

Opinion of the European Economic and Social Committee on ‘The impact of COVID-19 on fundamental rights and the rule of law across the EU and the future of democracy’

(own-initiative opinion)

(2022/C 275/02)

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1. Conclusions and recommendations

1.1. The EESC expresses its deep concern regarding the way COVID-19 is impacting the life, safety, welfare and dignity of all of the people living in the EU. It is also very concerned about the impact of COVID-19 on individuals and communities worldwide, especially in the countries lacking the proper health, social and educational infrastructure to deal with the pandemic.

1.2. The response of the EU and the Member States must address the systemic vulnerabilities of Europe's health infrastructure in the face of increased mobility and increased probability of dangerous zoonotic diseases. Moreover, efforts to combat the pandemic should go hand in hand with putting in place a proper social and economic support system to alleviate its disruptive effects.

1.3. As the EESC has previously stated, the European Union is based on common European values which are non-negotiable under any circumstances: respect for human dignity and human rights, freedom, democracy, equality and the rule of law ⁽¹⁾. These values cannot be forgotten when the EU and its Member States face an emergency and its fallout in terms of economic, social and educational challenges. While the response to the current crisis needs to be swift and warrants certain exceptional and time-limited measures, these cannot go against the rule of law and cannot endanger democracy, the separation of powers and the fundamental rights of European inhabitants ⁽²⁾.

1.4. The EU should align its policies, strategies and programmes to pursue a fair and comprehensive recovery from the crisis, with a view to achieving upward convergence in medical, social, economic and democratic standards. In the context of the efforts made through the NextGenerationEU instrument to repair the immediate economic and social damage brought about by the coronavirus pandemic, the EESC reiterates its support for the Commission's proposal for a regulation creating a new tool that would allow for economic corrective measures with regard to Member States that commit serious and persistent violations of the values listed in Article 2 ⁽³⁾. Moreover, we need a broader notion of the rule of law, that encompasses the protection of fundamental rights and guarantees the safeguarding of pluralist democracy. The rule of law exists in an interdependent, inseparable, triangular relationship with fundamental rights and democracy.

⁽¹⁾ Article 2 of the Treaty on European Union; Statement by Luca Jahier, president of the European Economic and Social Committee, and José Antonio Moreno Díaz, president of the Group on Fundamental Rights and the Rule of Law (FRRL), 15 April 2020.

⁽²⁾ Declaration by the European Economic and Social Committee, The EU's response to the COVID-19 outbreak and the need for unprecedented solidarity amongst Member States, 6 April 2020.

⁽³⁾ OJ C 62, 15.2.2019, p. 173.

1.5. The EU institutions and Member State governments should use the existing social and civic dialogue institutions to fully engage civil society organisations and the social partners in creating a pluralistic democratic space in which different visions and critiques are welcomed, with safeguards to limit the proliferation of fake news as well as unjustified and unjustifiable anti-human rights, conspiracy-driven, extremist discourse.

1.6. Governments should clearly identify the legal basis for their measures. Any reform of existing health emergency laws and related rules or introduction of new ones, including in preparation for future pandemics, should set explicit limits and conditions and make explicit provision for the parliamentary scrutiny and judicial review of the proportionality of the measures and their compliance with domestic and international human rights standards.

1.7. Rules and policies related to COVID-19 should be clear, coherent and consistent insofar as is possible, with the provision of information about them in a timely manner; the involvement and consultation of civil society, including social partners, with a view of developing rules and policies; and the inclusion of an evidence-based rationale. This principle of clarity should also guide the setting up of predictable mechanisms — entailing all of the necessary democratic substantive and procedural safeguards — so as to be prepared to respond in an orderly way to potential future pandemics, health crises or natural disasters. Rules, policies and any relevant information related to them should be accessible to all sections of society, including minority language groups. Where changes in policy need to be made, these should be announced sufficiently in advance through a variety of official and public channels, to give people time to prepare and adapt their behaviour accordingly.

