Critique and Crisis: The German Struggle with Pandemic Control Measures and the State of Emergency

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SARS-CoV-2 has hit Germany hard with (as of Easter 2020) more than 120,000 confirmed cases. The entire development of the pandemic has been accompanied by a critical debate about whether the Federal Government and the *Länder* (states) took the appropriate measures to fight the virus. The first objective of this post is to show which legal measures are available to the Federal Government and the *Länder* and to briefly report which of those have been applied to. It discusses whether extraordinary times are the right moment for constitutional amendments and why a critical reflection of the current legislative changes is not only necessary but essential for the understanding of our constitution.

Combating the Virus with Federal Emergency Powers?

Since the very beginning of the COVID-19 crisis, a debate emerged on whether a state of emergency could be declared. The *Grundgesetz* (the German Federal Constitution) provides an "Emergency Constitution" in several Articles (12a III-VI, 53a, 57a, 87a, 91, 115a sq.). At first glance, the mere existence of those instruments does not seem to be remarkable. However, regarding the Constitution's history of origins and background, they are not to be taken for granted. The founders of the Constitution gravely feared a new version of the Reich President's right to issue emergency decrees under Article 48 *Weimar Constitution* (1919), on the basis of which essential basic rights and liberties were suspended in 1933 (the most known is the Reichstag Fire Decree; referred to here as well). Accordingly, the new established *Grundgesetz* from 1949 initially refrained from an explicit "Emergency Constitution" until, under the impression of an ever approaching Cold War, emergency articles were incorporated in 1968.

For example, Article 91 of the *Grundgesetz* was incorporated, on the basis of which a state of internal emergency (*Innerer Notstand*) can be declared. Unlike Article 48 of the *Weimar Constitution* however, Article 91 of the *Grundgesetz* does not allow for a shift of powers towards the executive branch or special interventions in fundamental rights. Instead, the declaration of a state of internal emergency enables the Federal Government and the *Länder* to provide mutual administrative assistance. As per Article 91 of the *Grundgesetz*, a state of internal emergency can only be declared in "order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*". As of Easter 2020, SARS-CoV-2 has claimed almost 3.000 lives in Germany. However and as of now, the Virus is neither a hazard to

the free democratic order nor to the existence of the Federation or a *Land*, so that a state of internal emergency cannot be declared within the narrow boundaries of Article 91 *Grundgesetz*.

Somewhat surprisingly, despite the requirements for the declaration of a state of internal emergency are not being met, the *Bundeswehr* (Federal military) is currently deployed in 14 of the 16 *Länder*. As part of a civil mission the *Bundeswehr* helps out with physicians, nursing staff and needed medical equipment. This mission is based on Article 35 I *Grundgesetz* which obliges all the federal and *Land* authorities to render legal and administrative assistance to one another. Therefore, all authorities of the Federation as well as of the *Länder* can ask the *Bundeswehr* for technical-logistical support, which the *Länder* are in need of: Right now, the *Bundeswehr* is carrying out its largest mission since its establishment in 1955. However, Article 35 I of the *Grundgesetz* does not cover armed missions, so that, even in times of COVID-19, the competences of the *Bundeswehr* are limited.

COVID-19 and the Disaster Case Scenario

Germany is a federal republic. Deriving from this principle and according to Article 70 of the *Grundgesetz* the *Länder* (and not the Federation!) shall have the right to legislate as far as the *Grundgesetz* does not confer the legislative power to Federation. Pursuant to Article 73 I No. 1 of the *Grundgesetz* the Federation has exclusive legislative power with respect to foreign affairs and defence, including protection of the civilian population. However, this section does not cover the competences to avert dangers for public safety (*Gefahrenabwehr*). Therefore, the respective authorities in the *Länder* have the competence to avert dangers for public safety. This includes the right to declare a “state of disaster” (*Katastrophenfall*).

Every single of the 16 *Länder* passed its own Disaster Protection Act (see here) being applicable when disaster actually strikes. Every Disaster Protection Act has its own definition of disaster. For example, the Disaster Protection Act of the *Land* North-Rhine Westphalia (the most populous *Land* with about 18 million inhabitants) defines in § 1 II No. 2 that a disaster “is a damaging event which endangers or substantially impairs the life, health or vital supplies of numerous people, animals, natural resources or substantial material assets to such an unusual extent that the resulting threat to public safety can only be effectively countered if the competent authorities and services, organizations and deployed forces work together under the uniform overall management of the competent civil protection authority.”

