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Germany – Federalism in Action

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I. Introduction

Coronaviruses are not new threats. However, while the most recent two – SARS¹ and MERS² – coronavirus related diseases never reached the scale of a pandemic, COVID-19 shook most legal and political systems to their core and caused more than 2.3 million deaths before February 2021.³ The vast majority of countries was affected, but a variety of factors determined the severity with which states and regions were exposed. These include a region's geography, population density, exposure to tradable sectors and global value chains as well as its economic specialisation, for instance in tourism.⁴

Germany's approach to the pandemic is a particularly interesting one, for mainly three reasons: First, Germany is considered a state not only of enormous economic and financial power (and as a result having offered (albeit very poorly administered) generous measures for struggling businesses during the crisis),⁵ but with a strong legal and political tradition of the social state (*Sozialstaatlichkeit*)⁶ which should equip Germany well for a public health crisis. This principle is enshrined in Germany's Basic Law (GG) and is one of the inalienable core

*The author is thankful to Vanessa Bliecke, Rouven Dieckjobst, Nadine Grünhagen and Ella Schönlleben for assistance with research and editing.

¹ Severe Acute Respiratory Syndrome, cf E Rosenthal, 'The SARS Epidemic: The Path' *New York Times* (27 April 2003) www.nytimes.com/2003/04/27/world/the-sars-epidemic-the-path-from-china-s-provinces-a-crafty-germ-breaks-out.html.

² Middle East Respiratory Syndrome, cf. WHO, 'Middle East respiratory syndrome coronavirus (MERS-CoV)' www.who.int/news/item/09-07-2013-middle-east-respiratory-syndrome-coronavirus-mers-cov.

³ As of 16 February 2021, cf WHO, 'WHO Coronavirus Disease (COVID-19) Dashboard' covid19.who.int/.

⁴ OECD, 'The territorial impact of COVID-19: Managing the crisis across levels of government' (10 November 2020) read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government.

⁵ V Jentsch, 'Government Responses on Corona and Contracts in Europe: A Compilation of Extraordinary Measures in Times of Crisis', papers.ssrn.com/sol3/papers.cfm?abstract_id=3713699.

⁶ cf M Sachs, 'Art. 20' in M Sachs (ed), *Grundgesetz: Kommentar* (CH Beck, 2020) 816f.

principles of the constitution (*Ewigkeitsklausel*, Article 79, paragraph 3 GG).⁷ Chancellor Ludwig Erhard coined the idea of social market economy (*Soziale Marktwirtschaft*) in the 1950s;⁸ until today this notion forms very much part of German political identity. Along with it comes a supposedly strong healthcare system⁹ – even if questions of inequality in that system continue to be raised.¹⁰ So the question is: did the supposedly strong German economy and healthcare systems do as well as we would expect it to do?

Secondly, Germany is, challenged only by France, the political hegemon in the European Union. Economic and financial power are paired with 16 years of Angela Merkel's chancellorship – the most experienced political leader of all 27 EU Member States who has successfully weathered the storms of various European crises (eg, the 'financial crisis', the 'refugee crisis') to become one of the most respected political leaders worldwide. With a new German President of the European Commission and with the political heavyweight of the UK having left the Union, Germany has more power within the EU than ever before. However, did Germany do these high international and in particular European expectations justice?

Thirdly, and most importantly, Germany is explicitly a federal state. The principle of federalism, broadly understood as a mixed form of governance combining a central government with regional/provincial governments,¹¹ is another one of the inalienable core principles of the GG, of equal constitutional value as the principle of democracy or the rule of law. There is hardly another state within the EU in which the principle of federalism enjoys greater political importance and higher constitutional rank than in Germany¹² – a structure that is certainly in direct contrast to the EU's second most influential state, France, which heavily relies on a centralist form of state organisation. So, has Germany's federalist approach – allowing the *Länder* to set different rules rather than implementing a federal uniform approach – been a more responsive and democratic way of handling the crisis, or has it hampered the effectiveness of the German response?

⁷ R Herzog et al (eds), 'Art. 79' in T Maunz and G Dürig (eds), *Grundgesetz: Kommentar* (CH Beck, 2020) para 157.

⁸ L Erhard, *Wohlstand für alle* (Anaconda Verlag, 2020).

⁹ A Tandon et al, 'Measuring overall Health System Performances for 191 Countries' (*World Health Organization GPE Discussion Paper Series: No. 30*) www.who.int/healthinfo/paper30.pdf; OECD 'State of Health in the EU – Germany, Country Health Profile 2017', www.euro.who.int/__data/assets/pdf_file/0004/355981/Health-Profile-Germany-Eng.pdf.

¹⁰ Out of many: T Lampert et al, 'Health inequalities in Germany and in international comparison: trends and developments over time' (2018) *Journal of Health Monitoring*, edoc.rki.de/handle/176904/3046.

¹¹ German Federal Constitutional Court (BVerfG), *Neugliederung Hessen*, 11 July 1961, BVerfGE 13, 54 (77 f.); KP Sommermann, 'Art. 20' in H Mangoldt, F Klein and C Starck (eds), *Grundgesetz Kommentar*, 7th edn (CH Beck, 2018), para 28.

¹² Z Desson et al, 'Europe's Covid-19 outliers: German, Austrian and Swiss policy responses during the early stages of the 2020 pandemic' (2020) *Health Policy and technology* 405, 415. For another state with particularly strong federalist features, albeit outside the EU, see O Ammann and F Uhlmann, 'Switzerland: The (Missing) Role of Parliament in Times of Crisis', in this volume.

After giving an overview over the course of the pandemic in Germany including the state's response to it (section II), the analysis proceeds in section III with characterising the German model of federalism, the constitutional rules on state emergencies, democratic power-sharing and the special protection of fundamental rights as well as infectious disease law. It examines the different legal levels – the constitutional framework of the GG, federal laws (mainly the German *Infektionsschutzgesetz* (IPA)¹³) and – to some extent – decrees by the executive at the different levels (*Verordnungen*). In section IV, the strengths and weaknesses of the German (highly federalist) approach are weighed against each other in how far and under which circumstances is the federal state equipped to adapt its institutional set-up and its legislative procedures to adjust to 'crisis mode', and how has the German response played out with regard to the principle of democracy? The chapter concludes with options for legal and policy reform (section V).

II. Germany and the COVID-19 Pandemic in 2020

The first case of COVID-19 in Germany was discovered on 27 January 2020,¹⁴ significantly later than cases in Italy¹⁵ and France. The first two COVID-19 related deaths were reported on 9 March 2020,¹⁶ again much later than in other European States. The 'first wave' (spring to summer 2020) hit Germany later and took a milder course than in other EU States.

When looking at the numbers, Germany did remarkably well compared to other prosperous European States of comparable population size (eg, the UK, France, Italy or Spain),¹⁷ with roughly 2.3 million confirmed cases and an estimated 65,000 COVID-related deaths within the German population of 82 million.¹⁸ Areas in the

¹³ Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz), 20 July 2000, BGBl. I S. 1045, last amended 21 December 2020, BGBl. I S. 3136.

¹⁴ RKI, 'Epidemiologisches Bulletin 07/2020' (2020) www.rki.de/DE/Content/Infekt/EpidBull/Archiv/2020/Ausgaben/07_20.pdf?__blob=publicationFile.

¹⁵ Deutsche Welle, Corona war schon im September 2019 da, auch in Europa, www.dw.com/de/corona-war-schon-im-september-2019-da-auch-in-europa/a-55626017 (first instance in Italy in September 2019); Deutsche Welle, Erster Corona-Fall in Frankreich schon im Dezember, www.dw.com/de/erster-corona-fall-in-frankreich-schon-im-dezember/a-53341847 (first instance in France in December 2019).

