



EUROPEAN POLICY ANALYSIS

Restricting human rights in the Member States during the COVID-19 pandemic: What does it mean for the EU?

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Summary

Human rights are an integral part of the values on which the EU is founded, and their protection should be the shared responsibility of all EU institutions and all Member States. But during the COVID-19 pandemic all twenty-seven Member States derogated in some degree from certain civil and political rights. What are the consequences of these derogations for the EU legal system?

This European Policy Analysis examines the impact on human rights of the COVID measures in EU Member States by analysing the role of human rights and freedoms in a democratic system, the human rights restrictions imposed in five EU Member States and the legal framework for these restrictions. This leads to the conclusion that the circumstances of 2020 and 2021 made some derogation from human rights justifiable – perhaps even unavoidable – but only insofar as the legal principles of legality, necessity and proportionality were respected. The European Commission has already begun to examine the restrictive measures taken by Member States during the pandemic, and the European Court of Human Rights (ECtHR), along with the Court of Justice of the European Union (CJEU), are next in line to scrutinise them. Will this scrutiny result in the consolidation of the concept of margin of appreciation for the EU Member States? And if so, will it raise the threshold for the protection of the rule of law and human rights by the EU?

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1. Introduction

It is almost two years since the COVID-19 outbreak became an integral part of our reality, affecting the lives of every European citizen, as well as the European Union as a whole. In the field of law the pandemic represented a huge challenge for human rights, democracy, and the rule of law in all EU Member States. Emergencies may call for difficult choices, which is reflected in how many Member States used their emergency powers during the pandemic. Some of the measures taken constituted restrictions of the human rights and freedoms guaranteed in EU Member States by the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the EU Charter). Nevertheless, both these legal frameworks allow for exceptional measures under certain circumstances. Article 15 of the ECHR states that derogations might be justified ‘in time of war or other public emergency threatening the life of the nation’. Meanwhile Article 52 of the EU Charter allows limitations ‘if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’, which refers to the objectives mentioned in Article 3 of the Treaty on European Union (TEU) and other interests protected by specific provisions of TEU and the Treaty on the Functioning of the European Union (TFEU).

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The ECHR and the EU Charter are equally important in the constitutional systems of the Member States and are sources of European and EU law respectively, thus it is essential to consider judgments of both the European Court of Human

Rights (ECtHR) and the Court of Justice of the European Union (CJEU) when analysing the human rights derogations made by EU Member States during the pandemic.

As mentioned above, the ECHR allows derogations in the case of other public emergency threatening the life of the nation, which the ECtHR defines in its case law as ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’.¹ All 47 Member States of the Council of Europe, of which 27 are also EU Member States, are thus granted a ‘margin of appreciation’ by the ECHR in determining what constitutes an emergency. This means they have the certain space to evaluate whether there is reason to restrict human rights and freedoms, under what circumstances, as well as the extent to which they need to be restricted, however with respect to the principle of proportionality (see below). The list of restrictions used by Member States during the pandemic is quite extensive. However, in reviewing them, it is necessary, on the one hand, to address the concerns that such restrictions in EU Member States give rise to, while on the other hand, putting them into the context of the pandemic.

This European Policy Analysis aims to shed light on the impact on human rights that the COVID measures in EU Member States had, as well as to discuss the more general consequences for the EU legal system. The paper is divided into three sections. The first section focuses on the role of human rights and freedoms in a democratic system and points to some general concerns that restrictions on such rights may have. The second section includes a brief case study on the human rights restrictions that were made in five EU Member States: Hungary, Poland, France, Italy and Sweden. The third section draws attention to some important legal principles that must be considered when restrictions in the human rights legal framework are made. These principles include the principle of legality, necessity and proportionality. It gives an overview of these criteria in the European and EU legal frameworks and examines how they were applied with regard to human rights limitations due to the COVID-19 pandemic.

