** Federal legal systems with preexisting coordination mechanisms were able to respond more cohesively and unified to the

69. Fabbrini has shown that ‘a remarkable transatlantic divergence seems to exist in the judicial approach of EU and US courts when reviewing Covid-19-related *facere* measures, including mask mandates and especially compulsory vaccinations’ see Fabbrini.

70. Ibid.

71. Böck and Kettemann p. 37.

72. The deliverables of the REGROUP project can help legislators to identify best practices and policy choices for up-to-date public health legislation, see Víctor Burguete, ‘The EU and the Future Reform of Global Governance: Risks and Scenarios After Covid-19’ REGROUP Foresight Paper No 1, and Caroline Böck and Matthias C. Kettemann, ‘Mapping the Future of Technological Innovations’ REGROUP Foresight Paper No 3.

pandemic— in contrast, the EU’s initial response was a patchwork quilt. Taking the US federal system as a benchmark, it becomes apparent that it could apply a harmonised federal approach.<sup>73</sup> It did so more under the Biden Administration, and less under the Trump Administration, which left the measures to the States. The lessons to be learned is that in federal legal systems, such as the EU, coordination is key as it enhances trust and effectiveness.

In concrete, effective crisis management requires coordination and cooperation between different levels of government. A negative example is the non-coordination on the European level during the initial phase of the pandemic. This led, among others, to the reintroduction of border controls within the EU to stop the virus.<sup>74</sup> A measure which, in retrospect, had minimal impact on public health. For the future, the EU should establish clear frameworks for intergovernmental cooperation between the Member States and ensure that European principles, such as the Schengen area, are not set aside by the Member States. Clear rules and frameworks allow for streamlined responses and reduce conflicts between European, national, regional, and local authorities.

**Promoting Collaboration on the International Level:** Collaborative efforts through the World Health Organization (WHO) and regional bodies facilitated resource sharing and coordination of public health strategies. At the same time, the pandemic revealed institutional weaknesses at those institutions.<sup>75</sup> Pandemics are global challenges that require international cooperation and solidarity.<sup>76</sup> Therefore, the EU should engage in international organisations, frameworks and agreements to share information, resources, and best practices.<sup>77</sup> Participation in global health initiatives and critically complying with international health regulations is crucial.

As highlighted by Cinciripini, the EU should engage in four fields of action to promote international collaboration.<sup>78</sup> First, it should champion a reform of the multilateral system. Second, it should engage in a dual strategy with rival powers (like China) and like-minded countries (like the US). This is specifically true when engaging with coun-

73. ‘[...], unlike the EU institutions, within the US, the federal government can intervene when the arising public health issue requires a harmonised federal approach. 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.’ See in Böck and Kettemann, ‘The Pandemic’s Comparative Impact on Constitutional Checks and Balances Within the EU’.

74. See Salomon and Rijpma.

75. ‘[...] crisis have revealed weaknesses, but they have also been the trigger for creative responses that then generate institutional changes that potentially strengthen multilateralism.’ See in Anna Ayuso, ‘Analysing The Performance of Multilateral Organizations Facing Major Crisis: Covid-19 in Comparative Perspective’ REGROUP Research Paper No 4.

76. ‘By championing institutional reforms, fostering dialogue and cooperation with both allies and rivals, prioritising the needs of the Global South, and leveraging its regulatory powers to protect public goods, the EU can help build a more inclusive, resilient, and equitable global order that advances the interests and values of all its member states.’ see in Cinciripini.

77. ‘[...], the EU has a vital role to play in shaping the future of global governance through proactive leadership, strategic engagement, and principled advocacy.’ See in *ibid.*

78. See *ibid.*

tries such as China or India. Third, the EU should promote a sustainable partnership with the Global South. Fourth, the EU should use its regulatory power, i.e. the Brussels effect<sup>79</sup>, for the protection of public goods, such as climate, healthcare and digital rights.

In conclusion, the Covid-19 pandemic has underscored the importance of legal preparedness and resilience in liberal-constitutional democracies. Member States and the EU should enhance their legal frameworks to safeguard fundamental rights and democratic principles during a pandemic. The lessons learned during this crisis should inform future legal and policy reforms to ensure that liberal-constitutional democracies are well-equipped to face future public health emergencies.

79. Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

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