

# Testing Europe: COVID-19 and the rule of law

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“Sovereign is he who decides on the exception,” wrote the notorious constitutional law scholar Carl Schmitt in 1922 in his work [Political Theology](#), “exception” understood as measures undertaken in a state of emergency. The democratic constitutions of Europe are grounded on the notion of popular sovereignty; [Article 20 of the German Basic Law](#), for example, states that “[a]ll state authority is derived from the people”. The [Treaty on European Union](#) makes multiple references to the central concern for these “peoples” of Europe. Notwithstanding such promulgations, crises and emergencies quickly bring certainty as to the state of popular sovereignty. Have “[the values \[...\] common to the Member States](#)” provided sufficient “anti-bodies” to grant “herd immunization” against threats to the rule of law or democratic legitimisation?

## Best-practice made in Austria

Austria was hailed as a forerunner in the fight against COVID-19, both in its neighbour Germany (see [here](#), [here](#), and press review [here](#)) and internationally (with [CNN running an interview with Chancellor Sebastian Kurz](#) with the headline “Lessons from Europe: How to Reopen an Economy”). As [one of Europe’s most popular test markets](#), taking a closer look at its domestic measures, is there a case for “best-practice made in Austria”?

On Friday, 13 March 2020 (a superstition now also from a constitutional policy perspective), just before the start of stricter governmental measures to contain COVID-19 in Austria, [reports of a curfew and shop closings were dismissed as “fake news”](#). Already on the following Sunday, [the National Assembly met for an unscheduled session](#) in which similar measures were implemented and [a more budget-friendly alternative](#) to the [Epidemics Act](#) was enacted. In the spirit of “message control”, the population should be protected from itself, as Chancellor Kurz himself stated in [an interview on state television that same day](#). Does the constitution envision a governmental prerogative to deliberately misrepresent information on concretely planned measures in the public interest? Any “identity of ruler and ruled” would surely collapse in such a situation.

The fact that [a decree of 19 March 2020 on mandatory “home office”](#) or [unencrypted health data](#) were “accidentally” put online by the Ministry of Health is only human under the given circumstances but not a great trust-building effort in such times of uncertainty. Even more, this unfortunate streak has continued with the [postponement of scheduled announcements of new measures](#) and the [since withdrawn](#) announcement of [a somewhat contradictory – and most probably unconstitutional – “Easter decree”](#) that would have infringed on the privacy of people’s homes (with a high ministerial official [cheerfully announcing on state television on 4 April](#) that

the population would have to endure the legal uncertainty until Monday). “There will always be people who are pedantic about legal issues” and “it is totally irrelevant, so to speak, what legal experts have to say” Chancellor Kurz responded to the criticism of confusing regulations in [another interview on state television on 6 April](#) (also discussed [here](#)). [It eventually turned out](#) that the government had communicated stricter measures than were actually covered by the respective decrees.

The state of a constitution can be measured by governmental reaction to crises and emergencies. It is often revealed as fragile along its fault lines. It is for this reason exactly that constant, not after-the-fact evaluation of measures is an absolute necessity (after all, the crisis will hopefully be over, by the time the first [constitutional challenges](#) are decided). In a recent IBA podcast on COVID-19 and the rule of law, Baroness Helena Kennedy [stressed the need for limitation, monitoring, and review of measures](#) (for Germany, see also the commentary [here](#)).

### **Misconstruing subsidiarity**

In terms of state philosophy, the transfer of the police powers by a people to the state is seen as the constitutive moment of the social contract. Particularly in times of crisis, “Leviathan” is expected to hold a protective hand over the people to guarantee their safety. However, federalism and subsidiarity might prove capricious in the delivery of this result. Moving the burden of decision-making to lower levels can make sovereign measures to combat a crisis lose their intended effect. At no point should the principle of subsidiarity become the fig leaf for a lack of consequence ([as Angela Merkel emphasised](#)). In Germany, the [patchwork of reactions](#) triggered [a legislative push forward by the Federal Minister of Health](#) followed by a public debate on the federal division of competences (see the commentary [here](#), [here](#), [here](#), and [here](#)).

