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Stefan Haack
Europa-Universität Viadrina, Germany
haack@europa-uni.de
ORCID ID: https://orcid.org/0000–0001–8715–558X

Things Will Never be the Same Again: How the Coronavirus Pandemic is Changing the Understanding of Fundamental Rights in Germany

Abstract: In the coronavirus pandemic, the challenges for the doctrine of fundamental rights are significantly different from comparable issues in all previous crises in terms of their intensity, dynamics and the uncertainty of the risk. Scrutiny of the proportionality of the measures against the COVID-19 virus caused serious difficulties, and these difficulties could barely be overcome in the most critical phases during the first and second wave of infections. Furthermore, the combination of intensity, dynamics and uncertainties has forced federal and state legislators to make seemingly arbitrary differences in many cases. Therefore, in the jurisprudence of the administrative courts on the restrictions of fundamental rights during the coronavirus pandemic, there has been a shift in the standard of justification from aspects of freedom to aspects of equality. The pandemic has also led to the questioning of central categories of state liability law that are closely related to fundamental rights. Last but not least, the pandemic raised the question of the essence of fundamental rights. On the whole, the pandemic has made the limits of the efficiency of fundamental rights visible. The higher the expectations of optimization requirements and new dimensions of fundamental rights protection under normal conditions, the greater the disappointments will be about the effectiveness of fundamental rights in the case of an emergency such as the coronavirus pandemic. The luxury of fundamental rights afforded under normal conditions becomes a problem in an emergency situation. This carries the risk of obscuring the essence of fundamental rights protection.
Keywords: fundamental rights, pandemic, proportionality, state of emergency

Introduction

If we ask ourselves what distinguishes the coronavirus pandemic from other dangerous situations and crisis scenarios that modern constitutional states have had to cope with within the past decades (such as the financial crisis or the terrorist threat), three particular features can be identified. First, the intensity of the danger is remarkable: the highly contagious virus SARS-CoV–2, which leads to life-threatening illnesses, could have cost hundreds of thousands of lives in the Federal Republic of Germany, for example, if nothing had been done to prevent its spread. The second peculiarity lies in the dynamics of the pandemic, which required rapid and consistent action by the state after the outbreak.[1] Delays and misjudgments are directly linked to loss of life in such a situation. The same dynamic also characterized the later phases of the pandemic, when viral mutations ensured an accelerated spread of the disease. The third and possibly most significant feature is that at the beginning of the pandemic there was no reliable knowledge about the danger or the transmission routes of the virus – not to mention knowledge about possible methods of treatment.[2] With the spread of more and more new mutations, this became a permanent problem. The confluence of these three factors, intensity, dynamics and uncertainty, forced the German state to impose restrictions on fundamental freedoms unprecedented in the history of the Federal Republic. In order to justify these restrictions on fundamental rights, which were established primarily by executive orders of the German *Länder* (and, since the third wave of the pandemic in April 2021, in part directly by the federal Infection Protection Act), the state's duty to protect life and health, which can be derived from Article 2(2) of Germany's Basic Law, has been invoked.[3] The threat of

1 M. Erdmann, Kohärenz in der Krise? 'Neue Zeitschrift für Verwaltungsrecht' 2020, p. 1800; F. Hase, Verfassungsrechtswissenschaft in der Corona-Krise – worauf kommt es an? 'Juristenzeitung'2020, p. 1107.

2 M. Erdmann, Kohärenz in der Krise? *op. cit.*, p. 1800; M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie – Allgemeine Lehren, 'Juristische Schulung' 2021, p. 214; F. Hase, Verfassungsrechtswissenschaft…, *op. cit.*, p. 1107; J. Kersten and S. Rixen, Der Verfassungsstaat in der Corona-Krise, 2nd ed., Munich 2021, V. 1 (quoted from the online edition of the book).

3 Bundesverfassungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 876, 877; Oberverwaltungsgericht Bautzen, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 1853, 1854; for more detail, see C. Richter, Die Schutzpflicht des Verfassungsstaates in der Pandemie, 'Deutsches Verwaltungsblatt' 2021, p. 16. Also see D. Murswiek, Schutz – Freiheit – Covid, 'Die öffentliche Verwaltung' 2021, p. 505, who argues that the duty to protect, under Article 2(2) of the Basic Law, only relates to the prevention of dangers arising from the actions of persons, not to the prevention of damaging by natural events. Whether this is correct may be left open here. Contrary to Murswiek's assertion, the state would nevertheless have a duty to protect in the case of the coronavirus pandemic under Article 2(2) of the Basic Law, since natural events and human error cannot be distinguished in a pandemic situation. In essence, infection protection law is less about protection against a natural disaster than about protection against the careless behaviour of other people with regard to the risk of infection and transmission.

overburdening the healthcare system also jeopardizes the welfare state principle of Article 20(1) of the Basic Law, which includes an adequate level of in-patient medical care.[4]