¹ [Lawless v. Ireland \(No 3\)](#), (ECtHR) (1961), para. 28.

2. What is the threat? – the role of human rights in democratic systems

Almost two years into the pandemic, it is finally possible to analyse and ‘take the temperature’ regarding the proportionality of those measures taken by the EU Member States. Although the list of the restricted rights is not limited to civil and political rights, it seems to be worth paying significant attention to these rights because restricting them causes particular damage to the rule of law and democracy. As the [Venice Commission](#) stresses: ‘The rule of law consists of several aspects which are all of eminent importance and have to be maintained in an integral way. These elements are the legality principle, separation of powers, division of powers, human rights, [...], freedom of expression, association and assembly, [...]’.² Freedom of assembly, freedom of movement, freedom of expression and the right to a fair trial are illustrative examples of this group of rights that have been restricted due to the COVID-19 pandemic. To understand the value of these rights and freedoms, and their role in a democratic system, it is necessary to first look at their historical context.

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Civil and political rights are essentially derived from the Western liberal philosophy of the seventeenth and eighteenth centuries. The works of John Locke, Jean-Jacques Rousseau, Charles-Louis Montesquieu, and Voltaire developed natural rights theories of civil liberties and the freedom of the individual. These theories grew

in influence in Western political thought in the late eighteenth century, especially in the revolutionary zeal of the US and France. But the crucial moment in the transformation of natural rights into internationally recognized human rights principles was the Second World War and the adoption by the United Nations (UN) of the Universal Declaration of Human Rights (UDHR) in 1948. The discussion in the UN’s Commission on Human Rights about distinguishing human rights agenda into civil and political rights on the one hand, and economic, social, and cultural rights on the other, resulted in splitting the UDHR rights into two Covenants.³ Rights and freedoms, which are the subject matter of this analysis, ended up in the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN in 1966. Civil and political rights and freedoms are thus enshrined in two international human rights instruments, the UDHR and the ICCPR.

On the European level key political and civil rights are recognised in the ECHR, which entered into force in 1953 and was ratified by the 47 Member States of the Council of Europe. However, the human rights enshrined in the ECHR have a further application due to the significance of the ECHR in the EU’s constitutional order. The ECHR’s protection of human rights was formally recognized by the EU with the signing of the Treaty on European Union (TEU) in 1992. Since the Lisbon Treaty came into force in 2009, the values on which the EU is founded have been set out in Article 2 of TEU, and respect for human rights is one of these values. At the same time, Article 6 of TEU specifies that ‘fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. The Lisbon Treaty states that the

² The European Commission for Democracy through Law, also known as the Venice Commission, is the Council of Europe’s advisory body on constitutional matters, that issues not legally binding opinions. The Commission has 63 member states, including 27 EU member states. The European Parliament has requested the Venice Commission for an opinion on the measures taken in the EU member states since the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights. Venice Commission, *Compilation of Venice Commission Opinions and Reports on State of Emergency*, [CDL-PI\(2020\)003](#), 2020, p. 10.

³ Joseph, Sarah, Castan, Melissa. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 2013, 3d ed., pp. 3–8.

EU shall accede to the ECHR, but this has not yet happened due to the Opinion (2/13) of the ECJ.⁴ In 2000, the EU signed for the first time its own legal framework for the protection of human rights, commonly referred to as the Charter of Fundamental Rights of the European Union. The Charter became legally binding with the adoption of the Lisbon Treaty in 2009. It provides a broad catalogue of civil, political, economic, social and cultural rights. Among these are freedom of expression, freedom of assembly and association, freedom of movement and right to a fair trial guaranteed.

‘Measures such as lockdowns and requirements to socially distance curtailed individual freedoms such that no country recorded an increase in its overall civil liberties score.’

