

COVID-19 AND CONSTITUTIONAL LAW: THE CASE OF GERMANY

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SUMMARY: I. *Introduction*. II. *The Allocation of Powers in a Federalist System*. III. *The Functioning of the Legislature under Epidemic Circumstances*. IV. *Legal basis of enacted measures*. V. *Proportionality*.

I. INTRODUCTION

The Coronavirus SARS-CoV-2 first appeared in Germany in Bavaria in late January. To date, there have been approximately 300,000 confirmed infections and about 9,500 Covid-19 related deaths.¹ Initially, German authorities were reluctant to take action. However, as the crisis progressed and turned into probably the most serious health emergency since the establishment of the Federal Republic in 1949, far-reaching measures were enacted in mid-March that considerably affected public life and severely encroached on fundamental rights. They included contact restrictions, bans on leaving the house, the closure of schools, child-care facilities, universities, businesses, restaurants, and shops, and bans on events and assemblies, as well as restrictions on visits. However, no nationwide curfews were put in place. Compared to the rest of the world, in Germany the crisis has been quite mild to date, the death rates have remained relatively low, and the capacities of the health care system have been far from overstretched.

Four main constitutional issues emerged during the first weeks of the pandemic: the Federalist system, the functioning of parliament under epidemic circumstances, the adequacy of the adopted measures' legal basis, and their

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¹ As of October 2020, see https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Fallzahlen.html.

proportionality. Besides these specific constitutional issues, which will be discussed below, the first weeks of the pandemic also revealed much about German constitutional culture as a whole. This phase demonstrated that German society has great respect for constitutional law, using it as a medium of reflection and a means of solving societal problems. The public debate regarding the Covid-19 measures was conducted in a highly legalistic manner and employed the categories of constitutional law, which is not a matter of course. For the most part, these debates were carried out in the major daily newspapers as well as in online platforms such as the “Verfassungsblog”.² Nevertheless, this mode of reflection was not formalistic but extremely considered and responsive, impacting the choice of concrete measures. It allowed politicians to develop solutions that they would not have been able to reach without this reflection process. Consequently, the crisis has also revealed the degree to which constitutional law guides political processes in Germany. This close interaction with German constitutional law has contributed significantly to the successful management of the first weeks of the pandemic in Germany.

II. THE ALLOCATION OF POWERS IN A FEDERALIST SYSTEM

Federalism has shaped the management of the Covid-19 pandemic in Germany. The Infection Protection Act (*Infektionsschutzgesetz*, IfSG) of 20.07.2000 provides the ordinary legislative basis in the field of contagious diseases. As prescribed by the German federal system, this Act is a federal law that is executed by the states (*Länder*). Therefore, the states were the main actors in the crisis and responsible for taking the appropriate measures. At the beginning of the crisis, these measures therefore differed from one another. The federal government did not have the power to issue directives but could only make recommendations to the states. Art. 35 para. 3 of the German Basic Law (*Grundgesetz*, GG) grants the federal government emergency powers in the event of a natural disaster or accident that involves the territory of several states. However, this rule, which has never been applied to date, presupposes that the states are unable to cope with the situation and does not give the federal government a substitute power.

Yet German cooperative executive federalism has not proved detrimental to the fight against Covid-19, because the federal and state governments worked well together and were able to agree on comprehensive measures to combat the virus. There are many coordinating bodies between the states

² <https://verfassungsblog.de/>.

and the federal government, such as the conference of health ministers (which includes the state and federal health ministers) or the conference of prime ministers (where the presidents of the states and the Federal Chancellor come together). Furthermore, there is a joint federal and state situation center. Scholars have underlined the positive effects of federalism in combatting the crisis,³ emphasizing in particular that federalism promotes differentiated and flexible solutions rather than rigid and uniform action. It allows for open political debate and a more nuanced consideration of variations in regional circumstances.

