Legitimacy of Executive Power Shifts in Times of Crisis

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I. Introduction

In his famous essay "Legality and Legitimacy", *Carl Schmitt* asserted vehemently that he did not want to talk about crises: "There shall be no talk of 'crises' – be they of a biological, medical or economical nature, postwar-crises, crises of trust, crises of recovery, puberty crises, shrinkage crises or whatever."[1] Yet, talking about crises was precisely what he wanted to do – particularly about the one that occupied him the most: the crisis of parliamentarism. To this end, he famously contrasted "legality" and "legitimacy."

Today's task recalls this *Schmittian* project: Again, a crisis is occupying our minds – in what follows, I will address the government's handling of the COVID-19 pandemic in Germany. Again, parliament seems to be weakened – as illustrated by the assigned title of my text. And again, there is a question of legitimacy, or of legality and legitimation.

It makes sense therefore to take a step back yet again and to ask whether *Schmitt's* observations still carry explanatory weight today. In what follows,

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1 C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, 2012 [1932]) 7 (author's translation).

I will first make a few introductory remarks on the three vital Ls: legality, legitimacy and legitimation (II.). I will then briefly recall *Schmitt's* ideas (III.), before turning to the central question whether it still has explanatory value. At first glance, one might think that it does hold value, and I will in fact show that, especially at the onset of the crisis, when we were witnessing a certain power shift towards the executive (IV.), parts of German constitutional-law scholarship again took up Schmitt's narrative (V.). A closer look, however, reveals that the talk of a simple power shift towards the executive proves much too one-dimensional. What we can instead observe is three over-stretched powers that wrestle with their respective positions during the crisis to try and prove their problem-solving capacities (VI. and VII.).

II. The Three Ls

Legitimacy is a dark concept. We do not really know what it means precisely. While "legality" and "legitimation" became legal terms (in German doctrine), "legitimacy" as the third element in the group remained neglected and was later left to the political sciences and political theory. Yet, it remains a concept of constitutional theory.

The political sciences and political theory, too, were unable to find a common usage. I will therefore follow *Hasso Hofmann*,[2] who distinguishes a variety of different concepts of legitimacy: in social psychology (*Max Weber*), in constitutional theory (legitimizing the constitution), in discourse theory (*Jürgen Habermas* describes legitimacy as the acceptability of a political order) and elsewhere.

It was famously *Carl Schmitt* who pitted the two concepts of legality and legitimacy against each other in the final years of the Weimar Republic. I am turning now to his use of the terms.

2 H Hofmann, 'Legalität, Legitimität', in Ritter, Gründer and Gabriel (eds), *Historisches Wörterbuch der Philosophie online* (Schwabe AG, 1980), https://www.schwabeonline.ch/schwabe-xaveropp/elibrary/start.xav?start=%2F%2F*%5B%40attr_id%3D%27verw.legalitat.legitimitat%27%20and%20%40outline_id%3D%27hwph_verw.legalitat.legitimitat%27%5D <02/2024>.

III. Schmitt's *Narrative*

It is 1932, towards the end of the Weimar Republic. *Carl Schmitt*, the central, vicious, influential critic of liberal democracy, tells us a story of the good old days of the 19th century, where the legislative state still ensured a permanent, stable legal order and the resulting *legality* itself provided *legitimacy*. For *Schmitt*, however, this *coincidence* of legality and legitimacy is a phenomenon of the *past*: For a long time now, it had been other powers that had intervened into the legislative state: extraordinary legislators, in particular the President of the Reich, who, with his power to issue emergency decrees under Article 48 (2) of the Weimar Constitution, which had not originally been provided for by the constitution,[3] had become a substitute legislator.

Carl Schmitt attacks this practice, but also his colleagues:[4] "Incidentally, one […] does not seem to find anything conspicuous in the fact that an extraordinary legislator who creates law enters into the legality system of the Constitution of the Reich without the constitutional quality of his orders being in any way different from the law of the ordinary Reich legislator" (71). Legality and legitimacy diverged (14). "Instead, the President of the Reich receives legitimacy through the plebiscitary election of the people" (92 et seq.), i.e., the "only recognized system of justification that remains" (93).

