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# **Legal Policy & Pandemics**

**The Journal of the  
Global Pandemic Network**

# Legal Policy & Pandemics

## The Journal of the Global Pandemic Network

FOUR-MONTHLY REVIEW

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## COVID-19 and Government Response in Germany. Building Resilience by Comparison of Experiences

### Part I

*Cristina Fraenkel-Haeberle*

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**Abstract.** This contribution investigates the German response to the COVID-19 pandemic. The analysis highlights the measures taken by the German government in cooperation with subnational units to mitigate the spread of infections, as well as the efforts made to stem the economic consequences of the containment measures. The emergency situation turned out to be a real stress test for the German legal system, and a serious challenge for democratic institutions.

**Keywords:** *Germany, COVID-19, Federalism, Rule of Law, Fundamental Rights*

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#### 1. The German Response to COVID-19

When COVID-19 broke out more than a year ago, Germany was initially very cautious in adopting measures to contain the disease, one reason presumably being that the genuine risk of spread of the virus was not immediately perceived.<sup>1</sup> However, as the critical nature of the situation became apparent, the German government progressively acted with a *crescendo* of prohibitions. This contribution highlights the efforts made by the German government in cooperation with subnational units to tackle the pandemic, as well as the crucial role played by the principle of the rule of law and the requirements of federalism in the German legal system, in spite of the emergency situation.

At the time of writing, the end of April 2021, a hard shutdown has been in force in Germany since mid-December 2020. The shutdown was tightened in January 2021 and was due to continue for at least several weeks. Kindergartens, schools, and shops were closed (except food shops, pharmacies, and banks), and significant events were still not

allowed. Hotels and restaurants have been completely closed since the beginning of November 2020. In February 2021, there was pressure from the *Länder* (the German federated states), which are competent in matters of culture and education, to reopen nursery schools and schools at least. At the beginning of March 2021, this prompted the federal government to draw up a general proposal for reopening, conditional on the trends of coronavirus variants and the availability of vaccines.<sup>2</sup> Unfortunately, the loosening of restrictions and the strong impact of the variants caused infection rates to soar and intensive care units to quickly reach saturation in hospitals across Germany.<sup>3</sup> Thus, the German federal government decided to apply the emergency brake (*Notbremse*) and, accordingly, proposed an amendment to the Federal Infection Protection Act (*Infektionsschutzgesetz*).<sup>4</sup> This new provision was promulgated on April 22<sup>nd</sup>, 2021, came into force the next day, and imposed a general extension of the shutdown at the national level until the end of June 2021.<sup>5</sup>

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<sup>1</sup> See more extensively Elena Buoso and Cristina Fraenkel-Haeberle, 'La Germania alla prova del coronavirus tra Stato di diritto e misure emergenziali' (2020) *federalismi.it* 20, 75-104 <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=43704>> accessed 30 September 2021.

<sup>2</sup> See <<https://archiv.cdu.de/www.cdu.de/corona/mpk-beschluesse-3.3>> accessed 30 September 2021.

<sup>3</sup> As shown on the homepage of the Robert Koch-Institut <[https://www.rki.de/EN/Home/homepage\\_node.html](https://www.rki.de/EN/Home/homepage_node.html)> accessed 30 September 2021.

<sup>4</sup> Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (*Infektionsschutzgesetz – IfSG*), 1 January 2001 (BGBl. I, p. 1045), § 28b.

<sup>5</sup> For a more detailed analysis, see Section 5 of this chapter.

## 2. National Constitutional and Legal Rules on Emergencies

The COVID emergency involves complex assessments of risk which, being unspecified due to the novel and emergent nature of the virus and associated variants, is difficult to predict and quantify. As observed by well-known German sociologist Niklas Luhmann, democratic decisions and their legitimacy are of fundamental importance in situations of extreme uncertainty, when the actual virulence of a phenomenon is unknown, and it is impossible to precisely assess whether political choices will produce the desired effect.<sup>6</sup> In line with this approach, Germany used standard parliamentary instruments to deal with the emergency, applying the available legislation, above all police law and the mentioned Federal Infection Protection Act. However, the latter was conceived for more limited epidemics and therefore had to be amended to suit the COVID-19 pandemic.<sup>7</sup>

Like many other countries with democratic and polycentric structures, a key role in crisis management was played by multilayer tables of political consultation. In Germany, this choice was also because the central state (the German Federation) has somewhat limited room to maneuver. According to the federal division of competencies, the German *Länder* were called to take a front-line role in managing the emergency, through regulations and general administrative measures, to implement the federal *Infektionsschutzgesetz (IfSG)*. In this framework (so-called executive federalism, or “*Vollzugsföderalismus*”),<sup>8</sup> the Federal Government only exercises a power of recommendation, whereas the *Länder* have executive and administrative competence. The Federal Government permanently invited the conference of the Prime Minister of the *Länder* to the negotiating table (so called “*Ministerpräsidentenkonferenz*” – *MPK*). Thus, the quest for common solutions was an essential factor for building resilience and a

hallmark of the German pandemic management system.

This institutional architecture was also reflected in the central government’s role, which was characterized by the power bestowed by the fundamental law on Chancellor Merkel to determine the direction of government policy (*Richtlinienkompetenz*).<sup>9</sup> This mechanism created convergence and a largely uniform approach throughout the country.<sup>10</sup>

In general, the Parliament did not abdicate its function in favor of the executive. Despite the secluded role of the opposition, the mechanisms of parliamentary democracy were not abandoned.<sup>11</sup> Parliament approved extraordinary measures against the pandemic in the plenary session. To do so without infecting each other, the following elementary precautions were taken. There was very pragmatic agreement on the need for one out of two members of Parliament. Since the parliamentary regulation states that the *Bundestag* can deliberate in the presence of 50% of its members,<sup>12</sup> the regulation was amended, lowering the structural quorum to a quarter of parliamentarians until the next national elections (September 26<sup>th</sup>, 2021).<sup>13</sup> This regulation was considered compliant with democratic principles since members of Parliament had in any case been given the right to attend the sessions.<sup>14</sup>

## 3. Rule of Law, Obligation to Quote, and Principle of Essentiality

The decisive role of Parliament is an expression of the great importance of the principle of legality in Germany.<sup>15</sup> Administrative activity, especially limitations to fundamental rights, must be expressly authorized by the legislative body. Fundamental rights are, therefore, real “counter-limits” for emergency measures.<sup>16</sup> In this regard, constitutional jurisprudence has developed the “principle of essentiality” (*Wesentlichkeitsprinzip*), as a derivation of democratic principles and the rule

<sup>6</sup> Niklas Luhmann, ‘Legitimation durch Verfahren’ (Frankfurt am Main, 2001), 174, 203.

<sup>7</sup> Matthias Friehe, ‘Freiheit in höchsten Nöten: Warum die Corona-Krise nicht zum Verfassungsnotstand stilisiert werden darf’ (VerfBlog, 28 March 2020) <<https://verfassungsblog.de/freiheit-in-hoechsten-noeten/>> accessed 30 September 2021.