The constitutionality of these pandemic-related restrictions on fundamental rights was disputed in hundreds of lawsuits before the administrative courts (*Verwaltungsgerichtsbarkeit*), the state constitutional courts (*Landesverfassungsgerichte*) and the Federal Constitutional Court (*Bundesverfassungsgericht*). Among other things, these restrictions involved shop closures, curfews, masking obligations and bans on public assembly.[5] In most cases, decisions were made by way of interim legal protection. When the courts examined the proportionality of restrictions on fundamental rights in these proceedings and accepted or rejected their suitability, necessity and appropriateness, they always operated with the traditional categories of constitutional dogmatics. It almost seems as if we are dealing with the usual weighing of constitutional interests, as is familiar from numerous other contexts of security law (*Gefahrenabwehrrecht*). Can it be said that fundamental rights dogmatics have withstood the test, even in this crisis? Can we assume that our understanding of the meaning and functioning of fundamental rights will be the same after the crisis as before it? Probably not. We will see below how the coronavirus pandemic has cast light on the efficiency of our fundamental rights. To avoid misunderstandings, it should be emphasized at this point that our aim is not to confirm or cast doubt on the constitutionality of the individual measures or even of the coronavirus policy as a whole.[6] Nevertheless, the following reflections shed some light on the arguments of one side or the other.

4 *Ibidem*, p. 505; for general information on medical care as a component of the welfare state principle, see F. Stollmann and A. Wollschläger, Die Aufgaben der Krankenhäuser im gesundheitlichen Versorgungssystem, (in:) A. Laufs, B.-R. Kern and M. Rehborn (eds.), Handbuch des Arztrechts, 5th ed., Munich 2019, § 79 mn. 4ff.

5 For more information on the jurisprudence of the German courts with regard to coronavirus-related restrictions on fundamental rights see M. Erdmann, Kohärenz in der Krise? *op. cit.*, p. 1798; J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie – Der 'Corona-Lockdown' im Visier der Verfassungs- und Verwaltungsgerichtsbarkeit, 'Gesundheitsrecht' 2020, p. 341; M.H.W. Möllers, Der Verhältnismäßigkeitsgrundsatz bei Freiheitsbeschränkungen infolge der Coronavirus SARS CoV–2 Pandemie, 'Recht und Politik' 2020, vol. 56, p. 300; R. Zuck and H. Zuck, Die Rechtsprechung des BVerfG zu Corona-Fällen, 'Neue Juristische Wochenschrift' 2020, p. 2302.

6 Many statements on this issue are available; see for example M. Dumbs, Zwangsmaßnahmen gegen den Menschen als Gemeinschaftswesen, 'Neue Juristische Online-Zeitschrift' 2021, p. 69; C. Katzenmeier, Grundrechte in Zeiten von Corona, 'Medizinrecht' 2020, p. 461; O. Lepsius, Grundrechtsschutz in der Corona-Pandemie, 'Recht und Politik' 2020, vol. 56, p. 264; H. Schmitz and C.-W. Neubert, Praktische Konkordanz in der Covid-Krise, 'Neue Zeitschrift für Verwaltungsrecht' 2020, p. 666.

1. The Test of Proportionality and the Principle of Practical Concordance in the Coronavirus-Related Restriction of Civil Liberties

If the state restricts civil liberties, it must observe the principle of proportionality, which derives from the rule of law.[7] According to this principle, restrictions on conduct protected by fundamental rights can only be justified insofar as they must serve a legitimate purpose and prove their suitability, necessity and appropriateness for this purpose. When it comes to the restrictions on fundamental rights in the coronavirus pandemic, the examination of proportionality poses enormous problems, problems which could barely have been overcome in the critical phases during the first and second waves of infection.[8] A few brief references will illustrate this issue.[9] The difficulties begin with the question of the suitability of concrete containment measures, which can only be satisfactorily assessed once the transmission routes of a virus have been adequately researched.[10] The same applies to the examination of the necessity of certain governmental actions when the effectiveness of the measures in question is just as unclear as the effectiveness of alternative approaches. In addition, in the case of the containment of SARS-CoV–2, one is dealing with a comprehensive set of measures that encompasses a variety of very different interferences on fundamental rights – ranging from masking obligations and contact restrictions to the closure of stores. In such a context, how can it be determined whether less restrictive measures would have been available and whether they would have proved to be equally effective?[11] If the restrictions are components of a complex bundle of measures, their necessity will depend on whether the entire bundle of measures would be less effec-

7 See for example C. Degenhart, Staatsrecht I. Staatsorganisationsrecht, 36th ed., Heidelberg 2020, mn. 419ff.

8 See P. Häberle and M. Kotzur, Die COVID-19-Pandemie aus der kulturwissenschaftlichen Perspektive einer europäischen und universalen Verfassungslehre, 'Neue Juristische Wochenschrift' 2021, p. 134; F. Hase, Verfassungsrechtswissenschaft…, *op. cit.*, p. 1108; for a critical perspective, see I. Heberlein, Staatliche Pflichten verletzt – Lockdown als Folge, 'Gesundheit und Pflege' 2021, p. 50ff., who considers the proportionality test to have been undermined.