IV. Measures to Control the Pandemic

Especially at the beginning of the pandemic, parts of the constitutional-law scholarship had the impression of witnessing a development that was eerily similar to Schmitt's description of Weimar. It was the confluence of six central components that gave rise to this concern and created a picture in which parliament was the big loser of the pandemic:

1. Firstly, the creation of a new state of health emergency, the epidemic situation of national scope, in § 5 for the Infection Protection Act, the proclamation of which indeed had extraordinary legal consequences

3 AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 136 ff.
4 All quotations taken from C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, 2012).

(and still has, § 28a Infection Protection Act), in particular a shift of powers to the Federal Minister of Health. Ultimately, we are indeed dealing with a new state of emergency. One can try to separate a health emergency terminologically from a state of exception, but such attempts will necessarily fail. And, what is more, in a proposal of § 5 of the Infection Protection Act by the Federal Government, it was the executive that was supposed to have the power to declare it.[5]

The powers that accrued to the Federal Minister of Health with the amendment of the Act of March 2020 were arguably unconstitutional in two respects.[6] On the one hand, he was given the power to amend numerous, more detailed Acts of Parliament, which seems hardly conceivable in terms of the hierarchy of norms.[7] On the other hand, he was supposed to be able to issue orders, e.g., to companies, which raised the question of compatibility with Art. 83 et seq. of the Basic Law, i.e., the extent of the federal administrative competence.[8]

2. Secondly, the then Bundestag President, Wolfgang Schäuble, demanded the creation of an emergency parliament beyond Art. 53a of the Basic Law (Joint Committee), which could have been used during the pandemic. Had this emergency parliament been set up, this would have easily entailed a shift of competence, and thus power, away from parliament.[9]

5 Formulierungshilfe für die Koalitionsfraktionen für einen aus der Mitte des Deutschen Bundestages einzubringenden Entwurf eines Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite (23 March 2020), https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/S/Entwurf_Gesetz_zum_Schutz_der_Bevoelkerung_bei_einer_epidemischen_Lage_von_nationaler_Tragweite.pdf <2/2024>.

6 J Kersten/S Rixen, *Der Verfassungsstaat in der Corona-Krise* (C.H. Beck, 2022) 324 ff.; T Mayen, 'Der verordnete Ausnahmezustand. Zur Verfassungsmäßigkeit der Befugnisse des Bundesministeriums für Gesundheit nach § 5 IfSG' (2020) *Neue Zeitschrift für Verwaltungsrecht* 828, 832 f.

7 H Heinig et al., 'Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Corona-Krise' (2020) 75 *JuristenZeitung* 861, 867 f.; K Gärditz/M Kamil Abdulsalam, 'Rechtsverordnungen als Instrument der Epidemie-Bekämpfung' (2020) 7 *Zeitschrift für das Gesamte Sicherheitsrecht* 108, 114 f.

8 C Waldhoff, 'Der Bundesstaat in der Pandemie' (2021) *Neue Juristische Wochenschrift* 2772, 2773.

9 P Austermann/C Waldhoff, *Parlamentsrecht* (C.F. Müller, 2020) para. 630; see also the criticism by C Möllers, 'Über den Schutz der Parlamente vor sich selbst in der Krise' (20 March 2020) *Verfassungsblog*, https://verfassungsblog.de/ueber-den-schutz-der-parlamente-vor-sich-selbst-in-der-krise/ <2/2024>.

3. The third component regards the COVID-19 regulation regime of the *Länder*: The greatest restrictions of fundamental rights in the history of the Federal Republic of Germany were brought about by way of regulations, despite the fact that, due to Germany's history, regulations are only possible under the Basic Law within a very narrow framework of restrictions. In particular, the so-called essentiality theory (*Wesentlichkeitstheorie*) of the Federal Constitutional Court requires that the restrictions on fundamental rights that are "essential" to these rights must be decided upon by the parliamentary legislature.[10]
4. The restrictions on fundamental rights, which in some cases clearly exceeded the limits of constitutionality, are of central importance: blanket bans on assemblies in all federal states with the exception of Bremen;[11] dying people in hospitals who were not allowed to be visited;[12] bans on visits to retirement homes; closing churches, but opening DIY stores, in the first lockdown, that is, to my mind, decisions about what was allowed to remain open that were contrary to constitutional rights – all based on regulations.
5. For many months, there was no suitable authorising basis for these regulations. That only came with § 28a of the Infection Protection Act in the autumn of 2020. However, this § 28a was a rushed job and had technical deficiencies[13] – the Bundestag had hesitated too long, hoping that the pandemic would go away.
6. The "Conference of Minister Presidents", plus the Federal Chancellor, developed as a new format – this, too, certainly served to strengthen the executive. Many observers got the impression that the actual decisions were made in this body, effectively side-lining the state legislatures.[14]