<sup>8</sup> German Basic Law (*Grundgesetz – GG*), Art. 83.

<sup>9</sup> German Basic Law (*Grundgesetz – GG*), Art. 65 (1).

<sup>10</sup> Gerolamo Taccogna, ‘L’ordinamento giuridico tedesco di fronte al virus Sars-CoV-2’, in L. Cuocolo (ed.), *I diritti costituzionali di fronte all’emergenza Covid-19. Una prospettiva comparata*, Osservatorio emergenza Covid.19 (2020) 93 <103.-Articolo-Cuocolo-I-diritti-cost.pdf (fanti-grossi.it)> accessed 30 September 2021.

<sup>11</sup> Sophie Schönberger, ‘Die Stunde der Politik’ (VerfBlog, 29 March 2020) <<https://verfassungsblog.de/die-stunde-der-politik/>> accessed 30 September 2021.

<sup>12</sup> Geschäftsordnung des Deutschen Bundestages (GO-BT), 25 June 1980 (BGBl. I, p. 1237).

<sup>13</sup> Besondere Anwendung der Geschäftsordnung aufgrund der allgemeinen Beeinträchtigung durch COVID-19, 25 March 2020 (BGBl. I, p. 764, no. 17), § 126a GO-BT.

<sup>14</sup> Matthias Friehe, ‘Freiheit in höchsten Nöten’ (n 7).

<sup>15</sup> See Horst Dreier, ‘Rechtsstaat, Föderalismus und Demokratie in der Corona-Pandemie’ (2021) *Die Öffentliche Verwaltung*, 229.

<sup>16</sup> Anna-Bettina Kaiser, ‘Ausnahmeverfassungsrecht’ (Tübingen, 2020) 207.

of law.<sup>17</sup> In compliance with this principle, the basic rules governing the action of the public administration must be established by Parliament and not delegated to executive regulations, especially if these rules are essential for the protection of fundamental rights. This again shows the strong involvement of the Parliament in the German system.<sup>18</sup>

Moreover, Article 19 of the German Constitution, alias Basic Law (*Grundgesetz – GG*), the so-called “obligation to quote” (*Zitiergebot*), requires the legislator to expressly indicate the constitutional source of a restricted fundamental right when proposing and adopting such measures. Thus, according to the *Infektionsschutzgesetz*, for example, the right to personal freedom (Article 2, paragraph II, second sentence, *GG*), freedom of assembly (Article 8 *GG*), and freedom of movement (Art. 11, paragraph I, *GG*) may be affected.

Solid protection of fundamental rights, as a barrier to the power of state bodies, even in emergency situations, is also provided by another provision of the German Basic Law (Article 19, paragraph II, *GG*), according to which in no case can the indelible core of a fundamental right be infringed (so-called “*Wesensgehaltsgarantie*”).<sup>19</sup> This absolute bar is based on the hypothesis that the dignity of man is an inalienable right, under Art. 1, paragraph I, *GG*, constitutes the essential nucleus of every fundamental right and enjoys absolute protection.<sup>20</sup>

#### 4. Government Response to COVID-19: Deactivation of the “Debt Brake”

Germany quickly perceived COVID-19 as having dramatic downsides for the economy. In March 2020, immediately after the imposition of shutdown by all the *Länder*, and with remarkable speed and a vast majority, the German Parliament

(*Bundestag*) passed a supplementary budget allowing new debt of over 150 billion EUR. The package was approved by the second chamber of Parliament (*Bundesrat*) two days later. The measure necessarily entailed deactivating the so-called “debt brake” (*Schuldenbremse*), added to the German Constitution in 2009.<sup>21</sup> According to this provision, the ban on contracting new debt (under Article 115, paragraph II *GG*) can be waived “in the event of natural disasters or extraordinary emergency situations beyond state control and that significantly threaten public finances.” An absolute majority of the *Bundestag* (so called “*Kanzlermehrheit*”, which is the majority required by Art. 63 *GG* for election of the Chancellor) is necessary to waive the ban, and the resolution must be accompanied by a repayment plan with an adequate amortization period. Therefore, it was decided that debt contracted due to the pandemic could be paid off in 20 years, starting 2023.<sup>22</sup>

For several years after the economic crisis of 2008, the Minister of Finance strenuously opposed a budget deficit, remaining firmly anchored to the ideal of the so-called *schwarze Null* (balanced budget).<sup>23</sup> However, with the spread of the pandemic, the government was paradoxically very eager to adopt immediate support measures to the economy, called *Soforthilfe*. The social-democratic Minister of Finance, Olaf Scholz, declared that he was a “convinced Keynesian,”<sup>24</sup> sustaining the economic theories of John Maynard Keynes regarding anti-cyclic measures and deficit spending by the state in times of crisis.

The program of immediate measures to support the economy included lump-sum subsidies to micro-enterprises and self-employed workers. The goal was to ensure the economic survival of companies, allowing them to overcome liquidity problems caused by the pandemic and the closure

<sup>17</sup> Volker Boehme-Neßler, ‘Das Parlament in der Pandemie – Zum Demokratiegrundsatz am Beispiel von § 28a InfSchG’ (2021) *Die Öffentliche Verwaltung*, 243.

<sup>18</sup> Hartmut Maurer and Christian Waldhoff, ‘Allgemeines Verwaltungsrecht’ (München, 2017) § 6, marginal note 12.

<sup>19</sup> According to the interpretation of the Federal Constitutional Court, the *Wesensgehalt* (essential content) must be determined “for each fundamental right on the basis of its particular relevance in the general context” (Judgement of the Federal Constitutional Court, 18 July 1967, *BVerfGE* 22, 180, 219).

<sup>20</sup> Peter Häberle, ‘Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG’ (Heidelberg, 1983).

<sup>21</sup> Gesetz zur Ausführung von Artikel 115 des Grundgesetzes, 10 August 2009 (BGBl I, p. 2702), § 6 (*Ausnahmesituationen*).

<sup>22</sup> This long loan period has been criticized by scholars with reference to the recent high frequency of exceptional

events, such as the outbreaks of BSE, SARS and bird flu, aid to Greece and the migration crisis, all of which required so-called “emergency legislation” (*Krisengesetzgebung*); see H.-G. Henneke, ‘Coronabedingte Finanzschäden in den (Kommunal-)Haushalten isolieren?’ (2020) *Deutsches Verwaltungsblatt*, 725; A. Schwertfeger, ‘Krisengesetzgebung’ (Tübingen, 2018).

<sup>23</sup> Von Michael Sauga, ‘Die schwarze Null ist gut für Deutschland’ (Spiegelonline, 4 May 2018), <[www.spiegel.de/spiegel/olaf-scholz-will-keine-neuen-schuldenmachen-warum-das-gut-ist-a-1206284.html](http://www.spiegel.de/spiegel/olaf-scholz-will-keine-neuen-schuldenmachen-warum-das-gut-ist-a-1206284.html)> accessed 30 September 2021.