Despite this positive trend of stronger protection of human rights in the EU, the latest Democracy Index points in the opposite direction. The report highlights how global democracy fared in 2020 and takes respect for human rights to be a fundamental feature of democracy. It mainly focuses on the impact of the pandemic on democracy and freedom around the world and, among other things, on how the pandemic led to the massive denial of civil liberties. Measures such as lockdowns and requirements to socially distance curtailed individual freedoms such that no country recorded an increase in its overall civil liberties score. Moreover, there was not a single EU Member State that did not restrict freedom of assembly. The report emphasizes that the unprecedented suspension of individual freedoms, at least in countries (such as those in Europe) where liberty prevailed before the pandemic is the cause of the sharp democratic regression recorded in the 2020 Index.⁵

It is also noteworthy that despite the impact on the democratic legal order only a few EU Member States reported their derogations from fundamental rights and freedoms they are obliged to under the ECHR. Reporting these derogations means that they become public and a subject of control.

3. Behind the curtain: a brief country study

In the past couple of years EU institutions have kept a special eye on those EU Member States, that have made amendments to their constitutional systems in a way that challenges the principle of the rule of law.⁶ Despite the more general risk that these Member States pose to the EU as a whole, it cannot be ruled out that restrictions in the more liberal EU democracies during the COVID-19 pandemic have posed similar effects on the individual level. Against this background, this analysis looks at how five EU Member States, namely Hungary, Poland, Italy, France and Sweden have dealt with political and civil rights during the pandemic. The choice of Member States makes it possible to study two Member States (Hungary and Poland) that are already challenging to the European legal system and to compare them with three more liberal Member States that are rarely criticised for violating individual rights and freedoms. The study builds on sources from the EU institutions and human rights organisations as well as on voices from researchers from all over Europe who have raised concerns during the pandemic. One such channel is the German constitutional blog [Verfassungsblog](#), which hosted a debate on challenges presented by the pandemic to democracy, human rights, and the rule of law. The following text builds on the reviews by the authors who contributed to this debate.

When COVID-19 came to [Hungary](#), the state was already in a so-called ‘mass migration emergency’ which had been proclaimed by the Hungarian government in 2016. During the first wave of

⁴ For more information, see Nergelius, Joakim. [The accession of the EU to the European Convention on Human Rights: A critical analysis of the Opinion of the European Court of Justice](#) (2015:3), SIEPS.

⁵ The Economist Intelligence Unit. *Democracy Index 2020: In sickness and in health?*, 2021, pp. 17, 51.

⁶ See more in Pech, Laurent, Kochenov, Dimitry. [Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgements since the Portuguese Judges Case](#), SIEPS, 2021:3.

the virus the government introduced a ‘pandemic emergency’ and introduced a law that gave the government broad, unlimited extraordinary powers. This law was later revoked due to concerns from various international organizations but another law was adopted that also gave the government broad, unchecked power, and introduced a ‘medical emergency’. The second wave of the virus led to the introduction of the third state of emergency – a ‘state of danger’, that gave prime minister Viktor Orbán even broader powers than in the case of the two previously proclaimed emergencies. Alongside this a new amendment to Hungary’s constitution was adopted which essentially broadened the conditions in which emergencies can be declared. This implies that the prime minister has unlimited emergency powers in the sense that only he or she can revoke the powers. In effect, the temporary status of the law has no real meaning.

On a more practical level, the Hungarian government cancelled by-elections that had already been announced, closed ordinary courts by declaring an ‘extraordinary judicial holiday’ and criminalised the dissemination of falsehood and distorted facts which could interfere with the successful protection of the public. The beginning of the second wave was not characterized by any strict measures, with the exception of closed borders for non-Hungarians. However, the UEFA Super Cup final that took place in Budapest in September 2020 with approximately 20,000 spectators – appears to have caused a spike in cases which threatened the collapse of the Hungarian health-care system. A general curfew and a ban on public events followed. Freedom of assembly was heavily restricted in the sense that people were banned totally from meeting, regardless of time, manner, and place. It is stated in law that all assemblies are forbidden and ‘assembly’ is defined as ‘a public gathering held with at least two persons to express an opinion in a public affair’. In addition to the ban on public assemblies, gatherings even in open-air private places were prohibited if more than ten people were involved.

