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# COVID-19 and the rule of law: an attempt to classify German Federal Government measures to combat the pandemic from a rule of law perspective

## *Introduction*

Everything changed suddenly – and remains very different. The crisis crept up on us, with people noting reports from Wuhan but not feeling at risk themselves. Then, suddenly, the pandemic hit almost all parts of the world. By contrast with previous pandemics, globalisation, open borders, tourism and busy air traffic routes have had a dramatic impact on the spread of the virus, with ignorance meeting unpreparedness. Waiting until we knew more about the virus, its origins, transmissibility and prevalence, and treatments and longer-term impact was simply not an option for most countries. And the differing framework conditions in each country, including health care systems and economic, social, political and socio-cultural conditions, make it hard to draw conclusions regarding the effectiveness of individual measures in any given country. These layers of complexity have raised – and continue to raise – a series of issues and created uncertainty not just for politicians, governments and administrations but also for the law and the legal system itself.

The very drastic measures taken initially were accompanied by widespread commentary and argument, from assertions that COVID-19 was no more serious than flu and taking hydroxychloroquine would offer protection to claims that the pandemic was a global conspiracy. That commentary continues and is reflected in the way different governments and their leaders have reacted, including Donald Trump in the US, Jair Bolsonaro in Brazil and Alexander Lukaschenko in Belarus. And, as recent demonstrations in Germany have shown, there is no shortage of conspiracy theories: the boundaries between political groups are blurring as right-wing extremists, anti-Semites, evangelicals, anthroposophists, mystics, anti-vaxxers and others suddenly make common cause against the Government's measures to contain the virus. Meanwhile, over recent months, even German legal scholars could be heard expressing views to the effect that the country has become a fascistoid and hysterical 'nanny state' in its health policy and that the rule of law has been seriously damaged.

Ultimately, the issue is the relationship between law, science and politics in a democratic constitutional state (the rule of law).

## *The law*

The starting point is to consider the function of law. That is to oversee regulations established by society and, depending on the state in question, ratified by Parliament, government or autocrats and norms for the state and for how its citizens co-exist. The role of the law is to oversee, regulate and impose justice where necessary but also to exert power. It is that function

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in particular that is crucial when the rule of law is threatened. And the Constitution is a set of regulations to which the legislator has sought to give special weight.

Debate around the rule of law should always also include democracy – the democratic rule of law. The law requires democratic legitimation. However, what is often overlooked is that the law, and especially the Constitution, has the role of protecting the democratic process. These rights protecting the democratic process include freedom of speech, freedom of assembly, protection of minorities, and the prohibition of discrimination – that is, in essence, to guarantee human rights, which are viewed in the German Constitution (*Grundgesetz* or GG) as fundamental rights. In the absence of democratic legitimation and protection for the democratic process, the state is rapidly dominated by law: a case of rule by law, not the rule of law. This is obvious in autocratic regimes and dictatorships, but a similar situation can now be observed not only in the wake of populist movements in countries such as Hungary and Poland but also, in at least some respects, in the US. In such situations, the law and the independence of the judiciary are being reduced to the extent that they can no longer function as a bulwark and become merely an instrument for asserting power.

Alongside the legislative and executive branches, an independent judiciary is the third element that is of outstanding importance for the rule of law. This is especially true of the administrative jurisdiction, which is responsible for judicial oversight of state measures in connection with the fight against the pandemic and has the role of protecting the rights of the individual to freedom – to protect individuals against state intervention – on the one hand and, on the other, of ensuring the state's ability to function in accordance with the provisions of the Constitution and the law. The judiciary is a pillar of social stability and legal certainty and a guarantor of trust in the state.

In the Federal Republic of Germany as a federal state, the rule of law applies both at horizontal and at vertical level: the horizontal level includes the parliament, the *Bundestag,* (legislature) the Federal Government (executive), the constitutional court as the constitutional organs and the independent judiciary; at vertical level, meanwhile, the rule of law starts with the municipalities and districts and moves on up to the 16 federal states, which are committed under Article 28 of the *Grundgesetz* to upholding the principles of the democratic constitutional state. Accordingly, the federal states each have their own constitution, state parliament, state government and state constitutional jurisdiction. The relationship between the federal republic and the 16 federal states, for example with regard to legislative competence, is governed particularly by the *Grundgesetz*. Moreover, the Federal Republic itself is a European Union Member State.

Typically, the law is characterised by continuity, reliability and clarity: it is fundamentally about the normative typification of recurring constellations. Given the incomplete nature and uncertainty of knowledge about the pandemic and the effectiveness of individual decisions, the law and the rule of law both face great challenges.