<sup>24</sup> Martin Greive and Jan Hildebrand, Bundesregierung spannt gigantischen Schutzschirm: ‘Alle Waffen auf den Tisch’, (Handelsblatt, 13 March 2020) <[www.handelsblatt.com/politik/deutschland/coronavirus-bundesregierung-spannt-gigantischen-schutzschirm-alle-waffen-auf-den-tisch/25642060.html](http://www.handelsblatt.com/politik/deutschland/coronavirus-bundesregierung-spannt-gigantischen-schutzschirm-alle-waffen-auf-den-tisch/25642060.html)> accessed 30 September 2021.

period.<sup>25</sup> In addition, a “fund for stabilization of the economy” (*Wirtschaftsstabilisierungsfonds*) was activated to support larger companies and protect employment through loans.<sup>26</sup> Allocations were also made to hospitals, health facilities, scientific research, and the epidemiology service (*Gesundheitsämter*). In the initial phase of the pandemic, Germany decreed a massive increase in the number of beds in intensive care units (ICUs), already very high per capita.<sup>27</sup> The total now could reach more than 30,000 units. To ensure complete use of existing capacity, an online national register was created for real-time monitoring of ICU beds (DIVI-register).<sup>28</sup>

Other funds to support the economy have been allocated since the end of April 2020, when a first partial loosening of the restrictions began. The government approved a progressive increase in the redundancy fund (*Kurzarbeitergeld*) and extended unemployment benefits. Support was also provided for restaurants, and VAT was reduced from 19% to 16% during July-December 2020.

In March 2020, to adapt civil law to the aftermath of the pandemic, the Bundestag passed a law to mitigate the effects of COVID-19 in civil, bankruptcy, and criminal proceedings. It was included among the preliminary provisions of the civil code (Art. 240 *Einführungsgesetz BGB – EGBGB*).<sup>29</sup> This provision includes an extension of time (*moratorium*) for fulfilling a series of obligations, including payment of rents, leases, mortgages, utilities, and supply services. In this way, the legislator proposed a new balance of the mutual obligations of contracting parties, following

restrictions connected with the shutdown.<sup>30</sup>

## 5. Adaptation of the existing Federal Infection Protection Act (*Infektionsschutzgesetz*)

The ordinary legislative basis for the fight against COVID-19 is provided by the mentioned *Infektionsschutzgesetz (IfSG)*, which came into force on January 1<sup>st</sup>, 2001.<sup>31</sup> Thus the response to the pandemic was based on existing legislation, which was repeatedly adapted to the challenge of the pandemic in March 2020,<sup>32</sup> May 2020,<sup>33</sup> November 2020,<sup>34</sup> and April 2021.<sup>35</sup>

In March 2020, the federal government's powers were extended by amendment of Art. 5 (2) *IfSG*, a very controversial provision that empowers the Ministry of Health to regulate basic medical care, derogating from the *IfSG* or its regulations if the emergency so requires. This power only exists if the German *Bundestag* determines an “epidemic situation of national significance.” The *Bundestag* also decides when the epidemic situation has ceased.<sup>36</sup> Initially, the *Infektionsschutzgesetz* did not contain a legal definition of “epidemic situation of national significance.” With the amendment passed in November 2020, Art. 5 (1) *IfSG* defines the prerequisites for an epidemic situation of national significance, namely a severe threat to public health throughout the country.<sup>37</sup>

According to a legislative change introduced in March 2020, loss of income caused by having to look after children while schools were closed is eligible for compensation.<sup>38</sup> According to legal doctrine, these compensatory measures are

<sup>25</sup> See <[www.bundestag.de/dokumente/textarchiv/2020/kw13-de-corona-schuldenbremse-688956](http://www.bundestag.de/dokumente/textarchiv/2020/kw13-de-corona-schuldenbremse-688956)> accessed 30 September 2021.

<sup>26</sup> Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds, 27 March 2020 (BGBl. I, p. 543). For further details see Bundesregierung beschliesst weitergehenden KfW-Schnellkredit für der Mittelstand (Bundesministerium für Wirtschaft und Energie, Bundesministerium für der Finanzen, KfW) 6 April 2020 <<https://www.bmw.de/Redaktion/DE/Pressemitteilung/2020/20200406-bundesregierung-beschliesstweitergehenden-kfw-schnellkredit-fuerden-mittelstand.html>> accessed 30 September 2021. See also Thorsten Ingo Schmidt, ‘Kreditaufnahme in der Pandemie’ (2021) *JuristenZeitung*, 382.

<sup>27</sup> See <<https://www.bundesgesundheitsministerium.de/presse/pressemitteilungen/2020/1-quartal/corona-gesetzespaket-im-bundesrat.html>> accessed 30 September 2021.

<sup>28</sup> See below Elena Buoso, Part II. Main Issues Raised by Covid-19 Response in Selected Topics, n 65-66.

<sup>29</sup> Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht, 27 March 2020 (BGBl. I, p. 569).

<sup>30</sup> Christian Wolf and others, ‘Die zivilrechtlichen Auswirkungen des COVID-19-Gesetzes’ (2020) *Juristische Arbeitsblätter*, 401.

<sup>31</sup> See Peter Häberle, Hans Joachim Lutz, ‘Infektionsschutzgesetz Kommentar’ (München, 2020).

<sup>32</sup> Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 27 March 2020 (BGBl. I, p. 587).

<sup>33</sup> Zweites Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 14 May 2020 (BGBl. I, p. 1018).

<sup>34</sup> Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 18 November 2020 (BGBl. I, p. 2397).

<sup>35</sup> The last changes were introduced by Art. 1 of the Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, 22 May 2021 (BGBl. I, p. 802).

<sup>36</sup> Micheal Fuchs, ‘Corona, ‘Gesundheitsdiktatur’ und ‘Legisid’ (2020) *Die Öffentliche Verwaltung*, 653; Thomas Mayen, ‘Der verordnete Ausnahmezustand. Zur Verfassungsmäßigkeit der Befugnisse des Bundesministeriums für Gesundheit nach § 5 IfSG’ (2020) *Neue Zeitschrift für Verwaltungsrecht*, 828.

<sup>37</sup> § 5 (1) *IfSG*.

<sup>38</sup> § 56a *IfSG*.



justified to socialize risk and demonstrate a general liability of the welfare state.<sup>39</sup>

Another critical amendment, introduced in November 2020, consists in the analytical listing of all the protection measures that can be adopted to fight the spread of infection, such as social distancing, wearing masks, hygienic practices in companies and government offices, a ban or limitation on cultural, sporting and leisure events, a ban on tourist travel and closure of restaurants and hotels.<sup>40</sup> This detailed provision again demonstrates the influential role of Parliament and the vital significance of the principle of legality in the German system, according to which the acts of the executive power must always be “authorized” by the legislator.