¹⁶ RKI, 'Coronavirus Disease 2019 (COVID-19) Daily Situation Report of the Robert Koch Institute, 09/03/2020' (2020) www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Situationsberichte/2020-03-09-en.pdf?__blob=publicationFile.

¹⁷ See R Thomas, 'Virus Governance in the United Kingdom' in this volume; S Brunet, 'The Hyper-Executive State of Emergency in France' in this volume; A Vidaschi, 'The Marginalisation of Parliament in Facing the Coronavirus Emergency: What about Democracy in Italy?' in this volume; J Reichel and J Dahlgvist, 'Swedish Constitutional Response to the Corona Crisis – The Odd One Out', in this volume.

¹⁸ J Schilling et al, 'Disease severity of the first COVID-19 wave in Germany using reporting data from the national notification system' (2020) *Journal of Health Monitoring*, www.rki.de/EN/Content/Health_Monitoring/Health_Reporting/GBEDDownloads/JJoHM_S11_2020_Disease_Severity_COVID_19.pdf?__blob=publicationFile.

south (Bavaria, Baden-Wuerttemberg, Thuringia and Saxony) were more affected than the north,¹⁹ given, inter alia, the proximity to COVID-19 hotspots in States neighbouring Germany to the south and the east, such as Austria or the Czech Republic. In the west, Germany's region with the highest population density, North-Rhine Westphalia, was also significantly more affected than most rural areas.²⁰ In this first wave, Germany never reached numbers higher than 7,000 new cases and a death rate of hardly ever over 250 per day – compared to much higher numbers in Italy, Spain, France or the UK, where the daily infection rates were double or triple those in Germany.²¹

During this first wave, Germany was widely considered a poster-child for its approach in tackling the pandemic. Germany managed to establish a very high test rate in the early phase of the pandemic²² and built a reliable tracing system to follow infection chains.²³ Far-reaching curfews and social distancing rules were introduced in early March 2020.²⁴ Its modern healthcare system, well-equipped hospitals as well as its highly qualified doctors and hospital personnel, were instrumental in keeping the death rates low.²⁵ As one caveat, however, some political observers noted already in the first wave that the measures taken had a rather restricting effect on democratic structures, eg the unilateral empowerment of the federal ministry of health at the expense of Parliament.²⁶

The second wave (fall/winter 2020/2021) hit Germany significantly harder. While this is true for most, if not all European States, the difference in severity between the first and the second wave in Germany is striking. With infection rates well over 40,000 in December 2020 and regularly reported death rates

¹⁹ A Mense and C Michelsen, 'Räumliche Ausbreitung von COVID-19 durch interregionale Verflechtungen' (2020) Leibniz-Informationszentrum Wirtschaft' (2020) link.springer.com/article/10.1007/s10273-020-2674-7; RKI, 'Daily Situation Report of the Robert Koch Institute 14/03/2020' (2020) www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Situationsberichte/2020-03-14-en.pdf?__blob=publicationFile.

²⁰ *ibid.*

²¹ *The Economist*, 'Tracking the coronavirus across Europe' (21 January 2020) www.economist.com/graphic-detail/tracking-coronavirus-across-europe.

²² Bundesministerium für Gesundheit, 'Testen, testen, testen' – aber gezielt' (17 April 2020) www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/C/Coronavirus/Faktenpapier_Testen.PDF.

²³ RKI, 'Kontaktpersonennachverfolgung bei respiratorischen Erkrankungen durch das Coronavirus SARS-CoV-2' (18 March 2020) https://cdn.dosb.de/user_upload/Olympische_Spiele/Tokio_2020/Corona/RKI_Kontaktpersonen_Management_COVID-19_1803202.pdf; updated version available under: www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Kontaktperson/Management.html.

²⁴ T Bütthe, L Messerschmidt and C Cheng, 'Policy Responses to the Coronavirus in Germany' in GL Gardini *The World Before and After COVID-19: Intellectual Reflections on Politics, Diplomacy and International Relations* (Stockholm, European Institute of International Studies Press 2020) 97.

²⁵ F Hattke and H Martin, 'Collective action during the Covid-19 pandemic: The case of Germany's fragmented authority' (2020) *Administrative Theory & Praxis* 614, 616.

²⁶ Süddeutsche Zeitung, 'Spahn will dauerhaft Sonderrechte' (18 October 2020) www.sueddeutsche.de/politik/jens-spahn-gesetz-pandemie-1.5079500; Bundesministerium für Gesundheit, 'Drittes Bevölkerungsschutzgesetz' (18 November 2020) www.bundesgesundheitsministerium.de/drittes-bevoelkerungsschutzgesetz.html.

of over 1,000 per day,²⁷ Germany fared worse than many European neighbours. While trying to avoid a second full lockdown, the federal government and the *Länder* agreed in late October 2020 on a 'lockdown light',²⁸ with educational institutions (schools and kindergartens) as well as essential service-providers (hairdressers) remaining open. Chancellor Merkel had pressed for a more decisive approach and more drastic measures, but was unable to find agreement amongst the Prime Ministers of the *Länder*.²⁹

Germany also performed particularly poorly in its mass vaccination strategy since early 2021. While many States had a large part of their population vaccinated by spring 2021, Germany lagged dramatically behind. While, for instance, by mid-February 2021, Israel had vaccinated more than 50 per cent, the United Arab Emirates (UAE) more than 30 per cent and the UK more than 25 per cent of their respective population at least once, Germany had still vaccinated significantly less than 5 per cent of its population at least once at that time.³⁰ Germany not only started late, but also administered significantly less daily doses of COVID-19 vaccinations³¹ than other States such as the UAE, Israel, the US and the UK,³² even in comparison to other EU States with less advanced healthcare systems such as Malta, Poland, or Spain.³³ The German vaccination campaign was thus late and slow. Reasons for this include insufficient orders of the vaccine by the federal government and the EU in early 2020,³⁴ but also the lack of coordinated planning strategies of the federal state with the *Länder*.³⁵

III. The Relevant German Legal Framework

This section summarises federalist and democratic structures in Germany and highlights how they shaped Germany's response to COVID-19.

²⁷ eg RKI, 'Daily Situation Report of the Robert Koch Institute 18/12/2020', www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Situationsberichte/Dez_2020/2020-12-18-en.pdf?__blob=publicationFile; see all reports of December here: www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Situationsberichte/Dez_2020/Archiv_Dezember.htm.

²⁸ Bundesregierung 'Videokonferenz der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 28. Oktober 2020' www.bundesregierung.de/resource/blob/997532/1805024/5353edede6c0125ebe5b5166504dfd79/2020-10-28-mpk-beschluss-corona-data.pdf?download=1.

²⁹ Die Zeit 'Jetzt aber schnell' (28 October 2020) www.zeit.de/politik/deutschland/2020-10/ministerpraesidentenkonferenz-coronavirus-zweiter-lockdown-angela-merkel; Süddeutsche Zeitung, 'Teil-Lockdown an Weihnachten befürchtet' (23 November 2020) www.sueddeutsche.de/politik/corona-weihnachten-lockdown-dreyer-1.5123842.

³⁰ H Ritchi et al, Coronavirus (COVID-19) Vaccinations, www.ourworldindata.org/covid-vaccinations.

³¹ 0.13 doses per 100 people, see *ibid*.

³² UAE (1.41), Israel (1.12), the UK (0.63) and the US (0.44) per 100 people, see Ritchi (n 30).

