Dearth, Plague and Pestilence

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As everywhere, the state of emergency prevails on Verfassungsblog. The Corona crisis pushes all other issues to the sidelines and raises a thousand maximally urgent legal and constitutional questions at the same time, many of them ones which, for lack of necessity, hardly anyone has ever even thought about before. We, like everyone else around us, are doing our utmost to adapt to the situation and to increase the production of answers. Deliveries are underway, and organising them and filling the shelves and meeting the public's need for information, analysis and appraisal is our contribution to overcoming the crisis.

At the same time, of course, the state of emergency is not just the framework of all our doings right now, but also its object: What could be more delicate and problematic than a situation like this? The exception to the peaceful norm refers not least to the competences, procedures and limits of collectively binding decisions, in other words: to constitutional law and its validity. Will parts of it turn invalid now? Whose will fills the gap? What of the supposed exception will remain after the acute crisis has abated, like the mud after the flood? Where ends proportionate hazard control, where begins presumption of power and suppression? It is our task on Verfassungsblog to keep reflecting on this and will remain so for many weeks to come.

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Emergency

How well does the German *Grundgesetz* stand up to the current stress test? Not particularly well, say PIERRE THIELBÖRGER and BENEDIKT BEHLERT. The emergency constitution in the Basic Law, an overgrown cemetery of supposedly dead constitutional letters that has been slumbering undisturbed for half a century, has abruptly been shaken awake by the crisis – and, as it turns out, isn't much use in the current situation. "The lack of a clear distinction between the normal and the exceptional state which the *Grundgesetz* bestows on us for lack of explicit regulations, can … be quite dangerous", write Thielbörger and Behlert. "When the crisis has subsided – because haste is always a bad advisor – the constitutional legislators should gather and ask themselves the serious question whether the state can better prepare itself for the next comparable crisis." Memo to ourselves: we need to include this question into our ongoing project on constitutional resilience.

In **Italy**, where the crisis broke out much harder and earlier, ARIANNA VEDASCHI and CHIARA GRAZIANI come to a parallel conclusion: the emergency regulations in the Italian constitution are also blatantly inadequate.

In times of emergency and crisis, authoritarianism thrives like a virus in a petri dish, and my **Bavarian** homeland is particularly prone to make it a matter of honour to display the highest degree of robustness when it comes to manhandling potentially dangerous people. In a small Bavarian town called Mitterteich, the district authorities have imposed the first local curfew in Germany. Even if one looks favourably at this from a regulatory point of view, one should be careful to ensure that there is a sound legal basis for it. Which there isn't, according to ANDREA EDENHARTER. Neither federal infection control law nor Bavarian police law, in her opinion, provides for such a measure at present.

In the opinion of HANS-MICHAEL HEINIG, the situation is different with regard to the ban on religious services: Such an encroachment on religious freedom is justified – provided that these measures are applied with a sense of proportion. "It would be

unpleasant to find oneself in a community that has been transformed from a democratic constitutional state into a fascist-hysterical hygiene state in the shortest possible time."

Chancellor Angela Merkel has found the right balance between forcefulness and sobriety in her television address, according to many. Alas, says ROMAN LEHNER, she is not in charge. It's the federation states who are, and whose borders could become real sooner than one might think, up to a point where people get rejected at the border between Schleswig-Holstein and Hamburg (see below in the section on Europe). "The Chancellor did not have to show her teeth yesterday, but was allowed (and obliged) to say clever and correct things to appeal to the inner moral legislator in all of us. In this case the states are responsible for the heteronomous coercion. They must now show their teeth and refute Isensee's well-known dictum, according to which the countries are ultimately only 'states without emergency'. Then even the much-scolded **German** federalism can survive this crisis."

Emergency! For 100 years, this idea has aroused a certain kind of German constitutional law professors in an almost libidinous manner. 9/11, the financial crisis, the migration crisis – each time, there have been *Staatsrechtslehrer* from West Germany ready to gleefully spout all sorts of gloomy prophecies that *this time*, at last, the blissful innocence of human rights, freedom of movement, minority protection and proportionality will have a final encounter with the four riders of the apocalypse. It never happened, though. So how about now? UWE VOLKMANN, certainly not one of those emergency mongers, asks what happens if the Corona pandemic lasts too long to weigh the effectiveness and thus the proportionality of the measures against the restriction of freedom it causes.

On the other hand, it has been mostly authoritarian populist regimes who have so far tended to play down the corona crisis. Donald Trump and Boris Johnson, for example, for a long time found the prospect of mass deaths of poor, old and weak people in the **USA** and **UK** not scary enough to sacrifice a great deal of economic prosperity to prevent it, and were forced into breakneck u-turn manoeuvres only when they realised that it was precisely their boomer electorate that would be killed off in exorbitant numbers in the event of infection numbers bursting through the capacity cap of their already not exactly super-stable health care systems.