Finally, the fourth amendment came into force on April 23<sup>rd</sup>, 2020, introducing the “*Bundesnotbremse*” (federal emergency brake), which is activated when the “*Sieben-Tage-Inzidenz*” (seven-day incidence) that is the weekly average of infections per 100,000 people exceeds 100 on three consecutive days in a city or district. The measures envisage a curfew from 10 pm to 5 am, permission to meet only one person from outside the family unit, as well as the closing of shops, except grocery stores, florists, and booksellers. In order to buy in other shops, a negative test is needed and an appointment must be arranged. With a seven-day incidence higher than 150, only the pickup of ordered goods is allowed. Furthermore, with a seven-day incidence of 100, schools must alternate in person and distance learning, and with an incidence of 165, only distance learning is permitted.<sup>41</sup>

## 6. Preliminary Conclusions

Overall, the German response to COVID-19 was managed according to the principles of the rule of law and the requirements of federalism. In addition, the pandemic showed that despite the federal structure of the German legal system, it was possible to obtain broad agreement on decisions essential for tackling the pandemic, at least in the initial phase of the shutdown. This allowed coherence of the solutions adopted, in line with the principle of cooperative federalism and mutual consideration (*bündisches Einstehen füreinander*), a

leading criterion of the German legal system, not only in the field of financial relations.<sup>42</sup>

Over the months, however, signs of impatience have begun to show at meetings of the 16 prime ministers of the *Länder* with Chancellor Merkel, the mentioned *Premierministerkonferenzen – MPK*. The search for consensus has become increasingly difficult, transforming the meetings into nocturnal marathons from which poorly considered decisions emerge. Indeed, the meeting scheduled for April 12<sup>th</sup>, 2021 was canceled at the last moment when it became clear that no common ground could be established. The federal equilibrium, maintained until then, had broken down. Almost everybody agreed on the need to urgently mitigate the spread of infection and pressure on intensive care units, but there was no unanimity on the measures to adopt.

Therefore, the center of gravity of decision-making shifted to the federal level with the fourth amendment of the *Infektionsschutzgesetz* of April 2021, which stipulates binding national parameters for contagion containment.<sup>43</sup> As the discussion in the *Bundesrat* (the *Länder* Chamber) showed, the amendment was seen as capitulating to the federal level,<sup>44</sup> though the law was passed unanimously. The representatives of the *Länder* begrudgingly agreed that, since urgent action was necessary, dissent on how to act should take second place. In response, the opposition sharply criticized the complicated system of percentages (*Zahlenakrobatik*), on which the containment measures are based. The liberal party (*Freie Demokraten – FDP*) immediately announced an appeal to the Federal Constitutional Court against the curfew, considered to violate fundamental freedoms protected by the *Grundgesetz*, also because the curfew still applies to those who have been vaccinated.

In general, it may be added that a unique feature of the German response to COVID-19 is the criterion of social distancing instead of lockdown. In most *Länder*, only interpersonal contact has been prohibited (*Kontaktsperr/Kontaktverbot*).<sup>45</sup> Containment measures, such as travel restrictions and staying at home (*Ausgangssperre/Ausgangsbeschränkung*), applied in Spain, Italy, France, and other European countries, have only been imposed in a minority of

<sup>39</sup> Peter Itzel, 'Staatliche Entschädigung in Zeiten der Pandemie' (2020) *Deutsches Verwaltungsblatt*, 792.

<sup>40</sup> § 28a *IfSG*.

<sup>41</sup> § 28b *IfSG*.

<sup>42</sup> Judgement of the Federal Constitutional Court, 19 October 2006, *BVerfGE* 72, 330, 386.

<sup>43</sup> See footnote 35.

<sup>44</sup> 'Tiefpunkt der föderalen Kultur der Bundesrepublik Deutschland' (low point of federal

culture in the Federal Republic of Germany), as the decision was defined by Reiner Haseloff, Prime Minister of Saxony-Anhalt.

<sup>45</sup> As for example in the regulations of Berlin of 22 March 2020 (*GVBl.* 2020, p. 220) and the *Land Mecklenburg-Vorpommern* of 17 March 2020 (*GVOBl.* 2020, p. 82)

*Länder*, including Bavaria.<sup>46</sup> The reason for this solution is a long-standing controversy regarding whether the Federal Infection Protection Act is an appropriate legal basis for preventing the entire population from leaving their homes.<sup>47</sup> Against this backdrop, the battle over the proportionality and legitimacy of the new containment measures, especially the curfew, is yet to be fought, even if the restrictions imposed have a limited duration.

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<sup>46</sup> See *Bayerisches Infektionsschutzgesetz (BayIfSG)* of 25 March 2020 (*GVBl.* 2020, p. 174).

<sup>47</sup> Eike Ziekow, 'Die Verfassungsmäßigkeit von sogenannten, Ausgangssperren 'nach dem Infektionsschutzgesetz' (2020) *Deutsches Verwaltungsblatt*, 732.

## Part II

## Main Issues Raised by Covid-19 Response in Selected Topics

Elena Buoso

**Abstract.** The pandemic crisis has been an accelerator of many ongoing developments in the public administration but also in the society. It has also made clear the need for action in several key areas, in the immediate but also beyond the emergency. This contribution will address therefore some of the significant issues that have occupied the German system: the introduction of (in some cases mandatory) home office and home schooling; the digitalization and the simplification of the administrative procedure and public procurement; the innovations in the healthcare system. Finally, the reaction of the judicial system on the containment measures and the correlated compression of fundamental rights

**Keywords:** Germany, Pandemic Containment, Healthcare, Digital Tools, Judicial Review

### 1. Home Office: Contact Reduction at Work

The home office has become - where possible - *the* way of working during the shutdown and has, thus far, remained as preferred option afterward. In Germany, this model was significantly practiced before the pandemic compared to other countries. For example, a survey at the end of March 2020 showed that 43% of respondents already worked from home at least one day a week before COVID-19,<sup>48</sup> and an analysis taken on behalf of the Federal Ministry for Labour and Social Affairs stated that over two-thirds of the participants wished to work from home at least several days a week/month after the pandemic.<sup>49</sup>

In 2020, the Ministry issued the SARS-CoV Occupational Health and Safety Regulation,

rendering employers and employees' obligations and rights equal both in a home office and office.<sup>50</sup> In January 2021, the Bund and *Länder* agreed to promote working from home as a practice.<sup>51</sup> In addition, federal regulation was introduced, requiring employers to organize office work so that it can be done from home unless there are compelling needs that require physical presence at the workplace.<sup>52</sup> At the same time, the federal states and other local authorities have taken similar action concerning the home office in their administrations.<sup>53</sup>

On the one hand, these regulations encouraging working from a home office are being modified, including from July 1<sup>st</sup>, 2021, with the option for employers to reintroduce primarily traditional work arrangements, subject to restrictive

<sup>48</sup> The data are available at 'Home Office ist mehr als eine vorübergehende Krisenmaßnahme' (*Manage It*, 30 March 2020) <<https://ap-verlag.de/home-office-ist-mehr-als-eine-voruebergehende-krisemassnahme/59444/>> accessed 30 September 2021. The survey also shows that, in an international comparison, German workers are well equipped for mobile work, as 57% of them has a room or area of the house dedicated to the purpose. They also report that 49% spend the same amount of time spent in the workplace in the home office. 74% also stated that productivity at home is the same if not higher than in the office, while the remaining 26% complained of the loss of productivity linked to the distance from colleagues and the consequent communication difficulties.

