

COVID-19 Response and Human Rights - Comments From The German and European Perspective

Thomas Schmitz¹

¹Georg-August-Universität Göttingen, Germany
E-mail: tschmit1@gwdg.de¹

Abstract--The coronavirus pandemic is a challenge for the constitutional state. The state must take measures to stop it but they have a serious impact on economic, social and private life and, thus, on human and fundamental rights. This contribution discusses from the German and European perspective the classical human and fundamental rights questions raised by the COVID-19 restrictions but also the significance of the second dimension of these rights, the state's duties of protection (or positive obligations). Finally, it focuses on the decisive problems of the proportionality of the COVID-19 restrictions.

Keywords: COVID-19 and human/fundamental rights; limits of and limits of the limitation of human/fundamental rights; duties of protection (positive obligations); protection of public health; principle of proportionality

I. INTRODUCTION

The coronavirus pandemic is a weird challenge for the constitutional state: an insidious virus which kills only a small percentage of the infected but is highly infective and loves to be spread by persons without symptoms of disease that are unaware of their infection, thus demanding a quick and resolute but smart, differentiated and well-balanced reaction of the state, exposing the ineptitude of populist regimes and leaving in its wake many loser but also some winner states that reacted quickly, rationally and prudently. Since most COVID-19 restrictions have a serious impact on economic, social and private life, they are highly controversial with regard to human rights. This is a question of law, not just of politics. In the modern constitutionalist state of the 21st century, the pandemic is no excuse for watering down the rights of the human being: Modern human and fundamental rights doctrine allows a precise and accurate assessment of the legality of any measure to fight COVID-19. It is the mission of the courts, in particu-

lar the administrative and constitutional courts, to enforce these rights, even against COVID-19 restrictions. So it is not a surprise that in some states the courts are already busy with coronavirus cases: Until the beginning of September 2020, in Germany alone there have been more than 190 relevant court decisions.[1]

The following contribution will discuss classical human and fundamental rights questions raised by the COVID-19 restrictions (II.) but also the significance of the second dimension of human and fundamental rights, the state's duties of protection (or positive obligations) for the COVID-19 response (III.), and finally focus on the special problems of the proportionality of COVID-19 restrictions (IV.). In order to avoid misunderstandings, which sometimes occur in Southeast Asia, it is first necessary to clarify some terms: Under the common international legal terminology, which differs from Indonesian terminology, "human rights" are the pre-legal ("natural") rights of the human being, according to the philosophical doctrine rooting in the era of enlightenment, and also the rights guaranteed in international human rights treaties who pretend just to reflect them, while "fundamental rights" are the legal positions created by the implementation of this doctrine into the (constitutional) law.[2]

The following contribution will present comments from the European and in particular German perspective because the highly developed European and German human and fundamental rights doctrine serves as an important source of inspiration in the global discourse. This is mainly due to the rich and sophisticated *jurisprudence of the European Court of Human Rights* [= ECtHR][3] on the European Convention on Human Rights of 1950 [= ECHR][4] and its protocols *and of the German Federal Constitutional Court* [= FCC][5] on the fundamental rights in the Basic Law for

[1] See the compilation of *Martin Goege; Gregor Heiland; Mario Hoffmann a.o.*, Über 190 Gerichtsentscheidungen zum Coronavirus. Jüngere Rechtsprechung rund um die Coronavirus-Pandemie [More than 190 Court Decisions on the Coronavirus. Recent Jurisprudence related to the Coronavirus Pandemic], last visited 02.09.2020, www.etl-rechtsanwaelte.de/aktuelles/erste-gerichtsentscheidungen-zum-coronavirus. Until September 2020, most court decisions were on interim protection but they included already statements on the legal questions of the case, which usually will be maintained in the final decision on the case.

[2] See for a more detailed explanation my course material "On the terms 'human rights', 'fundamental rights' and 'constitutional rights'" from the course Human Rights Law, Semester 1, 2019/20, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_HRLaw-UGM_terminology.pdf.

[3] Official website: www.echr.coe.int; judgements available in the HUDOC database, www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=.

[4] English version available at www.echr.coe.int/Pages/home.aspx?p=basictexts/convention.

[5] Official website: www.bundesverfassungsgericht.de, English translation of some important judgements available at

the Federal Republic of Germany of 1949 [= BL][6], mostly on individual constitutional complaints. Furthermore, it is due to the innovative *Charter of Fundamental Rights of the European Union* in the revised version of 2007 [= ChFR][7], one of the most progressive fundamental rights catalogues of our time.[8]

II. CLASSICAL HUMAN AND FUNDAMENTAL RIGHTS QUESTIONS RAISED BY THE COVID-19 RESTRICTIONS

1. *The rights affected by the COVID-19 restrictions*

The first step should be to get clear about which rights are affected by the COVID-19 restrictions. Even a superficial survey reveals that this may be many:

a) The *freedom of occupation* (art. 12(1) BL, 15 ChFR) is affected on a large scale by severe restrictions of the free exercise of professions. In some cases, these restrictions practically amount to temporary prohibitions of certain professions (such as hairdresser, masseur, physiotherapist, prostitute etc.).

b) The *freedom to conduct a business* (art. 16 ChFR; in Germany part of the freedom of occupation) is affected by severe restrictions of the practical conduct of business. In some cases, these constraints virtually amount to temporary prohibitions of certain kinds of businesses (such as airlines, hotels, bars, discotheques etc.).