1.8. Regular reporting to parliament by government ministers charged with introducing pandemic measures should be required. Member States' parliaments should establish committees, commissions or groups to scrutinise COVID-19 measures and provide regular reports to parliaments and local and regional representative assemblies. Parliamentary debate on these reports and responses by the government should also be a requirement to ensure oversight of government action. States should ensure access to justice by guaranteeing an independent judiciary and enabling online and remote work by the courts in addition to providing support for vulnerable litigants, witnesses or those subject to criminal or civil proceedings.

1.9. Fundamental rights, the rule of law and respect for democracy are laid down in the EU Treaty, the European Charter of Fundamental Rights, and in international law commitments entered into on a sovereign basis by all EU Member States. Under international law, every State has the obligation to respect, protect and uphold human rights. These values are foundational, interdependent and mutually reinforcing. These are matters of international obligations, not ideology. Therefore, while debates on the procedures for the best implementation of human rights is a rational exercise, the principle of their respect should not be the subject of political debate. In the same way, responding to public health crises is an obligation for authorities. Authorities must ensure that the responses they offer are subject to proper democratic debate, public consultation and parliamentary oversight, which also includes the need to address fake news, including where this stems from the intention of undermining a political opponent, which can serve to undermine an effective response to a pandemic emergency.

1.10. The EESC emphasises that despite the best intentions behind the NextGenerationEU instrument and the national recovery and resilience plans, and the openness of the European Commission to having civil society organisations, social partners and stakeholders involved, the level of actual participation is still largely insufficient and the processes have not allowed CSO views to have enough of an impact⁽⁴⁾. The risk is that, even if successfully implemented, the plan will advance the green and digital transition, spurring growth in the medium and long term, but will not improve the difficult situation in which people find themselves today, in facing unemployment, a loss of income, and deteriorating health, living and working conditions, and increasing inequality. The Resilience Plans should be immediately subjected to distributional impact assessments and the results should be discussed with CSOs, social partners and stakeholders at national and EU level.

⁽⁴⁾ EESC Resolution on the *Involvement of Organised Civil Society in the National Recovery and Resilience Plans — What works and what does not?*, 25.2.2021 (OJ C 155, 30.4.2021, p. 1).

1.11. The EESC underlines the connection between protecting democracy, the rule of law and fundamental rights and developing and implementing the European Pillar of Social Rights (EPSR). As previously stated, the wellbeing and fundamental rights of citizens should be built around a common and consistent social model, flexible enough to accommodate different national traditions and experiences in line with the values, principles and goals of the Treaty, the Pillar and its renewed and forward-looking consensus⁽⁵⁾. The monitoring of the implementation of the EPSR Action Plan should take into consideration the wide-ranging disruptive effects of the pandemic.

1.12. The pandemic has been a global crisis that will certainly have lasting but unequal consequences on various fringes of the population. Supporting vulnerable populations should be a priority, in line with the principle of 'leaving no one behind', and particular attention should be paid to vulnerable workers and the fulfilment of Principle 14 of the EPSR on minimum income. Support for businesses affected by the pandemic should also be stepped up, especially for the ones that were disproportionately affected and those that are having difficulties remaining operational, for example SMEs. The effects on social economy enterprises, severely impacted by the crisis, should also be addressed⁽⁶⁾.

1.13. The EESC believes that the European Democracy Action Plan should include a large-scale initiative to foster education on democracy and fundamental rights, which is instrumental for safeguarding democratic values and active citizenship. The initiative should be inclusive and addressed to all citizens, with a special focus on young people.

2. The rule of law

2.1. There are clear criteria for assessing the conformity of any state action with the principles of the rule of law, and it is essential that these principles are respected during ordinary times, and even more so during emergencies. These criteria are legality, legal certainty, the prohibition of arbitrary use of executive powers, and the accountability of governments to the law which is guaranteed by judicial and parliamentary control⁽⁷⁾. The use of emergency powers must be necessary, proportionate and temporary, and must always be subject not only to the limits of the country's constitutional law, but also to the standards set by European and international law.