9 For further information, see M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie…, *op. cit.*, pp. 215ff.; P. Häberle and M. Kotzur, Die COVID-19-Pandemie…, *op. cit.*, p. 134; I. Heberlein, COVID-19 – Stresstest für das Prinzip der Verhältnismäßigkeit, 'Gesundheit und Pflege' 2020, p. 97; I. Heberlein, Staatliche Pflichten verletzt…, *op. cit.*, pp. 50ff.; C. Katzenmeier, Grundrechte…, *op. cit.*, pp. 463ff.; J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 1; M. Kloepfer, Verfassungsschwächung durch Pandemiebekämpfung, 'Verwaltungsarchiv' 2021, vol. 112, pp. 175ff.; M.H.W. Möllers, Der Verhältnismäßigkeitsgrundsatz…, *op. cit.*, p. 286; D. Murswiek, Die Corona-Waage – Kriterien für die Prüfung der Verhältnismäßigkeit von Corona-Maßnahmen, 'Neue Zeitschrift für Verwaltungsrecht' 2021, special issue no. 5, p. 1; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 666.

10 I. Heberlein, Staatliche Pflichten verletzt…, *op. cit.*, p. 51.

11 See J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 1 and 2.

tive without their addition.[12] Nevertheless, the question remains, and even becomes more acute: how can the effectiveness of a complex bundle of measures be evaluated in comparison to other possible bundles of measures – and this within a short period of time? It can already be seen here that all this leads to a wide margin of appreciation on the part of government agencies.[13] When it comes to the appropriateness of a measure (as the last stage of the proportionality test), the distinction between 'disruptors'[14] and 'non-disruptors'[15] was especially important in the area of hazard prevention. Until the coronavirus pandemic, this had also applied to the proportionality test of infection protection measures.[16] The pandemic indicated that this differentiation could not be maintained in times of crisis: it played no role in the restrictions on fundamental rights during the hard lockdown in the critical phases of the pandemic.[17] Again, this was a direct consequence of the three factors of intensity, dynamics and uncertainty. Significantly, it only became an issue when it came to the relaxation of restrictions for vaccinated and recovered persons.

These pandemic-specific problems of the proportionality test culminate when courts have to rule on encroachments on those fundamental rights that may be restricted by the legislature only in order to protect conflicting constitutional values; in constitutional dogmatics, this is referred to as unconditionally guaranteed fundamental rights.[18] In these cases, the so-called 'practical concordance' must be established, which seeks to find the best possible balance between the conflicting constitutional rights.[19] Courts must check whether a statutory regulation or a certain intervening administrative measure is the best possible balance. In this way, fundamental rights take on the character of optimization requirements.[20] When it comes to pandemic-induced restrictions on fundamental rights, achieving practical concord-

12 D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 5.

13 J. Kersten and S. Rixen, Der Verfassungsstaat,… *op. cit.*, V. 1 and 2; D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 5.

14 In the terminology of German security law, a 'disruptor' (*Störer*) is a person in accountability due to a dangerous behaviour or due to a legal position concerning a dangerous object.

15 In the terminology of German security law, a 'non-disruptor' (*Nichtstörer*) is a person who is held accountable even though he or she did not directly contribute to the danger. For further information, see T. Kingreen and R. Poscher, Polizei- und Ordnungsrecht, 11th ed., Munich 2020, § 9 mn. 74ff.

16 For details, see S. Kluckert, Verfassungs- und verwaltungsrechtliche Grundlagen des Infektionsschutzrechts, (in:) S. Kluckert (ed.), Das neue Infektionsschutzrecht, 2nd ed., Baden-Baden 2021, § 2 mn. 1ff.

17 I. Heberlein, COVID-19…, *op. cit.*, p. 99; M. Kloepfer, Verfassungsschwächung…, *op. cit.*, p. 184; for a critical perspective, see D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 11.

18 See generally G. Manssen, Staatsrecht II, 18th ed., Munich 2021, § 8 mn. 182ff.

19 See M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie…, *op. cit.*, p. 215.

20 For details, see T. Barczak, Rechtsgrundsätze, 'Juristische Schulung' 2021, p. 4; M. Klatt and M. Meister, Der Grundsatz der Verhältnismäßigkeit, 'Juristische Schulung' 2014, pp. 193–194.

ance in the sense of the best possible balance proves to be an insoluble problem.[21] For example, who could speak of only a gentle interference with the freedom of the arts (which is unconditionally guaranteed according to Article 5(3) of the Basic Law) when theatres, opera houses and concert halls had to close down for many months for reasons of health protection? In the end, it may have been right to prioritize health protection, but there can be no question of achieving practical concordance if one of the conflicting constitutional values crushes all the others.