Unlike Hungary, [Poland](#) never introduced a constitutional state of emergency. Instead, a statutory state of emergency – the ‘state of epidemic’ – was introduced, which enabled the crisis management of the pandemic by the

government and allowed it to introduce secondary legislation restricting human rights and freedoms. However, the use of secondary legislation to restrict human rights and freedoms in counter to the Polish constitution, which requires such limitations to be introduced in a parliamentary statute. Some of the early limitations were eventually enshrined in law, but many of them are still framed in government regulations and either without a proper basis in statute, or with only an extremely vague basis which leaves the secondary legislation to determine actual details and scope of measures. This is also contrary to the Constitution.

In Poland, the measures impacting human rights and freedoms affected freedom of movement most heavily, with curfews and a blanket ban on any personal movement within Poland. The measures resulted in derogations from several essential rights and freedoms, not the least the freedom of assembly (with a limit on the number of people meeting both in public and in private) and the right to a fair trial (with suspended court proceedings and reduced access to justice).

In [France](#) parliament responded to the pandemic by adopting an act that aimed to urgently deal with COVID-19. This act created a new regime of exception: the state of health emergency. It is worth mentioning that France was already in a state of security emergency following terrorist attacks prior to the pandemic, but the new state of health emergency gave even more power to the executive branch to restrict rights and liberties, with few checks or balances.

The most invasive measures in France were lockdowns and curfews, which greatly affected the individual freedoms of the public. Freedom of association was curtailed by a prohibition of gatherings and assemblies, freedom of expression by a ban on demonstrations, and freedom of movement by curfews and penalties on using cars without authorisation under lockdowns.

[Italy](#) was the first EU Member State to be significantly affected by COVID-19. The government responded by declaring a state of emergency on 31 January 2020. An important feature of this was that since the Italian constitution does not contain a state of emergency clause, the Council of Ministers declared a state of emergency

pursuant to the law on civil contingencies, which does not require Parliamentary scrutiny. The state of emergency granted wide rule-making powers to the executive branch, allowing the government to adopt decree-laws: temporary measures ‘in case of necessity and urgency’ that lose their effect retroactively if they are not converted into law by Parliament within 60 days of their publication. By the end of 2020 approximately 18 such decree-laws had been adopted. This legislative process approach, and the speed at which it was used, raised concerns that this was a threat to democracy. Other measures affecting fundamental rights were also adopted that year: decrees by the President of the Council of Ministers and orders by the Minister of Health and the Head of the Department of Civil Protection. However only some of them are legislative acts or acts having the same rank as legislation.

In Italy, freedom of assembly and the freedom to protest were restricted, with the exception of static protests subject to social distancing. Freedom of movement was curtailed by the implementation of regional curfews in some regions and the imposition of restrictions on travel to specific countries.

[Sweden](#) is known for having taken a less stringent approach to countering the pandemic; its restrictions were mostly in the form of recommendations from the government and relevant authorities aimed at facilitating efforts to control the spread of the pandemic and counter its impact on society. The Swedish constitution does not contain a state of emergency clause for use in time of peace, instead the Swedish parliament must grant the government additional powers. The only constitutional rights subject to restrictions were the freedom of assembly and demonstration. Sweden also implemented a near-total ban on visits from non-EU citizens.

How the Member States responded to the pandemic thus reflects their constitutional background and behavioural pattern in legal matters. The Hungarian and Polish governments, sometimes portrayed as ‘illiberal democracies’ in the literature, continued to exploit and disregard

their legislation in order to get more power or to influence elections.⁷ Italy and France, with their history of state emergency powers, did not hesitate in using them. Sweden followed its approach in citizen’s trust in the public authorities and vice versa, took a different path in handling the pandemic and in comparison did not force too harsh limitations on the population.