2.2. The COVID-19 pandemic has presented complex challenges to the legal, political, social, health and educational systems of all Member States. In such a challenging environment, maintaining a high degree of compliance with the rule of law can appear unachievable. However, emerging evidence within Europe and beyond indicates that those states that have maintained a policy and legislative process that respects the rule of law have correlated with more positive management of the health emergency with lower mortality and infection rates, but also with high levels of public trust in government, which is essential to the most effective response to crisis⁽⁸⁾. The principles of the rule of law should guide any democratic government in responding legitimately and effectively to the current health crisis and possibly to similar ones in the future.

2.3. With regard to Member States' pandemic responses, concerns have materialised in relation to three key principles at the heart of the rule of law: (1) the principle of legality; (2) the principle of legal certainty; and (3) the principle of accountability to the law⁽⁹⁾.

2.4. In terms of legality, a number of issues with governmental responses, at national and subnational level, have been identified, including: action undertaken without legal basis or legislative authorisation; the establishment and/or extension of a 'state of emergency' in apparent violation of national constitutional frameworks; the use of legal bases by the executive in a manner not intended to be used; and fundamental rights restrictions adopted in apparent violation of constitutional or international human rights provisions.

⁽⁵⁾ OJ C 374, 16.9.2021, p. 38.

⁽⁶⁾ Social Economy Europe, The Impact of COVID-19 on Social Economy Enterprises, June 2020.

⁽⁷⁾ Council of Europe, European Commission for Democracy through Law (Venice Commission), *Respect for Democracy, Human Rights and the Rule of Law during States of Emergency: Reflections*, Strasbourg, 19 June 2020, CDL-AD(2020)014.

⁽⁸⁾ See for example the global comparative studies and databases: CompCoRe with summation in Jasanoff, Sheila, Hilgartner, Stephen 'A Stress Test for Politics: Insights from the Comparative Covid Response Project (CompCoRe) 2020', *Verfassungsblog*, 11 May 2021, and 'Power and the COVID-19 Pandemic', *Verfassungsblog Symposium*, with summation in J Grogan, 'Power, Law and the COVID-19 Pandemic: Part I' and 'Part II' concluding the *Power and the COVID-19 Pandemic Verfassungsblog Symposium* (2021).

⁽⁹⁾ J. Grogan, *Extraordinary or extralegal responses? The rule of law and the COVID-19 crisis* (Democracy Reporting International, May 2021).

2.5. In terms of legal certainty, national measures that are problematic in this respect include the introduction of restrictive measures with unclear interpretation; contradictions between government policy and underlying legal measures; and such frequent changes to the law as to make it exceptionally difficult for ordinary citizens to understand what they may and may not do. In an emergency situation, risk and uncertainty are heightened, and the public looks to the government — and public authorities more generally — for clear guidance on what they can and cannot legally do.

2.6. With regard to accountability to the law, problems with parliamentary and judicial oversight of government action related to COVID-19 can be seen in the marginalisation of parliaments. Before February 2021, less than half of the EU Member States had set up specialised parliamentary committees, published reports or scheduled regular debates on COVID-19-related measures, and in less than a third of cases government measures had been scrutinised (e.g. by a debate or vote in parliament) or amended by parliaments⁽¹⁰⁾. Judicial review is the process by which courts ensure that governments act lawfully, and is particularly important in times of crisis, when fundamental rights may be severely restricted. A number of concerns have been raised across the EU as to the effectiveness of judicial review and access to justice in the context of COVID-19 measures⁽¹¹⁾. The closure of courts, or the restriction of access to courts to only certain types of proceedings negatively affected citizens' capacity to resolve their disputes, and undermined access to justice particularly where the most vulnerable members of society have been disproportionately affected by measures introduced in response to the pandemic. Judicial systems in most Member States were ill-prepared for the crisis because of their low level of digitalisation and because some parts of society, notably vulnerable groups, lacked sufficient information on how the judiciary works, thereby lacking access to it.