c) The *freedom of movement* (art. 11 BL, 2 Prot. 4 ECHR, 45 ChFR), that means the right to move freely on the territory and to visit places, is affected by travel restrictions, curfews, closures of public squares, parks and beaches etc. If the restrictions prevent someone from meeting his spouse or his children, they also interfere with the protection of marriage and family (art. 6(1) BL) resp. the respect for family life (art. 8 ECHR, 7 ChFR). Moreover, bans from using own holiday homes in tourist areas curtail *property* (art. 14 BL, 1 Prot. 1 ECHR, 17 ChFR).

d) Quarantine measures go beyond. They even represent a deprivation of liberty. They interfere with the *personal freedom* (art. 2(2) phrase 2 BL) resp. the *right to liberty* (art. 5 ECHR, 6 ChFR).

e) Bans on gatherings in large crowds make it impossible to exercise the *freedom of assembly* (art. 8 BL, 11 ECHR, 12 ChFR), an essential right which is constitutive for democracy. So even the fundamental principles, on which the state is based, suffer from the COVID-19 restrictions.

f) Bans on gatherings for public worshipping limit the free exercise of religion and, thus, the *freedom of religion*

(art. 4(1, 2) BL, 9 ECHR, 10(1) ChFR). However, this right is less affected than the freedom of assembly, since it is still possible to freely exercise one's religion privately, for example to pray at home.

g) Bans on public concerts, theatre performances and readings limit the *freedom of arts* (art. 5(3) BL, 13 ChFR; part of the freedom of expression under art. 10 ECHR). The same applies to the forced closure of museums and galleries.

h) The forced transition of university lecturers and researchers to online teaching and home office has encroached on the *freedom of science* (art. 5(3) BL, 13 ChFR), which includes the freedom of academic teaching.

i) The protection of resp. the respect for *family life* (art. 6(1) BL, 8 ECHR, 7 ChFR) is concerned by restrictions on family gatherings, such as wedding receptions or funerals.

j) The right of *informational self-determination* resp. to the *protection of personal data* (art. 2(1) read together with art. 1(1) BL, 8 ChFR; part of the right to respect for private life under art. 8 ECHR) is affected in case of compulsory testing or contact tracing. For this reason, the use of the general tracing app in Germany remains voluntary.

k) This list is not exhaustive. *Virtually any freedom right* and most other rights can be affected by the COVID-19 response. The German Basic Law guarantees a *general freedom of action*, i.e. the general right to do or not to do any activity you want (art. 2(1) BL; some aspects are also protected by the right to respect for private life under art. 8 ECHR, 7 ChFR). This freedom is affected by many measures, such as mandatory mask-wearing, contact restrictions, sport restrictions or limitations of private parties. Moreover, attention should be paid to the *equality rights* (cf. art. 3 BL, 14 ECHR, 1 Prot. 12 ECHR, 20 et seq. ChFR), which do not allow any discriminatory or other unjustifiably unequal COVID-19 restrictions.

2. *COVID-19 restrictions as encroachments on these rights*

The COVID-19 restrictions encroach on [= interfere with] these rights mainly in the classical way. Most are *prohibitions* laid down in government regulations (notably the prohibition to exercise certain professional or private activities or to exercise them without certain precautions, to meet with more than a certain number of people, to enter certain places or to enter them without a face mask). Others are *conditions* issued with the approval of certain activities by the competent authorities (e.g. the requirements to measure temperature, limit the number of participants and

www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language=en.

[6] English translation available at www.gesetze-im-internet.de/englisch_gg/index.html.

[7] English version available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT>.

[8] The Charter of Fundamental Rights primarily binds the institutions of the European Union, which, however, do not have regulating competences in the field of prevention of

pandemics. The member states are only bound when they are implementing Union law (cf. art. 51(1) phrase 1 ChFR) or when they take measures that encroach on the economic fundamental freedoms or the general freedom of movement (art. 21 FEU Treaty) of the Union citizens. The latter, however, is often the case with the COVID-19 restrictions. For other cases, for the purpose of this article the Charter is used as a general reference (to discuss whether it would allow such measures if it applied).

ensure physical distancing at an event or to refrain from singing or praying loud together). Commands requiring a positive behaviour are rare (example: the order to be tested for the coronavirus).

In some cases, the encroachment resides in a *specific official warning* of a local authority, e.g. not to attend public prayers at a certain place, not to take part in a certain demonstration or not to go shopping in a certain shopping mall. Although such warnings do not block the concerned activity, they hamper it and thereby also interfere with the concerned right. So they also need a legal basis and must be justified by the limits of the affected right.[9]

3. *The justification of the encroachments by the limits of the affected rights*

The fact that COVID-19 restrictions encroach on human and fundamental rights does not yet mean that they violate them. In a human society, freedom cannot be unlimited; otherwise, living together in harmony would not be possible. An affected right is only violated if the encroachment [= interference] is not justified by the right's limits.[10] This is the case if (a) the measure does not meet the requirements stipulated in the relevant limitation clause, in particular (b) not serve the overriding private or public interests mentioned there, or (c) does not respect the so-called "limits of limits".