***The pandemic: the characteristics and role of science***

Not only did the pandemic spread rapidly around the world, but scientists initially knew little about COVID-19. New findings were emerging all the time, many of them then rapidly overtaken and, in some cases, refuted. Such information included the causes of the pandemic, the speed and duration of infections, the susceptibility of different age groups and the severity of their illness, and the long-term impact on health. For example, initial claims that mortality would not be higher among the elderly, that young people were not at risk and that children did not spread the virus gave way to findings that some individuals had conditions that made them particularly vulnerable, such as obesity, diabetes, kidney disease and high blood pressure, and that young people could both spread the disease and catch it, although not as severely as older people. It was also established that the infection could cause long-lasting damage to health in some cases. The validity of statistics was repeatedly challenged. All in all, science faced major uncertainties, a situation that persists to this day. This has influenced – and continues to influence – not only public debate and discussion in the media but also discourse among scientists themselves. Physicians and researchers often contradict each other, and many scientists have claimed the opposite of what other scientists had previously argued. Ultimately, more or less provisional scientific findings went on, in many cases, to be modified or overtaken by more recent findings. In this situation, the scientific community has worked with pre-publication findings, among other things, to promote scientific discourse and to subject its own findings to scrutiny and review. Knowledge gained from earlier pandemics was initially restricted to the fact that breaking chains of transmission and restricting contact could be effective instruments to contain the pandemic.

These uncertainties and constantly changing knowledge faced politics and the law with major challenges – and continue to do so.

***Political reaction at federal and state level***

Fundamentally, determining and implementing risk prevention measures falls within the competence of the federal states under the division of powers between the Federal Government and the federal states laid down in the *Grundgesetz*. And in the pre-reunification states, it sometimes ranks between education and childcare, depending the extent to which these areas are dealt with at municipal or district level. Germany's national legislation in this area, the Act on the Prevention and Control of Infectious Diseases (IfSG), plays a key role. Where the Federal Government does have powers, measures such as the launch of an economic stimulus package or the introduction of short-time working have been enacted at this level. There has been, and continues to be, continuous coordination and agreement on temporary measures between the federal and state governments, particularly with the aim of achieving a uniform approach.

While at the beginning of the pandemic very far-reaching interventions and regulations were put into force, these have subsequently been relaxed as infection figures have come down, always subject to the proviso that the status quo does not deteriorate and the number of infections does not start rising again. Initial measures included lockdown, the closure of

schools, kindergartens, restaurants, bars, hotels, retail businesses, shopping centres and facilities such as fitness studios, and churches; groups were not permitted to meet, social distancing rules were put in place, and people were urged not to meet those outside their immediate family, while visits to care homes were banned, travel was significantly restricted, 14-day quarantine measures were imposed and the population were required to wear masks, to name only the most significant restrictions. Subsequently, a number of these restrictions have been relaxed at different times and to varying degrees in individual federal states, including by means of emergency measures for nurseries and kindergartens, allowing people to eat in restaurants and hotels (subject to limited numbers and precautions such as social distancing), a cautious opening of churches, reopening retail stores and shopping malls subject to measures such as distancing and hand sanitisation, and limited opening of larger stores with restrictions on the sales areas accessible, reopening of schools to varying degrees, and resumption of sporting events with reduced spectator numbers.

***Conflicting goals***

As a result, politics has been, and continues to be, faced with a complex, multifaceted and unwieldy mixture of uncertain scientific findings and many different goals affecting a large number of different areas of society. On the one hand, politicians must protect individuals and society, in particular from dangers to their health; on the other hand, individual measures involve massive intervention in the economy and employees' livelihoods and in the education system, sometimes with huge social and psychological impact on children and parents, the position of women, the health system, and, for example, the situation of older people. And even when restrictions are lifted, such as when schools reopen, a range of diverse interests always have to be weighed against each other: for example, it can be assumed that most parents and children, as well as large sections of the public, welcome the opening of schools and kindergartens, but the same may not be true of teachers but also other families with children, given the uncertain scientific knowledge about transmissibility and the virus's possible long-term damage to health.

This multifaceted nature is also reflected in the German Constitution. On the one hand, it requires the state to protect the public generally and every individual from damage to health in particular (Article 1, 2 *Grundgesetz* (GG)). On the other hand, though, it lays down rights such as personal freedoms (Article 2 GG), equality before the law (Article 3 GG), freedom of faith and conscience (Article 4 GG), marriage, family and children (Article 6), the school system (Article 7 GG), freedom of assembly (Article 8 GG), freedom of movement (Article 11 GG), freedom of occupation (Article 12 GG) and property, inheritance and expropriation (Article 14 GG). Individual measures are usually associated with massive encroachments on fundamental rights. And there is a need to meet the requirements of democratic rule of law (in particular Articles 19 and 20 GG).