<sup>49</sup> See the report of Holger Bonin and others, BMAS Kurzepertise. Verbreitung und Auswirkungen von mobiler Arbeit und Homeoffice (IZA Institute of Labour Economics Research Report, n. 99, 2020) 18 <<https://nbn-resolving.org/urn:nbn:de:0168-ssoar-70079-5>> accessed 20 August 2021. See also M. Schattenberg, Work from home has come to stay (Deutsche Bank Germany monitor 1/2021) 6.

<sup>50</sup> Arbeitsschutzausschüsse beim BMAS, SARS-CoV-2-Arbeitsschutzregel (GMBI, Aug. 20, 2020) 484. Last amended on 7 May 2021 (GMBI, May 7, 2021) 622.

<sup>51</sup> Conference of Prime Ministers with the Chancellor, Decision 19 January 2021 <[www.bundesregierung.de/suche/bund-laender-beschluss-1841048](http://www.bundesregierung.de/suche/bund-laender-beschluss-1841048)> accessed 30 September 2021.

<sup>52</sup> Ministry for Labour and Social Affairs SARS-CoV-2-Arbeitsschutzverordnung (*Corona-ArbSchV*) (2021) § 2, section 4 <[www.bundesanzeiger.de](http://www.bundesanzeiger.de)> accessed 30 September 2021.

<sup>53</sup> In November 2020 the number of public servants in home offices in North Rhine-Westphalia was 32.900, more than double (+117.7 percent) than in 2019: State Office for Information und Technik Nordrhein-Westfalen IT.NRW:Zahl der Home-Office-Plätze verdoppelt (IT.NRW, 9 December 2020) <[www.it.nrw/itnrw-zahl-der-home-office-plaetze-verdoppelt-101915](http://www.it.nrw/itnrw-zahl-der-home-office-plaetze-verdoppelt-101915)> accessed 30 September 2021. See also Von Wolfgang Görl, 'Wie eine Stadtverwaltung im Home-Office funktioniert' (2020) Süddeutsche Zeitung <[www.sueddeutsche.de/muenchen/muenchen-stadtverwaltung-aemter-home-office-1.4861999](http://www.sueddeutsche.de/muenchen/muenchen-stadtverwaltung-aemter-home-office-1.4861999)> accessed 30 September 2021.

conditions regarding workplace contacts, COVID testing, and vaccines.<sup>54</sup> On the other hand, the home office has been permanently introduced as mandatory for employers and employees in the Federal Infection Protection Act when the so-called “*Notbremse*” is activated because the incidence of 100 infections has been exceeded (art. 28b, section 7, *InfSchG*).

## 2. Homeschooling

Since 2020, the German central government and the federal states have intervened with financial contributions to support schools and families in purchasing computers and upgraded internet access.<sup>55</sup> However, homeschooling has not been a success. The educational offerings have been uneven because the schools had very different technical equipment and the ministerial guidelines left - also for that reason - a lot of discretion to school directors and teachers.<sup>56</sup> The resulting heterogeneous educational offerings has often significantly disadvantaged students from socially vulnerable families.<sup>57</sup>

Therefore, many teachers’ and parents’ associations are asking the *Länder*, which has jurisdiction over school policy, for more incisive intervention. In March 2021, for example, the *Land* of Berlin changed its School Law to allow those pupils who wish to repeat a year without it affecting their school career. At the same time, during the 2020/2021 school year, the law required that all students in a particular grade for designated degree programs move up to the next grade, regardless of

votes.<sup>58</sup> Several universities are also introducing similar rules, particularly extending the periods to complete all examinations.

## 3. Digital Administration and Public Procurement

The pandemic slightly accelerated the processes of modernization and digitalization of the administration, which was in progress for several years and had been established in particular by the *E-Government Gesetz* of 2013<sup>59</sup> and the Digital Agenda of 2014.<sup>60</sup> The pandemic response has not, in this sense, been an attempt to introduce profound changes.

Additionally, in the area of procurement law, Germany has reacted cautiously. In contrast, in other legal systems – such as in Italy – the pandemic has triggered intense discussion regarding simplification and ad hoc procedures for procurement. The German Ministry for the Economy and Energy called for the ordinary normal simplified and negotiated procedures already contemplated in the German law, in line with the European Commission’s recommendations for contracts above the EU threshold, to be used in pandemic responses.<sup>61</sup> In July 2020, the Ministry intervened with binding directives to simplify procurement procedures and raise the thresholds for direct awards.<sup>62</sup>

There has been no acceleration of the process of digitization of above-threshold contracts, which is already an ongoing concern, for example, the electronic register of procedures and the online

<sup>54</sup> See the draft of the new SARS-CoV-2-Arbeitsschutzverordnung of 1 June 2021, available on <[www.bmas.de](http://www.bmas.de)>.

<sup>55</sup> The various possibilities included in the ‘DigitalPakt Schule’ are described in detail on the website of the Ministry for Education and Research <[www.bmbf.de/de/wissenswertes-zum-digitalpaktschule6496.php](http://www.bmbf.de/de/wissenswertes-zum-digitalpaktschule6496.php)> and of the Federal Government <[www.bundesregierung.de/bregde/themen/coronavirus/unterstuetzung-fuer-familien-1738334](http://www.bundesregierung.de/bregde/themen/coronavirus/unterstuetzung-fuer-familien-1738334)> accessed 30 September 2021.

<sup>56</sup> Ludger Wößmann and others, ‘Bildung erneut im Lockdown: Wie verbrachten Schulkinder die Schulschließungen Anfang 2021?’ (2021) *Ifo Schnelldienst* 74, 36; Detlef Fickermann and others, ‘Bibliographie zum Thema «Schule und Corona»’ (2021) *Die Deutsche Schule* 17, 213–233.

<sup>57</sup> Ludger Wößmann and others, ‘Bildung erneut im Lockdown: Wie verbrachten Schulkinder die Schulschließungen Anfang 2021?’ (2021) *Ifo Schnelldienst* 74, 47.

<sup>58</sup> Schulgesetz für das Land Berlin - (Schulgesetz - SchulG) (GVBl. Berlin, 2004, I, 26) §129a amended by Gesetz zur Anpassung schulrechtlicher Regelungen im Rahmen der SARS-CoV-2-Pandemie im Schuljahr 2020/2021 (GVBl. Berlin, 2021, I, 256).

<sup>59</sup> E-Government-Gesetz of 25 July 2013 (BGBl 2013, I, 2749). See L. Prell, ‘E-Government: Paradigmenwechsel in Verwaltung und Verwaltungsrecht?’ (2018) *NVwZ*, 1255.

<sup>60</sup> Germany Digital Agenda 2014 - 2017 adopted by Federal Cabinet on August 20, 2014 <[www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2014/digital-agenda.html](http://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2014/digital-agenda.html)> accessed 30 September 2021.