Without doubt COVID-19 endangers the life of numerous people; in the meantime almost 3,000 people in Germany have lost their life. Consequently, the competent authorities in the *Länder* facing COVID-19 can declare a state of disaster. All of the 16 different Disaster Protection Acts have in common that in case of a disaster a more streamlined command structure is to be given to the authorities. For example, according to Article 2 Disaster Protection Act (Bavaria) the cities (*Kreisfreie Städte*) and districts (*Kreise*) are usually the responsible authorities. However, when a state of disaster is declared the Bavarian Government (*Staatsregierung*) respectively the Bavarian Ministry of the Interior (*Landesinnenministerium*) can attain competence.

So far, from the 16 *Länder* only Bavaria has used these means and, for the first time in its history it has done so not limited to certain areas but throughout its entire territory. It remains to be seen whether other *Länder* will follow.

The Legislator Remains Active

Meanwhile, several laws were passed with the intention of fighting COVID-19.

On the federal level, e.g. on the 25th of March a law was passed to provide the means to mitigate the economic consequences of the pandemic. The Federal Introductory Act to the Civil Code (*EGBGB*) was extended by Article 240, which contains special contractual rules occasioned by the COVID-19 pandemic. It aims – among other things – to protect tenants who can no longer pay their rent because of the crisis. Simultaneously, the *Bundestag* (Federal Parliament) adopted the largest assistance package in German history: To build a protective shield for employees, self-employed people and businesses the Federation issued new loans totaling roughly 156 billion Euro.

On the very same day, the *Bundestag* also modified the federal Infection Protection Act. § 28 I 1 Infection Protection Act contained a general clause according to which authorities could take “all necessary measures” to fight infectious diseases (comprehensive overview here). Based on § 28, local authorities, which are responsible for the enforcement of this Act, have already declared various pandemic control measures. The hereafter imposed ban on assemblies in public spaces or the prohibition of religious services in the presence of the congregation were particularly controversial in that is has been debated whether these measures were lawfully ordered on the basis of federal Infection Protection Act. However, the legislator modified § 28 I 1 for reasons of “clarification”. In other words: the legislator did not extend the scope of § 28. Because of this, the debate whether this norm is a legal basis for the pointed-out measures will most likely persist.

The parliaments in the *Länder* are active too: In North Rhine-Westphalia an "Epidemic Act" was recently discussed but has not yet been passed due to concerns of the opposition. Meanwhile, in Bavaria an Infection Protection Act (Bavaria) was passed as early as of March 25th. Article 1 I empowers the Bavarian Government (*Staatsregierung*) to declare a “public health emergency” (*Gesundheitsnotstand*) when a communicable disease spreads in the general public. When a public health emergency is declared, as per Article 2, the responsible authority can confiscate medical material from every private person. Furthermore, according to Articles 5 and 6, the responsible authority can gather information about medical experts and assign them to work in medical facilities.

In addition, the Bavarian Infection Protection Act also affects the electoral law: The Bavarian Act on the Election of Municipal Councils, Mayors, County Councils and *Land* Councils (*Gesetz über die Wahl der Gemeinderäte, der Bürgermeister, der Kreistage und der Landräte*) was also changed on the basis of Article 9a of the Bavarian Infection Protection Act. The Bavarian legislator had the intention of reducing the amount of personal contacts within the population to the absolute

minimum. Hence, presumably for the first time in Germany, a local run-off election was held only through postal votes in Bavaria on 29th of March 2020.

The Domestication of the State of Emergency

From a legal standpoint, the state of emergency does not play a decisive role in the German approach to the COVID-19 crisis. Nevertheless, the public discussion on the state's reactions frequently refers to this concept (see here, here, here and here). The reason behind that might be found in the influential work of infamous law scholar and political theorist *Carl Schmitt*. In his "Political Theology" he defined the sovereign as the one deciding on the state of exception, the *Ausnahmezustand*. Facing not only an economic and social, but also a life-threatening crisis, some seem to fear, others seem to hope that the Schmitt'ian prophecy will fulfill itself and the real sovereign will emerge in the emergency.

So far, no fundamental changes in the legal architecture of the German political system have been made in response to the spread of COVID-19. *Schmitt*, having been member of the German National Socialist Party (NSDAP) and opponent of parliamentarianism, obviously thought of the executive as *the* acting state power – especially in times of crisis – and approved of dictatorship as an instrument to restore orderly circumstances. It is not surprising that the role of the administration is now being thoroughly observed in and by the German public. Against the backdrop of historical impressions, the constitutional approach to the state of emergency in Germany can be interpreted as an attempt to integrate extraordinary powers in the regular legal framework of political decision making. The credo could be that exceptional situations do *not* need exceptional responses *but* democratic procedures and strict application of the rule of law.