³³ Malta (0.37), Poland (0.18) and Spain (0.15), see Ritchi (n 30).

³⁴ M Becker et al, 'Das Planungsdesaster' *Der Spiegel* (18 December 2020).

³⁵ S Stalinski, 'Warum so langsam?' (*Tagesschau* 4 January 2021) www.tagesschau.de/inland/gesellschaft/faq-schleppende-impfkampagne-101.html.

A. Federalism in the German Constitution

Both the German federal state as well as the 16 states (*Länder*) hold the basic characteristics of a state (*Staatsqualität*).³⁶ The *Länder* enjoy, even if in a limited way,³⁷ what the German constitutional court ('BVerfG') termed constitutional autonomy (*Verfassungsautonomie*),³⁸ emphasising their uniquely strong position within the German legal system.

Federalism is aimed at enabling variety while preserving state unity.³⁹ It also limits political power over the individual⁴⁰ – emphasised also by the central role the German fundamental rights (Articles 1–19 GG) play in the German constitution as a lesson from Nazi history.⁴¹ Federalism enables vertical separation of powers⁴² as a central means of checks and balances.

The 16 *Länder* are geographically and economically very different. North-Rhine Westphalia (18 million inhabitants) has 25 times the population of Bremen (0.7 million inhabitants),⁴³ Bavaria makes up 20 per cent of the German territory while the three city states of Hamburg, Bremen and Berlin combined only hold 0.5 per cent of the territory⁴⁴ and the GDP per capita in Hamburg is far more than double that one in Saxony-Anhalt.⁴⁵ These conditions are in contrast with the fact that the *Länder* are supposed to be at eye level of each other,⁴⁶ given that the constitution postulates comparable living conditions (*gleichwertige Lebensverhältnisse*) for all the *Länder* (Article 72, paragraph 2 GG).

With regard to the democratic principle within these federalist structures, the 'normative programming' in Germany lies firmly in the hand of the federal level.⁴⁷ Where the federal state does not hold 'exclusive' legislative powers,⁴⁸ it has in many policy fields 'concurrent' legislative powers,⁴⁹ which the state has

³⁶ J Isensee and P Kirchhof, *Handbuch des Staatsrechts VI*, 3rd edn (CF Müller, 2009) § 126, Rn. 4; Sommermann (n 11) 21. Despite this state quality, the *Länder* remain sub-ordinated to the federal state, see BVerfG, *Zensus 2011*, 19 September 2018, BVerfGE 150, 1 (103f.).

³⁷ PM Huber, 'Verfassungsautonomie der Länder und Landesverfassungsgerichtsbarkeit' in B Munz and A Uhle (eds), *Der deutsche Verfassungsgerichtsverbund* (Nomos, 2019) 29–51.

³⁸ BVerfG, *Finanzausgleich*, 24 June 1986, BVerfGE, 72, 330 (388); BVerfG, *Naturschutzgesetz Schleswig-Holstein*, 7 May 2001, BVerfGE, 103, 332 (350f.).

³⁹ BVerfG, *Studiengebühren Bremen*, 8 May 2013, BVerfGE 134, 1; H Jarass in H Jarass and B Pieroth (eds), *Grundgesetz: Kommentar*, 16th edn (CH Beck, 2020) 544.

⁴⁰ BVerfG, *Berufsausbildungsabgabe*, 10 December 1980, BVerfGE 55, 274 (318f.); B Grzeszick, 'Art 20 IV' in R Herzog et al (eds), *Maunz/Dürig Grundgesetz Kommentar* (Issue 92, August 2020), para 20.

⁴¹ H Vorländer, *Die Verfassung. Idee und Geschichte* (CH Beck, 2004) 11.

⁴² BVerfG, *Telekommunikationsgesetz*, 15 July 2003, BVerfGE 108, 169 (181f.); Jarass (n 39) Art 20 GG, p 546, para 32.

⁴³ Statistische Ämter des Bundes und der Länder, 'Statistikportal, Fläche und Bevölkerung' (2020) www.statistikportal.de/de/bevoelkerung/flaeche-und-bevoelkerung.

⁴⁴ *ibid.*

⁴⁵ Statistische Ämter des Bundes und der Länder, 'Statistikportal, Bruttoinlandsprodukt' (2020) www.statistikportal.de/de/vgrdl/ergebnisse-laenderebene/bruttoinlandsprodukt-bruttowertschoepfung/bip.

⁴⁶ M Klopfer, *Verfassungsrecht I* (CH Beck, 2011) § 9, para 90; Grzeszick (n 40) para 113.

⁴⁷ J Kersten and S Rixen, *Der Verfassungsstaat in der Coronakrise* (CH Beck, 2020) 113–14.

⁴⁸ See the list in Art 73 GG.

⁴⁹ See Art 72 and the list in Art 74 GG.

used extensively,⁵⁰ minimising legislative powers of the *Länder* de facto to a few selected fields, such as education, culture or police law.⁵¹ The general rule that state powers should primarily be exercised through the *Länder* (Articles 30 and 70 GG) has been reversed for the legislature. As a consequence of this, the devaluation of *Länder* Parliaments has long been observed to be problematic,⁵² with a view to the erosion of the democratic principle.

However, where legislative competence lies with the federal level, the *Länder* have nonetheless retained an important role in the legislative process – they are granted, dependent on the substantive matter, either the right to slow down or even veto the process via the upper German house (*Bundesrat*).⁵³ However, while this indeed promotes the *Länder*'s influence in federal law making, it does not include the *Länder* parliaments in this equation as the *Bundesrat* is made up of representatives of the *Länder* governments, not the *Länder* parliaments.

With respect to administration, Germany's political system takes the form of administrative federalism (*Exekutivföderalismus*).⁵⁴ Most federal laws are executed by the *Länder* in their own right (Articles 83 and 84 GG). Only in exceptional cases does the federal state hold the power to execute the laws itself (Article 86 GG). Seldomly does the *Länder* execute the laws on commission of the federal state, giving the federal level an increased power of oversight both in terms of legality and suitability of the chosen measures (Article 85 GG).

Furthermore, the unwritten constitutional notion of mutually faithful federal behaviour (*Bundestreue*) has become increasingly important over the last decades.⁵⁵ Both sides have to take each other's interests into account in good faith when exercising their competences.⁵⁶ This includes sharing information, consultation or cooperation.⁵⁷ Where *Länder* arbitrarily aim at having negotiations with the federal state fail⁵⁸ or use own competences to the detriment of the *Bund*,⁵⁹ they are in clear violation of said principle. The role of the *Länder* in federal law-making via the *Bundesrat* as well as this duty to cooperate have coined the term of cooperative federalism (*kooperativer Föderalismus*),⁶⁰ emphasising the multi-lateral bargaining and consensus-seeking character of German federalism.⁶¹

⁵⁰ Sommermann (n 11), para 31.

⁵¹ A Uhle, 'Art. 72' in Herzog et al (n 40) paras 348ff.

⁵² K Stern, *Staatsrecht I*, 2nd edn (CH Beck, 1984) § 19 IV para 3.

⁵³ MHW Möllers, 'Gesetzgebung' in R Voigt (ed), *Handbuch Staat* (Springer VS, 2018) 1014.

⁵⁴ J Kersten and S Rixen, *Der Verfassungsstaat in der Coronakrise* (CH Beck 2020) 113.

⁵⁵ BVerfG, *Kalkar II*, 22 May 1990, BVerfGE 81, 310 (337f.); BVerfG, *EG-Fernsehrichtlinie*, 22 March 1995, BVerfGE 92, 203 (234); Schnapp, MÜK 11.