2.7. It may ultimately be concluded that the rule of law can guide the most effective action in response to public health emergencies⁽¹²⁾, and is an essential value, not only in ordinary times, but also, and perhaps even more so, in times of crisis. In the context of the efforts made through the NextGenerationEU instrument to repair the immediate economic and social damage brought about by the coronavirus pandemic, the EESC reiterates its support for the Commission's proposal for a regulation creating a new tool that would allow for economic corrective measures with regard to Member States that commit serious and persistent violations of the values listed in Article 2⁽¹³⁾.

3. Fundamental rights

3.1. The COVID-19 pandemic has put tremendous pressure on all the institutions and infrastructures that support and protect fundamental rights in the EU. The quickly deteriorating medical services and the large-scale socioeconomic crisis threatened the life, health and wellbeing of the majority of people on the continent and increased risks of poverty. This especially hit specific groups affected by a concrete and continuous disruption of social services resulting from their long-term underfunding and the lack of preparedness of the system to face crises. In this regard, the EESC reiterates its call for a binding European framework for a decent minimum income in Europe⁽¹⁴⁾.

3.2. The EU and its Member States should engage in a deep societal reflection on the origins of the crisis and the reasons why most European health systems were pushed to the verge of collapse because of the pandemic. Years of austerity policies have led to a general trend of disinvestment in the health sector and other key social services (assistance to dependent and vulnerable persons, nursing homes, etc.), creating a time bomb that exploded in the face of a major health challenge. As the Conference on the Future of Europe unfolds, all involved should be encouraged to draw lessons from this crisis in order to lay the ground for the reconstruction of the welfare state. Resilience is an empty word if all efforts are not put towards the

⁽¹⁰⁾ J. Grogan, *Extraordinary or extralegal responses? The rule of law and the COVID-19 crisis* (Democracy Reporting International, May 2021).

⁽¹¹⁾ J. Grogan, *Extraordinary or extralegal responses? The rule of law and the COVID-19 crisis* (Democracy Reporting International, May 2021).

⁽¹²⁾ J. Grogan and N. Weinberg, *Principles to Uphold the Rule of Law and Good Governance in Public Health Emergencies* (RECONNECT Policy Brief, August 2020): https://reconnect-europe.eu/wp-content/uploads/2020/08/RECONNECTPB_082020B.pdf

⁽¹³⁾ OJ C 62, 15.2.2019, p. 173.

⁽¹⁴⁾ OJ C 190, 5.6.2019, p. 1. This EESC opinion received a counter opinion that was rejected but received at least a quarter of the votes cast.

construction of a regenerated European societal model that puts people at the centre. The EU must be prepared for future crises in terms of decision-making, transparent procedures, policies and financial resources.

3.3. The protection of rights enshrined in the Charter of Fundamental Rights was challenged by the unfolding of the crisis and the policy responses, especially those related to provision of healthcare, non-discrimination, gender equality, the rights of the child, the rights of the elderly and the rights of persons with disabilities, as well as fair working conditions and social security and social assistance. Unfortunately, in the area of gender equality, women were under-represented in ad hoc decision making structures set up to tackle COVID-19 and a gender-specific focus was lacking in many impact assessments. There is also a need for explicit recognition of the disproportionate impact of the pandemic and related measures in terms of gender.

3.4. Children's rights, especially relating to access to education and social support, are of high concern to the Committee. As already proposed by the EESC, special attention should be given to the impact of COVID-19 on the rights, welfare and intellectual and emotional development of children⁽¹⁵⁾.

3.5. The EESC reiterates the recommendation it made in its opinion on the *New Strategy for the Implementation of the Charter of Fundamental Rights* that the Commission should focus the 2022 report on the effects of COVID-19 on fundamental rights, especially those relating to socioeconomic wellbeing⁽¹⁶⁾.

3.6. The EU has a major responsibility to promote and protect human rights worldwide. In the context of the COVID-19 pandemic, the EESC also believes that the EU could do more to help the world tackle the COVID-19 pandemic. The EESC welcomes and supports EU efforts in the emergency response to humanitarian needs, strengthening health, water and sanitation systems and mitigating the social and economic consequences of the pandemic.

