FUTURE LAW
WORKING PAPERS 2023 • 3

universität innsbruck
Institut für Theorie und Zukunft des Rechts

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CLARA RAUCHEGGER • CAROLINE VOITHOFER
EDITORS

The Pandemic's Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives

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The Future Law Working Papers was established in 2022 to offer a forum for cutting-edge research on legal topics connected to the challenges of the future. As the German Constitutional Court recently ruled, we have to act today to save the freedoms of tomorrow. Similarly, the Future Law Working Papers series hosts research that tackles difficult questions and provides challenging, and at times uncomfortable, answers, to the question of how to design good normative frameworks to ensure that rights and obligations are spread fairly within societies and between societies, in this generation and the next. The series is open for interdisciplinary papers with a normative twist and the editors encourage creative thinking. If you are interested in contributing, please send an email to the editors at zukunftsrecht@uibk.ac.at. Submissions are welcome in English and German.

The series is edited by the senior members of the Department of Legal Theory and the Future of Law at the University of Innsbruck, Matthias C. Kettemann, Malte Kramme, Clara Rauchegger and Caroline Voithofer.

Founded in 2019 as the tenth department of the law faculty, the Department of Legal Theory and Future of Law at the University of Innsbruck (ITZR) investigates how law can make individuals as well as society, states as well as Europe "fit" for the future and if and how law has to change in order to meet future challenges. This includes the preservation of freedom spaces as well as natural resources in an intergenerational perspective, the safeguarding of societal cohesion in times of technologically fueled value change, the normative framing of sustainable digitization and digitized sustainability, and the breaking through of traditional legal structures of domination and thought with a view to rediscovering the emancipatory element of law against law.

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The Pandemic's Comparative Impact on Constitutional Checks and Balances within the EU: Update and Perspectives

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Introduction

Caroline Böck and Matthias C. Kettemann

This working paper is produced within the framework of the the Horizon Europe project REGROUP (Rebuilding governance and resilience out of the pandemic), funded by the European Union. At the same time, it draws from a 2022 volume entitled *Pandemocracy*, edited by Konrad Lachmayer and Matthias C. Kettemann. *Pandemocracy in Europe -Power, Parliaments and People in Times of COVID-19* engaged the challenges of pandemics for democracies at the example of the COVID-19 crisis and had contributors ask and answer a key question: How has the fight against COVID-19 and the individual and collective responses of states influenced the relationship of publics, people and parliaments. Does democracy take step back and let pandemocracy reign? Literally, like in Hungary? Or more subtly, like in Austria and Germany where *Nationalrat* and *Bundestag*, respectively, quickly passed legislation the government had proposed. After the crisis had passed, did relations swing back to normal? Or has the crisis fundamentally impacted the relations of democratic actors in countries from Sweden to Italy?

A year after publication and after the worst of the COVID-19 crisis seems over, a workshop in Innsbruck united authors from the *Pandemocracy* team and members of REGROUP to reflect on the normative road travelled and the impacts of the pandemic response – and its impact on constitutional checks and balances.

After the introduction, a number of country reports analyze whether and how societies have 'swung back' from the pandemic response and whether lasting damage to the separation of powers was done during the height of the pandemic.

We express our thanks to Raphaela Frauscher for editorial support.

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REGROUP
REBUILDING GOVERNANCE AND RESILIENCE OUT OF THE PANDEMIC

Abuse of Power and Self-Entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and the People

Antonios Kouroutakis

On 5 May 2023, the WHO Director-General declared the end of the public health emergency due to COVID-19.[1] Covid-19 was, without doubt, the most pressing global health crisis of the modern period. Due to its vast magnitude and impact on every society, COVID-19 disrupted every aspect of human activity, public or private. In the public sphere, elections and political processes have been postponed or conducted with the help of new technological tools, while restrictions on civil liberties were implemented as necessary means to slow the pace of the spread of the virus.[2]

But the wise people often say in times of confusion, tension, instability and unprecedented conditions that the 'the devil is busy on a high wind'. This is an idiomatic expression encapsulating the dangers which arise. In relation to Greece, the chapter entitled 'Abuse of power and Self-entrenchment as a State Response to the Coronavirus Outbreak: The role of Parliaments, Courts and the People' reported that 'the pandemic gave the government the opportunity to deviate from ordinary procedures and direct money to the media. The government, thus, created a fertile ground for positive reception of its policies and a hostile ground for the policy proposals of the opposition.'[3]

Once parliamentary procedures resumed, the Government of Greece, under the pressure of the opposition revealed more information about the money channeled to the press. In total more or less 20 million euros were paid to newspapers and media, as the government representative made public the list of amounts. Interestingly, further investigation revealed that the distribution was not balanced, as less than 1% of the

[1] WHO Director-General's opening remarks at the media briefing – 5 May 2023 available at https://www.who.int/news-room/speeches/item/who-director-general-s-opening-remarks-at-the-media-briefing.

[2] For a complete account on the emergency measures adopted by several states see Matthias C Kettemann, Konrad Lachmayer, Pandemocracy in Europe Power, Parliaments and People in Times of COVID-19 (Hart 2021).

[3] See Antonios Kouroutakis, Abuse of power and Self-entrenchment as a State Response to the Coronavirus Outbreak: The role of Parliaments, Courts and the People in Matthias C Kettemann, Konrad Lachmayer, ed, Pandemocracy in Europe Power, Parliaments and People in Times of COVID-19 (Hart 2021).

EUR 20 million campaign was given to the press directly or indirectly supporting the opposition.[4]

The major opposition in November 2021, tabled in Parliament a proposal for an official inquiry to investigate the business of political manipulation of public opinion, and waste of public money. This proposal was also supported by other parties of the opposition. However, the Committee established to examine the case was controlled by the government and the whole process ended up with different reports drafted by different political parties.

Such conclusion did not take anyone by surprise, as parliamentary procedures are controlled by the government due to the party discipline. However, the capture of the press has a plethora of implications on democracy. It undermines the principles of transparency, and pluralism and weakens substantially the checks and balances.

In the international arena, though, this incident was not left unnoticed. A report drafted by the EU Commission expressed concerns about the nontransparent way of allocation of funds to the media,[5] which was also reported by the US State Department.[6] Indicative is the fact that Greece received a very low score by the report of the Reporters Without Borders for both years 2022[7] and 2023.[8] In the Word Press Freedom Index, Greece came for a second year in a row last among EU countries.

While such reports would be alarming in every democracy, in Greece the Government repeated the recipe of funding the media with tax payer's money. In April 2023, a couple of weeks before the elections, with the excuse of the disruption causes by the war in Ukraine the Government gave 9 million euros to the media.[9]

Having said that, the long-term impact of the pandemic related measures on democracy is still unfolding. However, it is worth noting that democracy is not a static condition, and it is the responsibility of the people to struggle in order to maintain high standards of democracy.

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[4] Less than 1% in the opposition press for "Stay Home" The Press Project, available at https://thepressproject.gr/ligotero-apo-to-1-ston-antipolitevomeno-typo-gia-to-menoume-spiti/

[5] See 022 Rule of Law Report Country Chapter on the rule of law situation in Greece available at https://commission.europa.eu/system/files/2022-07/21_1_194014_coun_chap_greece_en.pdf

[6] See 2022 Country Reports on Human Rights Practices: Greece available at https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/greece/

[7] See 2022 Word Press Freedom Index https://rsf.org/en/index?year=2022

[8] See 2023 Word Press Freedom Index https://rsf.org/en/index

[9] Official Gazette B' 2673/21.04.2023.

Constitutional Checks and Balances in Post-Pandemic Europe: The UK

Robert Thomas

What has changed since COVID? Is everything (normatively) back to normal? Have any important lessons been learned? My presentation will address these questions under three headings: (1) COVID restrictions; (2) 'Party gate'; (3) COVID contracts; and (4) the COVID public inquiry.