<sup>61</sup> Ministry for Economic Affairs and Energy, Rundschriften zur Anwendung des Vergaberechts im Zusammenhang mit der Beschaffung von Leistungen zur Eindämmung der Ausbreitung des neuartigen Coronavirus SARS-CoV-2, (19 March 2020) <<https://www.bmwi.de/Redaktion/DE/Downloads/P-R/rundschriften-anwendung-vergaberecht.html>> accessed 30 September 2021.

<sup>62</sup> Federal Ministry for Economic Affairs and Energy, Verbindliche Handlungsleitlinien für die Bundesverwaltung für die Vergabe öffentlicher Aufträge zur Beschleunigung investiver Maßnahmen zur Bewältigung der wirtschaftlichen Folgen der COVID-19-Pandemie (8 July 2020) <[www.bmwi.de/Redaktion/DE/Downloads/H/handlungsleitlinien-vergr-corona.html](http://www.bmwi.de/Redaktion/DE/Downloads/H/handlungsleitlinien-vergr-corona.html)> accessed 30 September 2021. See Jonas Jürgens, ‘Das Vergaberecht in der (Corona)Krise: Zwischen Beschleunigung und Protektionismus’ (2020) *Vergaberecht*, 4/2020, 578-583.



access to procurement documents. The *Länder* introduced some changes for procurements below the EU threshold, such as submitting bids by email or an extended possibility of using the simplified electronic procedure.<sup>63</sup>

At present, there have been no considerable, permanent changes in this sector and the new rules are effective only until December 31<sup>st</sup>, 2021.

#### 4. Healthcare System and Digital Tools

According to the division of administrative responsibilities discussed in Part I, local health offices play a crucial role in monitoring and quarantine management within the framework of pandemic containment of the *Länder*.

Avoiding the collapse of the healthcare system has been one of the primary goals from the earliest stages of the pandemic, pursued not only by closing commercial activities and other preventative measures but also by increasing the number of hospitals (for this purpose, the Federal Building Code has been amended)<sup>64</sup> and intensive care beds (ICU). As the German Hospital Society wrote in September 2021, there were approximately 28,000 ICU beds in Germany before the pandemic, 22,000 equipped with ventilators. The occupancy rate of ICU beds was, on average, 70 to 80 percent at the time. Nationwide capacities were expanded. The number of operable ICU beds with ventilator capability suitable for COVID-19 patients increased to more than 28,000. There is an additional reserve of beds that can be activated within a week, which fluctuates between 10,000 and 12,000, depending on the staffing situation at a given time, coming to a maximum amount of 40,000 units. This reserve will

<sup>63</sup> For example Government of Baden-Württemberg, Verwaltungsvorschrift der Landesregierung zur Beschleunigung der Vergabe öffentlicher Aufträge zur Bewältigung der wirtschaftlichen Folgen der COVID-19-Pandemie - VwV Investitionsfördermaßnahmen öA (20 August 2020) Az. 64-4460.0/433 < <https://wm.baden-wuerttemberg.de/de/wirtschaft/aufsicht-und-recht/oefentliches-auftragswesen/landesrechtlichevorschriften/>>. An updated list of the ministerial indications currently in force in the *Länder*: <[www.forum-vergabe.de/news-detail/beschaffungen-in-der-corona-pandemie-fortlaufend-aktualisiert-8164/](http://www.forum-vergabe.de/news-detail/beschaffungen-in-der-corona-pandemie-fortlaufend-aktualisiert-8164/)> accessed 30 September 2021.

<sup>64</sup> See Baugesetzbuch § 246b; Johann Hartl, 'Öffentlichkeitsbeteiligung unter Pandemie-Einschränkungen. PlanSiG - ein unglückliches Kürzel in unglücklichen Zeiten' (2020) *Alternative Kommunalpolitik*, 4/2020, 54-56; Johann Hartl 'Befristete Regelungen in Corona-Zeiten. Ein Überblick zu aktuellen Regelungen im Planungsrecht' (2020) *Planerin* 3/2020, 55-56; R. Blechschmidt, '§ 246b BauGB Sonderregelungen für Anlagen für gesundheitliche Zwecke im Zuge der COVID-19-Pandemie', in Werner Ernst, Willy Zinkahn, Walter Bielenberg, Michael Krautzberger (eds), *Baugesetzbuch Kommentar (Beck, München, 2020)*.

become available through cutbacks in standard care and other measures.<sup>65</sup> In addition, an electronic registry of ICU and special units linked to COVID was created to monitor hospital stress levels – the so-called DIVI-Register.<sup>66</sup>

To relieve the burden on local health offices, the federal State has developed several digital tools:

- a) SORMAS (Surveillance Outbreak Response Management and Analysis System) for better management of contact tracing and contact chains;
- b) a digital symptom diary for less labor-intensive and resource-efficient care and management of isolated and quarantined persons, integrated into SORMAS;
- c) CovBot as an AI-supported telephone assistant for a relevant relief of the telephone lines of the health authorities;
- d) DEMIS (German Electronic Reporting and Information System for Infection protection) for a fast and nationwide standardized digital reporting and information processing of positive SARS-CoV-2 infectious agent detections.<sup>67</sup>

A federal vaccination plan has been in place since November 2020, and vaccinations began at the end of December 2020,<sup>68</sup> starting with a few tens of thousands of shots and currently reaching a peak of over 1.3 million shots a day.<sup>69</sup> The federal government is responsible for procuring vaccines, while the states provide the necessary equipment for vaccination centers and mobile vaccination units.

##### 4.1. Covid-19 Tracing Apps

In April 2020, the Robert Koch Institute developed an application that processes data from fitness

<sup>65</sup> See the press release of the DKGEV September 2021 <[www.dkgev.de/dkg/coronavirus-fakten-und-infos/](http://www.dkgev.de/dkg/coronavirus-fakten-und-infos/)> accessed 10 September 2021. See also Boris Augurzky and others, *Analysen zum Leistungsgeschehen der Krankenhäuser und zur Ausgleichspauschale in der Corona-Krise* (RWI-Leibniz Institute for Economic Research and the Technische Universität Berlin, 2021) 4.

<sup>66</sup> The register can be accessed on <[www.intensivregister.de/#/index](http://www.intensivregister.de/#/index)> accessed 30 September 2021.

<sup>67</sup> See 93rd Conference of Health Ministers Decision 6 November 2020 <[www.gmkonline.de/Beschluesse.html](http://www.gmkonline.de/Beschluesse.html)>. accessed 30 September 2021.

<sup>68</sup> Nationale Impfstrategie COVID-19 (Bundesministerium für Gesundheit, Robert Koch Institute, Paul-Ehrlich-Institute, BZgA, 6 November 2020) <[www.rki.de/DE/Content/Infekt/Impfen/ImpfungenAZ/COVID19/Impfstrategie\\_Covid19.html](http://www.rki.de/DE/Content/Infekt/Impfen/ImpfungenAZ/COVID19/Impfstrategie_Covid19.html)> accessed 30 September 2021.