10 BVerfGE 150, 1, para. 191. Regarding Covid-19, see BVerwGE 177, 60, para. 35 ff.; BVerwG 16.5.2023 – 3 CN 6/22, para. 22 ff.

11 J Kersten/S Rixen, *Der Verfassungsstaat in der Corona-Krise* (C.H. Beck, 2022) 350 ff.; B Völzmann 'Versammlungsfreiheit in Zeiten von Pandemien' (2020) 77 *Die öffentliche Verwaltung* 893, 893 ff.

12 AK Mangold, 'Relationale Freiheit. Grundrechte in der Pandemie' (2021) 80 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7, 27.

13 For an overview of the criticism see T Kingreen, 'Der demokratische Rechtsstaat in der Corona-Pandemie' (2021) *Neue Juristische Wochenschrift* 2766, 2767 ff.

14 C Waldhoff, 'Der Bundesstaat in der Pandemie' (2021) *Neue Juristische Wochenschrift* 2772, 2774 ff.

V. *Through* Schmitt's *Eyes*

The elements described do indeed point, at least in part, to an alarming shift of power in favour of the executive and at the expense of parliament, or parliaments. And so, it is not surprising that large parts of constitutional-law scholarship strongly – *and often rightly* – criticise the aforementioned pandemic control measures. *I expressly do not wish to belittle these problems.*

However, over time, a grand narrative emerged that was alarmingly similar to *Schmitt's*: The Bundestag and the parliaments in the *Länder* had failed in what was perhaps the greatest crisis of the Federal Republic.[15] The judiciary, too, had failed miserably, so the narrative ran, by uncritically waving through all measures to control the pandemic.[16] The Federal Constitutional Court had disappointed as a control authority;[17] while generally active, its silence during the pandemic appeared conspicuous.

The winner of this power shift was, according to the narrative, the executive, first in the form of the Federal Minister of Health, who created a kind of "emergency regulation authorisation" for himself via § 5 of the Infection Protection Act that appeared reminiscent of Art. 48 of the Weimar Reich Constitution; and then in the form of the state executives, who had largely issued the COVID-19 regulations.[18]

As with *Schmitt*, this diagnosed a major crisis of the legislative state and branded the executive branch as a legislator extraordinaire. The idea of an "executive unbound" – the diagnosis about the US system by *Posner* and *Vermeule* – was thus transferred to Germany.[19]

Admittedly, contrary to Schmitt, the question of legitimacy was rarely raised explicitly: The focus was rather on the lack of *legality* of the measures in question – for example, in the original version of § 5 of the Infection Pro-

15 W Merkel, 'Who Governs in Deep Crises? The Case of Germany' (2020) 7 *Democratic Theory* 1.

16 J Lindner, 'Justiz auf Linie' (28 January 2021) *Die Zeit*, https://www.zeit.de/2021/05/corona-politik-verwaltungsgericht-grundrecht-lockdown-pandemiebekaempfung <2/2024>.

17 O Lepsius, 'Einstweiliger Grundrechtsschutz nach Maßgabe des Gesetzes. Eine Analyse des Beschlusses des BVerfG vom 5.5.2021 zum Ausgangsverbot der „Bundesnotbremse"' (2021) 60 *Der Staat* 609.

18 T Kingreen, 'Eine solche Hindenburg-Klausel' (26 March 2020) *Süddeutsche Zeitung*, https://www.uni-regensburg.de/assets/rechtswissenschaft/oeffentliches-recht/kingreen/kingreensz.pdf <2/2024>.

