Kettemann, Matthias C, and Konrad Lachmayer. "Introduction and Acknowledgements."
Pandemocracy in Europe: Power, Parliaments and People in Times of COVID-19. Ed. Matthias C
Kettemann and Konrad Lachmayer. Oxford: Hart Publishing, 2022. 1–6. *Bloomsbury Collections*.
Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781509946396.0004>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023,
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Introduction and Acknowledgements

MATTHIAS C KETTEMANN AND KONRAD LACHMAYER

The COVID-19 disease occurred suddenly, spread fast and hit hard. After East-Asia, Europe was a region struck early by the pandemic and European governments were woefully unprepared. The virus challenged healthcare systems and impacted every fibre of European lives. With one million European dead at the time this manuscript was finalised (in May 2021, according to numbers from Johns Hopkins University), the effect of COVID-19 will be felt for years to come. Grandparents who died too early, parents to whom children could not say goodbye, middle-aged persons unable to climb steps due to Long-COVID. We are not doctors. We cannot help fight COVID-19 directly. But as international and constitutional law experts, we can diagnose another ill that COVID-19 has brought to Europe's vibrant democracies, having emerged surprisingly strong from the financial and the migration crisis. The impact of governmental responses to COVID-19 reverberated in their societies. COVID-19, as our book shows, challenged Europe and European democracies in more than one way: Europe needs to develop adequate and effective responses, but also to uphold its democratic values.

Together with an experienced team of authors from across Europe we ask whether *democracy* has to be conceptually reimagined as a *pandemocracy*, with other priorities, players and normative goals. Has a new viral-authoritarian age dawned (or were existing illiberal tendencies enhanced), demonstrably, like in Hungary, or more subtly, like in Germany, where the *Bundestag* quickly and controversially passed legislation? Did the European multi-level governance sufficiently support the Member States in the health crisis? What has been the role that internet platforms have taken on? Will democracies also suffer from Long-COVID?

This book focuses on the implications of the fight against COVID-19 for European democracies in times of the pandemic with contributions linking debates in political science, international relations and law. This book includes 17 chapters across four parts, that analyse the democratic implications of the specific challenges of a health-related state of emergency. Part I begins by focusing on theoretical questions concerning the three main aspects engaged by emergencies: politics, power relations and the people. Part II continues with seven case studies that, each with a pronounced focus on a particular element of democracy, show how different states reacted to COVID-19. Part III looks beyond the states, and analyses the international and European impacts as well as the influence of

non-state actors on democracy during COVID-19. Part IV finally asks which lessons can be drawn from the crisis and offers important insights regarding nationalism and populism.

In the opening chapter, Paul Gragl discusses the relationship between law and politics during the COVID-19 crisis. He states that this relationship is particularly problematic during times of crisis and emergency, since some believe in the postulate that politics is permitted to do anything, even in violation of the law, if necessary. He concludes that the law cannot be thought of or constructed from the exception, but only from the rule. The power of exception should not be overestimated, but we should include clear rules on how to handle crisis situations in the legal system.

Antonios Kouroutakis focuses on the abuse of power and self-entrenchment as the states respond to the COVID-19 outbreak. While it is the norm in liberal constitutional theory that power lies in the hands of the executive during emergencies, this leads to limiting the functions of the legislative body and gives rise to abuses of power. Furthermore, legitimate and illegitimate ways of self-entrenchment as well as roles of different institutions monitoring the executive are examined.

Concluding the first part, Konrad Lachmayer deals with the role of death in European democracies. He states that death can no longer be understood as an unpredictable destiny anymore, but having an economised dimension, which gives governments the possibility to influence death and dying. Budgetary law can serve as an example for the democratic decision-making about life expectancy. Legal rationalisation contributes to the discussion, especially regarding state obligations to guarantee eg the right to life, social rights, or right to health, which affects the government's decisions about life and death. He claims that it is necessary to understand death and dying as a core issue of public debate in democracies.

Opening Part II, Robert Thomas outlines the impact of the COVID-19 crisis on parliamentary democracy in the United Kingdom. While in the beginning of the crisis extensive powers were delegated to the executive and fast-track legislation weakened the role of the Westminster Parliament, the Parliament reenabled scrutiny of the government. Nevertheless the author claims that a number of constitutional reforms need to be conceived of and adopted, especially regarding a codified constitution, constitutional conventions, less centralisation and the devolution of more power to the regions as well as a reform of the Parliament by turning the House of Lords into a regionally representative chamber.

