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ON MATTERS CONSTITUTIONAL

Sancta Corona, ora pro nobis

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The full blast of the crisis hasn't quite arrived yet in Germany. Most of us are sitting in our apartments, grounded, sedentary and netflix-numbed, the spring outside agleam like a polished object in a glass case. Some mother of a friend of a sister-in-law is said to have symptoms. Everything is the same and everything is different. No triage in Germany, unlike in Alsace, yet. We can still go out jogging. We have not yet run out of toilet paper. We are not yet sick ourselves.

As far as the constitutional state is concerned, I suppose it's safe to say that the crisis has fully broken out, though. The lack of a legal basis for the curfew in Germany at the time it was imposed may appear condonable, considering what's at stake. But what has occurred in the meantime is not. The crisis has affected all levels of the legal order. And if this statement scandalizes some as pedantic, legalistic lack of solidarity or even responsibility, then this seems to me to be only one more symptom of how dizzyingly high the temperature of the body politic has already risen.

Not allowed to leave

We don't go out anymore unless we must. We do this (I hope) out of reason and solidarity, but not just for that. We are coerced by the law: We stay at home because we must. In the Federal Republik of Germany, a patchwork quilt of decrees and ordinances dictates us to stay in unless we're allowed out.

This is a collective encroachment on fundamental rights of unprecedented dimensions, and no one should be surprised if constitutionalists do what we're best at and start pondering over proportionality and the essential content of fundamental rights. THORSTEN KINGREEN did so in a particularly powerful way at the beginning of the week. STEFAN HUSTER warns that focusing on risk groups instead of locking everybody into their own apartments might be seen as no less effective, with corresponding consequences for the "limits of solidarity". JAN-ERIK SCHIRMER cautions against the slippery slope the apparent unambiguousness of the "flatten the curve" diagram might lead us onto. LUTZ FRIEDRICH reminds the state that its job is not to patronizingly grant us rights but to safeguard them. And HANNAH RUSCHEMEIER and SASCHA DAVID PETERS show that a mere ban on contacting others would stand much better chances to survive in court than than a downright ban on leaving our homes.

The fight against the pandemic is also an administrative practice which, under the rule of law, requires a solid legal basis. There were already massive doubts about that last week, although JOHANNES BETHGE shows that this can be seen differently. ROMAN LEHNER has taken a close look at the current decrees and regulations in the federal states and is greatly puzzled by what he finds: In Berlin, for example, most people believed their mayor's announcement that only a ban on contacting others was going to be implemented – although what was actually enacted is a curfew, albeit with exceptions such as for going out jogging in pairs of two. That is still allowed, unlike such reckless acts as solitary sunbathing on a towel. If there is a rationale behind all this, the Berlin state government has yet to explain it to the hard-to-faze Berliners who mostly seem to go about their business just like before, from what I can see from my study window. In the federal state of Lower Saxony, according to Lehner, the legislator seems to suffer "from a kind of split legal personality": the decree reads in some parts like a contact ban, in other parts like a

curfew. These are by no means all the curiosities Lehner has discovered. The administrative courts will still have a lot of fun with this, and some of them already do.

Protection against infection

On Wednesday, the *Bundestag* passed a comprehensive reform of the infection protection law on which all these measures are allegedly based, among them an alleged "clarification" of the part which allows for of prohibitions to leave or enter places. In ANIKA KLAFKI's view this is hardly specific enough to support the encroachment on fundamental rights based on it.

Furthermore, this norm is not limited to the situation of emergency ("epidemic situation of national importance"), which the Bundestag can now declare and is obliged to lift again as soon as its conditions are no longer met. The power of the government to impose this kind of thing will stay even after the crisis has passed.

To raise alarm about this is not constitutional nitpicking. As CHRISTOPH MÖLLERS notes with all due severity:

> *That the most massive collective encroachment on fundamental rights in the history of the Federal Republic of Germany can take place without an adequate legal basis because it is the right thing to do in substance, this insight could shake the understanding of legality as hardly any other event since the Prussian constitutional conflict, when the King's executive seized budgetary powers with a lasting effect on the understanding of law up until the Weimar Republic. This is all the more true if – unlike at that time – no serious attempt is made by parliament to remedy this situation.*

The same applies to the "epidemic situation of national importance", which is regulated in the new § 5 IfSG. With this norm, the Federal Health Secretary Jens Spahn has tailored a range of competences for himself that make a constitutional lawyer's eyes water: not only a kind of "Federal Health Police", but the right to "issue exceptions to the provisions of this law by statutory order without the consent of the *Bundesrat*". Just so I get this right: Do we now let Mr. Spahn decide at his own discretion to which extent the law enacted by Parliament is valid or not?