19 See the evidence given by A Nußberger, 'Regieren' (2022) 81 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7, 42 f.

tection Act and in the cases of the restrictions on fundamental rights and of the insufficient statutory authorisation – and on the lower democratic legitimacy of the executive legislator in comparison to parliaments. But the question of legitimacy kept lurking in the background – as the topic of this volume demonstrates.

VI. Not a Power Shift, but Overstretched Powers

What is to be made of this grand narrative? Like all grand narratives, it captures important aspects – while other aspects that do not conform to it fall by the wayside. At this point, therefore, I would like to offer a *counternarrative* that adds a few shades of grey to the picture painted so far, by drawing attention to problems that have hitherto gone almost unnoticed. To this end, I would like to look at the legislative and judicial branches and their role in the pandemic, and then conclude by comparing the resulting picture with that of the grand *Schmittian* narrative. In doing so – and this is important to me –, it is explicitly not my intention to play down the legal problems that I have outlined so far. Some of the mistakes that were made are unforgivable, especially the bans on visiting terminally ill patients,[20] and also the more or less blanket bans on assemblies in place during the first lockdown. My only concern is to put into perspective the black-and-white that is heard all too often. More ambivalence. More grey.

1. The Legislature

With regard to the Bundestag and the state parliaments, I would like to highlight four points:

1. I start with the smallest argument: Many of the fears have not come true at all:
   a) Under the Infection Protection Act, the epidemic situation of national importance is proclaimed by the Bundestag, not by the executive; the draft bill that had provided otherwise precisely *did not* become law.

20 AK Mangold, 'Relationale Freiheit. Grundrechte in der Pandemie' (2021) 80 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7, 27.

b) The same can be said about the emergency parliament: There was *no* corresponding amendment to the Basic Law.
And I would just like to add that, ever since the Basic Law came into force, there has been a discussion as to whether there is a loophole in the Basic Law if the Bundestag should ever cease to function outside of a case of defence.[21] It is true that the Basic Law, both in its rules which already existed before the emergency constitution and then through the insertion of the emergency constitution from 1968 itself, provides for many exceptional situations. But what is not provided for is the case of parliament becoming the victim of a terrorist attack, for example. Schäuble's proposal thus took up an old debate from the constitutional-law literature – a debate that merely flared up again during the pandemic.

c) The concerns regarding the "Conference of Minister Presidents plus Chancellor" format in place at the time also seem to me to be at least overstated, for several reasons:

– It is true that the Basic Law does not provide for any such body and that it runs the risk of weakening the state parliaments.
– However, it was clear to all actors at all times that the body's decisions were not legally binding, despite a great deal of de-facto pressure on the *Länder* to adhere to the format's results.
– This point regarding the lack of any legally binding effect is not just theoretical. In fact, the longer the pandemic lasted, the more the *Länder* (such as, prominently, the Saarland) started to break ranks, which ultimately led to the so-called federal emergency brake (to which I will turn in a moment).
– And finally, and as regrettable as one may find it, we know from organisational sociology that informal formats always emerge upstream of legal procedures.[22] From the academic system, for example, we could cite the assembly of professors, which is foreign to the, e.g., Berlin Higher Education Act; rather, the Act provides for the Departmental Council or Faculty Council as the central body at faculty level (§ 70), which are not purely professorial bodies.

21 AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 153, 342 f.

22 Regarding the many semiformal and informal bodies of Germany's federalism, see, famously, P Katzenstein, *Policy and Politics in West Germany* (Temple University Press, 1987) 45 ff.

– My argument is not that we should not take competences seriously. My point is simply to take a more realistic look at constitutional practice, which will never be without prior informal agreements.

2. As mentioned, with § 28a of the Infection Protection Act, the Bundestag finally and belatedly created, in the autumn of 2020, a suitable authorising basis for the numerous restrictions on fundamental rights by the *Länder* regulations. The courts had called for such an authorising basis and clearly communicated in their decisions that they would no longer accept the previous legal situation without a more specific basis clearly laying out the possible encroachments on fundamental rights.[23] Rightly so. Parliament had had plenty of time indeed to adjust to the new situation.