Some of these challenges in relation to the proportionality test are associated with, and exacerbated by, tangible practical difficulties. Where should administrative courts acquire the necessary expertise to weigh constitutional rights, especially if they are required to provide urgent relief?[22] How do they determine the epidemiological viability of a particular event when a new virus mutation increases the risk of infection in a way that is difficult to calculate at that point in time? In this situation, administrative courts are burdened with a responsibility that can hardly be overstated for life and health, but also for the economic existence of large sections of the population.[23] The call for experts, which was required and practicable in normal times, has been almost impossible in view of the limited number, and other urgent tasks, of virologists and epidemiologists. The courts had to look for other solutions in this (by no means enviable) situation – and they found them. The methods to which they have resorted, however, contribute to relativizing our previous understanding of fundamental rights.

2. Reducing the Standards of Review – Coherence as a Substitute Scale in a Crisis

Where the suitability, necessity and appropriateness of fundamental rights interventions can only be assessed in a limited way due to the three factors of intensity, dynamics and uncertainty, the margins of appreciation of the legislator and the executive increase.[24] In order to mitigate and compensate for the reduction in judicial review, the courts emphasized the obligation of the public authorities to con-

21 Cf. P. Häberle and M. Kotzur, Die COVID-19-Pandemie…, *op. cit.*, pp. 132–133.

22 O. Lepsius, Grundrechtsschutz…, *op. cit.*, pp. 276, emphasizes that it is unsatisfactory for the courts, as with all other government agencies, to rely significantly on the assessment of the Robert Koch Institute (RKI), a German federal government agency and research institute responsible for disease control and prevention. The risk assessment of the RKI thus has a force of precedent that neutralizes control by the courts in terms of content, because authorities and courts refer to the same assessments.

23 Cf. J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie…, *op. cit.*, p. 352.

24 Cf. J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 1; S. Rixen, Grenzenloser Infektionsschutz in der Corona-Krise?, 'Recht und Politik' 2020, vol. 56, p. 113.

tinuously monitor and regularly reassess the situation.[25] The constitutionality of the restrictions on fundamental rights has also been justified by the argument that they are temporary measures.[26] These considerations are plausible in themselves; however, they inevitably lead to the question as to when a measure (which is to be regarded as proportionate by reason of its time limit) becomes disproportionate and therefore unconstitutional in the passage of time;[27] the court is thus faced with similar difficulties to before.

In the administrative jurisdiction, there was also a different strategy to deal with the particular challenges of monitoring fundamental rights. A strict proportionality test was replaced in part by an examination of coherent and appropriate differentiations in the concrete design of containment measures[28] – to put it bluntly, one could speak of coherence as a possible substitute scale in a crisis situation.[29] Arguments such as consistency or conformity have so far played a role primarily in highly complex regulatory areas such as tax law,[30] where the main focus has been on certain minimum requirements for coherent legislation from an equality perspective: systemic deficiencies may indicate unequal treatment. Given the difficulties of administrative courts in resolving conflicts in fundamental rights according to the usual patterns of proportionality and practical concordance, this approach gained new importance

25 Bundesverfassungsgericht, 'Neue Juristische Wochenschrift' 2020, p. 1427 (on the prohibition of religious gatherings); Bundesverfassungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 1040, 1041 (on the closure of schools and kindergartens); Bayerischer Verfassungsgerichtshof, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 785, 788 (on curfews); see M. Goldhammer and S. Neuhöfer, Grundrechte in der Pandemie…, *op. cit.*, p. 214; J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie…, *op. cit.*, p. 352; S. Rixen, Grenzenloser Infektionsschutz…, *op. cit.*, pp. 112ff.; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 668.

26 For example, Bundesverfassungsgericht, 'Neue Juristische Wochenschrift' 2020, pp. 1429, 1430 (on curfews); Bundesverfassungsgericht, 'Neue Juristische Wochenschrift' 2020, p. 1427 (on prohibition of religious gatherings); Verwaltungsgerichtshof München, 'Neue Juristische Wochenschrift' 2020, pp. 1236, 1240 (on curfews); see S. Rixen, Grenzenloser Infektionsschutz…, *op. cit.*, p. 113; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 668.

27 Cf. D. Murswiek, Die Corona-Waage…, *op. cit.*, p. 14; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 668.

28 See for example Verwaltungsgerichtshof Kassel, 'Neue Zeitschrift für Verwaltungsrecht' 2020, p. 732 (on differentiations in school attendance); Verwaltungsgerichtshof München, BeckRS 2020, no. 6630 (on differentiations in closures in the retail trade); Verwaltungsgerichtshof München, BeckRS 2020, no. 32232 (on the closure of beauty salons); Oberverwaltungsgericht Bremen, BeckRS 2020, no. 30295 (on the closure of prostitution establishments).

29 For details, see M. Erdmann, Kohärenz in der Krise?, *op. cit.*, p. 1798 and J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 2; also see J.A. Kämmerer and L. Jischkowski, Grundrechtsschutz in der Pandemie…, *op. cit.*, p. 342.