4. When can derogations from human rights be made? – the European legal framework

There is little doubt that certain restrictions on fundamental rights and freedoms can be justified given the circumstances of 2020 and 2021. Without curfews and bans, it is difficult to see how Member States could have responded to COVID-19, which was declared a global pandemic by the World Health Organization. The pandemic outbreak is possibly the first event of this magnitude and impact since the Second World War. It is therefore not surprising if EU Member States made certain mistakes in their public policy as people were dying and economies were crashing during the pandemic. Nonetheless, even during states of emergencies there are certain rules and principles that must be respected when derogating from fundamental rights and freedoms.

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To begin with, members of the Council of Europe (CoE) are obliged under Article 15 §3 of the ECHR to inform the CoE Secretary General of derogations from the ECHR. None of the EU Member States discussed above did so when they introduced their respective states of emergency. Of all EU Member States only Estonia, Latvia and Romania notified the CoE Secretary General about the intention to derogate from the ECHR due to the pandemic. These states declared a statutory

⁷ Drinóczi, Tímea, Bień-Kacała, Agnieszka. [Illiberal Constitutionalism: The Case of Hungary and Poland](#). *German law journal*, 2019-12, Vol. 20 (8), p.1140–1141.

state of emergency and reasoned their notifications to various extents with the criteria specified in the next paragraph, and further notified which rights and freedoms were to be derogated due to the state of emergency.⁸

The [Venice Commission](#) of the CoE has developed a detailed opinion on states of emergency which states that the protection of national security and public safety may justify restrictions of the full enjoyment of certain human rights, and even derogations from certain human rights obligations. The restriction of human rights and freedoms, and derogations from them must, however, be regulated by law, and preferably have a basis in the state's Constitution. This constitutes a vital guarantee of the maintenance of democracy and the rule of law. The law must indicate in which cases limitations may be justified and it should preferably also define the states of emergency that may justify derogating measures.⁹ None of the five above-mentioned EU Member States that introduced states of emergencies did so by applying a constitutional state of emergency, instead introducing new acts on the state of emergency. Further, the Venice Commission stresses that any restrictions on human rights should be necessary in a democratic society and proportionate to the aim. This was formulated as a combination of a '[pressing social need](#)' with the effectiveness and proportionality of the scope and effects of the restriction in relation to the importance of the interests to be protected. There is no mathematical calculation or fixed scale to determine the balance between on the one hand national security and public safety and on the other the enjoyment of fundamental rights and freedoms, rather then it must be determined by the concrete situation and circumstances. Moreover, such measures should not last longer than the threat itself and must only apply to affected regions.¹⁰

At the EU level, the European Commission acts as the guardian of the EU Treaties and, among other things, promotes the general interest of the Union. In this capacity, the Commission noted during the pandemic that any emergency measures should be strictly proportionate, necessary, limited in time, and in line with European and international standards, and that they furthermore should be subject to democratic oversight and independent judicial review. The European Parliament shares that view and has emphasised that all measures taken at national and/or EU level must be in line with the rule of law, strictly proportionate to the requirements of the situation, clearly related to the ongoing health crisis, limited in time and subject to regular scrutiny.¹¹

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When it comes to the legal principles that bind the Member States through the European legal framework, legality and proportionality are cornerstones. The principle of legality is one of the key components in the rule of law, requiring public authorities to act only within the limits of their statutes. This is a relevant issue in the case of limiting human rights and freedoms during the pandemic. A common European feature is the requirement that restrictions on human rights should be enshrined in a law approved by parliament, or in an extraordinary decree issued by the government which is later subject to parliamentary confirmation. The principle has relevance for the pandemic measures in the sense

⁸ For more information, see [Derogations Covid-19 \(coe.int\)](#)

⁹ Venice Commission, Compilation of Venice Commission Opinions and Reports on State of Emergency, [CDL-PI\(2020\)003](#), 2020, p. 12.