<sup>69</sup> An updated day-by-day vaccination quota monitoring is held by the Robert Koch Institute: <[www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/Daten/Impfquotenmonitoring.html;jsessionid=F2DD0F74E043DFAA4E316FF92FC71DC0.internet061?nn=13490888](http://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Daten/Impfquotenmonitoring.html;jsessionid=F2DD0F74E043DFAA4E316FF92FC71DC0.internet061?nn=13490888)> accessed 30 September 2021.

devices and smartwatches, requesting a “donation” of data from users. Contrary to expectations, the request has been accepted by more than half a million users, even though the donated data is not anonymous and is detailed, including sensitive data on individual health status.<sup>70</sup>

Also available since June 2020 is the Corona-warn-app<sup>71</sup> developed by the federal government with an open-source system according to the Pan-European Privacy-Preserving Proximity Tracing Protocol.<sup>72</sup> Its digital contact tracing differs from approaches used in other countries<sup>73</sup> because there is no data collection on GPS position or repeater in the German app; instead, it uses only Bluetooth technology to register devices of COVID-positive tested users that come closer than two meters for at least 15 minutes. The app communicates with a central server once a day and sends out an alert if you have approached a COVID-positive individual. The use of the warn-app is voluntary and privacy safe since it does not store personal data but is based on randomly generated pseudonymized identification numbers, which change at regular intervals so that the developers and managers do not know the identity of a given ID or where the users are. The Corona-warn app is also helpful to obtain the EU Digital COVID Certificate directly - in the form of a QR-code - that can be requested otherwise to medical doctors and pharmacies authorized to issue it.<sup>74</sup>

Since the beginning of 2021, another commercial app (Luca-app) has been available. It is based on the capture of cluster-specific codes (QR codes) that the user must scan with their phone to enter restaurants, theaters, and other places open

to the public that subscribe to this tracking system.<sup>75</sup>

Although the number of downloads is relatively high (28 million for the Corona-warn-app<sup>76</sup> and about one million for the Luca-app<sup>77</sup>), these apps have not proven to be very effective for pandemic containment.<sup>78</sup>

## 5. Judicial Power and Fundamental Rights Protection in the Pandemic

Containment measures have compressed fundamental rights in a way unknown to the post-war German system. The judicial review of legislative and administrative decisions immediately came into effect, ensuring fundamental rights protections. This has led to an exponential increase in administrative and constitutional litigation, and the rights protection system has shown its effectiveness. In the pandemic stress test, fundamental rights have once again shown to act as duties to protect (*Schutzpflicht*) and as rights to defend (*Abwehrrecht*). These two dimensions must be balanced in the individual case.

According to the German Judges Association (DRB), more than 10,000 summary proceedings and lawsuits against anti-COVID measures were decided by the administrative and constitutional courts in 2020.<sup>79</sup> While the 51 administrative courts in Germany recorded more than 6,000 COVID-related proceedings from March to December 2020, the 15 higher administrative courts reported more than 3,000 complaints. Direct appeal to the Federal Constitutional Court and the states' Constitutional Courts (*Verfassungsbeschwerde*) also played an

<sup>70</sup> A detailed description of the project and analysis of the collected data, elaborated by the Robert Koch Institute, are accessible at: <<https://corona-datenspende.de/science/>> accessed 30 September 2021.

<sup>71</sup> See <[www.bundesregierung.de/breg-de/themen/corona-warn-app](http://www.bundesregierung.de/breg-de/themen/corona-warn-app)> accessed 30 September 2021. On the legal issues raised by this app see Thomas Köllmann, 'Die Corona-Warn-App. Schnittstellen zwischen Datenschutz und Arbeitsrecht' (2020) NZA, 831; M. Wünschelbaum, 'COVID-19: Pandemiebewältigung und Datenschutz. Kollektivvereinbarungen als krisentaugliches DS-GVO-Instrument?', (2020) NZA, 612.

<sup>72</sup> Francesco Buccafurri and others, 'A Privacy-Preserving Solution for Proximity Tracing Avoiding Identifier Exchanging' (2020) IEEE Explore, 235-242, <<https://ieeexplore.ieee.org/ielx7/9240475/9240501/09240513.pdf>> accessed 30 September 2021.

<sup>73</sup> Jürgen Kühling and Roman Schidbach, 'Corona-Apps - Daten und Grundrechtsschutz in Krisenzeiten' (2020) NJW, 1545; Jinfeng Li and Xinyi Guo, 'Global Deployment Mappings and Challenges of Contact-tracing Apps for COVID-19' (2020) SSRN; Jan-Patrick Weiß and others, 'Analyzing the Essential Attributes of Nationally Issued COVID-19 Contact Tracing Apps: Open-Source

Intelligence Approach and Content Analysis' (2021) JMIR 9/3, doi: 10.2196/27232.

<sup>74</sup> The system is well explained on the website of the Ministry for Health <[www.bundesgesundheitsministerium.de/coronavirus/faq-covid-19-impfung/faq-digitaler-impfung/faq-digitaler-impfnachweis.html](http://www.bundesgesundheitsministerium.de/coronavirus/faq-covid-19-impfung/faq-digitaler-impfung/faq-digitaler-impfnachweis.html)> accessed 30 September 2021.

<sup>75</sup> Theresa Stadler and others, 'Preliminary Analysis of Potential Harms in the Luca Tracing System' (2021) arXiv [preprint].

<sup>76</sup> Details are available on the website of the RKI: <[www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/WarnApp/Archiv\\_Kennzahlen/WarnApp\\_Kennzahlen\\_Tab.html](http://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/WarnApp/Archiv_Kennzahlen/WarnApp_Kennzahlen_Tab.html)> accessed 30 September 2021.

<sup>77</sup> Lena Rabe, 'Downloads der Luca-App über den Apple App Store in Deutschland bis Mai 202' (2021) statista.com.

<sup>78</sup> Alexander Dix, 'Mit Apps gegen Corona - Was bringen Luca und Corona-Warn-App?' (2021) ZD-Aktuell, 04441; Jan-Philipp Stroscher, and Sabrina Schomberg, 'Digitale Kontaktnachverfolgung per App - ist ein Ende der Zettelwirtschaft in Sicht' (2021) ZD-Aktuell, 05138.

<sup>79</sup> 'Richterbund: Mehr als 10.000 Eilverfahren und Klagen gegen Corona-Auflagen' (Neue Osnabrücker Zeitung, 8 March 2021) <[www.presseportal.de/pm/58964/4857338](http://www.presseportal.de/pm/58964/4857338)> accessed 30 September 2021.

important role. The federal court counted almost 900 proceedings related to the pandemic, including a record number of more than 240 emergency motions, although most of them were deemed inadmissible.<sup>80</sup> There is no official data concerning the constitutional courts of the states.