In a democratic constitutional state, it is primarily the role of politics, the legislature as legislator, or the executive branch, acting on normative guidelines, to strike an appropriate balance between the diverse constitutional rights involved. In principle, it is not the task of the

judiciary to balance the various constitutional rights involved in place of the government in court proceedings: its role is to monitor whether the legal requirements are being observed and whether the measures ordered are compatible with the rights of the individual as laid down in the Constitution – and in particular whether they are proportionate.

***The legal situation***

The relevant basis is the German Act on the Prevention and Control of Infectious Diseases (IfSG). Its purpose is to prevent communicable diseases in humans, to recognise trends at an early stage and to prevent the further spread of disease (Article 1 (1) IfSG). The law takes account of the volatile state of knowledge at various levels. According to Article 5 (1) IfSG, the *Bundestag* (German Parliament) determines an 'epidemic situation of national importance.' Without prejudice to the powers of the federal states, the Federal Minister of Health is authorised to issue specific orders. A prerequisite for the emergency situation is an assessment of its beginning and end. Depending on the measures taken, the corresponding regulations imply a time limit, in some cases very short (see Article 5 (4) IfSG). The Robert Koch Institute is assigned a special task as a scientific advisory body of the Federal Government for communicable diseases according to Article 4 IfSG. Article 28 (1) sentence 1 IfSG serves as a general clause for the enactment of the 'protective measures' mentioned above, with the explicit reference to the associated possible restriction of basic rights: freedom of movement, inviolability of the home, freedom of assembly, and personal freedoms. Individuals who are ill, are believed to be ill or are believed to be infected or who refuse to engage with the authorities expressly mentioned as 'disturbers and addressees' against whom measures may be directed. In addition, and insofar as this is not called into question by case law, claims may also be made against persons who at first glance appear to be uninvolved as third parties. In practice – and rather rarely – individual case orders ('administrative acts)', general rulings (administrative acts directed at a group of persons determined or determinable according to general characteristics) or legal ordinances are used.

***Effective legal protection guaranteed?***

In essence, the measures are regulatory measures. According to traditional interpretation, causality and probability are crucial: action to avert danger presupposes the existence of a danger, i.e. that if the objectively expected event proceeds unhindered, damage will occur with sufficient probability in the foreseeable future. If, on the other hand, the authorities consider the existence of a danger only to be potential, this is referred to as a 'suspected danger', which enables preliminary danger investigation measures to be taken. As a rule, these are administrative measures against individuals in manageable circumstances. The measures ordered to tackle the pandemic, however, are more than mere measures to establish the existence of danger. These measures, which affect a large number of citizens, including those who are not directly involved, are based on a set of circumstances that cannot yet be definitively assessed because of the incompleteness of knowledge and that do not allow for research to establish danger. On the other hand, individual measures generally represent massive

encroachments on fundamental rights. How has case law dealt with the incompleteness and lack of definitiveness of scientific knowledge? Has (regulatory) law proved capable of learning?

In a very large number of decisions, the German courts have dealt with the various measures such as containment orders, general rulings or individual orders by way of provisional legal protection – what are known as 'urgent legal procedures'. The approach chosen by the Act on the Prevention and Control of Infectious Diseases (IfSG) has not been challenged constitutionally by either the Federal Constitutional Court or the administrative courts, including the powers to issue ordinances. In this context, case law faces the problem just outlined that the intensity of intervention is in inverse proportion to knowledge of the effectiveness of the intervention in combating the danger. Here, reference is made to a calculation that has also been frequently attempted in the case law of the Federal Constitutional Court, which can be summarised as follows: the higher the impending damage is or may be, the lower the bar for the probability of the danger occurring. Based on the assumption that, in the event of an unimpeded spread of the pandemic, catastrophic consequences are possible, that they could not be ruled out at the beginning of the pandemic, and that they cannot be ruled out at present either, extensive restrictions were and still are considered possible under law in the vast majority of court cases. This could be argued to be a matter of risk prevention and risk minimisation required by the rule of law. In the case law, the state's duty to protect life and health is used to justify the appropriateness of the measures. The principle of proportionality is of great importance in case law. In addition, Article 3 GG, the principle of equality before the law, plays an important role in corresponding case constellations, including considerations of proportionality. In principle, case law has assumed in a large number of decisions that the administration has a decision-making prerogative, i.e. further scope for decision-making. In doing so, case law recognises the uncertainty and incompleteness of the state of knowledge and, in weighing up factors, also takes into account the short duration of the respective measures usually contained in general rulings and the associated possibility of their evaluation prior to possible extension.