In **Brazil**, however, President Jair Bolsonaro continues undauntedly to pretend that taking the pandemic seriously is for liberal pansies and the best way to fight it is rubbing with as many shoulders in as many public mass demonstrations as you possibly can. But even in Brazil people will soon be dying, and what will become of the president and his macho posturing will be seen (if you survive). Meanwhile, EMILIO PELUSO NEDER MEYER and THOMAS BUSTAMANTE see already more than enough reasons to impeach that man.

US President Trump, they say, has tried to get his hand on a German vaccine manufacturer to secure their product for the USA exclusively. PETER-TOBIAS STOLL is investigating what compulsory licenses can do in an emergency situation: They are conceivable as a last resort, but the state already has regular access to the results through its research funding cooperations.

One of the hardest hit countries is Iran, and while the Iranian government has to take much of the blame for this, it is not alone: Even before the Corona crisis, the US sanctions regime had already led to conditions that were hardly compatible with the Iranians' right to health and life, says CHRISTOPHER ROBERTS and examines why humanitarian exceptions in sanctions regimes are often so ineffective.

Freedom and democracy

In **Poland**, on the other hand, the authoritarian populist PiS government probably cannot believe its luck. Not only because in Brussels and elsewhere suddenly no-one seems to care much anymore about judicial independence and the rule of law in Poland (if you do, which I'd strongly advise you to: here is the open letter from LAURENT PECH, KIM SCHEPPELE and WOJCIECH SADURSKI calling on Commission President Ursula von der Leyen to finally get serious about the infringement proceedings against Poland's

"muzzle law", and here is the report from JOHN MORIJN of the CJEU hearing in the matter of the Disciplinary Chamber). What may have evaporated, too, is probably the last chance to stop the consolidation of the PiS regime by democratic means – the presidential election in May. The incumbent Andrzej Duda, thanks to the faithful support of state television in his many public appearances as a level-headed crisis president, is the only one who can still effectively campaign. It's social distancing for everyone else. No wonder that the PiS government does not find it at all urgent to postpone the election, to the outrage not only of WOJCIECH SADURSKI.

In **France**, at least the first round of the local elections was still held recently, and so were the **Bavarian** municipal elections last Sunday. JOSEF FRANZ LINDNER has examined the Corona-related legal framework for this.

In **Israel**, the pandemic seems to be a godsend to some, too – if not an opportunity to abolish democracy. The incumbent Prime Minister Benjamin Netanyahu must fear that his rival Benny Gantz will form the next government in his place, which would expose him to criminal proceedings for corruption. The Speaker of the Knesset, his loyal friend, has decided to swiftly suspend Parliament, allegedly for Corona-related reasons. More than 50 constitutional law experts from Israel warn in an open letter of the consequences:

> *Under the thick veil of smoke emanating from the fight against the Coronavirus – which is undoubtedly important and vital – in the fog of this battle, the Israeli democracy is facing a grave danger. We call for the immediate convening of the Knesset and for acting without delay to establish its various committees. Especially in this time of emergency, it is necessary to stand on guard in order to prevent the erosion of the basic principles of democratic rule.*

A democracy cannot simply call off its parliament as if it were a sporting event – not least because then there is no one left to enact laws which, if necessary, would allow for more far-reaching measures than the existing **German** pandemic law does. MATTHIAS FRIEHE noticed very early on that the necessity to cancel all major public events gets the German *Bundestag* into severe trouble indeed.

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In **Germany**, the existing legal basis in the Infection Protection Act was initially used only hesitantly because the authorities feared that they would then have to pay the bill for all financial losses that anyone could suffer as a result of their orders. There is a passage in the law (§ 65 InfSG) that indeed reads as if they had to. MATTHIAS CORNILS has earned the merit of allaying these concerns to some extent: If one reads the norm in context, the authorities' liability risk remains quite manageable.

What it means when the number of infections exceeds the capacity of the health system was already apparent in **Italy** last week: intensive care physicians have to decide over life and death and who gets treatment and who is left to die. According to what criteria? An Italian medical professional association has made recommendations on this so-called "triage" situation, and philosopher WEYMA LÜBBE urgently warns against using it as a model: making "years of saved life" and maximizing "benefit" the criteria, as the Italian recommendations do, completely misunderstands the "complex reasoning behind triage" and would require physicians to "radically break with all they have been trained in terms of medical need".