Be that as it may, critics still identified the decentralized competences as the weak link of the crisis management. They argued that the heterogeneity resulting from the various restrictions in different states created the impression of chaos and generated uncertainty concerning the applicable regulations.⁴ In response to these criticisms, § 5 IfSG was revised to allow the federal authorities more coordinating powers during epidemics. This revision entailed a centralization of powers under the Federal Ministry of Health in the event that the *Bundestag* declares a national epidemic emergency. The Ministry of Health, acting on advice from the *Robert Koch Institute*, can then make recommendations to enable a coordinated approach within the Federal Republic. This power is not linked to the states' inability to deal with the emergency, as is provided in Art. 35 GG in case of a natural disaster. However, critics considered it highly problematic that the Federal Minister of Health could now deviate from legal regulations by means of a statutory instrument, arguing that this change shifted parliamentary powers to the executive beyond what is constitutionally permissible.⁵

III. THE FUNCTIONING OF THE LEGISLATURE UNDER EPIDEMIC CIRCUMSTANCES

During the pandemic, the *Bundestag* and *Bundesrat* continually passed new laws to combat the virus and mitigate its consequences. However, the members of

³ L. Munaretto, Die Wiederentdeckung des Möglichkeitshorizonts, *VerfBlog* 30.3.2020, <https://verfassungsblog.de/die-wiederentdeckung-des-moeglichkeitshorizonts/>.

⁴ The measures were described as a “federal patchwork rug” (föderaler Flickenteppich), see for example T. Holl, Geschlossen handeln im Kampf gegen das Virus, *FAZ*, 10.3.2020, <https://www.faz.net/aktuell/gesellschaft/gesundheit/coronavirus/coronavirus-warum-es-keinen-foederalen-flickenteppich-geben-darf-16672721.html>.

⁵ S. Schönberger, Die Stunde der Politik, *VerfBlog*, 29.3.2020, <https://verfassungsblog.de/die-stunde-der-politik/>.

these houses were exposed to the risk of infection with the Sars-CoV-2 virus, and many were quarantined. These circumstances spurred discussions regarding digital plenary and committee meetings using modern technology or online voting⁶ and also raised the question of the relevant parliamentary quorum.

The German Basic Law does not contain provisions that would safeguard the *Bundestag*'s ability to work in the event of an *internal emergency*. Instead, the legislature relies on informal agreements, such as the so-called "pairing" procedure. This procedure is rooted in British parliamentary history, following a system requiring that for each absent member of the government, one member of the opposition must be absent as well. The only emergency situation defined in the German Basic Law is an *external emergency*. This situation arises in case of a state of defence (the so-called *Verteidigungsfall*). Here, according to Art. 53a GG, a small joint committee can take over the position of the *Bundestag* and *Bundesrat*, thereby allowing the legislature to act more effectively and flexibly. But there is general consensus that it would be far-fetched to classify the virus as a weapon attacking the Federal Republic.

The problem of maintaining a functioning legislature during the pandemic was solved by temporarily altering the rules regarding the quorum of the *Bundestag*. According to § 45 para. 1 of the rules of procedure of the *Bundestag* (*Geschäftsordnung Bundestag*, GO-BT), the *Bundestag* is quorate if more than half of its members are present (although this quorum must be verified for the lack thereof to condition any legal effects). When deciding the extraordinary measures to combat the epidemic in plenary session, the *Bundestag* agreed very pragmatically that one out of every two Members of Parliament would be in the Chamber. On March 25, 2020, the Members of Parliament amended the GO-BT by adding, for a limited period until September 30, 2020, a new § 126a. In its paragraph 1, this amendment reduces the quorum of the plenary session to one quarter of the *Bundestag* members.⁷ Since the *Bundestag* currently has 709 members, 178 are still required for a quorum. These rules were considered to be in accordance with democratic principles, as each individual member still had the right to attend the sittings. A further proposal suggested anchoring the "pairing"

⁶ For the debate on digitization in Corona-times see *C. Hagenah*, Das Corona-Virus und das Parlament – Die Stunde der Digitalisierung?, *JuWissBlog* Nr. 37/2020 v. 26.3.2020, <https://www.juwiss.de/37-2020/>.

⁷ *Bundestag-Drucksache* Nr. 19/18126.

procedure in the constitution in order to ensure the *Bundestag*'s working ability in the event of a crisis.⁸

IV. LEGAL BASIS OF ENACTED MEASURES

The IfSG entitles the authorities to adopt a series of different measures in order to prevent and control infectious diseases. The Act distinguishes between three orders of action: measures concerning the surveillance (§§ 6 et seq IfSG), prevention (§§ 16 et seq IfSG), and control (§§ 24 et seq IfSG) of infectious diseases. The measures must address not only those who have fallen ill but also those suspected to be ill, namely persons who do not appear sick but whose exposure to pathogens can be assumed as well as persons who secrete pathogens and can therefore be a source of infection for the general public without showing signs of illness. Moreover, some measures may be addressed to the general public: According to § 30, the authorities can order quarantines, ban professional activities (§ 31), and shut down care facilities for minors (§ 33). One provision, which served as the basis for several restrictive measures and so became central during the crisis as well as the subject of much debate, was § 28 IfSG. It was particularly controversial whether this article could be used as a basis for *bans on leaving the house*.