Overall, the reverberations of COVID are still being felt and played out slowly. At the same time, life has moved on with getting life back to normal and the current cost of living crisis. It is a strange time; the experience of COVID is both very recent, but also it is now in the past and new issues have come into being. There has not been any big constitutional change, but there have been many significant individual developments. These are all ongoing issues. It is not known what the settled picture will become.

1. COVID restrictions

The Coronavirus Act 2020 was introduced quickly in early 2020. There were many sets of rules and restrictions introduced. It is now widely thought that the restrictions were introduced without sufficient debate and scrutiny. There are concerns about too much power given to the government. There were multiple sets of restrictions introduced at short-notice which no-one really understood, including the authorities such as the police which was enforcing them. This has all received much criticism.

The Government has been criticized for poor response to pandemic, not being prepared in advance, not having the systems in place, for introducing restrictions at short notice. There was no 'playbook' at all. There has been a whole range of criticisms of the government from across the political spectrum. For instance, a legal challenge against the NHS releasing elderly people straight back into care homes without being tested for Covid. This happened early in the pandemic in 2020 when NHS was under intense pressure. Government said that people were not released back into care homes but they were.

2. 'Party gate'

During COVID, Boris Johnson was the Prime Minister. A number of parties were held during lockdowns at Number 10, Downing Street. All of this came out through leaks of photographs. Johnson denied the allegations and told Parliament and the public that all

restrictions were complied with. Over time, this increasingly became questioned. Johnson resigned as PM in July 2022. We are currently waiting for the House of Commons Privileges Committee to decide whether Johnson misled Parliament over 'partygate' allegations. This is the first-time a (former) Prime Minister has been accused of misleading Parliament and had a formal inquiry by a parliamentary committee.

3. COVID contracts

During the pandemic, the government had to respond quickly to purchase PPE and set up testing and trace and track systems. There have been many concerns about how contracts were agreed often with close associates of the government, the lack of formal process, transparency and open competition in the contracting. Some people made millions selling PPE to the government that turned out to be useless. There has also been issues about ineffective track and trace systems and the billions spent on systems that did not work. There are concerns about fraud, government awarding contracts to its close chums, public money being badly spent and poor value for money.

4. The COVID public inquiry

In the UK, when there has been a major problem including the loss of life, the principal way of finding out what happened, holding government to account and making recommendations is through a public inquiry. The COVID 19 is examining pandemic preparedness and the response to the pandemic (See https://covid19.public-inquiry.uk/). It is chaired by a senior judge and it is a very large public inquiry. It will probably take years to report, but will make recommendations for future pandemic preparedness. The inquiry has three current active modules: Resilience and preparedness; Core UK decision-making and political governance; and Impact of Covid-19 pandemic on healthcare systems in the 4 nations of the UK. It is likely that there will be future modules: Vaccines, therapeutics and anti-viral treatment; The care sector; Government procurement and PPE; Testing and tracing; The Government's business and financial responses; Health inequalities and the impact of Covid-19; Education, children and young persons; and other public services, including frontline delivery by key workers

The Marginalization of Parliament in Facing the Coronavirus Emergency: What About Democracy in Italy?

Arianna Vedaschi

In this brief paper, I address the marginalization of the Italian Parliament during the Covid-19 pandemic giving some references to the comparative scenario as well. From there, I highlight two outcomes, one unusual and the other one counterintuitive. The unusual one concerns the form of government, including institutional checks and balances; the other, the counterintuitive one, concerns the use of technology or rather the relationship between politics and technology. From this specific angle, in my conclusions I draw a couple of "lessons" for the future.

From a comparative perspective, we can detect that marginalization of Parliaments was a common issue during the Covid-19 pandemic: it happened in the majority of countries (even in advanced democracies). In that moment, marginalization was due not only to the overexposure of Executives, typical of any emergency, but also to the infectiousness of the virus.

This marginalization of the Legislature characterized Italy too; actually, in my country it was particularly evident, given the Italian Parliament's absolute refusal of online vote and remote discussion. The reasons why remote parliamentary procedures were never resorted to are based on the literal interpretation of the Constitution and of the standing orders of the two Houses of Parliament, as they talk about "attending" parliamentary sittings and "presence" in the premises of the Houses. Therefore, due to this literal interpretation, the majority of politicians (supported by many constitutional law scholars) rejected the possibility of remote vote or discussion.

In Italy, the marginalization of Legislature was combined not just with a strong role of our whole Executive, as I said it is something usual in emergency situations, but with a key role of the Head of Executive (our President of the Council of Ministers), which is instead very unusual in the history of Italian parliamentarism.

First of all, most of anti-Covid-19 measures (including serious limitations of rights and freedoms) were taken by the Head of Executive's decrees. In the Italian system, these decrees are lower-ranked than statutes; they are not approved by the parliamentary assembly (neither ex ante nor ex post) and cannot be reviewed by the Constitutional Court, nor overseen by other bodies guaranteeing lato sensu constitutional legality (as the President of the Republic).

Then, the Head of the Executive also had an unusual media exposure during Covid-19. As a matter of fact, before the entry into force of new anti-Covid-19 measures, our President of Council of Ministers directly addressed citizens in press conferences, broadcast on TV. Well, speaking directly to Italian people is something that only the President of the Republic (and in very limited circumstances) does.

Given the combination of these two features, the role of Italian Parliament during the very first months of the emergency was very weak. Therefore, the need to sort out the situation was so blatant that the heads of parliamentary groups made agreements to reduce the number of members attending the sittings while respecting the ratios between political parties in Parliament. Moreover, to involve Parliament, Decree Law no. 19/2020 provided that Houses had to vote a resolution on new anti-Covid-19 measures decided by the Head of Executive. However, resolutions are not binding in the Italian system and, in addition, the Executive often availed itself of an "urgency procedure", embodied in mentioned Decree Law, allowing measures to enter into force directly, with only ex post discussion in the Houses. Ultimately, we are talking about a particularly weak tool.

From a comparative viewpoint, the Italian scenario differed both from those systems where remote discussion and online vote were allowed (e.g., Spain, the United Kingdom) as well as from those where proxy vote (France) or the reduction of the quorum (Germany) were used, in some cases even by changing the parliamentary standing orders.

At the time being, with the pandemic emergency practically over, the system of vote and discussion in the Italian Houses of Parliament has gone "back to normal". Nevertheless, I think that at least a couple of "lessons" should be learnt from this side of the pandemic management.

The first specifically concerns Italy. The fact that Italy was so "unprepared" to handle the pandemic and it had to rely on "atypical" measures directly issued by the Head of Executive (with the consequent serious marginalization of Parliament I talked about) did not come "out of the blue". Rather, it might have depended on the lack of a clear and articulated regulation of emergency at the constitutional level, combined with a fragmented and not perfectly fitting statutory framework (let us just think that emergency was declared pursuant to a legislative decree aimed at managing natural disasters). Rethinking the regulation of emergencies, which are long-lasting, global and far-reaching, is one of the most important steps that the pandemic should prompt us to take.

The second lesson has a more comparative reach. Even in those countries (Spain, the United Kingdom) where technology was used to involve Parliaments, this did not automatically imply substantive participation in decision-making. I would say that involvement of Parliament was often more formal than substantive. In other words, technology was exploited as facade to pretend that assemblies were deciding (let us

think of the 6-months extension of the state of alarm in Spain, or of the UK Cabinet's "overreach" in times of Covid-19).