3.7. In the short term, more resources should be put into ensuring wide and fair access to vaccines. The 100 million vaccines pledged by the EU are not nearly enough for the pressing needs of most of the globe⁽¹⁷⁾. As the main exporter of vaccines in the world, the EU must be ready to change its approach. The vaccines must be produced on a larger scale and in greater numbers with the aim of allowing non-EU countries to achieve safe vaccination levels. As part of the aforementioned need to construct a new European economic and social model, all European players should engage in a deep reflection on the ultimate objectives of the single market and related policies. This reflection should be human-centred and should consider the notions of public goods, collective health, and alternative ways of measuring wealth, including based on the proposals made by the social partners⁽¹⁸⁾.

3.8. More should be done to promote and protect fundamental social rights, as a direct and effective way to address the negative health, social, economic and educational effects of the pandemic. The European Pillar of Social Rights should be considered a natural policy development of the protection of fundamental social rights.

3.9. The mandate of the Fundamental Rights Agency and the scope of the EC Reports on the Rule of Law should be extended to fully cover and allow adequate monitoring of the respect of these fundamental social rights.

3.10. The EESC underlines the connection between protecting democracy, rule of law and fundamental rights, and developing and implementing the European Pillar of Social Rights (EPSR). As previously stated, the wellbeing and fundamental rights of citizens should be built around a common and consistent social model, and flexible enough to accommodate different national traditions and experiences in line with the values, principles and goals of the Treaty, the Pillar, and its renewed and forward-looking consensus⁽¹⁹⁾. The monitoring of the implementation of the EPSR Action Plan should take into consideration the wide-ranging disruptive effects of the pandemic.

⁽¹⁵⁾ OJ C 341, 24.8.2021, p. 50.

⁽¹⁶⁾ OJ C 341, 24.8.2021, p. 50.

⁽¹⁷⁾ European Council Conclusions on COVID-19, 25 May 2021.

⁽¹⁸⁾ Supplementing GDP as a welfare measure: proposed joint list by the European social partners, 3 March 2021.

⁽¹⁹⁾ OJ C 374, 16.9.2021, p. 38.

4. The future of democracy

4.1. The pandemic is a global phenomenon and so are its political and democratic consequences. According to a recent study, the impact on the state of democracy are very serious and include: the number of countries moving in an authoritarian dimension exceeding that of countries moving in a democratic direction; democratic backsliding taking place in some of the largest countries; electoral integrity questioned in several countries; democratic backsliding often enjoying popular support; authoritarianism deepening in non-democratic regimes; and the prolonged health crisis tending to normalize restrictions on basic freedoms⁽²⁰⁾. The EU should take into consideration these global trends which impact its own global and regional policies and set a democratic example worldwide.

4.2. The future of democracy and the future of the EU are intertwined. The EU was built as an instrument of peace and cooperation and very importantly, an instrument of democracy, in all of its stages. We have to make sure that all the challenges and tensions stemming from the pandemic do not affect the quality and performance of our democratic systems, and, equally importantly, the commitment to build an integrated, democratic, social and prosperous Union. This implies, among other things, that European legislation should take precedence over national legislation in agreement with the Treaties.

4.3. Since early 2020, when COVID-19 arrived in Europe with devastating consequences, a range of policy instruments have been used in combating the pandemic. In most cases the medical, emergency and administrative measures were deployed under various emergency regimes, differing in content and duration.

4.4. In several EU countries, serious concerns about the motives and effects of these emergency regimes were raised. They have involved the side-lining of parliamentary and local/regional assemblies, a lack of oversight on executive action, limits on public information, a lack of transparency, social dialogue and participation, unchecked spending and inadequate support for the most affected persons, including medical staff. In the countries with already significant democratic vulnerabilities, the emergency regimes have acted as accelerators of previous trends⁽²¹⁾. In the countries with stable democratic systems, they have brought questions of adaptability to new circumstances and effectiveness of measures taken.