⁵⁶ BVerfG, *Biblis A*, 9 February 2002, BVerfGE 104, 249 (270).

⁵⁷ BVerfG, *numerus clausus II*, 8 February 1977, BVerfGE 43, 291 (348f.); Jarass (n 39) 545.

⁵⁸ BVerfG, *Wohnungsbauförderung*, 21 May 1952, BVerfGE 1, 299 (315f.).

⁵⁹ BVerfG, *2. Rundfunkentscheidung*, 27 July 1971, BVerfGE 31, 314 (355).

⁶⁰ TA Börzel, *States and Regions in the European Union: Institutional Adaptation in Germany and Spain* (CUP, 2001) 45; J Saurer, 'Covid-19 and Cooperative Administrative Federalism in Germany, Comparing Nations Responses to Covid-19' (*The Regulatory Review*, 13 May 2020) www.theregreview.org/2020/05/13/saurer-covid-19-cooperative-administrative-federalism-germany/.

⁶¹ *ibid.*, 48.

Summing up, German federalism is both *executive* (with most legislative powers at the federal level, but the implementation of the federal laws firmly in the hands of the *Länder*) and *cooperative* (obliging the federal state and *Länder* to work together in good faith).

B. Emergency Regulations in the German Basic Law

A specific part of the German constitution (GG) concerns the emergency constitution (*Notstandsverfassung*), largely introduced in 1968 following a wave of left-wing civil society unrest.⁶² Until then, the GG had remained silent on emergency regulations, as a result of bad experiences with emergency clauses in the Weimar constitution (Article 48, paragraph 2 of that constitution) and because the Allies had reserved for themselves certain emergency powers in Germany.⁶³

Today, these rules of the emergency constitution are spread all through the constitutional text which makes them rather complex and chaotic.⁶⁴ Their overarching goal is to protect the state in times of crisis through simplification of procedures and through concentration of powers with the federal executive. The GG sharply distinguishes externally-induced and internal emergency. Cases of externally-caused emergency are the case of self-defence (Article 115 a–i GG) and the case of external tensions (*Spannungsfall*) that are likely to turn into self-defence (Article 80 a GG). The legal consequences of such externally-caused emergencies are competence shifts to the federal government, simplified legislative procedures and possible restrictions in otherwise guaranteed fundamental rights.⁶⁵

Very different is the case of internally-induced emergency (Article 35 GG). This includes special cases of dangers for public security and order as well as the case of catastrophes. In such cases the *Länder* can request help from other *Länder* or the federal state (Article 35, paragraph 2 GG). If several *Länder* are affected, the federal government may instruct the *Länder* governments to place police forces at the disposal of other *Länder* and may deploy units of the federal border police or the armed forces to support the *Länder* police. The *Bundesrat* is given the power to request that such measures be rescinded (Article 35, paragraph 3 GG).

Going even further, Article 91 GG regulates the case of dangers for the existence or the free democratic basic order of the federal state or at least one of the

⁶² M. Kenzler, *An den Grenzen der Notstandsverfassung: Ausnahmezustand und Staatsnotrecht im Verfassungssystem des Grundgesetzes* (Duncker & Humblot, 1974) 15 f.

⁶³ *ibid.*

⁶⁴ P. Thielbörger and B. Behlert, 'COVID-19 and the Basic Law: On the (Un)suitability of the German Constitutional "Immune System"' (*Blog of the International Journal of Constitutional Law*, 20 March 2020) www.icconnectblog.com/2020/03/covid-19-and-the-basic-law-on-the-unsuitability-of-the-german-constitutional-immune-system/.

⁶⁵ For more specific information, see for instance: T. Mertins, *Der Spannungsfall. Eine Untersuchung zur Notstandsverfassung des Grundgesetzes unter besonderer Berücksichtigung der Abwehr terroristischer Gefahren* (Nomos, 2013).

Länder. In this case, the *Länder* can request police forces from other *Länder* or the German border police. According to paragraph 2, in such cases the federal executive can even take control over *Länder* police forces, give direct orders to the *Länder* governments or, if the use of police or border police is insufficient, use military forces (Article 87a, paragraph 4 in conjunction with Article 91, paragraph 2 GG).

Pandemics (such as COVID-19) do not classify as externally-induced emergencies, except for scenarios in which viruses would be used against Germany as a weapon by another state. However, they can be understood as internal emergencies such as natural disasters in the sense of Article 35 GG, even if the natural disasters that the authors of GG had in mind were sudden threats such as floods and earthquakes.⁶⁶ However, the typical legal consequences of Article 35, paragraphs 1–3 GG (sharing of police forces, the use of the military, etc) are inapt for dealing with a pandemic. Only where it reaches an extreme status (eg, the collapse of the entire healthcare system) which threatens the existence of the nation in the sense of Article 91 GG, might some of the legal consequences (eg, the possibility of giving direct order to *Länder* governments) become relevant. However, such a state of emergency was not proclaimed at the federal level, but only occurred in very few *Länder* (eg, Bavaria) and municipalities (eg, Halle) where regional cases of emergency were proclaimed at certain peak times of infections.⁶⁷

Thus, altogether while the German constitution is rather well equipped for making necessary changes if an externally-induced emergency (such as an armed attack), it provides hardly any tools for the federal level to react to an internal emergency (such as a pandemic).

C. The Role of Parliament

The *Bundestag* is Germany's main legislative organ, the heart of German democracy. Like any Parliament, it has an important 'integrative function through representation':⁶⁸ not only decision-making through majority, but also the exchange of different views give the *Bundestag*'s acts a higher degree of legitimacy than the acts of government.⁶⁹

Unlike in other States (eg, Poland), the *Bundestag* is elected for 48 months with no possibility to postpone elections (Article 39 GG), for instance

⁶⁶ P Thielbörger and B Behlert, 'COVID-19 und das Grundgesetz – Zur (Un)tauglichkeit des verfassungsrechtlichen „Immunsystems“' (*Verfassungsblog*, 19 March 2020) www.verfassungsblog.de/covid-19-und-das-grundgesetz/.

⁶⁷ T Frasch and M Grunert, 'Bayerns Katastrophe' (*Frankfurter Allgemeine Zeitung*, 16 March 2020) www.faz.net/aktuell/gesellschaft/gesundheit/coronavirus/massnahmen-gegen-coronavirus-bayerns-katastrophe-16682097.html.

⁶⁸ HM Heinig, 'Parlamentarismus in der Pandemie: Beobachtungen und Thesen' (*Verfassungsblog*, 25 November 2020) www.verfassungsblog.de/parlamentarismus-in-der-pandemie/.

⁶⁹ *ibid*; W Merkel, 'Wer regiert in der Krise? Demokratie in Zeiten der Pandemie' in *WSI-Mitteilungen*, pp 445–53.

during times of emergency.⁷⁰ Some of the *Länder* theoretically foresee the possibility of emergency Parliaments,⁷¹ but none of them made use of this possibility during COVID-19.⁷² For the *Bundestag*, the *Gemeinsame Ausschuss* (Article 53a GG) can take over certain functions in the case of an external emergency, not during internally-induced emergencies. While some academics⁷³ as well as the President of the Parliament had suggested including a similar possibility for the *Bundestag* also in case of pandemics (*Notfallausschuss*), this proposal was largely criticised and rejected.⁷⁴ Instead, the different party groups agreed informally that the quorum of more than half of the members of the *Bundestag* (§ 45 of the rules of procedure (GOBT) of the German *Bundestag*), if not reached, should not be challenged.⁷⁵ Eventually, in March 2020, the *Bundestag* changed and introduced a new § 126a GOBT.⁷⁶ § 126a GOBT allows for online meetings and voting of the committees (*Ausschüsse*), but not of plenary meetings, although this possibility was discussed by political observers.⁷⁷ Moreover, the *Bundestag* can now vote on issues when one fourth of its members are present, as a direct reaction to the pandemic.