From a more general perspective, it seems that no advanced technology is enough when there is a political will to enhance a body (the Executive) and marginalize another (the Parliament). Paradoxically, in the case of Covid-19, technology appeared to be "submitted" by politics, and not the other way around. This is unusual, as we often see technology as a factor that escapes law and politics. With this statement, I do not want to say that technology is "useless" during emergencies to keep the correct balance between powers of the State; rather, I'd like to remark that there is a high risk that it is exploited to political purposes (as pretending some "fake" parliamentary involvement). This is definitely another point that should be kept in mind in future emergencies.

Swedish Constitutional Response to the Corona Crisis – The Odd One Out?

Julia Dahlqvist and Jane Reichel

In our contribution to "Pandemocracy in Europe" we wrote about the Swedish constitutional responses to Covid-19 and asked if Sweden was in fact the odd one out. Since then, Covid-19 has more and more come to be seen as an endemic disease at the global level and many restrictive measures taken at national level have been dismantled. This is also the case in Sweden. During February of 2022 many of the restrictions where removed. Since the 1 of April 2022 Covid-19 is no longer classified as a disease with "danger to society and a threat to public health" in Sweden.[10] Only a few restrictions remained in force for a period of time and the covid-19 act was revoked. As of today, there are no more binding restriction in place due to the Covid-19-pandemic. Some recommendations from the Public Health Agency remain, e.g., that people older than 50 years old are recommended to get vaccinated against Covid-19, and for everyone to stay home and avoid close contact with others when ill with symptoms of Covid-19.[11] Since our contributions a few reports and inquiries have been issued and some are yet to be published.

The commission appointed to evaluate the measures taken both by the Government and by the relevant administrative authorities, regions, and municipalities to limit the spread of COVID-19 (the *Coronacommission)* issued its report in February of 2022. The commission concludes, inter alia, that "In comparison with the rest of Europe, Sweden has come through the pandemic relatively well and is among the countries with the lowest excess mortality over the period 2020–2021".[12] In the commissions overall assessments it stated that focusing on advice and recommendations was fundamentally correct because it ensured that citizens had more personal freedom than in many other countries. It however goes on to state that measures taken were too few and should have come sooner and that Sweden should have enforced harsher measures in relation to disease prevention and control. Furthermore, the commission is critical of the Governments role in the management of the pandemic. The Government could according to the commission have assumed a greater leadership role without inflicting on the agencies autonomy etc. and it should have taken a greater leadership regarding the

[10] Prop. 2021/22:137, Riksdagens prot. 2021/22:86, p. 102. As of the 5 of May 2023 the WHO no longer classifies covid-19 as a public health emergency of international concern.

[11] See the webpage of the Public Health Agency of Sweden, https://www.folkhalsomyndigheten.se/the-public-health-agency-of-sweden/communicable-disease-control/covid-19/how-to-protect-yourself-and-others-covid-19-recommendations/control-measures/.

[12] English Summary, SOU 2022:10.

communication to the public. The role of the Public Health Agency is also criticized as the Government were too dependent on its advice and assessments. The Government has since made some organizational changes pertaining to crisis management.[13]

The Riksdag returned to its ordinary structure in February 2022 and all members are again allowed to participate in votes.[14] As we mentioned in our contribution, the previous arrangement could have democratic implications, which was also brought forward by a committee tasked with evaluating the Riksdags work during the pandemic (the *Riksdags Corona Committé*). Although most members of parliament thought the arrangement worked well some wanted to bring attention to how the members attending the votes were selected.[15] The fact that there were no regulations in place and that it was based on a non-binding agreement opens for pressure and conflict affecting who is to vote. The Riksdags Corona Committé therefore notes that a regulatory framework that would ensure predictability etc. should be considered and investigated further. A parliamentary inquiry is investigating the procedure in place for times of war where a previously elected war delegation enters into the Riksdags place. Whether the delegations mandate will be reformed and extended to peacetime crises as well remains to be seen.

The parliamentary committee, which is also tasked with reviewing the Government's powers to, for example, legislate in place of the Riksdag during exceptional situations in peacetime, is to present its inquiry in November 2023. Our question as to whether the Swedish constitutional approach to crises in peacetime will be revised and a new system enacted – and whether this in fact will strengthen or weaken the constitutional framework – remains unanswered to a large extent.

[13] See e.g. 11§ a-g förordning (1996:1515) med instruktion för Regeringskansliet.

[14] Whereas only 55 members voted during the pandemic, which was based on a voluntary agreement between the parties. This was removed for a while and later enacted with 100 members until the Riksdag returned to ordinary in February of 2022.

[15] See Riksdagen under coronapandemin 2020, 2021/22:URF1, p. 8f.

The Pandemic and Illiberal Constitutional Theories – An Update After Two Years

Gábor Halmai

The main aim of my chapter was to demonstrate how old and new illiberal constitutional theories provided normative justification for autocratic measures introduced by certain illiberal regimes as a reaction to the Corona virus. Among the old theories the chapter discussed Carl Schmitt's ideas about the role of the executive in emergency situations, and their use by some court ideologists of wannabe autocrats. Before dealing with these justificatory theories the paper provided a short overview on some typical constitutional reactions to COVID-19, with particular attention to the Hungarian case. The new emergency situation and its normative justification attempts again raised the question, whether 'illiberal democracy' or populism are the proper conceptual frameworks to descibe the perils of new authoritarianism, and also whether the transnational responses, for instance that of the European Union towards its backsliding Member States can adequately cope with them.

Developments ever since the publication of the book and my chapter in it proved that indeed the pandemic as one of the recent crisis situation served as a pretext for illiberal government to strengthen their grip on unlimited power. The Orbán government's dealing with the emergency situation is a case in point. Based on the initial Enabling Act of 2020 and amendments to it from 2021 and 2022 altering the sunset clause the government keeps postponing the 'state of medical emergency' with governmental decrees, despite the fact that the pandemic has almost disappeared, and the Parliament is working properly.

The same happens with the prolongation of the 'state of migration emergency' in every six month (the current governmental decree ends in September 2023), although there are hardly any migrants in the country, and also here the Parliament is not obducted to act, if it would be necessary.)

After Russia's unlawful invasion of Ukraine, what the Hungarian government has been failed to condemn provided the opportunity to introduce the 'state of humanitarian catastrophe-related danger again by amending the Enabling Act in November 2022 to give a blanket endorsement for the government to rule by decree for 210 days, allowing its unlimited extension.

All in all, the Orbán government's continued 'overreactions' to the pandemic, as well as the preciding migration and the following Ukranian war provide pretexts to strengthen the autocratic character of their systems. In all these emergency situations the Parliament, which is no way hindered in its operation voluntarely handed over its

legislative and control power to the govenment, which has also weekened the parliamentary form of governance and strengthened the unlimeted executive power of a sort of Schmittian 'sovereign dictatorship'.

This approach is highly dangerous to be copied by other emerging illiberal regimes also within the European Union. The only reason for optimism is that the EU's new conditionality mechanism used against Hungary may deter these new backsliding member states to abuse the pandemic and other crisis situations to violate the joint values of the Union.

Austria's Response to COVID-19

Konrad Lachmayer

This article provides a short overview of the Austrian response to the COVID-19 pandemic, focusing on some key legal and institutional issues raised.[16] First of all, a few key numbers and facts on the pandemic in Austria shall provide some background to the legal analysis:[17] With a population of over 9 million people, Austria had recorded more than 6 million COVID-19 infections and a little over 22,5000 deaths by the end of June 2023. With 200 million, the number of tests carried out is exceptionally high for a relatively small country like Austria. Meanwhile the vaccination rate had stalled a little under 75% by March 2022.