a) The limitation of the rights by specific or general limitation clauses

While in simple human or fundamental rights regimes the limits of the rights are determined in a general limitation clause, more advanced regimes use specific limitation clauses for each right, which reflect an important political-philosophical decision about the importance and the balancing of the individual rights. We find such clauses in the German Basic Law and the European Convention (here usually the second section of the relevant article), while the Charter of Fundamental Rights of the European Union uses a mixed system with specific limitation clauses for some rights (cf. art. 52(2, 3) read together with some clauses in the Charter and the EU Founding Treaties) and a general limitation clause for the others (art. 52(1) ChFR).[11] All limitation clauses allow restrictions by law or based on law to protect the rights of others or to pursue

certain or any public interests that are overriding in the individual case. Some rights that are guaranteed in the German Basic Law without explicit limitation (e.g. the freedom of religion, art. 4(1, 2) BL) can also be restricted but only when colliding with other constitutional rights or values (so-called inherent limits).[12]

b) The overriding interests protected by the COVID-19 restrictions

Which are the overriding interests, as determined in the limitation clauses, whose protection can justify the COVID-19 restrictions?

aa) By preventing infections with a dangerous virus which can cause death or serious disease, the COVID-19 restrictions serve to protect **the fellow citizens' right to life** (art. 2(2) phrase 1 BL, 2 ECHR, 2 ChFR) and their **right to physical integrity** (art. 2(2) phrase 1 BL, 3 ChFR)[13], ensuring the effective exercise of the citizens' **right to protection of health** (art. 11 of the European Social Charter)[14]. Concerning working life, they also serve to comply with the *right of workers to working conditions which respect their health and safety* (art. 31 ChFR). The protection of the rights of others is regularly implied or even mentioned expressly as one of the reasons that can justify encroachments (see, for example, art. 2(1) BL, 52(1) phrase 2 ChFR, 8(2), 9(2), 11(2) ECHR).

bb) However, the COVID-19 restrictions are not limited to the protection of individual rights but serve in a more comprehensive approach to protect the imminent public interest of **public health**. Public health is vital for any modern society and even for any modern economy. Its protection requires comprehensive preventive measures. Concerning the coronavirus pandemic, in particular the prevention of a collapse of the healthcare system is vital. In this wider sense the European Convention allows the restriction of many of its rights "for the protection of health" (cf. art. 8(2), 9(2), 11(2) ECHR, 2(3) Prot. 4 ECHR). Art. 5(1) lit. e even allows explicitly the "detention of persons for the prevention of the spreading of infectious diseases". Art. 11 no. 3 of the European Social Charter also supports this general approach by obliging the state, in order to comply with the right to protection of health, to take appropriate measures to "prevent as far as possible epidemic ... diseases".

cc) Furthermore, COVID-19 restrictions can serve other public interests, such as public safety, public order or

[9] Cf. *Martin Ibler*, Grundrechtseingriff und Gesetzesvorbehalt bei Warnungen durch Bundesorgane [Encroachment on Fundamental Rights and Statutory Reservation in the Case of Warnings by Federal Bodies], in: Max-Emanuel Geis (editor), Staat, Kirche, Verwaltung. Festschrift für Hartmut Maurer, 2001, p. 145 (154 ff.); accessible at <http://nbn-resolving.de/urn:nbn:de:bsz:352-opus-74447>.

[10] See for the German law *Gerhard Robbers*, An Introduction to German Law, 6th edition 2017, no. 121 ff.

[11] This unsatisfying systematic of fundamental rights limits is the weak point of the Charter of Fundamental Rights, see *Thomas Schmitz*, Die EU-Grundrechtecharta aus grundrechtsdogmatischer und grundrechtstheoretischer Sicht

[The EU Charter of Fundamental Rights from the Perspective of Fundamental Rights Doctrine and Theory], *Juristenzeitung* 2001, p. 833 (838 f.).

[12] See *Gerhard Robbers* (note 10), no. 123.

[13] Some aspects are also protected by the right to respect for private life under art. 8 ECHR.

[14] The European Social Charter, which exists parallelly in its original version of 1961 and in a more demanding revised version of 1996 (not ratified by Germany), is another important European human rights treaty, to which, however, the jurisdiction of the European Court of Human Rights does not extend.

the economic well-being of the country, depending on the individual measure and on the concerned right. Note the double effect of COVID-19 restrictions on the economy: They may hinder economic activities (e.g. by forcing the shops to close temporarily or to follow inconvenient health protocols) but eventually serve to sustain them during the pandemic. As the economic decline of the United States of America in 2020 proves, there will be no sustainable economic recovery without a significant containment of the coronavirus.

c) The need of the COVID-19 restrictions to comply with the "limits of limits"

If encroachments on human and fundamental rights serve to protect the rights of others or public interests, as determined in the limitation clause, that does not yet imply that they are legitimate. They must also comply with the so-called "limits of limits" ["Schranken-Schranken"]. Just as there can be no right without limits, there can also be no power to encroach on rights without limits, notwithstanding the measure's important objective.

aa) There must be *no encroachment on the essence of the affected rights* (cf. art. 19(2) BL, 52(1) phrase 1 ChFR). This excludes, for example, a total ban of political demonstrations for a longer period, which would practically destroy the freedom of assembly.