   At the same time, however, the then enacted § 28a shows the whole ambivalence of such a provision. For those who no longer have § 28a in mind: It allows, for example, the prohibition or restriction of cultural events, as well as the prohibition or restriction of the operation of catering establishments, the closure or restriction of businesses, trades, retail and wholesale trade etc.

   But to what extent is such a provision ambivalent, given that it was required by law? I am alluding to the old dilemma of legalising exceptional situations: The danger of such an emergency provision is always that it will gradually bleed into the law of the normal times. This phenomenon can be observed particularly well in the French *état d'urgence*, the state of urgency. It was first declared in the wake of the terrorist attacks in Paris in 2015 and then repeatedly extended. Under President *Emmanuel Macron*, this state of emergency was finally ended – but not without first transferring the relevant provisions into normal law. The emergency law became the law of the normal situation.[24]

   However, precisely because such a normalisation is a well-known phenomenon of emergency law and was also prominently put forward as a counter-argument in the discussion on the emergency constitution, the hesitation on the part of the Bundestag can perhaps also be explained by an at least *implicit* knowledge of the ambivalence of such a provision.

   There is another observation that points in the same direction: the *Querdenker* movement (which mobilised against the COVID-19 measures)

23 Bayerischer Verwaltungsgerichtshof 27.4.2020 – 20 NE 20.793, *juris*, para. 45; Verwaltungsgerichtshof Baden-Württemberg 9.4.2020 – 1 S 925/20, *juris*, para. 37 ff.

24 Cf. AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 189 ff.

really only sprung up with § 28a InfSG. Thus, of all things, the provision that was necessary for rule of law and democracy reasons became the rallying point for a movement that questions the German Federal Republican system.

3. The central point, however, seems to me the following: The story of the abdication of parliaments is a fairy-tale spread, for example, by the political scientist Wolfgang Merkel. In 2020, he wrote in the journal *Democratic Theory*: "The parliament has fallen to the status of a rubber-stamping institution."[25]

   By now, however, quantitative evaluations of parliamentary activities during COVID-19 are available. In this respect, I refer to the results of the political scientist *Sabine Kropp* and her team from Free University Berlin. They analysed the work of *Länder* parliaments which had been accused of the same hesitancy as the Bundestag.[26] The results are astounding. "Based on the stenographic minutes of the plenary sessions in the 16 *Länder* parliaments, all proceedings with a direct COVID-19 connection that were debated there between 1 February 2020 and the elections to the German Bundestag on 26 September 2021 were integrated into a data set."[27] How often did the state parliaments deal directly with the pandemic, be it via legislative activity, parliamentary question procedures, or other avenues? The result is the figure of 2,677 parliamentary procedures that make direct reference to COVID-19. Kropp sums up: "The state parliaments and their deputies have fulfilled their functions during the pandemic."[28] There is no question of rubber-stamping institutions.

   The political scientist *Sven Siefken* from the University of Halle studied the Bundestag itself and came to comparable conclusions. His answer to why the work of the Bundestag in the pandemic was often perceived as so weak is that the Bundestag is traditionally a "working parliament",

25 W Merkel, 'Who Governs in Deep Crises? The Case of Germany' (2020) 7 *Democratic Theory* 1, 4.

26 S Kropp et al., 'Landesparlamente in der COVID-19-Krise' (2022) *Berlin University Alliance Policy Brief* 1, https://www.berlin-university-alliance.de/commitments/knowledge-exchange/_media/policy-brief-landesparlamente.pdf <2/2024>.

27 S Kropp et al., 'Landesparlamente in der COVID-19-Krise' (2022) *Berlin University Alliance Policy Brief* 1, 2 (author's translation), https://www.berlin-university-alliance.de/commitments/knowledge-exchange/_media/policy-brief-landesparlamente.pdf <2/2024>.

28 *Ibid.*

not a "speaking parliament", and had *sold* itself particularly badly in the pandemic – but had not *worked* particularly badly.[29]

4. In April 2021, the federal government finally decided on uniform federal provisions with the so-called federal emergency brake (*Bundesnotbremse*) and stipulated the measures themselves, dependent on certain infection numbers, in § 28b Infection Protection Act (in its version at the time).