After the spread of COVID-19 took its starting point in Austria in the skiing village of Ischgl, the Austrian government was quick to introduce a lockdown in the middle of March 2020.[18] Although the Austrian Constitution provides for a limited state of emergency in case parliament is unable to convene,[19] at no point during the pandemic was declaring a state of emergency and no rights were suspended. Rather Austria's pandemic response remained within the constitutional framework. The functioning of the Austrian parliament was never affected by the pandemic as voluntary and informal measures (reducing the number of representatives present) taken ensured continued operation in line with health recommendations.[20]

The statutory basis for the pandemic measures taken by the executive was the outdated Epidemic Act[21] as well as newly adopted legislation such as the COVID-19 Measures Act[22] - overall parliament enacted at least 15 different COVID-19 statutes and amended over

[16] This overview is based on the more detailed account of the Austrian response in K. Lachmayer, Constitutional Compliance or Governmental Mismanagement? Rights Limitations in Austria from Lockdowns to Compulsory Vaccination, in A. Vedaschi (ed), Government Policies to Fight Pandemics: Defining the boundaries of legitimate limitations on fundamental freedoms (Intersentia) (Forthcoming).

[17] See, regarding Austrian COVID-19 statistics, the data provided at <https://orf.at/corona/daten/oesterreich>; in regard to infection related data this was last updated at the end of June 2023 when infections with SARS-CoV-2 ceased to be subject to mandatory reporting.

[18] See K Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', VerfBlog, 2020/4/28, <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/>, DOI: 10.17176/20200428-165012-0.

[19] See Art. 18 para. 3 Federal Constitutional Act (Austrian Constitution).

[20] See C. Konrath, C. Neugebauer, R. Posnik, C. Rattinger and A.K. Struth, 'Sicherstellung der Tätigkeit von Nationalrat und Bundesrat in der COVID-19-Pandemie (2021) Austrian Law Journal 219-51, 227 (<http://alj.unigraz.at/index.php/alj/article/view/152>).

[21] Re-enacted by Federal Law Gazette 186/1950 dating back to the 1913 Act concerning the prevention of and fight against communicable diseases, Empire's Law Gazette No. 67/1913.

[22] Federal Law Gazette I No. 12/2020.

100 pre-existing acts mostly initiated by the government.[23] For example, the Epidemic Act has been amended 25 times to expand the arsenal of measures available to fight COVID-19 (general lockdowns, restrictions on private gatherings, notification obligations, etc). The legislator made regular use of sunset legislation meaning that many newly introduced acts and individual provisions have ceased to be in force by the end of June 2023. One much debated piece of legislation was the Compulsory Vaccination Act.[24] Following an extensive parliamentary debate and review procedure, the act authorising the Minister of Health to introduce general compulsory COVID-19 vaccination was passed at the beginning of 2022. However, after its enactment was initially postponed, parliament eventually decided to abolish the act on the governing parties' initiative before it ever took effect[25] – even though the Austrian Constitutional Court (ACC) had confirmed its constitutionality.[26]

From a procedural point of view, parliamentary deliberation was cut short especially at the outset of the pandemic with bills being pushed through to enable rapid responses. Later on, more intensive parliamentary deliberation and review procedures returned as the example of the Compulsory Vaccination Act in 2022 illustrated. Moreover, since the governing parties only held the majority in the first (National Council) and not the second chamber (Federal Council) of Parliament the government was forced to take time for parliamentary deliberations and involve opposition parties in particular to avoid delays in the legislative process.[27]

Most of the concrete pandemic measures were then implemented by the executive through administrative ordinances based on these statutory acts on different levels – federal, state and local. These measures included lockdowns, access regulations and conditions of use for mass transportation, customer areas of shops medical or care facilities to name a few. Only the most restrictive measures implementing general lockdowns and curfews required the additional consent of the main committee of National Council. Furthermore, the government involved different – pre-existing and newly established – scientific and technical committees in its decision-making, but the way the government (dis)regarded the information provided by these experts has been criticised.

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[23] See, for a comprehensive overview of COVID-19 related measures K. Stöger, Austria: Legal Response to Covid-19, in J. King and O L.M. Ferraz et al (eds), The Oxford Compendium of National Legal Responses to Covid-19 (OUP 2021). doi: 10.1093/law-occ19/e28.013.28.
[24] Federal Law Gazette I No. 4/2022.
[25] Federal Law Gazette I No. 131/2022.
[26] See ACC 23.06.2022. G 37/2022.
[27] See Art. 42 Federal Constitutional Act.

Austria's federal structure played a key role in how the overall pandemic response panned out with the states gaining more and more influence to implement flexible regional measures as the pandemic progressed after an initially very centralised approach steered by the federal level (especially the Chancellor but also other Federal Minsters).[28] Rapidly changing measures implemented by different actors were a regular source of confusion for people as to which measures were in force in which area at a specific time. The communication of the measures via press conference and lack of or conflicting available information on measures online did not only contribute to this confusion but this sort of governance by press conference brought challenges for the rule of law to a certain extent as well.[29] Other than legal statutes on the federal and state level, authentic versions of ordinances by local and district authorities were generally not published on the centralised 'Austrian legal information system'. However, by 2023 this has been remedied as most states now have legislation in place providing for a publication of ordinances of local authorities on the centralised web-platform in some way.

The Austrian Constitutional Court played an important part in reviewing the government's COVID-19 measures. Since the Austrian Constitution does not provide for a fast-track procedure to grant interim protection and the ACC did not hold extraordinary sessions to pass judgement more quickly, decisions took some time and often came a few months after the short-lived measures ceased to be in force. Having said that, the ACC argued that it was competent to review those cases as they were still affecting the respective person and they had a legitimate interest in legal protection.[30] This way, the ACC could enforce and set (especially rule of law) standards, which had significant impact on future pandemic measures. From a substantive perspective, a wide range of rights violations were put forward (including property and other economic rights, liberal rights, the right to education etc). When the ACC decided in favour of the complainants it mainly did so based on formal issues regarding the rule of law (especially concerning a lack of advance documentation of considerations by the executive) as well as in substance based on the violation of the right to equality (due the lack of reasonability of the concrete provision). In contrast to the formal, rule-of-law-based approach, the ACC declared many rights infringements to be proportionate in a substantive review e.g., concerning the

[28] For the area of health, competences within the constitutional allocation of powers are federal competences (Art. 10 para. 1 Nr. 12 Federal Constitutional Act) and the highest administrative authority is the Minister of Health. State governors are entitled to enact ordinances in their respective states, if general ordinances are not enacted by the Minister or stricter measures are demanded by the local COVID-19 situation; district administrative authorities are authorised to do the same at a district level.

[29] See T. Upperton, T. Buocz, M. Nemeth and I. Eisenberger, 'Lockdown by Press Conference? COVID-19 and the Rule of Law in New Zealand and Austria' (2022) 82 Heidelberg Journal of International Law (HJIL) 577.

[30] See leading decision, ACC 14.07.2020, V 411/2020.

curfews in November 2020, cultural restrictions or compulsory face mask regulations.[31] In doing so it showed a clear deference towards the political powers giving government a certain leeway. Nevertheless, the role of the ACC remained strong and it set the constitutional scene for the government's COVID-19 measures.

Assessing the Austrian legal performance in the COVID-19 pandemic overall, a shift towards the executive can be observed, but in general democratic procedures were upheld, and the judicial accountability mechanism remained strong with the Constitutional Court fostering rule of law standards in particular. However, due to fast changing measures it was very difficult for people to know which measures were actually in force at times. The overall assessment of the government's pandemic management cannot be positive as a clear and comprehensible strategy was lacking: Measures were often taken hastily, came too late and then had to be more restrictive than if they had been introduced earlier. This led not only to confusion, but also to increasing levels of dissatisfaction and lack of compliance with the COVID-19 measures among people. Especially the second half of the pandemic saw the re-rise of populism in Austria and emergence of very outspoken groups of critics of corona measures and in particular the planned compulsory vaccination.

[31] See ACC 10.06.2021, V561/202; ACC 6.10.2021, V86/2021 or ACC 03.12.2021, V 617/2020, V 618/2020.