During COVID-19, there were many debates in the *Bundestag* on the topic of the pandemic. These debates, however, remained remarkably uncontroversial with most party groups supporting the same political solutions at least during the first wave,⁷⁸ with the role of members of Parliaments largely being reduced to political bystanders.⁷⁹ The *Bundestag* never challenged any of the governmental proposals concerning the crisis, including the far-reaching reforms of the IPA which caused a dramatic shift of power from the legislative to the executive branch.

⁷⁰ M Friehe, 'Die Demokratie muss immun bleiben' (*Verfassungsblog*, 21 May 2020) www.verfassungsblog.de/die-demokratie-muss-immun-bleiben/.

⁷¹ cf Art 62 I of the Constitution of Baden-Württemberg; Art 113 I of the Constitution of Saxony.

⁷² Heinig (n 68).

⁷³ P Thielbörger and B Behlert, 'COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze' (*Verfassungsblog*, 30 March 2020) www.verfassungsblog.de/covid-19-und-das-grundgesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/.

⁷⁴ *Süddeutsche Zeitung* (4 April 2020) www.sueddeutsche.de/politik/corona-grundgesetz-aenderung-wolfgang-schaeuble-1.4868353; *Legal Tribune Online*, www.lto.de/recht/nachrichten/n/bundestag-corona-grundgesetz-aenderungen-notparlament-fraktionen-ablehnung-schaeuble-vorschlaege/.

⁷⁵ Thielbörger and Behlert (n 73).

⁷⁶ § 126a GOBT was initially intended to be in force only until 30 September 2020, but is still in place until 30 June 2021, dip21.bundestag.de/dip21/btd/19/275/1927529.pdf.

⁷⁷ R Roßmann, 'Wie der Bundestag virtuell tagen könnte' (*Süddeutsche Zeitung*, 13 April 2020) www.sueddeutsche.de/politik/virtueller-bundestag-corona-schaeuble-digitaler-1.4874777.

⁷⁸ R Roland, 'Demokratie und Bürgerbeteiligungs in Zeiten von COVID-19' (Opuscula 141, Maecenata Institut für Philantropie und Zivilgesellschaft Berlin, 2020) nbn-resolving.org/urn:nbn:de:0168-ssoar-68889-1.

⁷⁹ See for instance H Aden, C Arzt and J Fährmann, 'Gefährdete Freiheitsrechte in Krisenzeiten – Lehren aus der COVID-19-Pandemie' (2020) *Zeitschrift für Bürgerrechte und Gesellschaftspolitik* 99–111 who list measures that were in their view too far-reaching with respect to freedom of assembly, freedom of movement and data protection, 116.

Some observers have therefore mourned the ‘self-disempowerment’⁸⁰ or ‘uncritical, subservient attitude’⁸¹ of the Parliament during the COVID-19 crisis.

D. The Centrality of German Fundamental Rights

The founding mothers and fathers of the GG put fundamental rights at the very beginning of the GG (Article 1-19 GG)⁸² signaling their utmost importance for the new German state. Starting with Article 1 GG (human dignity), the list includes a variety of fundamental rights. For our purpose most importantly, these include personal freedoms (Article 2 GG), freedom of expression, arts and sciences (Article 5 GG), freedom of assembly (Article 8 GG), freedom of association (Article 9 GG), freedom of movement (Article 11 GG) as well as occupational freedoms (Article 12 GG). The state has not only the obligation to respect (‘negative obligation’), but also to ensure these rights (‘positive obligation’).⁸³ Restrictions are generally allowed, but according to Article 19, paragraph 1 GG, laws must specify the fundamental right they affect, and under no circumstance may the essence (*Wesensgehalt*)⁸⁴ of a basic right be touched (Article 19, paragraph 2 GG). Any restriction of fundamental rights must be prescribed by law (*Vorbehalt des Gesetzes*), rules below the rank of the law are not sufficient. While Article 80 GG allows the federal government, a federal minister or the *Länder* governments to issue statutory instruments below the level of the law (*Verordnung*), their content, purpose and scope of the authority conferred must be specified at the level of the law itself. These rules are important safeguards for the principle of democracy in Germany as they put the Parliaments at centre stage when it comes to protecting fundamental rights.

Furthermore, any provisions of the constitution must be understood in light of international law (*Völkerrechtsfreundlichkeit des GG*)⁸⁵ which is important for German fundamental rights given that they are closely mirrored in international human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights or the European Convention on Human Rights and Fundamental Freedoms, which even

⁸⁰ C Möllers, ‘Parlamentarische Selbstentmächtigung im Zeichen des Virus’ (*Verfassungsblog*, 26 March 2020) www.verfassungsblog.de/parlamentarische-selbstentmaechtigung-im-zeichen-des-virus/.

⁸¹ Merkel (n 69).

⁸² Grundgesetz für die Bundesrepublik Deutschland vom 23 Mai 1949, BGBl. p 1 (Nr 1).

⁸³ In detail: M Cornils, *Die Ausgestaltung der Grundrechte: Untersuchungen zur Grundrechtsbindung des Ausgestaltungsgesetzgebers* (Mohr Siebeck, 2005) 561 f.

⁸⁴ On the concept of essence, see in general: P Thielbörger, ‘The “Essence” of International Human Rights’ (2019) 20 *German Law Journal* 924; On the German case specifically, see J Bernstorff, ‘Die Wesensgehalte der Grundrechte und das Verhältnis von Freiheit und Sicherheit unter dem Grundgesetz’ in F Arndt et al (eds), *Freiheit – Sicherheit – Öffentlichkeit* (Nomos, 2009) 40ff.

⁸⁵ The ‘Völkerrechtsfreundlichkeit’ is a well-established principle in the jurisprudence of the German Federal Constitutional Court, see eg BVerfG, *Bodenreform III*, 26 October 2004, BVerfGE 112, 1 (25).

enjoys special gravity when interpreting German fundamental rights.⁸⁶ As in most other States, fundamental rights and the principle of democracy find themselves in a multi-faceted relationship in the German system: they enable and restrict democratic decision-making at the same time.⁸⁷

E. Challenges to the Legal Regime of Infectious Diseases

i. Amendments of the German Infection Protection Act

The legal regime for the protection against infectious diseases is a typical case of the ‘work-share’ between *Bund* legislative and *Länder* administration. The *Bundestag* enacted a statutory law in 2000, the Infection Protection Act (IPA) (*Infektionsschutzgesetz*)⁸⁸ under Article 74, No 19 GG in the form of concurrent legislation, whose execution lies in the hands of the *Länder* in their own right. The IPA entitles the competent *Länder* authorities to adopt measures for the prevention and control of infectious diseases. Such measures must be ordered by the *Länder* or local authorities within them; the federal state can neither issue directives nor give orders to the *Länder*.