According to the previous version of § 28 para. 1 sentence 2 IfSG, the competent authorities could “restrict or prohibit events or other gatherings of a large number of people” and could also “oblige persons not to leave the place where they are located or enter designated places until necessary protective measures have been taken”. The majority of legal scholars argued that this provision could not serve as a basis for bans on leaving the house.⁹ They held that the provision was intended to cover only short-term measures, such as an order not to leave an aircraft until the authorities have isolated potentially infected persons, as indicated by the wording “until the necessary protective measures have been taken”. Yet the courts did not agree with this criticism, instead allowing the provision to be used as a legal basis.¹⁰

⁸ P. Thielbürger/ B. Behlert, COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze, VerfBlog, 30.3.2020, <https://verfassungsblog.de/covid-19-und-das-grundgesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/>.

⁹ For example A. Kießling, Rechtssicherheit und Rechtsklarheit bei Ausgangssperren & Co?, JuWissBlog Nr. 33/2020, 24.3.2020, <https://www.juwiss.de/33-2020/>.

¹⁰ OVG Berlin-Brandenburg, 23.03.2020 – OVG 11 S 12/20, DVBl. 2020, p. 775, 776, para. 9; VG Freiburg, 25.3.2020, 4 K 1246/20, COVuR 2020, p. 156, para. 16 et seq.

§ 28 para. 1 sentence 1 IfSG contains a general clause that allows the competent authorities to take “necessary measures”. When introducing the provision, the legislature argued that it was important to include a general basis of authorization in the law so as “to be prepared for all eventualities”.¹¹ However, legal scholars were skeptical whether this general clause authorizing only the adoption of unspecified “necessary measures” could act as an appropriate legal basis for measures as intrusive as the ban on leaving the house. Instead, scholars demanded the creation of a specific basis of authorization.¹² Furthermore, many doubted whether the provision satisfied the constitutional requirements, especially with regard to the principle of legal certainty (the so-called *Bestimmtheitsgrundsatz*) and the theory of “legislative reservation” (the so-called *Wesentlichkeitstheorie*).¹³ Finally, the ban on leaving the house not only interfered with the freedom of the person (Art. 2 para. 2 sentence 2 GG) but also with the freedom of movement (Art. 11 para. 1 GG). However, § 28 para. 4 IfSG did not cite Art. 11 para. 1 GG as a restrictable fundamental right, even though Art. 19 para 1 sentence 2 GG (the so-called *Zitiergebot*) requires this citation.

Thus, in great haste, the *Bundestag* and *Bundesrat* passed the “Act for the Protection of the Population in the Event of an Epidemic Situation of National Significance”, also amending § 28 para. 1 IfSG.¹⁴ The general clause in § 28 para. 1 sentence 1 IfSG remained unaltered. However, a second part was added, enabling the competent authorities to oblige persons not to leave their current location. The elimination of the restriction “until the necessary protective measures have been taken” extended the norm’s scope of application to long-term measures, such as bans on leaving the house. Yet some observers held that even this new regulation was not sufficient to legitimize bans on leaving the house because it did not fulfil the requirements of the principle of legal certainty. Instead, legal scholars demanded that measures such as bans on leaving the house be explicitly governed by a separate provision.¹⁵ Finally, § 28 para. 1 sentence 4 IfSG now also mentions Art. 11

¹¹ Bundestag-Drucksache Nr. 8/2468, p. 27.

¹² A. Klafki, Corona-Pandemie: Ausgangssperre bald auch in Deutschland?, JuWissBlog Nr. 27/2020, 18.3.2020, <https://www.juwiss.de/27-2020/>.

¹³ A. Edenharter, Freiheitsrechte ade?: Die Rechtswidrigkeit der Ausgangssperre in der oberpfälzischen Stadt Mitterteich, VerfBlog, 19.3.2020.