Developments in Germany

Caroline Böck

In my presentation I was focusing on the German path in pandemic response with reference to constitutional checks and balances. On the basis of the book 'Pandemocracy in Europe -Power, Parliaments and People in Times of COVID-19'[32] I tried to explain what happened during the pandemic and I tried to line out what will last in the future.

In my legal research, it has become apparent that five important problematic fields have arisen within the separation of powers: These include the Rules on state emergencies, the major reform of the Infection Protection Act, the Model of Federalism, the Role of the Parliament and the Judicial Responses, where the judgements have been made rather recently.

1. Constitutional rules on state emergencies

Germany is a unique country concerning state of emergency rules. Until 1968 the German constitution did not contain any provisions on state of emergency rights. This has been a result of fatal experiences with emergency clauses in the Weimar constitution and because the Allies had reserved for themselves certain emergency powers in Germany. The state of emergency rights was introduced in 1968 following a wave of left-wing civil society unrest in these years.

Since then, these rules of the emergency constitution are spread all through the constitutional text which makes them rather complex and chaotic. Until now the Constitution distinguishes between internal and externally-induced states of emergencies:

The external state of emergency can be declared if the country finds itself under military attack or facing a similar situation. Hence those regulations are not applicable to Pandemics. The internal states of emergency seem to be more relevant. They are set in Art. 35; 91 GG and they can be triggered in the event of a natural catastrophe or other kind of grave disaster. Epidemics are not mentioned explicitly but legal scholars agree that those provisions do not exclude health crisis, such as COVID-19 and therefore could be applicable. Contrary to other Member States, Germany has not declared a nation-wide state of emergency in order to combat the pandemic. Only a few states and cities have temporarily declared a state of emergency. For example, Bavaria.

[32] Kettemann/Lachmayer, Pandemocracy in Europe -Power, Parliaments and People in Times of COVID-19 (open access via: https://library.oapen.org/bitstream/handle/20.500.12657/52489/9781509946389.pdf?sequence=1).

There are two main reasons for that: The typical legal consequences of Article 35 and 91 GG such as the sharing of police forces and the use of the military are inapt for dealing with a pandemic. Only where it reaches an extreme status (eg, the collapse of the entire healthcare system), might some of the legal consequences become relevant. Secondly, a declaration of a state of emergency is regarded as a measure of last resort because of historical concerns.

2. Reform of the Infection Protection Act (IPA)

The central legislative tool used during the country's fight against Covid19 was the Infection Protection Act. The act was passed in 2001 and did not change that much until the pandemic. The act was changed and specified several times during the pandemic and its newest version differs strongly compared to the beginning of the pandemic. It outlines the Federal and state governments' scope for action during an epidemic. It equips them with various instruments designed to prevent, control and combat the spread of disease.

On the basis of the act, a variety of restrictions have been imposed: Such as a nation-wide contact ban on gatherings of more than two people, Or the forced closure of care facilities for minors (Section 33 IPA) and a complete ban on events (Section 28 IPA).

In legal scholarship, concerns arose regarding the rule of law of certain norms in the Infection Protection Act, in particular Section 28 IPA. Section 28 IPA was not precisely differentiated at the beginning of the pandemic. Rather, the provision was to be understood as a general clause. It did not contain any precise measures that may be taken in the event of a pandemic. As a result, the norm has been adapted several times during the pandemic and as beforementioned now contains a variety of measures that can be used to contain a pandemic.

During the pandemic, the most important norm of the IPA was the authorization for the states to issue decrees according to Section 28, 32 IPA. Hence, the states' governments remained the primary actors in charge.

3. Model of Federalism and executive power to issue decrees

Section 32 IPA is an expression of the system of shared responsibilities between the states and the federal government, according to which the states have sole executive authority for federal laws. Therefore, the measures listed in the Infection Protection Act could only be enacted by the state governments. Likewise, the state governments were responsible for controlling the gradual lifting of restrictions.

In order to enable a coordinated approach nonetheless, there were regular conferences of minister presidents under the leadership of Chancellor. However, these

do not have any legally binding effect, so that the prime ministers have nevertheless issued different regulations in individual cases. This approach has led to the fact that within a few kilometers different regulations have applied. This in turn has caused a lot of resentment within society. Despite these negative impacts, no policy voices have prevailed that envision a uniform federal approach to future pandemics.

Since Federalism continues to be viewed as an effective tool of taking more targeted action in pandemics, such as COVID-19, than would be possible at the federal level. The states will therefore have a great amount of executive power in future pandemics and splitted approaches will be carried out. They issued decrees but these are no longer in force.

4. The Role of the Parliament

The next power I examined was the Parliament. The Bundestag (the German parliament) is the main legislative organ, the heart of the democracy. Like any Parliament, it can make decisions through majority. Unlike in other States (e.g., Poland), the Bundestag is elected for 48 months with no possibility to postpone elections (Article 39 GG), for instance during times of emergency. Some of the states theoretically foresee the possibility of emergency Parliaments, but none of them made use of this possibility during COVID-19. While some academics as well as the President of the Parliament had suggested a similar possibility for the Bundestag also in case of pandemics (Notfallausschuss), this proposal was largely criticized and rejected.

There have been some smaller actions of the Parliament during the pandemic, that are still existing, e.g.:

According to the newly inserted Section 126 a Rules of Procedure of the Bundestag, online meetings and voting of the committees (Ausschüsse) are allowed, but not of plenary meetings. Moreover, the Bundestag can now vote on issues when one fourth of its members are present. In general, concerning the important parliamentary debates, it has been shown that while there has been a lot of discussion overall, the debates have been generally uncontroversial. Most party groups were supporting the same political solutions. The parliament never challenged any of the governmental proposals concerning the crisis, including the far-reaching reforms of the Infection protection Act which caused a shift of power from the legislative to the executive state branch. Critics have therefore mourned the 'self-disempowerment' or 'uncritical, subservient attitude' of the Parliament during the COVID-19 crisis. The role of the Parliament can therefore be compared with the role of the Italian parliament during the crisis.

5. Judicial Responses

This brings me to the last power: the judiciary especially the federal constitutional court (BVerfG). The Federal Constitutional Court exercised judicial control by examining constitutional complaints only by individuals and not parties. Of particular importance are two decisions from November 2021, which are referred to as the Bundesnotbremse I and II (Federal Emergency Brake I and II- decision):

The subject of the first decision were exit as well as contact restrictions, which were recorded in Section 28b IPA. They came into force at an incidence of 100 and were terminated as soon as the incidence fell below 100. The restrictions regulated that a household outside and inside the home have contact with only one person per day. Between 10 p.m. and 5 a.m. one was not allowed to be outside the house. The court classified this regulation as constitutional, as it had been proportionated and was within scope for assessment and judgment of the legislature. The subject of the second decision were temporary school closings in 2020 and 2021 that were classified as constitutional as well.

For these decisions, the Court has been continuously criticized in the legal community for not acting as a guardian of the Constitution. It was heavily criticized for the method as well, since the court was conducting an unsystematic proportionality test and resting on the discretionary power of the legislature. The decision also fails to draw a clear line on measures for the legislature that could be used for future pandemics.

The federal Court of Justice has issued a number of other decisions in various fields such as the freedom of assembly, freedom of religion, freedom of profession and compulsory vaccination. Within this, the critical voices cannot be clearly substantiated. For example, the BVerfG has lifted assembly bans imposed by cities in a timely manner, thus enabling these assemblies.

The lower instance courts have also made decisions in these fields and thus exercised their judicial control.

6. Conclusion

No State of Emergency has been declared nationwide in Germany since it is seen as the measure of last resort. The IPA is reformed and has numerous specifications that have been made during the pandemic. Pandemic control was made decisively through legal decrees of the state governments, that led to massive executive power which will be the case in future similar crisis as well. The parliament never challenged any of the governmental proposals and the discussions remained uncontroversial. The judiciary has supported most of the political as well as legal decisions of the politicians, but has contradicted them in individual cases.