¹⁰ Schabas, William A.. *The European Convention on Human Rights: A Commentary*. Oxford University Press, Incorporated, 2015, p. 516.

¹¹ European Commission, Council Recommendation on the 2020 National Reform Programme of Sweden and delivering a Council opinion on the 2020 Convergence Programme of Sweden, [COM/2020/527](#) final (the same provision is found in each Recommendation in regard to each EU Member State; European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences ([2020/2616\(RSP\)](#))

that any measures taken in the absence of correctly proclaimed laws imply a violation of the principle of legality.

As shown above, in European law some human rights restrictions may be justified during an emergency but nonetheless they need to take the principle of proportionality into consideration. In EU law, the principle of proportionality, enshrined in Article 5(4) TEU and Article 52(1) of the Charter, is likewise of vital importance. The concept is invoked in three interrelated ways: as a market integration mechanism used to determine the legality of national restrictions on free movement; as an instrument for the protection of civil liberties and fundamental rights from interference by EU or Member States authorities, and as a principle of governance seeking to limit the scope and intensity of EU action.¹² There is no mention of the principle of proportionality in the ECHR. However, both the CJEU and the ECtHR apply the principle in a quite similar way, through a tri-partite test: of suitability, necessity and proportionality *stricto sensu*. Without going into too much detail we can summarise by noting that both courts will examine in every case whether the applied measures were suitable and necessary in order to achieve the proposed aim, and whether the competing rights and interests are balanced against each other.¹³

If the CJEU does eventually examine the proportionality of the measures applied by Member States during the pandemic, the Court might face another complexity. In the EU legal system, the protection of human rights may come into conflict with the strong protection of the 'four freedoms': the free movement of goods, services, capital and persons. The reconciliation of these primarily economic freedoms and fundamental rights has already been explored in CJEU case-law. In one of the most essential cases in this regard, [Schmidberger v Republic of Austria](#), the question was raised whether the principle of the free movement of goods as guaranteed by the EU Treaties prevails over freedom of expression and freedom of assembly. The subject matter was a public body granting a request by an environmental

campaign group to hold a protest against the polluting impact of the Brenner motorway. The protest resulted in the closure of the motorway for more than 24 hours and immobilised the heavy goods vehicles of the Schmidberger transport company. CJEU ruled that the free movement of goods as one of the fundamental principles of the Treaty may be subject of restrictions if there are overriding requirements relating to the public interest. The Court also acknowledged the ECHR protection of freedom of expression and assembly, noting that the ECHR allows some limitations as long as they can be justified by a pressing social need and, in particular, are proportionate to the legitimate aim pursued. As a result, taking into account the wide margin of discretion of national authorities and applying a proportionality test, the CJEU concludes that the legitimate aim of that demonstration could not be achieved by measures less restrictive of intra-Community trade. In effect, in this case fundamental rights prevailed over the free movement of goods.

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From the above, it can be concluded that the role of the CJEU is more complex than at first sight because if such an issue is raised the Court will need to address both the protection of human rights and single market freedoms. Future judgments of CJEU and the ECtHR will shed light on whether derogations from the EU's four freedoms and ECHR rights took place, and whether they were proportionate and justified. In my view the derogations by EU Member States so far seemed to be estimated as legitimate.

5. Reflections

The whole world has been rocked by the COVID-19 pandemic and the measures taken to combat it, with citizens and governments finding themselves in circumstances which have

¹² Tridimas, Takis. 8 The Principle of Proportionality. In *Oxford Principles of European Union Law. Volume I, The European Union legal order* Robert Schutze, Takis Tridimas (ed.), 243–264. Oxford University Press, 2018, p. 244.