¹⁴ Federal Law Gazette 2020 I p. 587.

¹⁵ A. Klafki, Neue Rechtsgrundlagen im Kampf gegen Covid-19: Der Gesetzesentwurf zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, VerfBlog, 25.3.2020, <https://verfassungsblog.de/neue-rechtsgrundlagen-im-kampf-gegen-covid-19/>.

GG as a restrictable fundamental right, thus addressing the constitutional issues raised by the *Zitiergebot*.

V. PROPORTIONALITY

Another fundamental rights issue that emerged during the pandemic was the proportionality of state intervention in fundamental rights on the basis of the IfSG. This matter arose in particular because measures in the field of containment or control of the pandemic often intensely affected fundamental rights, in some cases even completely suspending their exercise to an extent hitherto unknown. Furthermore, the question of proportionality gained considerable importance because the IfSG provides for the possibility of taking measures against persons who present no threat to the public and because violation of the measures can be punished as an administrative or even criminal offence.

The case law reveals a common narrative: Initially, the courts recognized the pandemic's serious, sometimes even irreversible impact on fundamental rights for a large number of people. After balanced consideration, they decided in favour of the right to life and physical integrity.¹⁶ They argued that this was possible because the measures were only temporary.¹⁷ Then this trend was reversed, following efforts to recall the importance of fundamental rights other than life and health. This development was particularly evident with regard to the *freedom of assembly*. Initially, the courts gave *a priori* precedence to the protection of human life and health over the right of assembly,¹⁸ even concerning an assembly of only two persons.¹⁹ They argued that other forms of protest were possible, for example through social media channels.²⁰ In a highly symbolic decision on April 15, 2020, the Federal Constitutional Court lifted a ban on assembly and underlined the freedom of assembly as an outstanding feature in a democracy – even in times of pandemic.²¹ This heralded a new phase, in which more and more admin-

¹⁶ See for example BVerfG, 7.4.2020, 1 BvR 755/20, para. 11 with regard to the ban to leave the house.

¹⁷ With regard to the freedom of assembly VG Hannover, 27.3.2020, 15 B 1968/20, juris, para. 19; VG Dresden, 30.3.2020, 6 L 212/20, p. 12; with regard to the freedom of religion BVerfG, 10.4.2020, 1 BvQ 28/20, para. 14.

¹⁸ VG Hannover, 27.3.2020, 15 B 1968/20, juris, para. 19; VG Dresden, 30.3.2020, 6 L 212/20, p. 12; VG Hamburg, 2.4.2020, 2 E 1550/20, p. 6 et seq.

¹⁹ VG Neustadt (Weinstraße), 2.4.2020, 5 L 333/20.NW, juris.

²⁰ VG Dresden, 30.3.2020, 6 L 212/20, p. 13.

²¹ BVerfG, 15.4.2020, 1 BvR 828/20.

istrative court decisions allowed assemblies.²² The situation was similar in the area of *freedom of religion*. Initially, the courts affirmed the proportionality of prohibitions of worship and rejected the applications of religious associations and churchgoers against these prohibitions.²³ They argued that there were other possibilities to exercise the freedom of religion, such as church services broadcast on radio or television.²⁴ On April 29, 2020, however, this trend was reversed when the Constitutional Court lifted a ban on the opening of mosques based on the regulations of Lower Saxony, arguing that the exercise of fundamental rights could be permitted despite the pandemic, provided certain contextually adequate conditions were met.²⁵

²² VG Hamburg, 16.4.2020, 17 E 1648/20; VG Halle, 17.4.2020, 5 B 190/20 HAL; OVG Sachsen-Anhalt, 18.4.2020, 3 M 60/20; VG Hannover, 16.4.2020, 10 B 2232/20.

²³ For example BayVGH, 9.4.2020, 20 NE 20.704, juris; BayVGH, 9.4.2020, 20 NE 20.738, juris; OVG Thüringen, 9.4.2020, 3 EN 238/20, juris; BVerfG, 10.4.2020, 1 BvQ 28/20, para. 14.

²⁴ VG Berlin, 7.4.2020, 14 L 32/20, juris, para. 22; confirmed by OVG Berlin-Brandenburg, 8.4.2020, OVG 11 S 21/20, juris, para. 12.

²⁵ BVerfG, 29.4.2020, 1 BvQ 44/20, para. 9 and 14 et seq.