30 Fundamental texts include C. Degenhart, Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat, Munich 1976 and F.-J. Peine, Systemgerechtigkeit, Baden-Baden 1985; from the current legal literature, see P. Kirchhof, Comment on Article 3, (in:) T. Maunz and G. Dürig, Grundgesetz-Kommentar, Munich 2020, mn. 404ff. to Art. 3(1).

during the coronavirus crisis. The problem of coherent and appropriate differentiation was an issue, among other things, where courts had to rule on whether (and if so, how) the closure of retail stores may be graded according to the type and size of the stores. Accordingly, a violation of fundamental rights could be found in the inconsistent inclusion or non-inclusion of certain types of stores.[31] The crisis thus witnessed a certain shift in the standards of review, from aspects concerning freedom to those about equality: when the dangers are enormous and the effectiveness of countermeasures uncertain, more attention is drawn to equality in the commitment of different segments of the population to cope with the crisis. However, even this approach to solving the problem quickly reaches its limits. In many cases, the combination of intensity, dynamics and uncertainty has forced legislators and regulators to adopt seemingly arbitrary definitions and delimitations: an example is the setting of coronavirus incidence rates (negotiated in part as a compromise between the federal government and the *Länder*) as decisive factors for the closure of stores and service agencies.[32] Accordingly, numerous decisions of higher administrative courts on coronavirus-related measures state that strict compliance with the requirement of consistency cannot be demanded.[33]

3. The Concept of 'Special Sacrifices' in State Liability Law and Its Limits in the Coronavirus Pandemic

From the point of view of equal treatment, yet another limit of traditional legal doctrine has become apparent. This has to do with a category that plays a key role in compensation claims by private individuals against the state: the concept of the 'special sacrifice' (*Sonderopfer*). Where state measures interfere with the fundamental right to property (Article 14 of the Basic Law) or the right of life and health (Article 2(2) of the Basic Law), the Federal High Court of Justice (*Bundesgerichtshof*) awards compensation under certain conditions.[34] When one considers that the civil courts also subsume the 'right to an established and practised business' under the

31 See for example Verwaltungsgerichtshof München, BeckRS 2020, no. 6630; Verwaltungsgericht Hamburg, BeckRS 2020, no. 6396.

32 For a critical view, see I. Heberlein, Staatliche Pflichten verletzt…, *op. cit.*, p. 47.

33 Cf. Oberverwaltungsgericht Bremen, 'Zeitschrift für öffentliches Recht in Norddeutschland' 2020, p. 462 (on the closure of shisha bars) and Oberverwaltungsgericht Lüneburg, 'Zeitschrift für öffentliches Recht in Norddeutschland' 2020, p. 312 (on restrictions for furniture stores).

34 Claims to 'special sacrifice' (in the broader sense) are linked to the impairment of fundamental rights under Article 14 of the Basic Law or Article 2(2) of the Basic Law; however, these are not derived from these fundamental rights but apply by virtue of customary law. Therefore, they do not have constitutional status. See for example H. Sodan and J. Ziekow, Grundkurs Öffentliches Recht, 9th ed., Munich 2020, § 87 mn. 6.

concept of property,[35] it can be seen that such claims may also be relevant in the case of pandemic control.[36] A special feature of these legal institutions is that under certain circumstances, those affected must also be compensated for lawful measures.[37] The liability requirement presupposes that a so-called 'special sacrifice' has been demanded of those affected. According to a formulation from the standard literature on state liability law, such a special sacrifice will be given if the encroachment on property (in the context of the pandemic, the encroachment on the business) and its consequences are so severe that acceptance without compensation would be unreasonable.[38] The coronavirus pandemic has highlighted the limits of this concept.[39] Who would say that it was reasonable for entrepreneurs in particular sectors of the economy (such as hoteliers, event organizers or owners of clubs and discotheques) to not provide their services nor open their facilities for many months? The sacrifices demanded of these entrepreneurs by legislators and regulators can hardly be qualified as 'reasonable' when measured against previous standards.[40] Nevertheless, the assumption that we are dealing with special sacrifices in the original meaning of this term is questionable – precisely because it is a matter of whole economic sectors, and thus thousands and thousands of people were involved.[41] How should jurisdiction deal with cases of sacrifices in which the consequences of a lawful government action turn out to be unreasonable not only for individual recipients but also for entire professional categories and population groups? There is no answer to this yet.[42]

35 See for example Bundesgerichtshof, 'Neue Juristische Wochenschrift' 1990, p. 3260; Bundesverwaltungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2005, pp. 1178, 1181. In the recent past, the *Bundesverfassungsgericht* has left unanswered the question of whether the 'right to an established and practised business' is a component of the fundamental right to property; see Entscheidungen des Bundesverfassungsgerichts, vol. 143, pp. 246, 331ff.