Most legal actions have been declared inadmissible or rejected, such as the recent appeals against the *Bundesnotbremse*.<sup>81</sup> Some positive decisions - although primarily for injunctive relief - are particularly significant. They are based on:

- the principle of proportionality in the compression of a fundamental right: e.g., the freedom of movement,<sup>82</sup> the right to protest,<sup>83</sup> or the freedom of religion.<sup>84</sup> The particular circumstances of uncertainty in which some containment measures were taken and the judgments were carried out have led to a change in the structure of the judgment of proportionality, in which the first step, that relating to the suitability of the choices made by the public administration, has taken on new relevance;
- the incompleteness of the preliminary investigation and scientific basis;<sup>85</sup>
- the use of an administrative legal instrument to impose general measures that require a formal regulation.<sup>86</sup>

With the *Bundesnotbremse*, the Federal State has taken over the uniform containment measures and simultaneously enacted them.<sup>87</sup> The consequence of this is the centralization of judicial protection at the Federal Constitutional Tribunal (*Bundesverfassungsgericht*) instead of the administrative or constitutional courts of the states. This outcome has been the subject of fierce criticism. On the one hand, it favors legal certainty and the stability of containment strategies. On the other hand, it risks lowering the protection of fundamental rights.

## 6. Lessons Learned: The Legacy of This Pandemic

The responses of the system to the pandemic have not all been optimal or sufficiently timely, however, the experience in dealing with this crisis allows us to identify some winning solutions, which confirm the validity of some structural choices or that could be developed further. They can be summarized in five points:

1) The democratic polycentric structure of the German system adopted a coordination strategy through political entities that have mostly proven effective: the Conference of Prime Ministers with the Chancellor. The German Basic Law does not prescribe this conference; instead, it is only mentioned in the rules of procedure of the federal government. Nevertheless, in the pandemic crisis, it became the most powerful decision-making body. It made it possible to conciliate the requirements of federalism and their differentiation with a reasonably unified strategy.

2) Even if the conference meetings are not public, this structure requires transparent communication of decision-making processes, which was achieved by an obvious communication strategy by the federal government and the *Länder*.

3) Such a pattern of political coordination requires the willingness of the Federal State and states to act in harmony. Unfortunately, the prolonged pandemic and approaching election deadlines cracked the compactness of the governments. Therefore, the Federal State intervened by taking decisions and imposing them on the states through an ordinary law of Parliament. Thus, German federalism confirms its unitary component that can become more or less evident according to need.

4) The Robert Koch Institute has contributed to communication clarity, ensuring up-to-date,

<sup>80</sup> See the official statistic of the Federal Constitutional Court available at <[www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/vorwort.html](http://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/vorwort.html)> accessed 30 September 2021.

<sup>81</sup> Federal Constitutional Tribunal (*Bundesverfassungsgericht* - BVerfG) 1 June 2021, 1 BvR 927/21 <[www.bverfg.de/e/rk20210601\\_1bvr092721.html](http://www.bverfg.de/e/rk20210601_1bvr092721.html)> accessed 30 September 2021. BVerfG 31 May 2021, 1 BvR 794/21 <[www.bverfg.de/e/rk20210531\\_1bvr079421.html](http://www.bverfg.de/e/rk20210531_1bvr079421.html)> accessed 30 September 2021.

<sup>82</sup> High Constitutional Court of Baden-Württemberg (VGH Baden-Württemberg), decision 5 February 2021 <[http://lrbw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=33772](http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=33772)> accessed 30 September 2021.

<sup>83</sup> BVerfG, 15 April 2020, 1 BvR 828/20 <[www.bverfg.de/e/rk20200415\\_1bvr082820.html](http://www.bverfg.de/e/rk20200415_1bvr082820.html)> accessed 30 September 2021.

<sup>84</sup> BVerfG, 29 April 2020, 1 BvQ 44/20 <[www.bverfg.de/e/qk20200429\\_1bvq004420.html](http://www.bverfg.de/e/qk20200429_1bvq004420.html)> accessed 30 September 2021.

<sup>85</sup> Constitutional Court of Saarland (*VerfGH Saarland*) 28 March 2020 - Lv 7/20 eA <<https://verfassungsgerichtshof-saarland.de/frames/index.html>> accessed 30 September 2021; Administrative Court Berlin (VG Berlin), 31 May 2021 - VG 3 L 180/21 <<https://openjur.de/u/2341796.html>> accessed 30 September 2021.

<sup>86</sup> Administrative Court Munich (VG München), 24 March 2020, M 26 S 20.1255 <[www.vgh.bayern.de/media/muenchen/presse/pm\\_2020-03-24\\_b1.pdf](http://www.vgh.bayern.de/media/muenchen/presse/pm_2020-03-24_b1.pdf)> accessed 30 September 2021.

<sup>87</sup> About the role of the federal State and of the federal Parliament in the pandemic, see H. Dreier, 'Rechtsstaat, Föderalismus und Demokratie in der Corona-Pandemie' (2021) DÖV, 229; V. Boehme-Neßler 'Das Parlament in der Pandemie' (2021) DÖV, 243.

scientific, and sober information. This pandemic has clarified the importance of the RKI's scientific advice and its role as an authoritative federal body, referred to by local and central governments, to whom the decision has always remained. The division of roles between technical and political is clear.<sup>88</sup>

5) Finally, the Nudge Theory and the importance of persuasion and non-binding recommendations based on the precautionary principle have been affirmed. Many of the measures affecting individual behavior were not imposed, at least not immediately. Instead, these were recommended and accompanied by immediate business, and individuals support financial efforts. This has increased the willingness of the population to endure the shutdown and reduced the conflict with those who deny the seriousness of the pandemic and the necessity of containment measures. The protests have been quite loud and have even led to an attempted assault on the Bundestag,<sup>89</sup> but thankfully, in this context, it did not end up as Capitol Hill.

Elections for the new federal parliament (and thus the designation of the new chancellor) will take place in September. This has caused a sharpening of the political debate in recent weeks, also in relation to the handling of the pandemic, but does not seem to have had such a divisive effect on the society as in other countries.

Germany's management of the pandemic, while surely accentuating the role of executives, confirmed the cautious tendencies of a legal system that introduces innovations in stages and focuses on respect for the rule of law and constitutional guarantees. However, it must be acknowledged that in many cases – such as, for example, the management of the health system and support for workers – the effective intervention of the State has been guaranteed thanks to the considerable economic and financial resources available to the Federal Republic. This factor must be taken into consideration in every comparison.

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<sup>88</sup> About the responsibility of the scientists during the pandemic, see L. Del Corona, 'Distrust in science as a threat to scientific freedom. Some considerations in light of COVID-19 emergency' (2021) CERIDAP <<https://ceridap.eu/distrust-in-science-as-a-threat-to-scientific-freedom-some-considerations-in-light-of-covid-19-emergency/>> accessed 30 September 2021.

<sup>89</sup> Von Jan Heidtmann, 'Im Westen Sit-ins, im Osten Randalen', (2020) Süddeutsche Zeitung <[www.sueddeutsche.de/politik/demonstration-berlin-corona-massnahmen-hildmann-1.5014391](http://www.sueddeutsche.de/politik/demonstration-berlin-corona-massnahmen-hildmann-1.5014391)> accessed 30 September 2021.