The Post-Pandemic Governance in France

Sylvia Brunet

The Covid-19 pandemic seems to be behind us in France, after a 9th wave observed in December 2022. Nearly 170,000 people died during the 3-year crisis, but 80% of the population is now vaccinated. The virus has become endemic and is circulating, more slowly.

To summarize how the pandemic was managed in France (see my contribution in the book published in 2022, Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19, M.-C. Kettemann, K. Lachmayer (eds.)), it can be said that French Government was not prepared to deal with the health crisis of such magnitude that struck France from March 2020.

The crisis has been from the beginning managed by the President of the Republic and his Prime Minister. A 16 March 2020 Decree required a general lockdown for all inhabitants and suspended most of the civil liberties. This Decree was based on the traditional case-law of administrative courts about "exceptional circumstances". The Executive decided to give legal basis to these regulations, with the 23 March 2020 "emergency" Statutory Law "to face the Covid-19 epidemic". This text was certainly democratic, because it was passed by the deputies and the senators and because it provided that both Houses of Parliament shall be informed about the measures taken by government and shall be able to require any further information. But parliamentary majority - under the grip of the President of the Republic - has not set up a proper committee of inquiry. This statutory law raised furthermore problems of form and substance. On the form, the bill was passed precipitously and under exceptional conditions. Article 46 of the Constitution was violated, but the constitutional judges didn't reject the law, what is a problem in terms of Democracy and Rule of law. On the substance, the bill enacted a new state of emergency, the "health emergency". It increased the powers of the Prime Minister and of the Minister of Health and affected more intensively the rights and freedoms. The Members of parliament were empowered to vote only after one month, to extend it or not. That means that the Executive had nearly full decision-making powers during the application or the state-of-emergency legal regime.

The decisions for all exceptional measures, which have severely limited rights and freedoms, were thus not taken by the two Houses of Parliament or by local elected councils but by the President of the Republic Emmanuel Macron (who was elected since 2017, and who has been re-elected in 2022). The President took alone all the decisions to fight the pandemic, only surrounded by a few ministers and councils of experts without

any democratic legitimacy (a scientific council, the Security and Défense council, even the private American firm McKinsey - for French vaccination strategy - …). This mode of operation has disrupted the usual decision-making processes within the executive branch, has weakened national and local democratic bodies and has undermined the rule of law and the protection of rights and freedoms. However, the extensions of the specific policing emergency powers of the Executive have been justified by the courts, in particular during the peaks of the crisis. This state-of-emergency regime set up in March 2020 and extended several times until June 2021, the ending of its application in metropolitan France (but an Act of Parliament of November 2021 has postponed to the end of July 2022 the lapse of its legal framework) was thus the first legal framework applied. The state of emergency can be imposed by a Council of Ministers' decree in the event of a health disaster. Prime Minister, Minister of Health and prefects can then take measures that derogate from the law applicable in normal circumstances. This new state of emergency defines a regime that is very restrictive in terms of civil liberties (general lockdown, night curfew or quarantine are possible).

A second state of exception, the transitional regime to end the state of emergency, was set up in July 2020 and ended at the end of July 2022. Even if this was a post-crises regime, that means a transitional regime which linked the emergency system and the ordinary-law system, this exceptional regime was rather similar to the first one (mandatory sanitary or vaccination certificate for activities of everyday life was for example possible).

Thirdly, in the same transitional logic, a new legislation was adopted at the end of July 2022. It ended the two exceptional regimes created to combat the Covid-19 epidemic. However, the law made it possible to continue to require travellers to have a negative Covid test at the borders until the end of January 2023, and extended the tools designed to monitor the circulation of the virus: the "Contact Covid" file, which identified and accompanied sick people and contact cases, was maintained until 31 January 2023; and the "SI-DEP" file, which centralises the results of the Covid-19 screening tests, has been extended until 30 June 2023.

If August the 1st 2022 was thus the end of the state-of-emergency regime and of the transitional regime to end the state of emergency, a lighter state of exception has been applied and is partly still applied. In addition, the decree allowing the return of unvaccinated Covid caregivers (suspended from their duties since August 2021) was recently published, on 14 May 2023. It also marks the end of the obligation for caregivers to be vaccinated against Covid-19. Another issue is also now that of considering the "long Covid" diseases. Statute Law of 24 January 2022 therefore decided to create a referral and management platform for chronic covid-19 patients; but it has not yet been created.

Now that the Covid-19 has become endemic, the question arises as to whether French Government is now better prepared to deal with future emergency situations, both at logistical and legal levels. The experience of the Covid-19 pandemic has undoubtedly made it possible to better prepare for future health crises, even if not all lessons have been learned (1.). Another question arises as to whether a sort of de facto permanent legal state of exception has been established in France (2.).

1. What lessons have been learned from the pandemic in France?

a. On the health and social front

aa. Some changes

On the material side, we have now enough (too many?) masks, hydroalcoholic gel, tests, vaccines...; that was not the case during the first months of the pandemic.

On the institutional side, new institutions have been created, for example the Committee for the monitoring and anticipation of health risks ("Covars"), composed of 18 members (virologist, veterinarian, citizens representative...). Its objective is to inform the decisions of public authorities. Established by a Decree of 30 July 2022, it began its work on 29 September 2022. The committee published a report on 5 April 2023, as there was an increase in the rate of contamination at the end of March in France, considering that anti-Covid vaccination was still relevant.

Since the pandemic, scientific expertise (medical, but also legal or military experts) has entered the field of political decision-making in an unprecedented way. The word given to the experts also shows in the open that their positions are sometimes contradictory (concerning the AstraZeneca vaccine for example). The result is a questioning of public decision-making, a French society that is more divided and violent than before, and the proliferation of conspiracy theories. The regulation of cyberspace and social networks has therefore become a necessity, and the new European regulation on digital services was really needed.

Concerning the working environment, teleworking and videoconferencing are now widespread, both in the private sector and in the public service. Young people in particular have also changed their relationship to work and now want a better work-life balance.

bb. Some problems that remain

The pandemic has had a lasting impact on young and vulnerable people. It has caused a significant deterioration in the mental health of the French people, especially

the most vulnerable. Social divides have also been accentuated. The situation is unprecedented and very serious.

The problem of prison overcrowding has not been resolved, even though it had serious consequences during the pandemic. And perhaps the worst thing is that French hospitals remain in crisis. The pandemic revealed the inadequacies of French public health system, which had been undermined by budgetary reforms over the past 20 years and revealed France's over-dependence on a globalised economy. For several years, nurses have been warning about the state of the hospital. After the pandemic, measures were taken by the executive, but they remain insufficient.

b. On the economic and industrial front

aa. Some changes

The "whatever it takes" politics has saved many French companies and compensated many employees for short-time working. But the public deficit has now to be closed. The public deficit for 2022 is 124.9 billion euros, that means 4.7% of GDP, after 6.5% in 2021 and 9.0% in 2020. President Macron has decided to reindustrialise France. At the "Choose France" summit in particular, President Macron praised France's economic attractiveness. For example, the American laboratory Pfizer has just announced an additional investment of 500 million euros in France.

bb. Some problems that remain

Current and future major crises (linked with the Covid-19 pandemic!) are not sufficiently anticipated, especially the climate and environmental crisis. The challenge is to find long-term substantive solutions, without resorting to permanent legal regimes limiting rights and freedoms.