4.5. The policy responses also brought about an unprecedented level of misinformation and opposition to the health measures, from lockdown to treatments and vaccines. While the EU was generally successful in its efforts to support research into, procurement and distribution of vaccines, its failure to communicate this clearly to the whole European population helped fuel the spread of fake news, in particular by anti-vaccine groups. The narratives became so powerful in social media that they affected public trust in the health system and its professionals and fuelled discontent against researchers, politicians, academics and civil society leaders who advocated the WHO-sanctioned response strategy. They typically were a combination of conspiracy theory beliefs and strong mistrust in medical science and technology, especially vaccines. Overall, the OECD found that the COVID-19 crisis has accelerated a general declining trend in public trust in institutions, which has given rise to disinformation, polarisation and unwillingness to comply with public policies.

4.6. In several countries, these attitudes have helped radical right-wing and Eurosceptic parties and organisations to further build their political constituencies. As the medical and socioeconomic crises continue, their mobilisation and influence will be further enhanced⁽²²⁾.

4.7. In all countries, the tensions of the health and economic crisis have significant potential to cause divisions between various groups and social categories. According to a recent study, the pandemic and its consequences affected in a different way: young and old; people who report that they have been economically affected and those who see COVID-19 mainly as a public health crisis, and those who see the state as a protector and those who see it as an oppressor⁽²³⁾.

⁽²⁰⁾ International Institute for Democracy and Electoral Assistance (International IDEA), *The Global State of Democracy Report 2021*.

⁽²¹⁾ See Petra Guasti, *The Impact of the COVID-19 Pandemic in Central and Eastern Europe. The Rise of Autocracy and Democratic Resilience*, *Democratic Theory*, Volume 7, Issue 2, Winter 2020: p. 47.

⁽²²⁾ See for example José Javier Olivas Osuna and José Rama, *COVID-19: A Political Virus? VOX's Populist Discourse in Times of Crisis*, *Frontiers in Political Science*, 18 June 2021.

⁽²³⁾ Ivan Krastev and Mark Leonard, *Europe's Invisible Divides: How COVID-19 is Polarizing European Politics*, ECFR Policy Brief, September 2021.

4.8. The EU and the Member States should become aware of the risks a prolonged crisis will generate. The main challenge facing the EU institutions and the Member State governments is to be able to strengthen democracy, the rule of law and fundamental rights during the pandemic, in the face of questioning and criticism. The aim of a democratic strategy would not be the legitimisation of political and governmental elites, but maintaining the effectiveness of the responses while promoting democratic pluralism, proper checks and balances, and rational, constructive and civic critiques.

4.9. In this respect, the EU institutions and Member State governments should use the existing social and civic dialogue institutions to fully and transparently engage civil society organisations, social partners, and stakeholders in creating a pluralistic democratic space in which different visions and critiques are welcomed. The EESC emphasises that despite the best intentions behind the NextGenerationEU instrument and the national recovery and resilience plans, and the European Commission's willingness to involve civil society organisations, social partners and stakeholders, the level of actual participation is still largely insufficient and the processes in place have not allowed their views to have enough of an impact.

4.10. As recommended in its opinion on the European Democracy Action Plan (EDAP), in addition to the areas already included, the promotion of European democracy should involve fostering democratic participation at EU, national, regional and local levels; it should involve civil society and cover democracy in all its facets and areas, including labour democracy, among others. The EESC also believes that greater emphasis should be placed on civil dialogue, which is a key prerequisite for the highest quality decision-making and ownership in any democracy, showing due regard for Article 11 TEU ⁽²⁴⁾.

4.11. The EESC believes that the European Democracy Action Plan should include a large-scale initiative to foster education on democracy and fundamental rights, which is instrumental for safeguarding democratic values and active citizenship. The initiative should be inclusive and addressed to all citizens, with a special focus on young people.

Brussels, 23 February 2022.

The President
of the European Economic and Social Committee
Christa SCHWENG

⁽²⁴⁾ OJ C 341, 24.8.2021, p. 56.