   Previously, individual states such as the Saarland (see above) had not adhered to the informal agreements of the Conference of Minister Presidents and the Federal Chancellor. But now, with the uniform federal provision, the excitement was particularly great. People did not celebrate a shift of power back to parliament, but complained – not at all unjustifiably, but nevertheless I would like to make the point – about the self-executing character of the provision and the – at least alleged[30] – deterioration of legal protections. Now, suddenly, the advantages of the old COVID-19 regulation regime were recognized, which had at least made it possible to attack the regulations by way of interim injunctions via § 47 VI *Verwaltungsgerichtsordnung*, at least in many *Länder*.

   And what do the critical voices of constitutional scholarship say, looking through *Schmitt's* eyes? They are now suddenly warning against "parliamentary absolutism",[31] forgetting that it was they themselves who had resolutely advocated the primacy of parliament.

2. The Judiciary

This brings me to the judiciary. As already indicated, the judiciary has been berated repeatedly over the course of the pandemic for being too uncritical.

First, it should be noted: According to the *Juris* database, the administrative courts have handed down several thousand decisions that make

29 ST Siefken, 'The Bundestag in the Pandemic Year 2020/21 – Continuity and Challenges in the Covid-19 Crisis' (2023) 32 *German Politics* 1, 16 f.

30 On procedural means for legal protection against federal regulations, see BVerwGE 111, 276; BVerwGE 166, 265, para. 22.

31 O Lepsius, 'Der Rechtsstaat wird umgebaut' (10 December 2021) *Frankfurter Allgemeine Zeitung*, https://www.faz.net/aktuell/feuilleton/corona-notbremse-entscheidung-des-bundesverfassungsgerichts-17676024.html <2/2024>.

direct reference to COVID-19, although the exact number is unclear, as there is no obligation to enter decisions into the database.[32]

And without question, among these decisions were grave mistakes. Just think of an early decision of the Gießen Administrative Court from the spring of 2020. Several assemblies were to take place in Gießen on various dates in April 2020, with approximately 30 (!) participants expected. The organisers had prepared hygiene measures and appointed stewards to ensure that the social-distancing rules in place would be complied with. Nevertheless, the city of Gießen prohibited these assemblies, referencing the Hessian COVID-19 regulations in force at the time.[33] In the end, it was the Federal Constitutional Court that ruled that the ban had violated the protesters' freedom of assembly and that interpreted the Hessian COVID-19 regulations more leniently to make them conform with the constitution.[34]

Incidentally, the principle of proportionality has proven to be a major problem in many administrative-court decisions. I have already dealt with the limits of the principle in my monograph on emergency constitutional law,[35] and I think that the pandemic has confirmed my observations. At least two problems are virulent. The first could be called the knowledge problem. On the first two levels of the proportionality test, suitability and necessity, the courts must ask themselves whether certain pandemic-control measures are *actually* suitable, for example, to prevent infections and thus protect life, and whether less stringent, but equally effective, means are not apparent. In both these assessments, the legislature and probably also the executive legislator enjoy a certain level of discretion.

To answer these questions, the courts had to rely on outside expertise. Whether curfews were suitable, what effect FFP2 masks had or what dangers come from (formerly) unvaccinated schoolchildren had to be assessed through outside expertise. And since there were divergent opinions on many of these questions, also among experts, the courts had no choice but to rely on the presentation of the available knowledge by the Federal Disease Prevention Agency, the Robert Koch Institute, which continuously

32 Early on, J Kruse/C Langner, 'Covid-19 vor Gericht: Eine quantitative Auswertung der verwaltungsgerichtlichen Judikatur' (2021) *Neue Juristische Wochenschrift* 3707 ff., analysed more than 5000 decisions.

33 Verwaltungsgericht Gießen 9.4.2020 – 4 L 1479/20.GI, *BeckRS 2020,* 5767, para 3 ff.

34 BVerfG (2020) *Neue Juristische Wochenschrift* 1426. On this, see M Hong, 'Coronaresistenz der Versammlungsfreiheit?' (17 April 2020) *Verfassungsblog*, https://verfassungsblog.de/coronaresistenz-der-versammlungsfreiheit <2/2024>.