36 It may be left open, however, to what extent the compensation provisions of IfSG (German Infection Protection Act) §§ 56ff. may derogate claims by customary law, such as the claim of 'special sacrifice'; on this, see P. Bachmann and J. Rung, Entschädigungsrecht und IfSG, (in:) S. Kluckert (ed.), Das neue Infektionsschutzrecht…, *op. cit.*, § 15 mn. 68ff.

37 Cf. for example S. Detterbeck, Allgemeines Verwaltungsrecht, 19th ed., Munich 2021, § 22 mn. 1161.

38 *Ibidem*, mn. 1171; see also H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 670, and from case law, Bundesgerichtshof, 'Neue Juristische Wochenschrift' 2013, p. 1736 and Bundesgerichtshof, 'Neue Juristische Wochenschrift' 2017, pp. 1324ff.

39 Also see J. Rinze and R. Schwab, Dulde und liquidiere – Staatshaftungsansprüche in Coronazeiten, 'Neue Juristische Wochenschrift' 2020, p. 1910; H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, pp. 670ff.

40 *Ibidem*, p. 670.

41 Landgericht Hannover, 'Neue Juristische Wochenschrift – Rechtsprechungsreport' 2020, pp. 1226, 1230 (on claims for compensation of restaurants); Landgericht Hannover, BeckRS 2020, no. 34842 (on claims for compensation by cinema operators, hoteliers and owners of escape rooms); for a different opinion, see H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 670.

42 *Ibidem*, p. 670.

During the coronavirus pandemic the state itself ensured financial compensation for losses in sales (although it is questionable whether these compensation payments have been sufficient).[43] Due to this, the difficulty of state liability law has been slightly mitigated. Jurisdiction[44] and legal literature[45] have considered these compensation payments as an instrument to contribute to the proportionality of limitations on fundamental rights. It will be possible in the future that one considers the limitations of fundamental rights to be justified more easily if the state pays financial compensation for that interference. This would be a development that must be watched with concern: administrations and legislators could 'buy' the proportionality of interferences in fundamental rights.[46] Whether it will come to that is uncertain, but it is certain that the criterion of the 'special sacrifice' as an essential requirement of the liability to pay compensation for interferences in fundamental rights has been shaken through the coronavirus pandemic and needs to be reconsidered.

4. The Essence of Fundamental Rights

From this plethora of problems, one last aspect should be touched upon. Article 19(2) of the Basic Law stipulates that the essence of a fundamental right must not be touched. Contrary to a misunderstanding which is sometimes advocated, this is not about constitutional amendments but about the limits of the restriction on fundamental rights by legislator and administration.[47] This is why in the German constitutional debate, Article 19(2) of the Basic Law is referred to as a so-called '*Schranken-Schranke*' (boundary on the limitation of fundamental rights).[48] It is not unreasonable to consider a fundamental right such as the freedom of assembly, in Article 8 of the Basic Law, being impaired in its essence if assemblies cannot take place over many months or can only take place under very difficult conditions, particularly as the scope of this fundamental right comprises not only rallies and demonstrations but also assemblies in closed rooms, which have been significantly limited due to the pandemic.[49] Significantly, assemblies in closed rooms are not at all or only inciden-

43 Schmitz and Neubert are sceptical about this; *ibidem*, p. 669.

44 See for example Oberverwaltungsgericht Münster, BeckRS 2020, no. 5158, mn. 63; Verwaltungsgerichtshof München, 'BeckRS 2020', no. 6266, mn. 43.

45 See for example K.P. Dolde and M. Marquard, Ausgleichspflicht für pandemiebedingte Betriebs- und Tätigkeitsverbote, 'Neue Zeitschrift für Verwaltungsrecht' 2021, p. 674.

46 For details, see S. Haack, Entschädigungspflichtige Grundrechtseingriffe außerhalb des Eigentumsschutzes, 'Deutsches Verwaltungsblatt' 2010, pp. 1477ff.

47 For example, see Bundesverfassungsgericht, 'Entscheidungen des Bundesverfassungsgerichts', vol. 109, pp. 279, 310ff.; H. Dreier, Comment on Article 19 sec. 2, (in:) H. Dreier (ed.), Grundgesetz-Kommentar, 3rd ed., vol. 1, Tübingen 2013, mn. 11 to Art. 19(2); G. Manssen, Staatsrecht II…, *op. cit.*, mn. 230.

48 H. Dreier, Comment…, *op. cit.*, mn. 7 to Art. 19(2).

49 H. Schmitz and C.-W. Neubert, Praktische Konkordanz…, *op. cit.*, p. 669.

tally mentioned by many authors who focus on coronavirus-caused interferences in fundamental rights.