¹³ Harbo, Tor-Inge. *The Function of Proportionality Analysis in European Law*. BRILL, 2015, p. 198.

not been experienced for many decades. The pandemic affected most areas of life, including human rights, which resulted in derogations from a number of fundamental rights and freedoms by every EU Member State. The derogations from civil and political rights and freedoms resulted in a democratic regression in Europe and raised concerns about the impact of these derogations on the rule of law and democracy in the EU. No-one expected the pandemic to develop so rapidly and dramatically, and therefore it was likely difficult for Member States to know with confidence what actions to take in these circumstances. But can the lack of knowledge justify restricting human rights?

The restrictive actions of certain Member States highlighted here showed, firstly, that each state determined its own course of action (in accordance with the concept of the ECHR's principle of the margin of appreciation), and secondly, that the actions taken by each state reflected their particular background and traditions.

Even though there is a strong protection of human rights in the EU, Member States enjoy a margin of appreciation under the ECHR, which is to say a certain amount of flexibility in regulating the protection of human rights. The pandemic showed that the Member States perceived a wide margin of appreciation in human rights regulation but it is yet to be determined whether their restrictions will be accepted by the European Courts. A reasonable question for the future, given the experience during the pandemic, is whether the margin of appreciation should be so wide, and if not, whether the EU should intervene in cases of public emergency in order to protect its values. Meanwhile derogations made by Member States may become subject to investigation on a national level and lead to constitutional changes which in turn could affect the EU's role in future interventions.

It is possible that the pandemic could be the impetus for the EU to establish a legal threshold for protecting the rule of law and human rights. In its recent [report on the rule of law](#) the Commission points out that safeguarding fundamental rights, democracy, and the rule of law is a shared responsibility of all EU institutions and all

Member States. The Commission analysed whether restrictive measures taken by Member States were necessary, proportionate, limited in time, subject to continued scrutiny by national parliaments and courts, and looked at the legal foundation of the measures. Monitoring Member States' actions reflects the Commission's feeling of responsibility for the rule of law development in the EU Member States.

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But it is not only the rule of law situation in the EU that might require raising the threshold of protection for human rights in the EU. A recent study by the European Council on Foreign Relations highlighted the divisions between on the one hand those who live in the north and the west of Europe and on the other those who live in the south and the east of Europe, based on how they were affected by COVID-19, and speculated that this division will shape people's attitudes to politics, the role of the state, the idea of freedom etc. One of the surveys in this study explored public beliefs about the main motivations for government restrictions. Three main groups of people were identified: the first group considered that the main motivation was public safety and stopping the spread of the virus, while a second group thought that the biggest motivation was to cover up the impotence and incompetence of the government with a simulacrum of action. A third group suspected governments of using COVID-19 as cover to increase their control over people's lives. The second and third groups tend to be smaller than the first group, but in some countries, such as Poland and France, the first group is much smaller than it is in the rest of Europe, and the number of people in the second group is relatively large.¹⁴ Considering the number of people questioning the justification for the restrictive measures taken by their governments, the EU cannot afford to turn a blind eye to Member States' actions during the

¹⁴ Krastev, Ivan, Leonard, Mark. [Europe's invisible divides: How covid-19 is polarising European politics](#). *European Council on Foreign Relations*. 2021.

pandemic. Doing so could lead to deepening social division and a decrease in trust in Member States and EU institutions.

In conclusion, the EU must do what it can to ensure that Member States comply with European law; both the ECHR and the EU Treaties. This is an essential goal for the EU, if its values as expressed in Article 2 of TEU are to be fully respected. In addition, the EU needs to restore trust to those citizens who lack faith in their

governments, as evidenced in the report mentioned above. How the EU should pursue this goal, while taking into account Member States autonomy, however, is part of a bigger discussion. At this point, it does not appear that during the crisis irreparable damage has been done to the EU legal order, democracy or the rule of law, but these values should not be taken for granted and it is to be hoped that the EU will pay particular attention to human rights protection in the post-pandemic period.

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