bb) All encroachments are limited by the *principle of proportionality*.^[15] This principle, which has a long tradition in Germany, is the most important sub-principle of the rule of law^[16] and at the same time the most important element of any human and fundamental rights doctrine. It is the most radical challenge to totalitarianism: a categorical rejection of any claim of absoluteness for any objectives of the state - including the objective to stop the coronavirus pandemic. Traditionally there has been a different structure of the examination in European and German law but for some time there is a general tendency to follow the more clear and differentiated German approach, which distinguishes four requirements: the measure must (1) pursue a *legitimate aim* and it must be (2) *suitable*, (3) *necessary* and (4) *proportional in the strict sense* (appropriate) to pursue that aim. As for most encroachments of public authorities on the citizen's rights, also for the COVID-19 restrictions the decisive question with regard to their justification by the limits of the affected rights is the question of their proportionality. Numerous problems have arisen, which will be discussed in detail at the end of this article (see *infra*, IV.).

cc) There must be *no unequal treatment in the restriction of the human and fundamental rights*. First, there must be no discrimination on grounds of personal characteristics, such as sex, race, colour, ethnical, national or social origin, birth, language, religion or belief or political opinion (art. 3(3) BL, 14 ECHR, 1 Prot. 12 ECHR, 21 ChFR). The Convention and the Charter also exclude those on grounds of property or belonging to a national minority, while the Charter and the Basic Law also exclude those on grounds of disability and the Charter further excludes those on grounds of sexual orientation. For example, COVID-19 regulations cannot allow the Catholic Sunday service but ban the Muslim Friday prayer or allow the annual march to celebrate the national day but ban separatist demonstrations. Second, the general principle of equality (equality before the law, art. 3(1) BL, 20 ChFR) prohibits any unequal treatment which is not justified by objective reasons. In Germany, this usually makes for a high number of constitutional complaints before the Federal Constitutional Court in often complicated cases. It will be the same with the COVID-19 restrictions. For example: Were there justifying objective reasons to reopen the small shops after some weeks of lockdown but to keep the bigger stores closed, except the supermarkets, or to reopen the cafes but to keep the bars closed? It is for sure that the courts will have a busy time with these questions.

III. COVID-19 AND THE SECOND DIMENSION OF HUMAN AND FUNDAMENTAL RIGHTS: THE STATE'S DUTIES OF PROTECTION (POSITIVE OBLIGATIONS)

The discussion in the public on COVID-19 restrictions and human rights is imbalanced - not only in Indonesia but also in Europe. While there is a lot of complaining about the economic impact of the restrictions and the allegedly excessive limitation of freedom, the need to protect the life and health of the citizens is recognized in principle, as a classical mission of the state, but not discussed further with regard to human and fundamental rights. This biased perspective ignores the second dimension of the rights, as it has been worked out in human and fundamental rights jurisprudence:

1. *The doctrine of "positive obligations" of the European Court of Human Rights*

According to the established jurisprudence of the European Court of Human Rights,^[17] the state must not only

[15] See on the principle of proportionality *Luka Anđelković*, The elements of Proportionality as a Principle of Human Rights Limitations, *Law and Politics* 15 (2017), no. 3, p. 235 ff., <http://casopisi.junis.ni.ac.rs/index.php/FULawPol/article/view/2988>; *Gertrude Lübbe-Wolff*, The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court, *Human Rights Law Journal* 34 (2014), p. 12 ff., www.researchgate.net/publication/326782433_The_Principle_of_Proportionality_in_the_Case-Law_of_the_German_Federal_Constitutional_Court; *Christian*

Bumke; *Andreas Voßkuhle*, German Constitutional Law. Introduction, Cases and Principles, 2019, no. 123 ff.

[16] See on the sub-principles of the rule of law my course material "The principle of the rule of law in the modern constitutional state" from the course Comparative Constitutional Law, Semester 1, 2019/20, Diagram 2, www.thomasschmitz-yogyakarta.id/Downloads/Schmitz_CompConstLaw_diagram2.pdf.

[17] See in particular ECtHR, judgements of 23.07.1968, 1474/62 a.o., Belgian linguistics; 13.06.1979, 6833/74,

refrain from encroaching on the rights guaranteed in the European Convention and its protocols but also engage in activity to secure their effective enjoyment. So the European human rights law does not only constitute negative but also "positive obligations".[18] They include, among others, the *obligation to take substantive measures for the protection* of the guaranteed rights against threats.[19]

2. The doctrine of "duties of protection" of the Federal Constitutional Court

According to the jurisprudence of the German Federal Constitutional Court,[20] the fundamental rights guaranteed in the Basic Law do not only represent subjective (personal) defensive rights of the citizens but also an *objective system of values*, which must be realized in all spheres of life. The *state must not only respect them but also protect them by active intervention* against threats emanating from other persons or from nature. This obligation also derives from the guarantee of *human dignity*, to which the fundamental rights are closely related. While it is not yet clear in German doctrine if the duties following from that derive from the individual fundamental rights read together with the guarantee of human dignity or vice versa, it is clear that under the German constitution, with regard to the fundamental rights the state must meet its "duties of protection" ["grundrechtliche Schutzpflichten"].[21]

3. The problem to define clear standards and to determine violations in complex situations such as the coronavirus crisis