How can one identify whether (and if so, from which moment) the essence of this fundamental right has been damaged due to the coronavirus restrictions? This is difficult to answer. Article 19(2) of the Basic Law barely played a role in the jurisdiction of the Federal Constitutional Court.[50] The interpretation of this provision is disputed among constitutional lawyers: while many supporters assume an inner core, an essence, of every fundamental right, which should be determined absolutely,[51] others look at what remains of the fundamental right with the restriction.[52] In the end both approaches are helpless in facing the question of the violation of the essence of fundamental rights during the coronavirus pandemic. In the constitutional law debate, a violation of the essence of Article 8 of the Basic Law due to the coronavirus containment regulations that restrict assemblies is rejected with the argument that those restrictions have a time limitation.[53] This sounds plausible: if the exercising of this constitutionally protected conduct is inhibited only for a short period, one could hardly speak of the violation of the essence of the fundamental right. Nevertheless, the question arises of how these time limitations must be determined and how often they can be extended until the violation of the essence occurs. The same would apply to the assumption[54] that the essence of a fundamental right is not infringed if the constitutionally protected conduct is exercised by getting special permission (which is reasonably expected to be granted), despite a general prohibition.[55] The question arises of how long such a prohibition, when permission is reserved, will

50 H. Dreier, Comment…, *op. cit.*, mn. 8 to Art. 19(2).

51 The so-called 'Lehre vom absoluten Wesensgehalt'; see for example C.D. Classen, Staatsrecht II, Munich 2018, § 5 mn. 69; C. Hillgruber, Grundrechtsschranken, (in:) J. Isensee and P. Kirchhof (eds.), Handbuch des Staatsrechts, vol. 9, 3rd ed., Heidelberg 2011, § 201 mn. 100; H.D. Jarass, Comment on Article 19, (in:) H.D. Jarass and B. Pieroth (eds.), Grundgesetz, 16th ed., Munich 2020, mn. 9 to Art. 19.

52 The so-called 'Lehre vom relativen Wesensgehalt'; see for example H. Dreier, Comment…, *op. cit.*, mn. 17 to Art. 19 (2); M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot und Maskengebot: Die Versammlungsfreiheit in Zeiten der Corona-Pandemie, 'Neue Juristische Online-Zeitschrift' 2020, p. 934.

53 Oberverwaltungsgericht Weimar, BeckRS 2020, no. 6395, mn. 30; M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot…, *op. cit.*, p. 934.

54 Cf. Oberverwaltungsgericht Bautzen, BeckRS 2020, no. 9349, mn. 34; M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot…, *op. cit.*, p. 934.

55 Such regulations could be found in many coronavirus containment regulations, whereas a total prohibition on assemblies has remained an exception. For details, see J. Kersten and S. Rixen, Der Verfassungsstaat…, *op. cit.*, V. 3; M. Martini, B. Thiessen and J. Ganter, Zwischen Vermummungsverbot…, *op. cit.*, p. 929; cf. also R. Sinder, Versammlungsfreiheit unter Pandemiebedingungen, 'Neue Zeitschrift für Verwaltungsrecht' 2021, p. 103.

satisfy the demand for such an important fundamental right.[56] How tight are the exception clauses allowed to be to not affect the essence of the fundamental right? In the coronavirus pandemic one could experience that the violation of the guarantee of the essence moved further and further away the more one thought the critical issues were being approached. If the infection situation had remained as difficult as at the height of the first and second waves of infection over a longer period of time, the legal substance of Article 19(2) of the Basic Law might have turned out to be a mirage and would have evaporated.

Conclusions

What conclusion can be drawn from these considerations? The functioning of constitutional reasoning, with its processes of weighing and its standards of reviewing, is tailored to a normal state – and for this area it continues to be valid. As soon as we have returned to normality, the dogmatics of fundamental rights will, in many contexts, be able to take up what had been regarded as the secure state of affairs before the pandemic.[57] However, this does not change the fact that our understanding of the fundamental rights will never be the same again.[58] The coronavirus pandemic visualized the limits of the power of the provisions of fundamental rights – brutally and unambiguously, in fact – and awareness of these limits will remain engraved. If in the future one is talking about the proportionality test, the practical concordance, the special sacrifice, or the guarantee of the essence, one will know that a situation can suddenly and quickly arise in which the familiar instruments of the protection of fundamental rights fail.

The question remains of how to deal, not to mention cope, with this finding. In politics, the implementation of provisions for a state of emergency in the constitution for hazardous situations such as the coronavirus pandemic was proposed, which

56 To what extent a prohibition when permission is reserved can be consistent with Article 8 of the Basic Law in the specific circumstances of the pandemic was left open by the Bundesverfassungsgericht, 'Neue Zeitschrift für Verwaltungsrecht' 2020, pp. 711, 712. In the jurisdiction of the administrative courts, this question has been answered inconsistently (for compatibility with Article 8 of the Basic Law, see Verwaltungsgericht Hamburg, BeckRS 2020, no. 7213; for the opposite view, see Verwaltungsgericht Hamburg, BeckRS 2020, no. 9930). It should be noted that according to its wording, Article 8 of the Basic Law guarantees the right to assemble 'without application or permission'.