Possible measures under the IPA aim at monitoring (§§ 6 ff. IPA), prevention (§§ 16 ff. IPA) and fighting the disease (§§ 24 ff. IPA). Quarantines can be ordered – at home or in medical isolation units – (§ 30 IPA), professional activities banned (§ 31 IPA), care facilities for minors like kindergartens or schools can be closed (§ 33 IPA), events or other gatherings of a large number of people can be restricted or banned (§ 28, paragraph 1, sentence 2 IPA). Of particular importance is § 28, paragraph 1, sentence 1 IPA which broadly allows the administration to take ‘*all necessary measures*’. Curfews or the closing of shops or universities were, in the absence of a more specific regulation, regularly based on this general clause of § 28 IPA.⁸⁹

⁸⁶cf Scientific Services of the *Bundestag*, ‘Bedeutung der Europäischen Konvention für Menschenrechte und der Entscheidungen des Europäischen Gerichtshofs für Menschenrechte für die deutsche Gesetzgebung’ (2016) www.bundestag.de/resource/blob/436800/8e288ab7acd739fcad2463017ad44b08/wd-3-162-16-pdf-data.pdf; BVerfG, EGMR-Entscheidungen, 24 October 2004, BVerfGE 111, 307 (315f).

⁸⁷J Isensee, ‘Staat und Verfassung’ in Isensee/Kirchhof (eds), *Handbuch des Staatsrechts*, 2nd edn (CF Müller, 2004) § 15 Rn 4.

⁸⁸Infektionsschutzgesetz of 20 July 2000, BGBl. I, p 1045.

⁸⁹Out of many, curfew in Bavaria: § 4 Allgemeinverfügung Vorläufige Ausgangsbeschränkung anlässlich der Corona-Pandemie Bekanntmachung des Bayerischen Staatsministeriums für Gesundheit und Pflege, Az. Z6a-G8000-2020/122-98 (20 March 2020) www.bayern.de/wp-content/uploads/2020/03/20-03-20-ausgangsbeschraenkung-bayern-.pdf; closure of shops in the city of Bottrop: § 2 Allgemeinverfügung zum Zwecke der Verhütung und Bekämpfung der Ausbreitung des Coronavirus SARS-CoV-2, Amtliche Bekanntmachung der Stadt Bottrop 2020/027 – Allgemeinverfügung Schließung Einzelhandel und Restaurants (18 March 2020) www.bottrop.de/rathaus/bekanntmachungen/2020/2020-026_218369.php; closure of universities in NRW: § 6 Verordnung zum Schutz vor Neuinfizierungen mit dem Coronavirus SARS-CoV-2 (Coronaschutzverordnung – CoronaSchVO) (7 January 2021), www.land.nrw/sites/default/files/asset/document/210212_coronaschvo_ab_14.02.2021_lesefassung_mit_markierungen.pdf.

The competent authorities can implement measures in relation to specific individuals (*Verwaltungsakt*) or issue administrative acts of a more general nature (*Allgemeinverfügung*). The health ministers of the *Länder* can also employ even more broad ordinances (*Rechtsverordnungen*).

Early in the first wave, academics⁹⁰ and politicians⁹¹ demanded a reform of the IPA. Some critiqued that the IPA did not give the federal state the competencies it needed for effective disease control,⁹² others argued that § 28 IPA was not specific enough to justify intense forms of restrictions of fundamental rights,⁹³ such as curfews or the closing of businesses.

From March 2020 onwards, the IPA was amended multiple times.⁹⁴ The most important amendments were based on three bills. In March 2020,⁹⁵ the *Bundestag* introduced a bill to amend the IPA giving new powers to the federal health ministry, which now, according to the new § 5 IPA, has the power to establish ordinances in case of epidemics of national significance. The competence to enact such ordinances in § 5, paragraph 2 IPA explicitly left out the involvement of the *Bundesrat*, thereby not only strengthening the federal government as a collective organ, but one single ministry.⁹⁶ Even the scientific services of the *Bundestag* concluded in examining the legality of the new bill that this amendment was alarming, arguing that given the democratic principle Parliament should decide upon such intrusive measures.⁹⁷ The possibility to enact ordinances without the support of the *Bundesrat* was also seen as problematic,⁹⁸ both with regard to the principles of federalism and democracy. This was only made worse by the vagueness of § 5 IPA, putting its constitutionality in light of Article 80 GG altogether in question.⁹⁹

⁹⁰ A Klafki, 'Coronavirus und Reformbedarf des „Pandemierechts“' (*Verfassungsblog*, 5 March 2020) www.verfassungsblog.de/coronavirus-und-reformbedarf-des-pandemierechts; Thielbörger and Behlert (n 80); A Kießling, 'Offene Fragen der (Massen)Quarantäne' (*Verfassungsblog*, 2 July 2020) www.verfassungsblog.de/offene-fragen-der-massenquarantaene/.

⁹¹ cf 'Corona trifft Föderalismus' (*Tagesschau*, 04 March 2020) www.tagesschau.de/inland/coronavirus-297.html.

⁹² Klafki (n 90).

⁹³ A Klafki, 'Corona-Pandemie: Ausgangssperre bald auch in Deutschland?' (*Ju Wiss*, 19 March 2020) www.juwiss.de/27-2020/; A Edenharter, 'Freiheitsrechte ade? Die Rechtswidrigkeit der Ausgangssperre in der oberpfälzischen Stadt Mitterteich' (*Verfassungsblog*, 19 March 2020) www.verfassungsblog.de/freiheitsrechte-ade/; Möllers (n 80).

⁹⁴ See overview at www.buzer.de/gesetz/2148/l.htm.

⁹⁵ Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite of 28 March 2020, BGBl. I p. 587 (Nr 14).

⁹⁶ This was criticised by most commentators, see for instance Möllers (n 80) and Thielbörger and Behlert (n 73).

⁹⁷ Scientific Services of the *Bundestag*, 'Staatsorganisation und § 5 Infektionsschutzgesetz' (2020) www.bundestag.de/resource/blob/690262/cb718005e6d37ecce82c99191efbec49/WD-3-080-20-pdf-data.pdf.

⁹⁸ *ibid*.

⁹⁹ T Kingreen, 'Comment to the proposed change of the IfSG' (2020), www.bundestag.de/resource/blob/694844/0b2af0e61b45ddbfe1311c78557720ee/19_14_0160-27-_ESV-Prof-Dr-Kingreen_2-Bevoelk-schutzg--data.pdf.

In the second bill¹⁰⁰ of May 2020, the federal ministry of health was given an even broader competence to enact ordinances, again excluding the involvement of the *Bundesrat*. Experts criticised that the proposed further amendment could even amount to a violation of the separation of powers, which is not only an important element of the rule of law,¹⁰¹ but yet another safeguard for protection of the principle of democracy.¹⁰²

The third bill of November 2020¹⁰³ finally introduced a definition of the term ‘*epidemische Lage von nationaler Tragweite*’ in § 5, paragraph 1, sentence 4 IPA, made significant changes in the data protection regime (§ 14 IPA) and introduced a new § 28a IPA, which allowed for a set of *specific* measures to be enacted. These measures include specific rules for social distancing in public as well as an obligation to wear masks in public. Some experts argued again that the new bill did not meet the required standards concerning clarity of the law and the separation of powers, denying the *Bundestag* one of its core competences (*Parlamentenvorbehalt*),¹⁰⁴ thus yet again not paying tribute to the principle of democracy. Fundamental rights had also not been given sufficient importance.¹⁰⁵ The proposal to bind the *Länder* to agree on uniform federal measures (§ 28, paragraph 2, sentence 6 IPA in its proposed form) was seen by experts as outright illegal.¹⁰⁶ For this, an entirely new competence of the federal level to issue ordinances (*Verordnungsermächtigung für den Bund*) would have been needed. Neither *Länder* nor the districts nor the cities could be obliged to agree on uniform measures nationwide.¹⁰⁷ In light of this criticism, the relevant passage in the proposed bill was eventually entirely dropped.