So the state can violate human and fundamental rights not only by taking action but also by refraining from it or by taking not enough action. If the life or health of the citizen is in danger, it must undertake measures (normative and practical measures) for an *adequate and effective protection*. However, in doing so, the state must also take into account the conflicting legal interests, in particular the rights that would be affected by the measures, and therefore enjoys a *wide margin of appreciation and discretion*, whose limits are still diffuse. While the European Court of Human Rights follows a case-by-case approach, the Federal Constitutional Court postulates a *prohibition of insufficient means* ["*Untermaßverbot*"] [22] whose contours and whose relation to the prohibition of excessive means ["*Übermaßverbot*"] are still unclear.[23] During the coronavirus crisis, a constitutional complaint against the easing of COVID-19 restrictions was not even admitted for decision.[24]

In complex situations, such as the coronavirus crisis, where different authorities take various measures that complement each other and have a serious impact on the economic, social and private life, these doctrines *only* allow to identify *obvious and serious failures of protection*. I consider as typical examples the premature easings of regional lockdowns in times of soaring infections and fatalities in Florida and East Java, which have led to many deaths and hospitalisations which could have been avoided. Furthermore, a failure to protect may be seen in the strongly

Marckx v. Belgium; 28.10.1998, 23452/94, Osman v. UK; with regard to the right to life ECtHR, judgement of 20.12.2011, 18299/03 a.o., Finogenov a.o. v. Russia.

- [18] See on the positive obligations *Dimitris Xenos*, *The Positive Obligations of the State under the European Convention of Human Rights*, 2012; *Alastair Mowbray*, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004. This doctrine also applies to the rights under the Charter of Fundamental Rights of the European Union, insofar as they correspond to those in the ECHR, because they have the same meaning and scope (art. 52(3) ChFR).
- [19] Cf. with regard to the coronavirus crisis *Natasa Mavronicola*, *Positive Obligations in Crisis*, Strasbourg Observers 07.04.2020, <https://strasbourgobservers.com/2020/04/07/positive-obligations-in-crisis>.
- [20] See in particular with regard to the protection of the right to life the famous decisions on the limitation of abortion, BVerfGE 39, 1 (Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 39, p. 1 ff.); BVerfGE 88, 203, English translation at <https://germanlawarchive.iuscomp.org/?p=1190>; see furthermore BVerfGE 56, 54; BVerfGE 77, 170 (214); BVerfGE 115, 118, English translation at www.bverfge.de/entscheidungen/rs20060215_1bvr035705en.html; BVerfGE 121, 317.
- [21] See on the duties of protection *Dieter Grimm*, *The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany*, *International Journal of Constitutional Law* 13 (2015), issue 1, p. 9 (24 ff.), <https://doi.org/10.1093/icon/mov005>; *Christian Starck*, *State Duties of*

Protection and Fundamental Rights, PER/PELJ 3 (2000) no. 1, <https://journals.assaf.org.za/per/article/view/2882>; *Christian Bumke*; *Andreas Voßkuhle* (note 15), p. 188 ff.; *Johannes Dietlein*, *Die Lehre von den grundrechtlichen Schutzpflichten* [The Doctrine of the Duties to Protect Fundamental Rights], 2nd edition 2005; *Peter Unruh*, *Zur Dogmatik der grundrechtlichen Schutzpflichten* [On the Doctrine of the Duties to Protect Fundamental Rights], 1996.

- [22] Cf. BVerfGE 88, 203 (headnote 6, p. 254), following *Josef Isensee*, in: *Josef Isensee*; *Paul Kirchhof* (editors), *Handbuch des Staatsrechts* [Handbook of State Law], vol. 5, 1992, no. 165 f.
- [23] There have been numerous attempts of scholars to clarify what the "Untermaßverbot" means and requires, see, for example, *Karl-Eberhard Hain*, *Der Gesetzgeber in der Klemme zwischen Übermaß- und Untermaßverbot?* [The Legislator in a Tight Squeeze between the Prohibitions of Excessive and Insufficient Means?], *Deutsches Verwaltungsblatt* 1993, p. 982 ff.; *Johannes Dietlein*, *Das Untermaßverbot* [The Prohibition of Insufficient Means], *Zeitschrift für Gesetzgebung* 1995, p. 131 ff.; *Karl-Eberhard Hain*, *Das Untermaßverbot in der Kontroverse* [The Prohibition of Insufficient Means in Controversy], *Zeitschrift für Gesetzgebung* 1996, p. 75 ff.; *Lars Peter Störing*, *Das Untermaßverbot in der Diskussion. Untersuchung einer umstrittenen Rechtsfigur* [The Prohibition of Insufficient Means being discussed. Scrutiny of a Controversial Legal Concept], 2009.
- [24] Cf. FCC, decision of 12.05.2020, 1 BvR 1027/20, www.bverfge.de/e/rk20200512_1bvr102720.html.

insufficient testing, the regular testing with the unreliable antibody test,[25] which creates a false sense of safety, and the general refraining from contact tracing in some countries. Apart from these extreme cases, critics may politically criticise the authorities for insufficient reaction but it will be difficult to establish a violation of the legal obligation to protect. However, the doctrines of "positive obligations" and "duties of protection" have another significant effect: The legal obligation of the state to protect effectively (with "sufficient means") the life and health of the citizens in the pandemic is an important factor in the assessment of the proportionality of COVID-19 restrictions, notably in the balancing of the restricted and the protected rights.