57 A mainly optimistic view is presented by M. Kloepfer, Verfassungsschwächung…, *op. cit.*, pp. 202ff.; for a more sceptical comment, see H.M. Heinig, T. Kingreen, O. Lepsius, C. Möllers, U. Volkmann and H. Wißmann, Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Corona-Krise, 'Juristenzeitung' 2020, pp. 861–862.

58 H.M. Heinig et al. doubt that 'the complex connection of freedom and responsibility', as it shapes the liberal order of the modern constitutional state, can be switched off and on at will; *ibidem*, p. 865.

would allow – similarly to Article 15 of the European Convention on Human Rights (ECHR)[59] – a time-limited derogation of the fundamental rights.[60] This would not be applied in an unlimited way but would have to preserve the core of human dignity in the fundamental rights, just as in the law of the ECHR[61] some fundamental rights are excluded from the possibility of the derogation. This suggestion involves the risk that such an opportunity could be made use of to reduce the constitutional standard in an abusive and excessive way, which is why it appears to be more advisable to leave the constitution as it is and to look for other ways to overcome the experience with the capacities of the fundamental rights. This primarily requires jurisprudence which must cope with the knowledge gained in these further developments. The more expectations have been raised by optimization requirements and ever new dimensions of fundamental rights protection during a normal state, the greater the disappointment will be in a real state of emergency later on, such as in the coronavirus pandemic. Fundamental rights standards that cannot be realized must turn out to be false promises in such situation, which harms the trust of all legal subjects in the constitutional system; in the coronavirus pandemic this loss of trust turned out to be a real threat. Constitutional jurisprudence does not need to take this risk because the classic theorems of the interpretation of fundamental rights, as they emerged for constitutional reasoning in the first decades of the Federal Republic of Germany, conveyed a satisfactory level of fundamental rights protection. Therefore, we can learn from the pandemic that overambitious fundamental rights doctrines do more harm than good. If

59 During the pandemic, ten Member States of ECHR notified derogations according to Article 15 ECHR: the lawfulness of this practice has been discussed throughout Europe. See for example R. Duminică, Some Reflections about the Activation of Art 15 of the European Convention on Human Rights by Romania in the Context of the COVID-19 Pandemic, 'Journal of Law and Administrative Sciences' 2020, vol. 13, p. 78; M.L. Fremuth and A. Sauermoser, Menschenrechte im Ausnahmezustand?, 'Zeitschrift für Menschenrechte' 2020, p. 150; S. Haack, Die Corona-Pandemie und das Abweichen von Konventionsrechten gem. Art. 15 EMRK bei Vorliegen eines Notstands, 'Europäische Grundrechte-Zeitschrift' 2021, p. 364; S. Jovičić, COVID-19 Restrictions on Human Rights in the Light of the Case-Law of the European Court of Human Rights, 'ERA Forum' 2021, vol. 21, p. 545; S. Panov, To Derogate (and Notify) or Not to Derogate (and Not to Notify), That is the Question!, (in:) TRAFO Re:constitution Working Paper 2020, vol. 1; N. Rusi and F. Shqarri, Limitation or Derogation? The Dilemma of the States in Response to Human Rights Threat During the COVID-19 Crisis, 'Academic Journal of Interdisciplinary Studies' 2020, vol. 9, p. 166; K.A. Suyunova, Dimensions of Human Rights and Derogation Clauses During Covid 19 Pandemic Under Article 15 of the European Convention on Human Rights, 'Lawyer Herald' 2020, vol. 6, p. 147; V.P. Tzevelekos and K. Dzehtsiarou, Normal as Usual? Human Rights in Times of COVID-19, 'European Convention on Human Rights Law Review' 2020, vol. 1, p. 141.

60 This view was expressed by the former Federal Minister of the Interior Thomas de Maizière, in an interview with the Frankfurter Allgemeine Sonntagszeitung of 4 April 2021. The considerations of the first minister of Baden-Wurttemberg, Winfried Kretschmann, which he shared in an interview with the Stuttgarter Zeitung of 24 June 2021, aim in the same direction.

61 See footnote 59.

the legal instruments that are used by the courts are to be suitable for the normal state of affairs as well as for a state of emergency, they must be as robust as possible and must leave aside all components of special 'extras'. The higher the standard of the fundamental rights doctrine in the normal state, the more likely that one is forced to fall back on constitutionally questionable emergency rules and ad hoc measures in a state of emergency. If you want to buy a vehicle that has proven itself in all situations and is suitable for traversing rough terrain, you should buy an off-road vehicle and not a convertible. During the coronavirus pandemic, German constitutional jurisprudence has been driving through difficult ground with a luxurious cabriolet, but there is hope that we will make it to the destination (which will be the continued existence of the constitutional state after the end of the pandemic). As soon as we have arrived, we should go to a car repair shop to check whether the damage which has occurred can be fixed. If this is not possible – as is to be feared – we should continue our journey with a more robust car.

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