Apart from individual cases, the measures put in place so far have generally been sustained by the administrative courts. Where orders have been overturned by the courts, this has applied, for example, to cases in which formal requirements were not observed or to the banning of large groups or religious services; milder solutions than an exclusive ban, such as the imposition of requirements regarding social distancing, limits on numbers and the wearing of masks, were also imposed in view of the great importance of individual constitutional provisions, such as freedom of assembly and freedom of faith and conscience, and the associated high intensity of intervention.

The classic legal review of the principle of proportionality is whether the measure ordered pursues a legitimate purpose, i.e. whether it is covered by the legal basis for authorisation, whether it is appropriate and necessary (the mildest measure possible), and whether it is proportionate in the narrow sense, i.e. not disproportionate to the objective pursued. In view of the lack of sufficient valid scientific foundations and evidence regarding measures that may be equally suitable, this approach appears to be problematic with regard to the points of

examination of suitability and particular necessity if it is applied to the individual measures at the outset, which is typically the subject of legal proceedings. In the case of general rulings, the issue is rather to tackle highly complex and multifaceted situations in which, within the framework of an overall concept, the administration/policy is seeking to impose control on the pandemic by means of the intermeshing of various individual measures. This concept must in turn be appropriate to achieving the desired goal. If, however, judicial review is limited to individual measures without taking the overall concept into account, there is a risk that the court will take the place of the administration if this specific measure is repealed, for example because of inequality with comparable case constellations, but the overall concept is ignored. Finding the right balance here between, on the one hand, allowing the administration wide scope for decision-making in the context of an overall concept and, on the other hand, guaranteeing effective legal protection with regard to encroachments on fundamental rights is a challenge for administrative jurisdiction.

***Summary***

In summary, with regard to the question of whether the measures put in place to combat the pandemic in Germany meet the constitutional requirements of a democratic constitutional state and whether sufficient legal protection by independent courts is guaranteed, it can be stated that, in my opinion, this is essentially the case.

- Extraordinary situations such as a pandemic require extraordinary responses.
- The holistic approach adopted by the Federal Government and state governments, which combines a wide variety of measures with a cautious approach, has essentially proved its worth, especially by comparison with most other states, in terms both of infection rates and of the other social impacts, with high approval rates among the population.
- The judiciary as the third branch of the state has demonstrated its ability to function in a large number of proceedings by reviewing numerous measures. In particular, it has succeeded in finding a convincing way to deal with uncertain and incomplete knowledge.
- The short durations and the associated scope to evaluate regulations and general orders plays a decisive role in the success of the packages of measures and the rule of law.
- Federalism has essentially proved its worth. There have been repeated isolated attempts by individual federal states and their prime ministers to single themselves out, either through particular rigour or further relaxation of the restrictions. In summary, however, the competition between the concepts in place in individual federal states was able to create an indirect control function on a comparative basis, for example in public debate, and also, as examples of best practice, to provide impetus for successful concepts. Individual states or, in the case of regional states such as Bavaria or Lower Saxony, individual parts of the state have been affected differently, and the respective decision-making authority enabled specific and tailor-made measures.

- In public debate, what is known as a ‘prevention paradox’ can be observed: the more successful the measures taken were, the more doubts arose about their necessity. It is also possible to discern a paradox in terms of basic rights: if politics and government are accused of ‘COVID-19 totalitarianism’ – a tendency towards state control and restrictions on freedom of speech – critics are able to articulate this criticism precisely because of the freedom of speech guaranteed by Article 5 GG and are also protected by the independent courts in the exercise of their fundamental rights with regard to freedom of assembly guaranteed under Article 8 GG, to the extent that, as in Berlin, for example, bans on demonstrations were lifted by the courts, provided participants wore masks and observed social distancing.
- The greater the relaxation of restrictions and opening up of society, and the greater the decline in infections, the more those still affected by closures and restrictions will complain. This is an area in which politics and the judiciary still face challenges.
- Transparent and open communication on the part of the Federal and state governments and administrations is important. In my opinion, this has, by and large, been achieved.
- **The efficacy of the democratic constitutional state has, in my opinion, been proved by global comparison with countries including Brazil, Russia and the US up to the time of writing (mid-September 2020). The current Rule of Law Index 2020 of the World Justice Project demonstrates this: the countries ranking highest, namely the Scandinavian countries, the Netherlands and Germany, are also those that have broadly been most successful in dealing with the pandemic so far. However, our knowledge remains incomplete and uncertain, the number of infections is rising in various countries, and the current situation imposes additional risks, making a final assessment impossible, especially relating to autumn and winter and the uncertain timing of the roll-out of an effective vaccine.**

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