35 AB Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020) 232 ff.

put the various expert opinions in relation to each other,[36] that is, the same knowledge that was also available to the other two powers. The courts did not and do not have superior knowledge.

In addition, there is a balancing problem at the level of proportionality *sensu stricto*. The more important the goods to be protected are, the more intensive the encroachment on fundamental rights can be without becoming disproportionate. As a reminder: According to the Robert Koch Institute, 172,215 people had died of or with Covid in Germany by 19 April 2023.[37]

Therefore, in my view, the accusation that the courts have not been strict enough is unfounded.[38] *What is true, however, is that the courts are only as good as their standards.*

The courts have also seen this problem and probably also for this reason strengthened the principle of equal protection as an alternative standard. In this way, the principle of equal protection has acquired considerable significance in the review of pandemic-control measures.[39]

In some cases, attempts have been made by the judiciary to control the measures more strictly overall, possibly to counter the accusation of laxity. But such attempts have sometimes been accompanied by major methodological errors.

For example, some courts, such as the Constitutional Court of the Saarland, relied on individual studies instead of meta-studies made available by the Robert Koch Institute.[40] Often, however, these individual studies were not sufficiently valid.

Another example was the voiding of the rule in the retail sector that only vaccinated or recovered persons could access shops by the Appellate Administrative Court of Lower Saxony in December 2021.[41] This decision attracted a lot of attention at the time. Here are some background details to the case: The legislator had provided, for proportionality reasons, for ex-

36 HH Trute, 'Ungewissheit in der Pandemie als Herausforderung' (2020) 7 *Zeitschrift für das Gesamte Sicherheitsrecht* 93, 96 f.

37 See Statista, 'Todesfälle im Zusammenhang mit dem Coronavirus (COVID-19) in Deutschland nach Alter', https://de.statista.com/statistik/daten/studie/1104173/umfrage/todesfaelle-aufgrund-des-coronavirus-in-deutschland-nach-geschlecht/ <2/2024>.

38 See the early analysis, pointing in the same direction, by A Klafki, 'Kontingenz des Rechts in der Krise' (2021) 69 *Jahrbuch des öffentlichen Rechts der Gegenwart* 583.

39 A Edenharter, 'Grundrechtseinschränkungen in Zeiten der Corona-Pandemie' (2021) 69 *Jahrbuch des öffentlichen Rechts der Gegenwart* 555, 578.

40 Verfassungsgerichtshof des Saarlandes 28.4.2020 – Lv 7/20, *juris*, para 36.

41 Oberverwaltungsgericht Niedersachsen (2022) *Neue Juristische Wochenschrift* 256.

emptions from the rule for unvaccinated people; indeed, the legislator was not allowed to exclude the unvaccinated from access to grocery stores in particular. The COVID-19 Regulation was therefore unquestionably "right" to include this exception, which the Court itself also assumed (para. 33).

This exception therefore existed precisely in order to take account of the requirements of proportionality. Strangely enough, however, this is precisely where the court intervened. At the level of suitability, it criticized a reduced appropriateness due to the exceptions mentioned, in order finally to use the argument of reduced appropriateness as a decisive factor at the proportionality level *sensu stricto*, and in order to find the regulation disproportionate (para. 50). In other words: In the Senate's reasoning, an exception that had to be introduced for reasons of proportionality leads to the disproportionality of the 2G rule. Proportionality then results – via the intermediate step of reduced suitability – in disproportionality. This cannot be right.[42]

I have singled out this ruling from a multitude of decisions. It is interesting because it stands for the attempt of an Appellate Administrative Court to be critical, perhaps particularly critical, and at the same time illustrates that this, too, can create problems.

3. The Executive

My final reflections concern the executive. First of all, we have to speak of the executive in the plural; it was precisely during the COVID-19 pandemic that the effectiveness of a vertical separation of powers came to the fore. We were not dealing with one leader who ruled the country, or with Viktor Orbán, who in fact used the pandemic to introduce a kind of enabling legislation and further transform the Hungarian system towards an autocracy,[43] but with 16 *Länder* governments that at least made every effort to find appropriate solutions.