2. Is there a de facto permanent legal state of exception in France?

a. The risk of an ongoing malfunctioning of the institutions and decision-making processes

The question arises as to whether the French management of the Covid-19 crisis will have a lasting effect on the functioning of our parliamentary system established by the 1958 Constitution. Already under ordinary circumstances, the French President of the Republic is powerful, Parliament is weakened, and decentralised authorities often lack the resources to exercise their powers. But this structural tendency in the Fifth Republic has been accentuated since the beginning of the pandemic.

aa. A fluctuating management by the Executive

President Macron, who presents himself as political neither left nor right, who changed the French political landscape (the consequence being a real rise of the extreme-right wing), and who had already used new methods of governance before, managed the pandemic on his own, outside the Council of Ministers, and this even if public health is not within the President's jurisdiction. This mode of operation in itself has been criticised. It brought lack of understanding and new fragmentation of French civil society. The results of the management of the pandemic have also been criticised, because it has been late, fluctuating and sometimes contradictory (wearing a protective mask by the general public is no use, then is compulsory).

Therefore, complaints were filed against ministers and former ministers - not against the President, who benefits from political and legal immunity - in the Court of Justice of the Republic (CJR), which is responsible for judging the criminal liability of ministers for acts carried out in the exercising of their duties. Procedures are underway. If the CJR decides in the next months to acquit or dismiss the cases, it may be perceived as lax and protective of the Executive, and the ministers will be perceived as enjoying impunity. If the CJR convicts ministers or former ministers, ministers will be very cautious in the future, and this will lead to a further strengthening of hyper-presidentialism…

The current management of other crisis remains fluctuating and contradictory, as illustrated by the pension reform - which has just come into force despite trade union opposition and numerous demonstrations -. For example, in February 2023, there have been contradictory ministerial communications on the supposed minimum pension of 1200 euros thanks to the reform. The same communication errors as during the pandemic are therefore repeated.

bb. The relative denial of democracy

The two national Houses of Parliament have been deprived of the power to decide on the content of the legislation to fight the pandemic. In particular, they empowered the Government to legislate by 'ordinance' (according to Article 38 of the Constitution), that means without parliamentary debate. And the question arises as to whether legislation by ordinance has become an ordinary legislative process in France.

Furthermore, the National Assembly was recently again deprived of the power to decide concerning different important legislations: Prime Minister Elisabeth Borne (PM since May 2022) used Article 49 paragraph 3 of the Constitution eleven times between October 2022 and March 2023, because there was a risk of not having a majority to pass the bills. According to this article, the Prime Minister may make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence is carried (translation: https://www.conseil-

constitutionnel.fr/en/constitution-of-4-october-1958). For example, the highly contested pension reform passed in that way in April 2023 (legal retirement age has thus increased to 64 instead of 62).

As President Macron has no more the support of absolute majority since the 2022 general elections of deputies, the situation is brand-new and the necessary search for compromises could have led to a return to a more balanced, shared and protective decision-making democracy. But the way is rather to force decisions through. In other words, usual democratic decision-making processes have not been restored after the pandemic.

The pandemic has also accentuated an already strong trend over the last 15 years, that of the recentralisation of power, such recentralisation being particularly marked in the field of public health. Thus, the national State (President of the Republic, Ministers and Prefects) has directed the management of the pandemic without relying on local democracy. That has caused incomprehension and distrust among the population and might have partly explained the high abstention rate in the last local and national elections, from 2020 to 2022.

But the mayors played in a concrete way a central social role for their citizens during the pandemic. For example, they distributed protective masks, disinfected schools, and managed the vaccination centres in their municipalities. That's why President Macon decided last year to give them more power: A statute law ("3DS") of 21 February 2022 intends to give room for manoeuvre to local elected representatives. Furthermore, a few days ago, President Macron called for greater local responsibility. A revision of the Constitution seems to be envisaged. But can this reform succeed with a (since 2022) relative parliamentary majority?

There is not only a risk of an ongoing malfunctioning of French parliamentary system and democracy, even under ordinary-law system, but also a risk of an ongoing limitation of rights and freedoms.

b. The risk of an ongoing limitation of rights and freedoms

aa. The normalization of states of exception based on emergency has occurred already before the pandemic, concerning the fight against terrorism. A new anti-terrorism (ordinary) legislation was adopted on 30 October 2017 (No 2017-510), which created a de facto permanent (security) state of emergency.

In addition, the pandemic has made it even more common to deprive people of their freedoms. And Article L.3131-1 of the Public Health Code, which was in force before the pandemic, still allows the Minister of Health to adopt emergency health measures in the event of a serious health threat, such as an epidemic. Under this Article, it is

incumbent on the Minister of Health, in the event of a serious health threat requiring emergency measures, to prescribe, in the interest of public health, any measure that is proportionate to the risks involved and appropriate to the time and place in order to prevent and limit the consequences of possible threats to the health of the population.

bb. The right to demonstrate, which was very limited during the health crisis, is still affected today, and the Courts have a central role.

For example, demonstrating with pans (called "portable sound system") to make noise during the visits of President Macron has been forbidden by Prefects in April 2023, due to risk of terrorism: prefects invoke the existence of a terrorist threat to justify the ban on saucepans! But the administrative courts considered on 25 April 2023 (TA Orléans No 2301545) that one of these orders was illegal. According to the judges, a visit by the President of the Republic, "in the absence of special circumstances", does not justify the establishment of a security perimeter. This procedure is only applicable in the event of a real terrorist threat, a condition that does not seem to be fully met in the presence of people armed with saucepans…

But in other cases, the use of drones to monitor demonstrations on 1st May 2023 in Paris, Lyon and Bordeaux has been validated by the administrative Courts. For other cities (Le Havre for example), the Courts have only reduced the area and time allowed. However, it should be remembered that during the pandemic, the use of drones was prohibited by the Courts. Drones had been used to monitor compliance with sanitary measures, in order to control and prevent the gathering of people. But the supreme administrative Court considered that their use was incompatible with the treatment of personal data protection, due to the capacity of this technology to collect individual information and possibly store it. As this is a technology that should have received authorisation as soon as it was capable of collecting such data, the public authorities could not use it (CE, ord., 18 May 2020, n° 440442, 440445 La quadrature du Net et Ligue des droits de l'Homme).

The Constitutional judges (Conseil constitutionnel) have for their part recently (17 May 2023) validated the statutory law relating to the organisation of the 2024 Olympic Games in France. The judges have validated - with certain reservations - the algorithmic processing of images collected by video surveillance or drones, as well as the use of genetic analysis in the context of anti-doping tests.

The serious risks are thus the normalization of emergency powers and the permanency and banalization of exceptional measures within the standardised rule of law. Finally, the question arises as to whether the Courts will clearly protect differently the rights and freedoms during and outside of emergency.

3. Conclusion

The French Hyper-Executive State of Emergency has thus turned into a still Hyper-Executive normal period. The question remains whether the regime would have evolved in the same way if the pandemic had not occurred. It can be assumed that the trends were already present before the health crisis, but that the crisis reinforced them.

Admittedly, with one crisis succeeding and overlapping the next (relating to economic and social issues, migration, terrorism, military aggression and war, public health, environment, climate, energy, water…), Governments have continuously to deal with complex situations. The management of major crises has thus become a permanent task. But Governments have the choice of the management method and of the legal frameworks and tools.

Pandemics, Expertise and Deliberation at the International level 2.0

Pedro A. Villarreal

The original chapter addressed the role of deliberation within the World Health Organization (WHO), when its Director-General ponders declaring that an event is a Public Health Emergency of International Concern (PHEIC). This category is enshrined in the International Health Regulations (IHR) of 2005. The chapter focused on deliberations within the so-called IHR Emergency Committee, a group of experts convened by the WHO Director-General with the mandate to provide advice on whether an event is a PHEIC or not, and which measures to adopt. Since the chapter was published in early 2022, at least three major developments directly related to the contents have occurred, and they are addressed below.