¹⁰⁰ Zweites Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite of 19 May 2020, BGBl. I, p 1018 (Nr 23).

¹⁰¹ Kingreen (n 99).

¹⁰² cf German Federal Constitutional Court, Order of 17 July 1996–2 BvE 2/93, paras 42–45.

¹⁰³ Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite of 18 November 2019, BGBl. I, 2397 (Nr 52).

¹⁰⁴ Kießling, *Comment to the proposed change of the IfSG*; A Klafki, ‘Stellungnahme als geladene Einzelsachverständige für die öffentliche Anhörung im Gesundheitsausschuss des Deutschen Bundestages am 12.11.2020’ (*Ausschussdrucksache* 19(14)246(9), 10 November 2020); A Kießling, ‘Stellungnahme als geladene Einzelsachverständige für die öffentliche Anhörung im Gesundheitsausschuss des Deutschen Bundestages am 12.11.2020’ (*Ausschussdrucksache* 19(14)246(7), 10 November 2020).

¹⁰⁵ *ibid*; H Wißmann, ‘Sachverständige Stellungnahme zum Gesetzentwurf der Fraktionen von CDU/CSU und SPD für ein „Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite“, BT-Drs. 19/23944 und weiteren Anträge der Fraktionen des Bundestags’ (10 November 2020) www.jura.uni-muenster.de/de/institute/kommunalwissenschaftliches-institut/stellungnahmebt4/.

¹⁰⁶ Kießling (n 90) 7.

¹⁰⁷ *ibid*; C Möllers, ‘Stellungnahme zum Entwurf eines Dritten Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite Drucksache 19/23944 und begleitende Anträge’ (*Ausschussdrucksache* 19(14)246(15), 11 November 2020) 9, www.bundestag.de/resource/blob/805682/90775997933c613cc334fd5065cded6e/19_14_0246-15-ESV-Prof-Dr-Moellers-3-BevSchG-data.pdf.

ii. Institutional Perspective

From an institutional perspective, the Robert Koch Institute (RKI) deserves special mention, whose position was significantly strengthened in the first bill.¹⁰⁸ The Robert Koch Institute is a federal scientific authority, which reports to the federal health ministry, but also provides medical information to the *Länder* and issues epidemiological recommendations (§ 5 IPA). Political decision-makers follow the recommendations by the RKI almost word for word, without such findings being challenged or questioned (eg, through a committee of the *Bundestag*).

The federal level and the *Länder* have also developed several modes of institutionalised cooperation, most importantly regular meetings of the Prime Ministers with members of the federal government.¹⁰⁹ The purpose of such meetings is coordination, but also to find a joint political strategy. However, the implementation of the agreed measures is then up to the *Länder*. In the past, *Länder* have regularly deviated from the agreed standards, for instance by opening *kindergartens*, schools or other public institutions earlier or by allowing less restrictive social distancing rules than agreed, or interpreting general terms (eg, bans on ‘large’ assemblies) very loosely compared to other *Länder*.

IV. Critical Evaluation of the German Legal Regime for Pandemics

Germany faces a conundrum: while the pandemic is a problem of national scale, the execution of the federal laws such as the IPA lies firmly with the *Länder*. The literature has assessed Germany’s ‘federal approach’ to fighting the pandemic very differently.

A. Germany’s Federalist Approach as ‘Inhibitor’ to Fight the Pandemic Effectively

i. Fragmentation Through Federalism

Some authors argue that federalism made it difficult for Germany to tackle COVID-19 effectively as centralised regulations are believed to be more effective

¹⁰⁸ See eg § 4, paragraph 1 and paragraph 1a, § 5, paragraphs 2, 6 and 7 IPA.

¹⁰⁹ For a good summary of the different forms of meetings, see A Klafki, ‘Legal Harmonization Through Interfederal Cooperation: A Comparison of the Interfederal Harmonization of Law Through Uniform Law Conferences and Executive Intergovernmental Conferences’ (2018) *German Law Journal* 1437, 1437 ff.

than decentralised regulations.¹¹⁰ A possible more decisive uniform response of federal state and *Länder* action was repeatedly reduced to a minimum common denominator, in favour of political autonomy and individual responsibility of the *Länder*.¹¹¹ Some have called the authority of Germany fragmented and insisted that Germany's hesitant approach has highlighted the weakness of the German decentralised authority.¹¹² The lack of a decisive uniform federal response was made even worse by the lacuna displayed at the same time by European Union law in the field of disease control.¹¹³ Some see a weak institutional link between the federal level and the *Länder* as cause for the lack of a more decisive federal answer¹¹⁴ arguing that the connection between the delegating and the receiving authority was too loose.¹¹⁵

Content-wise the German approach was also critiqued for relying on bans and restrictions, without even giving alternative approaches (like the Swedish one based on incentives and voluntary self-restriction),¹¹⁶ a chance.¹¹⁷ While federalism in theory should have enabled the trying of different measures, the variance of attempted measures in practice remained small, as a virtually singular public discourse, largely influenced by the unchallenged expert opinion of the RKI,¹¹⁸ pressured the *Länder* to adopt measures already taken by other *Länder*, creating fragile cohesion rather than real deliberation.¹¹⁹

ii. The Disempowerment of Parliament

Another major criticism relates to the role of parliaments in Germany's COVID-19 response. Governments of *Bund* and *Länder*, not representatives of their parliaments, were involved in the regular meetings between *Bund* and *Länder*.¹²⁰ This problem was made worse by the fact that usually only the Prime Ministers

¹¹⁰ U Münch, 'Beiträge zum Deutschen Föderalismus: Wenn dem Bundesstaat die Stunde der Exekutive schlägt: der deutsche (Exekutiv-)Föderalismus in Zeiten der Coronakrise' (2020) *Jahrbuch des Föderalismus* 209, 217–18; patrially in agreement: HP Aust, 'Im Auftrag des Bundes, Ein Vorschlag zu einer föderalismusfreundlichen Zentralisierung des Infektionsschutzes' (*Verfassungblog*, 15 December 2020) www.verfassungblog.de/im-auftrag-des-bundes/.

¹¹¹ *ibid.*

¹¹² M Bartsch et al, 'Inside Germany's Piecemeal Response to Corona' (*Der Spiegel*, 13 March 2020) www.spiegel.de/international/germany/inside-germany-s-piecemeal-response-to-corona-a-f376b3f9-625f-4a6a-8e7d-04bd48be20b2.

¹¹³ *ibid.*

¹¹⁴ J Saurer (n 60).

¹¹⁵ *ibid.*

¹¹⁶ See J Reichel and J Dahlqvist, 'Swedish Constitutional Response to the Corona Crisis – The Odd One Out?' in this book.

¹¹⁷ M Frommel, 'Corona-Politik 2020 – ein schmaler Grat zwischen kluger Einschränkung und überzogener Panik' (2020) *NK Neue Kriminalpolitik* 123, 124.

¹¹⁸ *ibid.*

¹¹⁹ Bütthe, Messerschmidt and Cheng (n 24).

¹²⁰ S Harbarth, '„Grundrechte sind keine Privilegien“' (*Rheinische Post*, 10 February 2021) www.rp-online.de/politik/deutschland/praesident-des-verfassungsgerichtes-grundrechte-sind-keine-privilegien_aid-56152945; see also: JM Dostal, 'Governing Under Pressure: German Policy Making During the

of the *Länder* were involved in these meetings, not representatives of all governing parties in the *Länder*. This led to an over-representation of the two big German parties (conservatives and labor) and an under-representation of the smaller parties (ie, greens, liberal, left-party as well as the populist ‘Alternative for Germany’), compared to their relatively stronger representations in the Parliaments of *Bund* and *Länder*.