Is misconstrued subsidiarity the issue at the European level, too? Unfortunately, the European Union was (once more) unable to position itself in this crisis as a stronger whole of its individual parts. Instead, it turned out a patchwork of sovereign measures. In an administrative apparatus as sophisticated as the Commission, pre-designed emergency plans with clear structures and chains of command could have been expected – not only regarding curfews and flight bans, but also for the economy and regional cooperation. As new as the Corona virus may be, as old is the [existential threat of a pandemic](#). That public health does not fall within the exclusive competences of the European Union would be a sorry excuse for not providing coordinated measures of crisis response.

### **Solidarity in unilateralism**

While Great Britain [attempted](#) treading its own paths despite the transitional period until the actual withdrawal from the *acquis communautaire*, Germany has demonstrated its role as *moteur de l'intégration européenne* with [an export ban on medical protective equipment](#) followed by [a bulk order for 10,000 ventilators](#) (also discussed [here](#)). It seems beyond cynical when the Commission then carries the slogan of “European solidarity at its best” [on its website](#). Making the caricature of the “Franco-German engine” complete, the [“Snapshots of European solidarity”](#)

start with the following headline: “France has donated 1 million masks to Italy and Germany has delivered 7 tons of medical equipment to Italy, including ventilators and anaesthetic masks, helping save lives.” Only then are further measures by Austria, the Czech Republic, Greece, Luxembourg, Romania, and Poland listed, followed by the repatriation efforts of even more member states.

The Commission has [itself successfully undermined](#) the “gold data protection standard” of the GDPR (discussed [here](#) and [here](#)). When it sagely [advises to follow the instructions of national public health authorities](#), it implicitly embraces domestic measures *en bloc*, including [Polish measures to force quarantined persons to periodically upload “selfies”](#). The erosion of fundamental rights or the parliamentary process all together, as in Hungary, [did not even trigger an immediate response](#) (discussed [here](#) and [here](#)).

### **New normality**

Will the current Schmittean “exceptions” – in a system of subsidiarity – see us entering a “[phase of new normality](#)”, as proclaimed by Austrian Chancellor Kurz? With an eye to Brussels, member states of the Union – and its “peoples” – should now pay particular attention to upholding fundamental rights, the rule of law, and legitimate expectations in the legal system so that they do not wake up from the sleep of isolation in a small state “neo-Biedermeier”. The fabric of Europe has always been strongest at its seams, in fluid border regions of cultural amalgamation. Today, the ties have been severed and crossings barricaded, manned with 18-year-olds in their compulsory military training holding assault rifles, [as was the case in Austria](#) until recently. The divide continues with [the first Austrian militia operation since 1945 supporting border police](#) (for a general criticism of these border controls from the perspective of EU law see [here](#)).

For the Union, this should be a wake-up call for deeper meditation and reflection on its current course (something Austrian Chancellor Kurz had [emphasised on 29 March 2020](#)): what remains of von der Leyen’s “[with one big heart and not with 27 small ones](#)”? For sure, without democratically legitimised decision-making structures (see also the commentary and proposals [here](#)) and overcoming the hegemony of the “Franco-German integration engine” (with the candidate for President of the European Commission [having to pass a \*de facto\* Macronian veto](#)), it will not be possible to get all member states on board and move forward together (alternative instruments such as “Corona bonds” have been suggested for that purpose, see the commentary [here](#) and [here](#)).

Testing Europe, the COVID-19 pandemic comes with a realisation that there is no “herd immunization” against threats to the rule of law in 2020, not even among the EU member states. If the project for an “ever greater union” should succeed, it might start by avoiding complicity in the “exceptions” of its member states (in its external affairs, the EU has since mirrored Germany by placing [an export limitation on medical protective equipment](#), assuring that “[t]his is a measure of temporary nature and not an export ban and is in line with all of the EU’s international obligations”, discussed [here](#)). A self-confident Union held to its values could provide sufficient “anti-bodies” to resist future challenges and paint a brighter picture.

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