After all that has been said, the overall assessment of the pandemic-control measures appears to be much more nuanced than is often assumed.

42 See in more detail AB Kaiser, 'Vorläufiger Rechtsschutz gegen Corona-Verordnung mit 2G-Regelung im Einzelhandel' (2022) 64 *Juristische Schulung* 382, 383 f.

43 See G Halmai/G Mészáros/KL Scheppele, 'From Emergency to Disaster' (30 May 2020), *Verfassungsblog*, https://verfassungsblog.de/from-emergency-to-disaster/ <2/2024>.

And that has been my point: not to negate the problems that actually occurred, but only to take the other side into consideration as well.

But if we now look ahead, what is there to consider?

VII. Resilience in the Administrative State

My last point regards the resilience in the administrative state, because I wish to point out problems that have arisen at the *lower* levels in the administration, and which have been lost sight of in the grand narrative.

- One thinks of the overburdened health offices that gave up contact-tracing at some point.
- In Berlin, for example, civil servants were no longer able to enforce so-called distancing orders (i.e., quarantines) in a legally correct manner. To take an example from my own experience: In a private day-care centre, it was the day-care centre *itself* that messaged an administrative order to the parents.[44] Of course, this was highly problematic in terms of the rule of law: no legal remedy notice, vagueness, no legal basis, etc. And this was not an isolated case, but the new norm.
- One also thinks of the regulatory chaos; for instance, complete confusion over COVID regulations, some of which should have been implemented immediately, but the administration was not in a position to do so at all.
- One thinks of lingering problems of non-knowledge: The German Medical Association warned of a "data blindness" (*Datenblindflug*) with regard to the autumn and winter of 2022;[45] we knew little about the immunity status of the population, about the occupied intensive-care beds and about the actual number of COVID infections, because people no longer had PCR tests done, etc.
- Consider the example from the "Federal Emergency Brake Decision II":[46] School administrations often failed to organise online teaching and limited themselves to analogue homework. On the one hand, this may have been due to data-protection problems (can Zoom legally be

44 See, on such a case, V Schürmann/R Hensel, 'Schule unter Quarantäne' (2021) 64 *Juristische Schulung* 970.

45 See Deutsches Ärzteblatt, 'Bundesärztekammer warnt vor 'Datenblindflug' im Coronaherbst', https://www.aerzteblatt.de/nachrichten/134955/Bundesaerztekammer-warnt-vor-Datenblindflug-im-Coronaherbst <2/2024>.

46 BVerfGE 159, 355.

used by public authorities in Germany?), but often also due to a lack of willingness on the part of those responsible.

- Final example: During the summer of 2022, an elderly lady collapsed next to me in Berlin Mitte. I called the Berlin fire brigade for the first time ever, but to my great surprise I got put on hold and had to listen to the announcement: "We are currently in a 'state of emergency'. Our entire staff is currently busy. Please consider whether your request is really important."

We do not see an energetic administration here, an overreaching executive that has accumulated broad powers, but a completely overstretched second power that is lacking personnel and equipment.[47] Yet we should pay attention to that – a grand narrative that is interested in the big questions, but then partially overlooks them, misses these points because it is not interested in what is happening on the ground.

Of course, in sociological terms, my examples have only anecdotal value, but I suspect you will agree that the examples I have chosen are indicative of the overall picture after all. My thesis is therefore: A resilient crisis-management system needs a high-performing administration, especially at the lowest levels. Even a perfect COVID Regulation is of no use if it cannot be implemented on the ground.

VIII. Conclusion

To sum up, we were able to observe three powers in the pandemic that were strongly challenged and in part overstretched. In a way, this should not surprise us, because otherwise we would not have been able to speak of a crisis at all.

And what does that mean in terms of legitimacy? The "acceptability of the government" is certainly still given, but legitimacy falters *when basic administration is no longer ensured*. The populists also pick up on this. Let us not leave the field to the populists. What COVID-19 teaches us is that it is crucial to create a resilient infrastructure, above all in terms of staff, so that we are prepared for future crises.

47 Without denying the distinction between the gubernative and the executive.

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