Above all, this applies to the role of parliament, whose task it is to create the legal basis for the administrative branch to act by and in the meantime control its respective enforcement. During times of COVID-19, participation in plenary sessions of hundreds of representatives is a risky undertaking. Formal changes of the parliamentary procedural law as well as informal agreements like the parliamentary practice of pairing, are made in order to preserve the parliament's functionality. These legal measures were based on a broad political consensus to avoid the suspicion manipulating the distribution of power within parliament. Again, the suggestion to amend the constitution, made by president of the *Bundestag*, *Wolfgang Schäuble*,was declined by the opposition as well as by representatives of the majority fractions. In a letter addressed to the leaders of the parliamentary fractions, *Schäuble* considered it necessary to modify the rules on the state of emergency and enable the possibility of an emergency parliament in the current crisis through the implementation of a new Article 53b. As an alternative, he suggested virtual parliamentary sessions, which would also require constitutional modifications. The rejection of these suggestions by the members of parliament is well justified: A state of emergency is regarded as the wrong time for significant constitutional changes. Under the given circumstances, which are shaped by

tremendous uncertainties, the influence of the parliament as a diverse body should not be limited, especially when those limitations cannot be easily undone.

Although its formal position remains untouched, various constitutional law scholars (for example here and here) criticize the role of parliament and its legislature in this emergency. Currently, executive powers are being increased and centralized while civilian rights have been restricted up to an unknown degree. But is the warning of a dangerously sovereign government ("fascist-hysterical hygiene-state") justified? The complex constitutional architecture balancing the different powers still seems to work, first and foremost the German federalism. In addition to that, legal protection through courts is granted despite the health crisis. Although many judicial proceedings were suspended due to risk of infection in court hearings, the state's measures and actions to control the virus can be reviewed through preliminary legal protection in front of administrative courts. While most of the legal actions were dismissed, the higher administrative court of Mecklenburg Western Pomerania suspended the prohibition of trips to the coast of the Eastern Sea due to its disproportionately on 8th of April, 2020. The Federal Constitutional Court, the *Bundesverfassungsgericht*, had to decide over the ban of religious services. The legal action concerning this matter was dismissed on 10th of April 2020, but the court demanded a continuous consideration of these "massive interventions into the freedom of faith" in view of the development of the COVID-19 outbreak.

Critique and Crisis

Weighing the arguments, the threat of getting an authoritarian government whilst fighting the Corona pandemic in Germany seems very limited. But: the harsh criticism of the state's reaction to COVID-19 never touched upon that. Rather, critics are demanding standards set by the rule of law, especially the observance of legal procedures and the appropriate justification of civil rights restrictions. Facing COVID-19 and the difficulty to estimate risks for public health, the authorities are searching for quick and effective responses. Some suspect that the legality of these measures could be relegated to a secondary role. The major fear is that if legal concepts show a lack of validity in times of crisis, their authority might be questioned under regular conditions too.

Also, the criticism does not remain unchallenged and critics are attacked themselves. The critics of the critics depict that the threat originating from COVID-19 and the lack of real knowledge of how it can be contained are so great and unpredictable that authorities have broad leeway to decide how it should be faced. The government is said to act carefully and responsibly in order to save as many lives as possible. From their point of view, some critical voices are regarded as "shrill", their criticism as not constructive and therefore at times even detrimental.

Amidst the COVID-19 crisis, the ancient question about the notion and conception of criticism and the (scientific) public sphere in general arises anew (for example here and here). From one point of view sharp criticism can be identified as a root or at least a motor for a national crisis due to its questioning the state's legitimacy.

From the other perspective, the *Ausnahmezustand* can be regarded as a situation in which criticism has to be fierce and insisting in order to prevent the erosion of key concepts of the constitution like the rule of law and civil rights. The same is true for the discussion about the introduction of competencies as per the Infection Protection Act or emergency powers on the constitutional level: Are those necessary and therefore legitimate measures or do they rather present a dangerous shift of powers in favor of the executive?

Even if the Corona pandemic will not reveal the Schmitt'ian sovereign, it sheds a light on the very different perceptions of the state, its boundaries and the role of a critical public sphere in times of crisis.