Of course, all this seems to fit in well with the myth of executive empowerment in the state of emergency: enough talking, all we need now is firm and manly action, and so forth. This is mostly cryptomilitaristic humbug, though. If anything has become clear in the last few days, it is that in the hour of need – when that which the legislature did not and could not expect to happen – the legislature is called upon to adapt the legal basis of the actions of the executive to the emergency situation. At the beginning of the week, due to the infection risks caused by a public event of the scale of a *Bundestag* plenary session, there were considerations to introduce an "emergency parliament" by means of a constitutional amendment – a plan to which the aforementioned CHRISTOPH MÖLLERS has swiftly announced his energetic opposition as well: The technical challenge of keeping the Bundestag able to work without hundreds of MPs scurrying about in the narrow space of the plenary hall should be met at the level of the Parliamentary Standing Orders, not at that of the Basic Law. "In times of a strong executive, the parliaments at federal and state level have the duty to ensure their ability to act without diminishing themselves."

After the Wednesday session, there was much solemnity about how the Bundestag has proved itself in the hour of need, and I don't mean to deny that. But I would have felt even more solemn if it hadn't decided such nonsense. All the more we'll have to rely on the judiciary now, which is also under immense pressure not to place any unnecessary obstacles in the way of overcoming the crisis. This also applies to the Federal Constitutional Court in Karlsruhe, which will sooner or later have to decide whether or not the new government powers in the Infection Protection Act will stand. CARSTEN BÄCKER dares a prognosis: The court will declare the regulations and orders unconstitutional, but will leave them in force until the legislator can adapt them. In principle, this is less unusual than it may seem (§ 95.3 BVerfGG).

Speaking of the ensuring the parliament's ability to act: While the *Bundestag* could simply adapt its rules of procedure, the Bavarian state parliament faces a more difficult situation, because in Bavaria, the necessary quorum of present MPs is directly regulated in the constitution. The cavalier way in which the state parliament has handled this could become a real problem, says WALTHER MICHL: "This creates a considerable risk that all laws enacted during this phase will be under the sword of Damocles of formal unconstitutionality".

There is no lack of other examples of legally dubious measures in the fight against the spread of corona: ALEXANDER THIELE focuses on the crackdown against second home owners, which began on the East Frisian North Sea coast and has since spread to the whole of Schleswig-Holstein and Mecklenburg-Vorpommern, effectively banning people from their own (vacation) homes.

A particularly tricky business are the demands for increased surveillance in order to identify contacts of infected persons and control flows of movement, which in ordinary times would be regarded highly problematic under data protection law. OSKAR J. GSTREIN and ANDREJ ZWITTER explain the problem, and DIETER KUGELMANN warns against following the principle "necessity knows no commandment" in matters of data protection. SEBASTIAN BRETTHAUER takes a different stance: Processing location and health data in times like these is not only possible in fact, but also legally.

What works and what doesn't

And how are these things done elsewhere? In **Austria** there is also a curfew in place, which PETRA SUSSNER for its part finds problematic from a fundamental rights point of view and on top of that in conflict with the obligation to protect the rights of women who are exposed to domestic violence if confined to their homes.

How deeply rooted the logic of the state of emergency is in **French** law is highlighted in a detailed report by AURORE GAILLET and MAXIMILIAN GERHOLD. And speaking of duties of protection: In France, it's also persons exposed to infection risks who call on the state to protect their fundamental rights, to be specific: their rights to life and health under Art. 2 ECHR, by enacting even stricter measures than those already in place.

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What the authorities are allowed to do in the fight against the pandemic and what compensation claims exist, is the subject of comparative online symposium under the title "Fighting COVID 19", which we held this week with contributions from ANIKA KLAFKI and ANDREA KIESSLING (Germany), PAUL F. SCOTT (UK), WEN-CHEN CHANG (Taiwan), LEILA BARRAZA and SARAH A. WETTER (USA), YUXUE FANG (China), FELIX UHLMANN (Switzerland), DILETTA TEGA and MICHELE MASSA (Italy), TOON MOONEN and JONAS RIEMSLAGH (Belgium), SEOKMIN LEE (South Korea) and possibly more in the next days.

A negative example how not to deal with a pandemic crisis is certainly the **USA** right now. MAX STROBEL explores what this has to do with fake news and the national emergency law.

Two sorts of authoritarianism

The camp of the authoritarian populists seems to be splitting into two parts at the moment: one tries to lie its way out of the predicament in the hope to get away with pretending that everything is pretty much fine. The other part, though, follows the good old authoritarian tradition to never let a crisis go to waste and use the opportunity for a power grab and weaken the institutions which get into their way. US President Trump, for the time being and for all the power grabbing and institution weakening he has already done, belongs to the first camp. (Boris Johnson, who initially tended in this direction as well, has meanwhile tested positive for COVID 19 himself).