1. The end of the COVID-19 PHEIC

Perhaps the more conspicuous development related to the chapter took place on 5 May 2023, when the WHO Director-General, upon receiving advice from the aforementioned Emergency Committee, declared that the spread of COVID-19 no longer constituted a PHEIC.[33] The main reason was, according to the Committee members, that after more than three years of witnessing the spread of the SARS-CoV-2 virus, it is no longer an "extraordinary event".

As per custom, the deliberations of the Emergency Committee took place behind closed doors, without any recordings or minutes of the meeting available. In fact, Committee members are even duty-bound to maintain confidentiality of meeting discussions and deliberations. The justification is, this allows participating individuals to express their views freely and without worrying about the public scrutiny. From a normative perspective that favours transparency, such a logic may be questionable. But such decision-making at the international level sometimes involves trade-offs, as there are a number of Member States who are not so keen on having all of the information they provide to be disclosed.

[33] WHO, *Fifth Meeting of the International Health Regulations (2005) (IHR) Emergency Committee on the Multi-Country Outbreak of mpox (monkeypox)* (11 May 2023) https://www.who.int/news/item/11-05-2023-fifth-meeting-of-the-international-health-regulations-(2005)-(ihr)-emergency-committee-on-the-multi-country-outbreak-of-monkeypox-(mpox).

2. The declaration, and end of the mpox PHEIC

With the COVID-19 pandemic was still raging, another multi-country disease outbreak took the world by surprise. On 23 July 2022, the WHO Director-General declared that the spread of mpox (still called "monkeypox" at that moment) was a PHEIC. But unlike with COVID-19, this emergency lasted for ten and a half months, because on 11 May 2023, the emergency was terminated by the WHO Director-General. Reasons for the short duration were, among others, that the disease actually had a mild nature, rarely leading to any fatal case.

The declaration of a PHEIC due to the spread of mpox represented a break with emergency decision-making orthodoxy for several reasons. For the first time ever, the WHO Director-General went against the advice of the Emergency Committee,[34] which was split on whether to recommend declaring a PHEIC or not. Also unprecedented was the extensive disclosure of opposing views between Committee members, though without naming which members favoured which views. A similar, but much less detailed practice had been hinted at in the first meeting of the Emergency Committee due to the then-novel SARS-CoV-2 virus on 23 January, 2020, when a statement published by the WHO simply referred to "divergent views" amongst Committee members.[35]

The decision of whether the spread of the novel SARS-CoV-2 virus in Wuhan was a PHEIC or not was initially delayed for one week, leading to controversies. By contrast, in the case of the mpox outbreak, the WHO Director-General decided not to wait for a consensus from the Emergency Committee and, instead, issued the PHEIC declaration. As argued elsewhere,[36] this shift in practice represents a significant departure away from full deference owed to advice provided by expert bodies, and towards a more executive rationale.

3. PHEIC Declarations in the Crosshairs: Proposed Amendments to IHR (2005)

The third, arguably unconcluded development related to the chapter has to do with the currently proposed amendments to the IHR (2005), which are being negotiated in Geneva at the moment of writing. After the United States governments first tabled a set of amendment proposals in January 2022, the World Health Assembly – the WHO's

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[34] Under Article 12 IHR (2005), the WHO Director-General has the ultimate authority to declare a PHEIC, with the Emergency Committee providing non-binding advice.

[35] WHO, *Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)* (23 January 2020) https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).

[36] Clare Wenham and Mark Eccleston-Turner, "Monkeypox as a PHEIC: implications for global health governance" (2022) 400 *The Lancet* 2169-2170.

principal decision-making body under its Constitution – decided in May of that year to initiate a process to receive submissions of amendments from all Member States who would be interested. The deadline was September, 2022, and submissions will be reviewed by a Working Group on Amendments to the International Health Regulations, itself composed of Member State representatives, who are scheduled to present a final proposal at the World Health Assembly in May, 2024.

Among the proposed amendments, several have touched upon the procedures for declaring a PHEIC and how Emergency Committees should be set up. One of these proposals would explicitly allow for members to express dissenting opinions.[37] While, as evidence by the PHEIC declaration due to mpox, this is already practice, having it enshrined in a provision of the IHR (2005) would send a clearer message that these deliberative expert bodies cannot be expected to work only under consensus. That is especially critical during instances of high uncertainty because of incomplete or missing information related to an event.

4. Conclusion: What future for expert deliberation on pandemics at the WHO?

Depending on the outcome of the amendment process of the IHR (2005), some of the tenets that lie in the original chapter may be put to the test. Regardless of the final outcome, the overall message would still stand, which is how these advisory expert bodies play a key governance role in facing health emergencies at the international level. Whereas the ultimate authority to declare PHEICs lies with the WHO Director-General, expert advice can exert considerable influence. Ongoing reforms of the IHR (2005) are partly aimed at ensuring that decision-making mechanisms for facing future health emergencies of unknown nature are further calibrated. Considering the experience with the devastating COVID-19 pandemic, and in the face of similar future health threats of unknown origin and nature, the stakes of improving such emergency decision-making both from an input and from and output perspective[38] remain as high as ever.

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[37] WHO, *Report of the Review Committee regarding amendments to the International Health Regulations (2005),* A/WGIHR/2/5 (6 February 2023) 74.

[38] Pedro A. Villarreal, "Pandemics, Expertise and Deliberation at the International Level" in Matthias Kettemann and Konrad Lachmayer (eds.) *Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19* (Hart Publishing, 2021) 240-241.

Conclusion

Caroline Böck and Matthias C. Kettemann

Overall, it can be seen that the nation states have used very different strategies to combat COVID-19. These range from the very liberal Swedish variant to long-lasting severe restrictions on fundamental rights in Italy and Austria. Similar results can be seen in the handling of the pandemic after it has subsided. The effects on constitutional checks and balances therefore differ as well. Nevertheless, similar effects can be identified that have emerged in different countries, albeit due to various causes. Essentially, four points of intersection can be acknowledged.

First, in many EU countries, a major factor that has caused shifts in constitutional checks and balances has been the unpreparedness of the three powers for health crises. This is no different between countries with pre-existing legislation that applies in pandemics and those that had no such legislation. Despite all of this, swift, far-reaching decisions were made without the participation of Parliament.

This is related to the second point that in most states, there was a strengthening of the executive branch and the adoption of decrees during the course of the pandemic. In most countries, this ended with the termination of the state of emergency, but despite the long duration of the pandemic, it must be evaluated critically.

The third point to note is that especially the executive branch made greater use of the media and other technologies to justify pandemic control. In addition, digitization was often used to maintain parliament, which in retrospect seems like a facade due to the small role of parliament. In Greece, for example, the COVID-19 pandemic was used to exert a degree of control over the media by providing them with initially undisclosed government funding. This approach has continued despite massive international criticism. In these countries, as noted above, it is becoming increasingly clear that the population is losing confidence in the government and its democratic and constitutional actions. It is therefore necessary to clarify how technical means can be used more sensibly in future crises in order to strengthen democratic principles and the rule of law. Such an evaluation will take place within the REGROUP project from the beginning of 2024 under the leadership of the team of the University of Innsbruck.

The fourth point to note is that despite all the difficulties and changes during the pandemic, there has been a more or less strong reappraisal of the pandemic and the work of state institutions, especially the government. This is particularly true of Sweden, where the process of coming to terms with the pandemic is still ongoing. However, this applies less to countries such as Hungary or Poland, which are already being viewed critically from the perspective of rule of law. Here, the impression is growing that the governments of these states have used and continue to use the pandemic to centralize their power.

A further comprehensive analysis of the national responses in the context of COVID- 19 regarding the change in constitutional checks and balances will be carried out in the Focus Paper "The Pandemic's Comparative Impact on Constitutional Checks and Balances within the EU", which will be published at the end of 2023.

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