Looking at Germany's handling of the crisis, Pierre Thielbörger identifies the most relevant legal features for dealing with the pandemic. This includes the federalist structure ('executive federalism' and 'cooperative federalism'), the rules on emergencies in the German Constitution, changes in democratic processes as well as the restrictions of German fundamental rights during the pandemics. The author concludes that federalism can be an enabler rather than an inhibitor in tackling crises such as pandemics, but only if 'executive federalism' is balanced appropriately with 'cooperative federalism'.

Arianna Vendaschi describes how Italy struggles with two main issues arising as a result of the severe COVID-19 crisis. First, the marginalisation of parliament

as a typical effect of emergency times resulting in reduced checks of the executive and its activities and, second the impact of executive decrees on individual rights. She concludes that the COVID-19 crisis has impacted not just on representativeness and political accountability, but also on key features such as the protection of rights, constitutional review, transparency and certainty of law. Italian institutions have shown a fragmented and sometimes incoherent attitude, both as regards the relationship between parliament and the executive and, within parliament itself, between majority and opposition political forces.

Julia Dahlqvist and Jane Reichel analyse the Swedish constitutional response, which has differed from the more restrictive approaches of other nations. This is a result of the particularities of Swedish constitutional law and legal culture including the lack of provisions regarding the state of emergency, the principles of legality, objectivity and transparency as well as non-legal factors like values, social trust and a strong tradition of consensus-building in the political sphere. The authors state that the pandemic has shed light on the need for foreseeable, transparent, and accountable procedures when adopting measures affecting all of society, even when the measures in question are non-binding and adopted by the semi-independent public authorities.

Taking a look at Hungary, Zoltán Szente and Fruzsina Gárdos-Oros analyse the reaction to the pandemic in a semi-authoritarian system. Criticising the unconstitutional governmental self-empowerment, they hone in on the lack of parliamentary control of the emergency measures in practice. They conclude that the Hungarian government prepared the legal system for a long-term state of exception, institutionalising extraordinary powers and instruments, which provide wide-ranging empowerment for the executive even under normalcy, in the ordinary constitutional order.

In Switzerland, the COVID-19 pandemic has led to unprecedented regulatory activity on the part of the executive branch. Odile Ammann and Felix Uhlmann analyse the extensive use of the intra-constitutional emergency powers by the federal government. The authors emphasise that the longer an emergency situation lasts, the more pressing it becomes for parliament to play an active part in tackling the emergency situation. They discuss two dimensions of parliament's reaction: first, they provide a critical appraisal of the COVID-19 Act, and secondly, they examine how parliament adjusted its own functioning to COVID-19, and the extent to which it succeeded in maintaining its capacity to act despite the crisis.

Sylvia Brunet completes the analysis of the practice of domestic states in the second part of the book. She deals with the health crisis that has struck France since March 2020 as a result of the COVID-19 pandemic; lockdown periods have been implemented and a new, exceptional, state-of-emergency legal regime has been created. The decisions for such measures, which severely limit rights and freedoms, are not taken by parliament or local elected councils but by the President of the Republic, surrounded by a few ministers and advised by experts. She analyses the management of the crisis as centralised and technocratic. The mode of operation, unprecedented in various ways, disrupts the usual decision-making processes

within the executive branch, weakens national and local democratic bodies and undermines the rule of law.

In the third part of the book, Pedro Villareal takes us beyond the nation states. He deals with rapid decision-making on an international level with the example of the WHO's emergency committee. Since the Director General had deferred to the emergency committee's advice concerning the decision whether a specific event as a public health emergency occurs, it is essential to assess how deliberation takes place within the committees. He concludes that a more harmonious balance of the input and output dimensions of pandemic deliberation at the international level is long overdue.

On the one hand the European Union faces criticism for not taking enough action to tackle COVID-19 while on the other hand the Union only has limited competences to do so. Consequently, Anja Naumann discusses whether this sheds a different light on the current, narrow stance on the need for harmonised EU action in the matter and if this will lead to a shift of power towards the EU in terms of health competences post COVID-19. She concludes that, despite the current instruments' positive impact towards addressing the COVID-19 pandemic, there are good reasons for Member States to consolidate the more influential role the EU has taken on during this pandemic in the form of concrete health crisis competences in the treaties to enhance preparedness as well as to allow for a faster response during future crises.