Europe

What has gone largely unnoticed with all this going on is that the **German** Federal Constitutional Court has postponed the pronouncement of its ruling on the ECB's bond purchase programme. That is per se not surprising: after all, public hearings in Karlsruhe are exactly the kind of crowd events whose cancellation is expected in these days. On the other hand, one can only speculate about the content of that judgment. The responsibility for forcefully showing the ECB the limits of German democratic and sovereign statehood at the very moment when the economy of the entire Euro area is falling off a cliff was perhaps a little heavy even for the most square-shouldered guardian of the constitution in Karlsruhe. In any case, the date of the announcement has now been postponed to 5 May, a few days before the regular term of office of Court President Andreas Voßkuhle ends. Will the dilemma be resolved by then? I don't think that's likely, but what do I know?

Oh well, Europe. Where has Europe been in the last weeks? I am certainly not the only one who has wished that there was an institution that could perhaps ensure that resources get where they are needed in the crisis and counteract the temptation of the Member States to close off their borders as if the worst thing about the virus is that it somehow comes from abroad. Oh well…

"We will probably only realise after the crisis that we have lost much more than just (relatively briefly) our freedom of movement during this period," writes CONSTANTIN HRUSCHKA. "For people who believe in the European peace project, this is a frightening prospect. For once European solidarity as a concept and as a practical solution is disavowed, it will not be long before the sense of the EU as a whole is called into question."

If you want to know more about what European law allows and does not allow in terms of border controls and border closures, look no further than DANIEL THYM's exhaustive account.

ULRICH KARPENSTEIN and ROYA SANGI show that European law is not to blame for the misery: Union law grants the Member States "sufficient flexibility … to cope with the current crisis situation. No government is induced to leave the common legal area or to enter into a state of emergency free of law and coordination. The solidarity demanded by Union law seems to have fallen by the wayside very quickly, however."

In the meantime, by the way, nothing at all has improved at the Greek-Turkish border. On the contrary: the little solidarity that was still to be mobilised in the EU with the refugees at and beyond the EU external border seems to have evaporated completely now, too. Instead, we warmly welcome every Jagatee-inebriated Ischgl returnee, infected or not, as one of our own in our cuddly emergency communion, while we scream in panic for the epidemic police with every plane arriving from Tehran and every Syrian child not arriving from Moria.

All the more emphatic is my recommendation to note J. OLAF KLEIST's proposal on how the EU-Turkey deal could be replaced by an refugee and migration policy worthy of the "European values" that are supposedly so dear to us all.

And if you have more patience for reports from the supposed pre-Corona period: the reasons for the Italian Court of Cassation's acquittal of Seawatch captain Carola Rackete have recently been published. MARCO GOLDONI, FLORIAN SCHÖLER, KARL MAUER and ZARA FREUDENBERG (the latter three are legal advisors of Seawatch) have analyzed them and draw much hope from them, a resource which is in short supply theses days.

Russia, Hungary, Turkey

In Russia, President Vladimir Putin has driven his constitutional reform to the point of absurdity by trying to get around the problem of term limits by annulling his previous terms of office. Absurdity, however, should not be a matter of great concern to him, especially as his poodle of a constitutional court has meanwhile also barked approvingly. ALINA CHERVIATSOVA reports on how all this has happened.

Even before the Corona crisis, Hungary was remarkably successful in keeping the level of alarm

about the state of democracy and the the rule of law on the Danube at a manageable level out- and inside Brussels. A new law came into force at the beginning of this month suspending compensation payments for the inhumane conditions in Hungarian prisons – payments which the European Court of Human Rights had awarded to the plaintiffs. CSABA GYÖRI reports.

The issue of compensation for prisoners is a welcome propaganda tool for the Orbán regime to drill holes into the public trust into its independent judiciary. The same applies to another case which LILLA FARKAS analyses: compensation for the segregation of Roma children in the school system.

Finally: how long ago was it that so many streets were filled with fearless demonstrators on International Women's Day? I'll tell you: twelve days. In Turkey, Istanbul saw the liveliest, most peaceful demonstration in ages, and BERTIL EMRAH ODER describes on this occasion the outcome of the Gezi Park trials and its scandalous turn after the defendants' surprising acquittals.

Okay, then. I suppose this was a bit exhausting. Not just for you, I can tell you. That's what I get from skipping last week's editorial at a moment when, of all times, we publish as many posts in one day as before in a whole week, and people are sick all over the place. Well, it's done. That's it for now. Expect more, though. This is all not going to end soon.

Meanwhile, stay healthy, don't infect anyone, read Verfassungsblog and get through all this with as little damage and as much lust for life as you possibly can!

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