A horrible special problem lies in the question of whether the legislator is obliged to pass regulations on the *coronavirus triage*, that is the selection of the small number of patients that shall be admitted to the limited intensive care units in hospitals, which are overwhelmed by the number of patients. In most cases this will be a life or death decision. In Germany, the Federal Constitutional Court rejected an application for a preliminary injunction, arguing that it is not possible to vet these difficult questions in proceedings for interim protection and that it is unlikely at the present time that the problem will arise in the country.[26] To regulate the coronavirus triage would bring up profound ethical, philosophical and legal questions which would go far beyond the scope of this contribution and require an intensive discourse in science, politics and society.

IV. THE SPECIAL PROBLEMS OF THE PROPORTIONALITY OF COVID-19 RESTRICTIONS

The most important issue of the COVID-19 restrictions is their proportionality. Numerous special problems have arisen in this field. However, from the perspective of legal science they do not represent a challenge. The legal standards are clear and just need to be applied consistently. In a state based on the rule of law, the law is not a vague guideline but must be respected and applied and enforced correctly in each individual case. This requires that the regulating authorities think their measures through, considering all possible effects and side-effects and alternatives. This, however, does not always happen.

1. Individual assessment with regard to the specific circumstances

The principle of proportionality seeks to prevent excessive burden in the individual case. Therefore, it does not allow a general assessment of types of COVID-19 measures but requires the *individual examination of the individual measure*, as such and in context with other measures, *with regard to the specific circumstances of place and time and of available epidemiological expertise*. Identical measures in different countries, regions or cities, at different phases of the pandemic or under different knowledge about the virus may need to be evaluated differently. Measures that were proportional at one time may be unproportional at another time and vice versa. For example, a second lockdown will be more difficult to justify than the first one, considering the grown knowledge, experience and alternatives. Moreover, measures may be proportional at first but become unproportional as the epidemiologic, economic, social, public security or weather situation or the understanding of the coronavirus progresses. For example, the prohibition of serving food in restaurants and cafes may be proportional in winter time, when the guests are served in closed rooms where the aerosols make the virus spread easily, but unproportional in the summer when the guests are served outdoors where the wind disperses the aerosols and the risk of infection is considerably smaller.

2. The legitimate aim of the restriction

The requirement that the measure must pursue a legitimate aim does not cause problems.[27] However, the fight against the pandemic must be the essential objective of the measure. For example, the authorities are not allowed to prohibit demonstrations under COVID-19 pretext to prevent criticism of the government.

3. The suitability of the restriction to pursue that aim

The COVID-19 restrictions must be suitable (conductive, helpful) to fight the pandemic. Since the suitability of measures is often difficult to assess, it is generally recognized that the legislator and also other regulating authorities enjoy a wide *margin of appreciation and evaluation*. [28] The courts cannot replace the assessment of the authorities by their own assessment but are limited to control if the assessment is *tenable*, in particular well-founded

[25] Cf. *Donald G. McNeil*, Why Antibody Tests Won't Help You Much, *New York Times* 21.08.2020, www.nytimes.com/2020/08/21/health/coronavirus-antibody-tests.html; *Ardila Syakriah*, Doubts loom over widespread use of rapid tests in virus-stricken Indonesia, *Jakarta Post* 19.07.2020, www.thejakartapost.com/news/2020/07/14/widespread-use-of-rapid-tests-in-virus-stricken-indonesia-raises-questions.html.

[26] FCC, decision of 16.07.2020, 1 BvR 1541/20, part II.2, www.bverfg.de/SharedDocs/Entscheidungen/DE/2020/07/rk20200716_1bvr154120.html.

[27] See for the legitimate aim of the COVID-19 restrictions supra, II.3.b; see also *Michael Lysander Fremuth*, Corona-

virus und Menschenrechte. Die Bekämpfung des Coronavirus - Menschenrechtliche Grundlagen und Grenzen [Coronavirus - Menschenrechtliche Grundlagen und Grenzen [Coronavirus - Human Rights. Combating the Coronavirus - Human Rights Foundations and Limits], 2020, p. 16, <https://bim.lbg.ac.at/de/artikel/aktuelles/bekaempfung-des-coronavirus-menschenrechtliche-grundlagen-grenzen>.

[28] See in particular BVerfGE 90, 145 (173 ff.) with further references, English translation at <https://germanlawarchive.iuscomp.org/?p=85>, on the assessment of the suitability of the prohibition of possessing cannabis for the purpose to protect public health and to contribute to international drug control.

with reference to established scientific knowledge. When there are divergent opinions in science, the authorities are free to rely on the prevailing opinion.[29] If they want to follow a minority opinion advocated by few scientists, they need to give reasons and make sure that they rely on serious science. At the beginning of the pandemic there have been doubts concerning the suitability of mandatory mask-wearing but they have been cleared up by science. Meanwhile, in Germany at least three Higher Administrative Courts have confirmed the suitability of this measure.[30]

Note that restrictions may be harsh but still suitable! For example, all measures ensuring physical distance between human beings are suitable to fight COVID-19. Even a total curfew would meet this standard.

4. *The necessity of the restriction to achieve the pursued aim*

The COVID-19 restrictions must be necessary to fight the pandemic. In practice, this is often the crucial point. The individual measure must be the least intrusive act of intervention that is equally conducive; there must be no milder alternative. Here too, the authorities enjoy a margin of appreciation and evaluation.