Analysing the role of online platforms in managing and governing information during the pandemic, Matthias C Kettemann and Marie-Therese Sekwenz take a look at how platforms have reacted to the pandemic, how they have supported governmental health measures and how they have de-amplified and countered disinformation about COVID-19. The authors show how platforms have emerged as key actors in the shaping of communication flows in increasingly datafied societies.

In the final chapter of the third part, Mart Susi puts forward the proportionality deficit paradox, which says that social media and blockchain-based QR codes for monitoring travel and vaccination status (or other statuses during future crises) are capable of applying human rights rules, but are not capable of applying human rights principles. He concludes that the COVID-19 crisis confirms the thesis of a negative correlation between e-statehood and fundamental rights. The spread of e-state usage to more and more public administration areas and by more and more public offices invigorates the development aspect without the need to consider how the new developments coincide with human rights related obligations.

The fourth part focuses on populism and power in times of the pandemic. Gábor Halmai demonstrates how old and new illiberal constitutional theories provide normative justification for autocratic measures introduced by certain illiberal regimes as a reaction to the coronavirus. Before dealing with these justificatory theories the chapter provides a short overview of some typical constitutional reactions to COVID-19, paying particular attention to the Hungarian case. The new emergency situation and its normative justification attempts again raise the question whether 'illiberal democracy' or populism are the proper conceptual frameworks to describe the perils of new authoritarianism.

While many observers rushed to predict that the pandemic would seriously harm the political fortunes of populists, Jan-Werner Müller states that it is yet too early to determine what impact this crisis will have on populism. Since populism is primarily characterised by claiming to represent the ‘real people’ and putting citizens against each other, much will depend on the frustrations and economic dislocations that are going to arise. The author states that a pandemic is an emergency, but an emergency is not automatically an exception during which all democratic politics must stop. There are good reasons why an opposition should come on board with emergency measures, but it would be entirely unjustified if dissent became delegitimated in the name of some form of ‘national unity’.

Finally, the editors offer some conclusions concerning the current challenges of core elements of democracies, especially the role of parliaments and European multi-level governance. We identify different grades of engagement of parliaments in European democracies in the COVID-19 crisis and identify a backlash to multi-level governance in Europe. We conclude that the traditional governmental-based understanding of crises has to be overcome and a democracy-based concept of the state of emergency should be established.

Together, the chapters in this book allow for a deep and complex reappraisal of the distribution of power between parliaments and governments in pandemic times. The challenges to European democracies in the COVID-19 pandemic are analysed and several suggestions for reform and conclusions to build upon in a post-pandemic world are presented.

We are extremely grateful to our terrific authors, that they were not only willing to participate in this project in these difficult times, but also for delivering their contributions perfectly in time. We are honoured by your participation, especially in times like these.

It should be noted that all contributions were substantively finished by April 2021 and updated slightly in July 2021. Since then a number of new coronavirus measures will have been adapted.

We also would like to thank Hart Publishing, especially Kate Whetter and Rosemarie Mearns, for their willingness to publish this edited collection, their tireless support and their patience with the editors, and Claire Banyard for her excellent copy editing. Moreover, we are grateful to the anonymous reviewers for their endorsement as well as their useful comments.

With our social and scientific lives moving online, open access to knowledge has become essential in pandemic times. It will remain so. We are therefore very happy that we can offer this book as an Open Access title thanks to generous support from Sigmund Freud University, the *Publikationsfonds für Monografien der Leibniz-Gemeinschaft* (OA Publication Fund for Books of the Leibniz Community) and the Leibniz Institut for Media Research | Hans-Bredow-Institut.

The publication of books, especially edited collections, involve many people, who support the project in many different ways, including discussion, formal oversight and language review. Thus, we would like to thank in alphabetical

order: Tamara Ehs, Susanne Gstöttner, Susanne Karner, Ilse Kettemann, Felicitas Rachinger, Marie-Therese Sekwenz, Johannes Steinböck, and Lukas Wieser for their support.

The COVID-19 pandemic has been a tremendous struggle for families. We would like to thank our families (and our authors' families), who supported the realisation of this book despite the extreme pressure on all of us in these difficult times.

Floreat Europa.

Hamburg/Vienna, July 2021

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