Hungary's Prime Minister Viktor Orbán firmly belongs to the second camp. RÉNATA UITZ compares his boundless emergency powers with the German Enabling Act of 1933 and warns that Orbán is threatening to unleash a "constitutional pandemic". (More on what Orbán is up to, here. Caution, strong nerves required)

Israel's Prime Minister Benjamin Netanyahu belongs to this camp as well. To protect him from criminal justice, his ally, the former speaker of parliament, paralyzed the Knesset under the pretext of the Corona crisis and ignored a court order, as MICHAL KRAMER reports.

This second camp may also include the newly appointed Prime Minister of **Slovenia**, Janez Janša, who has been in government for less than three weeks and, as JAKA KUKAVICA's reports, has already used the crisis to set up extra-legal structures.

That the crisis can have a direct impact on democracy is demonstrated in Poland, France and Bavaria, where elections are imminent. Should people be allowed to go to the ballot box as if nothing had happened? In **Poland** (first camp, although only in this respect) this is very much in the interest of the PiS government, which is why it's what is in all likelihood going to happen. The incumbent Andrzej Duda, who was able to campaign without competition since the outbreak of the pandemic, will win the election with minimal voter turnout. Is that illegal? It probably is, says MICHAŁ ZIOLKOWSKI, but that doesn't change much because after the PiS "judicial reforms" the matter will end up before one of the new chambers of the Supreme Court hijacked by PiS, anyway.

Speaking of the judiciary, in the context of the ongoing attacks on its independence in Poland, the recent ruling of the ECJ was a bitter disappointment to all those who had hoped for a more incisive verdict from Luxembourg. As LUKE DIMITIOS SPIEKER points out, while the Court upholds the EU law requirement to preserve judicial independence, it limits procedural access to it in the referral procedure, thus taking away with one hand what it gives with the other.

Meanwhile, in **Ukraine**, the Constitutional Court has declared large parts of President Volodymyr Zelensky's judicial reform unconstitutional, thereby strengthening the independence of the judiciary, according to ANDRII NIKOLIAK.

To return to the matter of elections in Corona times: in France, unlike in Poland, the second round of the local elections has been postponed. In **Bavaria**, on the other hand, run-off elections will be held by absentee ballot exclusively. Is that even possible? What about the principle of election publicity? The initial approach of the Bavarian state government to order postal voting simply by administrative decree was problematic, indeed. But now, since there is a proper legal basis for this in place, JOSEF FRANZ LINDNER believes that, all things considered, this is acceptable.

Borders

The economy is collapsing, first in places where the pandemic first struck; the others in the common Euro currency boat are confronted with demands for solidarity, fearing that they themselves will soon be caught up in the maelstrom. In other words, the sovereign debt crisis in the Euro area appears to be back (if it ever really was gone). JULIAN PRÖBSTL considers it legally less problematic to activate the EMS than to issue "Corona bonds". ANA BOBIĆ and MARK DAWSON examine the bond purchase programme launched by the ECB on the occasion of the pandemic (in addition to the one on which the German Constitutional Court will judge within a few weeks, shudder …)

and point out that this "signals both the increasing redundancy of the legal framework governing EMU and an opportunity to develop a new one in its place". MATTHIAS GOLDMANN finds the bond purchase programme less problematic from a legal point of view, but wonders about the sense of a strategy that is again focused on monetary policy.

The Corona crisis is first and foremost a public health crisis, and a global one, too. "Imagine the World Health Organization (WHO) had declared the outbreak of the mysterious lung ailment in the Chinese city of Wuhan a potential public health emergency of international concern already in late December 2019", muses CHRISTIAN KREUDER-SONNEN. But the cost of making this dream come true for the next pandemic would be high, and the fact that it remained an illusion this time may well be connected to the growing dependence of WHO on China.

Why can we do in the corona crisis what apparently can't in the climate crisis? THOMAS SCHOMERUS asks this question and hopes that the fight against the virus will serve as a "model" for the fight against global warming.

It is cruelly ironic that last Thursday marked the 25th anniversary of the abolition of internal border controls in the EU – exactly the day when 16 member states of the Schengen area reintroduced them as a measure against the spreading of the coronavirus. A "collateral damage" of the crisis, as CONSTANTIN HRUSCHKA notes, is the right to asylum. In fact, those who four years ago didn't succeed in their demands for closing EU internal borders and turning away refugees without a hearing appeared more than pleased to seize the opportunity now available. "It seems that the ministries responsible for asylum and the governments of the Member States of the Schengen area are now using the Corona crisis to take down the right to apply for asylum."

Meanwhile, at the Greek-Turkish border, as well as on the Greek islands, large numbers of refugees are still trapped, helplessly exposed to the looming pandemic. ANNE PERTSCH and JONAS PÜSCHMANN call on the EU to exert pressure on Greece to abandon the blatantly illegal suspension of the right to asylum, instead of making itself an accomplice in the Frontex operation.

Alright then, that's all for this exceptional week, I guess.

Let's see how the next one goes.

All the best to you, and stay home and healthy!

Max Steinbeis

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