The standard of necessity requires the COVID-19 restrictions to be *limited in time*. Usually, this is ensured by so-called "sunset clauses", which provide that the provisions automatically expire at a certain date if their validity period is not prolonged. As the Saarland Constitutional Court has stated, increasing duration demands increasingly sustainable fact-based evidence of risks feared from repealing or moderating the restrictions.[31]

The standard of necessity does not allow a curfew or even limited restrictions to go out if contact and gathering

restrictions are sufficient to fight the pandemic.[32] It generally excludes any comprehensive prohibitions if **targeted restrictions** are sufficient. This has far-reaching practical consequences. For example, there must be *no ban of public demonstrations and religious events if precautions in special health protocols* (a limited number of participants, physical distancing, mask-wearing, no singing or praying aloud together etc.) *can avoid infections and compliance is ensured*. The Federal Constitutional Court emphasized that the authority must take a discretionary decision about a possible approval under conditions in the individual case, with regard to the specific circumstances.[33] The Court also stressed that there can be *no total ban of Friday prayers in the Mosques*. [34] This decision also paved the way to resume Christian services. It is interesting that it was Muslims who defended the freedom of religion against the inconsiderate general prohibitions.

Concerning lockdowns of businesses, the standard of necessity did not allow a complete lockdown of restaurants in the early days of the pandemic but the limitation to selling food for take-away. It does not allow the lockdown of shisha bars if elaborate precautions (exclusive use of shishas, disposable mouthpieces, intensive room ventilation etc.) can prevent infections.[35] With regard to the physical distance of the customers in their cars, a general ban of drive-in cinema shows, even with large audiences, is also not justified.[36] However, with regard to the lack of distance, bad ventilation and easy virus spreading by dancers, the general lockdown of discotheques (clubs) may be considered necessary.[37] The same applies to a limitation of wedding parties to 50 participants because partying typically leads to a closer physical contact of a larger number of persons (who, by the way, usually show less discipline in complying with health protocols).[38]

[29] *Michael Lysander Fremuth* (note 27), p. 17.

[30] Cf. Higher Administrative Court Koblenz, decision of 06.06.2020, 6 B 10669/20, no. 24 ff., www.landesrecht.rlp.de/portal/portal/t/7qe/page/bsrlprod.psm1?pid=Dokumentanzeige&showdoccase=1&doc.id=MWRE200002705&doc.part=L; Higher Administrative Court Weimar, decision of 13.06.2020, 3 EN 374/20, p. 6 f., [www.vgwe.thueringen.de/webthfj/webthfj.nsf/8F5442B96A36629AC125858C0046DB40/\\$File/20-3EN-00374-B-A.pdf?OpenElement](http://www.vgwe.thueringen.de/webthfj/webthfj.nsf/8F5442B96A36629AC125858C0046DB40/$File/20-3EN-00374-B-A.pdf?OpenElement); Higher Administrative Court Münster, decision of 29.07.2020, 13 B 675/20.NE, no. 62 ff., www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2020/13_B_675_20_NE_Beschluss_20200728.html.

[31] Saarland Constitutional Court, decision of 28.04.2020, Lv 7/20, part C, www.verfassungsgerichtshof-saarland.de/verfghsaar/dboutput.php?id=352&download=1.

[32] *Michael Lysander Fremuth* (note 27), p. 19.

[33] FCC, decision of 15.04.2020, 1 BvR 828/20, part II.2, www.bverfg.de/SharedDocs/Entscheidungen/DE/2020/04/rk20200415_1bvr082820.html; decision of 17.04.2020, 1 BvQ 37/20, part II.2.b, www.bverfg.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200417_1bvq003720.html. These decisions (and the following decision) were Chamber decisions (of three instead of eight constitutional judges) under sect. 93a et seq. of the Federal Constitutional Court Act, which do not answer new questions of general constitutional significance but build on the already esta-

blished jurisprudence. Within the reasoning about interim protection, the Chambers came to the tentative conclusion that the constitutional complaints were manifestly (resp. probably) well-founded.

[34] FCC, decision of 29.04.2020, 1 BvQ 44/20, part II.3, www.bverfg.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html.

[35] Higher Administrative Court Lüneburg, decision of 27.07.2020, 13 MN 272/20, no. 17 ff., www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psm1?doc.id=MWRE200002858&st=null&showdoccase=1.

[36] Higher Administrative Court Berlin-Brandenburg, decision of 21.07.2020, OVG 11 S 65.20, no. 17 ff., www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/?quelle=jlink&docid=MWRE200002880&psml=sammlung.psm1&max=true&bs=10.

[37] See with a partially different reasoning Higher Administrative Court Münster, decision of 08.07.2020, 13 B 870/20, no. 51 ff., www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2020/13_B_870_20_NE_Beschluss_20200708.html.

[38] Higher Administrative Court Lüneburg, decision of 13.08.2020, 13 MN 290/20, no. 54 ff., www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psm1?doc.id=MWRE200003156&st=null&showdoccase=1.

The standard of necessity allows general restrictions in the Coronavirus crisis that affect everyone. Special restrictions for vulnerable groups, such as the elderly or persons with pre-existing conditions, are not an equally conducive alternative, since it has turned out that everybody can spread and suffer from the virus. The principle of proportionality does not require to isolate the sick and elderly in order to preserve more freedom for the young and healthy.

Was it *necessary to close the borders with little affected neighbouring states*? This problem will be on the agenda of the European Union, since the temporary general closing of the borders between the EU member states did not only affect human and fundamental rights but also the free movement and the economic fundamental freedoms of the Union citizens, the heart of the European internal market. There are no apparent reasons while it might have been necessary to close the border between the German Land Rhineland-Palatinate and the little affected neighbour Luxembourg while at the same time persons from the heavily affected neighbouring German Land North Rhine-Westphalia, a hotspot of the pandemic, could still freely enter. If an interruption of mobility is necessary, the pandemic hotspots must be isolated, not the little affected foreign neighbour. Intensive transborder coordination between the authorities is required to keep mobility high and infections low. What happened in the European Union in spring 2020 was not compliance with the duties of protection but simply a backfall to the destructive manners of the isolated egocentric loner state of the 19th century.

5. *The proportionality of the restriction in the strict sense to pursue its aim*

The COVID-19 restrictions must be proportional in the strict sense (appropriate, reasonable, not excessive). The burden imposed on the citizen must *not be out of proportion* to the aim in view. This requires a *thorough balancing* of the protected and affected rights and public interests. Again, the authorities enjoy a margin of appreciation and evaluation, which depends, however, on the value of the affected rights.[39]

Even if the right to life is not absolute and does not stand above everything, the state's duty to protect the life and health of the citizens is crucial for the balancing. It justifies *even severe restrictions*, notably of economic activities. However, the measures must not endanger life and health themselves, e.g. by hindering access to medical care for other health problems. The risk of collateral damages, such as psychological stress, suicides and fatalities because of delayed surgeries or treatments must be taken into account too.

Exceptions from general prohibitions and the granting of the power to the competent authorities to allow derogations under strict conditions can avoid excessive burdens. However, precautions against corruption must ensure that this will not lead to an unjustified unequal treat-

ment in the restriction of the rights of the citizens (see supra, II.3.c.cc), which would be in itself a violation of human and fundamental rights (see supra, II.1.k). Furthermore, *accompanying state support measures* for companies, freelancers, workers etc., which strengthen their economic viability, can alleviate the severity of the restrictions. In Germany, short-time allowances (state subsidies granted to avoid redundancies of employees) and state support for freelancers played an important role in keeping lockdown measures proportional.

Not only the standard of necessity but also the standard of proportionality in the strict sense requires the COVID-19 restrictions to be *limited in time*. Even essential measures to fight COVID-19 will cause an unbearable burden in the long run and therefore need to be repealed, moderated or replaced by alternatives over time. There will be a threshold beyond which rising sickness and death rates will be the lesser evil. For example, even if it appears necessary for fighting the pandemic, there cannot be a permanent total lockdown of airports, restaurants, bars and sports facilities but one day they must be allowed to reopen under strict health protocols. This balancing will be one of the most delicate missions of the democratically elected authorities in the times of pandemic.

Last but not least, two problems of the proportionality in the strict sense shall be brought up for discussion: First, is it appropriate to sustain *travel restrictions which separate unmarried life partners over a long period of time*? Unmarried couples do not enjoy the protection of marriage or family life (art. 6(1) BL, 8 ECHR, 7 ChFR) but are seriously suffering from separation too. However, the entry restrictions for non-EU citizens did not allow for exceptions for unmarried life partners until August.[40] Second, is it appropriate to keep *dying COVID-19 patients in absolute isolation*, separated from their spouses, families and friends? This problem occurred notably but not only in Italy during the first outbreak of the pandemic. Numerous patients died in loneliness, without a chance to say goodbye to their loved ones, except, in some cases, by a video call on the smartphone. This practice may be medically indicated but causes great grief. It is questionable if this is acceptable with regard to human dignity, since the last moments are often some of the most important moments in human life. An appropriate solution may be to set up special meeting rooms in the hospitals (with glass partition, audio system and assistance) to allow personal meetings and a farewell with dignity.

V. CONCLUSION

The many problems discussed in this analysis demonstrate the *need for a permanent critical monitoring and discussion* of all COVID-19 restrictions, individually and in context, going into the details and keeping both dimensions of human and fundamental rights in mind. This is not only the mission of the politicians and the civil society but also

[39] Cf. *Michael Lysander Fremuth* (note 27), p. 22.

[40] See the report of *Deutsche Welle*, Coronavirus: Germany allows non-married couples to reunite, 10.08.2020,

www.dw.com/en/coronavirus-germany-allows-non-married-couples-to-reunite/a-54493685.

of the lawyers. A resolute and sophisticated, differentiated application of the principle of proportionality will be crucial for a successful harmonisation of public health and individual rights in the pandemic. After the end of the pandemic, political, economic and legal scientists need to analyse together what has gone well and wrong and how to be better prepared for the next pandemic. In the wake of globalisation, it may arrive sooner than expected.

Scientific progress will help to mitigate the crisis. From the perspective of human and fundamental rights, not only the eagerly awaited availability of a vaccine would be helpful but also the development of a reliable and cheap ad hoc coronavirus test, which delivers results immediately. Such a test would allow to ensure virus-free venues and events by simple entrance controls, which are easy to organise. This already would render most COVID-19 restrictions obsolete.

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