In replacing federal laws by amending the IPA several times in 2020, executive decrees of the federal minister of health took central stage more and more. The rule (law) – exception (executive decree) relationship was essentially reversed with dramatic consequences for federalism¹²¹ as well as the principle of democracy. Given the importance of executive decrees under the new IPA for the exercise of fundamental rights, the disempowerment of the Parliament was found to be highly problematic. In most cases, not even the consent of the *Bundesrat* is required for these decrees – another significant devaluation of Germany’s upper house, the *Bundesrat*, representing the *Länder*.¹²²

iii. Complex Federalism and the Need to Act Fast

Yet another concern relates to the complexity of federalism. Some observers have argued that an already diffuse situation was made even more protracted through the complexities of federalism.¹²³ The coordination in federal systems is described to be time-consuming while in a pandemic the state typically has to act fast.¹²⁴

iv. Different Treatment of Fundamental Rights in Different Länder

Limitations of fundamental rights varied in terms of their intensity and duration in the different *Länder*,¹²⁵ with such distinctions not always being justified through equally different infectious rates in the *Länder*. This caused unequal treatment¹²⁶ in partially similar (if not equal) situations. For instance, the German approach has led to rather erratic outcomes concerning border management,¹²⁷ a sensitive

Coronavirus Crisis’ (2020) *The Political Quarterly* 542, 549; J Schnabel, ‘The Covid-19 crisis and German federalism’ (2020) *Cuadernos Manuel Giménez Abad* 71, 73.

¹²¹ Münch (n 110), 212.

¹²² *ibid.*

¹²³ R Arnold, ‘Pandemia and constitutional law: some reflections on the German experience’ (2020) *University of Pitești Journal Legal and Administrative Studies* 33; in this sense, F Palero points out in: ‘Is there a space for federalism in times of emergency? What is at stake? Federalism as part of constitutionalism’ (*Verfassungsblog*, 13 May 2020) www.verfassungsblog.de/is-there-a-space-for-federalism-in-times-of-emergency/, that federalism is a ‘accelerator’: it can increase efficiency when this is already given, but it also adds to confusion when this is the prevailing mood.

¹²⁴ S Kropp, ‘Zerreißprobe für den Flickenteppich?’ (*Verfassungsblog*, 26 May 2020) www.verfassungsblog.de/zerreissprobe-fuer-den-flickenteppich/.

¹²⁵ Arnold (n 123) 47.

¹²⁶ Münch (n 110) 217.

¹²⁷ L Coatleven, F Hublet and T Rospars, ‘Subsidiary crisis management in the COVID-19 pandemic. Germany’s federalist experiment in transborder perspective’ (2020) *Groupe d’études géopolitiques* 10.

issue not only because of the Schengen regime, but also from the perspective of German and European fundamental rights.¹²⁸ The erratic treatment of fundamental rights in the different *Länder* is even more dramatic given that the long-term consequences for the economic and mental wellbeing of the incurred fundamental rights restrictions are still unknown.¹²⁹

v. Strengthening Federal Oversight

Some authors have criticised the IPA for putting measures in the realm of the administration of the *Länder in their own right*. Instead, some authors have suggested to make measures under the IPA a case of execution *on federal commission* (*Bundesauftragsverwaltung*).¹³⁰ This rather rare form of administration in the German system would constitute a middle ground between administration through the federal state and through the *Länder* on their own, which would give the *Bund* higher levels of control than currently, in particular not limiting such control to the legality, but expanding it to the suitability of the chosen measures.

vi. Clarifying Constitutional Regulations

Other authors have highlighted that Germany's constitution itself is 'unfit' for a pandemic.¹³¹ On the one hand, while procedural simplifications for the constitutional bodies (eg, voting procedures in Parliament) exist for the case of externally-induced emergencies, they exist much less for internal emergencies – during which they would be equally needed.¹³² Given how uniquely strict the restrictions of fundamental rights during COVID-19 were,¹³³ more explicit rules at the level of the German basic law itself for derogation from and restrictions of fundamental rights during internal emergencies would also be desirable.¹³⁴ This would make the GG more proactive in terms of warning against fundamental rights restrictions and limiting them in substance and time, as many international human rights treaties already do.¹³⁵ The legislator should not have attempted 'quick fixes' at the level of the IPA and the statute of the *Bundestag*, but have engaged in the discussion of constitutional reform to create clearer rules on the limitation

¹²⁸ See in detail: M Dawson and P Thielbörger, 'EU Law in the 'first wave' – The Legality of National Measures to tackle the COVID-19 crisis' (8 December 2020) www.greens-efa.eu/en/article/document/eu-law-in-the-first-wave, 39ff.

¹²⁹ Desson (n 12).

¹³⁰ Aust (n 110).

¹³¹ Thielbörger and Behlert (n 64); Thielbörger and Behlert (n 66).

¹³² *Ibid.*

¹³³ See for instance Aden, Arzt and Fährmann (n 79), 99–111 who list measures that were in their view too far-reaching with respect to freedom of assembly, freedom of movement and data protection.

¹³⁴ Thielbörger and Behlert (n 64); Thielbörger and Behlert (n 66).

¹³⁵ *Ibid.*

and derogability of fundamental rights as well as the simplification of legislative procedures rather than putting the rule-making outright into the hands of the executive.¹³⁶

B. Germany's Federal Approach as 'Enabler' to Fight the Pandemic Effectively

i. Coordinated and Cooperative Collective Action

Other authors have emphasised the very positive role of federalism in Germany's response to COVID-19.¹³⁷ Decentralised systems governing public (and private) organisations on multiple levels of authority are seen to be more resilient and more capable of collective action during a crisis.¹³⁸ These authors argue that a coordinated and cooperative collective action early in the first wave of the pandemic was made possible precisely through the federalist structures, driven by a shared sense of urgency and recognition based on reliable information.¹³⁹ The level of variance in the *Länder* responses was adaptable to the severity of the crisis, expressing a successful compromise between the highly decentralised structure of the governmental system and the demand for uniform federal action during more severe stages of the pandemic.¹⁴⁰ Germany is considered to have managed the balancing act between the preservation of the lives and the preservation of democracy particularly well,¹⁴¹ at least during the first wave of COVID-19.

ii. Scientifically-informed and Transparent Decision-making

Some authors have described the German approach as a hybrid (federal and *Länder*) response, highlighting in particular the key role of scientific advice via the RKI.¹⁴² Coordination was strengthened by increasing the frequency of high-level meetings of the federal government and *Länder* Prime Ministers, taking the scientific advice into account, while making the decision processes transparent through joint press conferences.¹⁴³ These high level meetings have, according to some, led

¹³⁶ Thielbörger and Behlert (n 73).

¹³⁷ S Kropp, 'Demokratie im Ausnahmezustand, Hat sich der bundesdeutsche Föderalismus in der Krise bewährt?' library.fes.de/pdf-files/dialog/16456.pdf; MB Siewert et al, 'A German Miracle? Crisis Management during the COVID-19 Pandemic in a Multi-Level System' (2020) *PEX Special Report on the Coronavirus Outbreak, Presidents' Responses, and Institutional Consequences*.

¹³⁸ Hattke and Martin (n 25) 616.

¹³⁹ *ibid*, 628.

¹⁴⁰ S Kuhlmann, 'Between Unity and Variety: Germany's Responses to the COVID-19 Pandemic' in P Joyce, F Maron and PS Reddy (eds), *Good Public Governance in a Global Pandemic* (2020) 291, 294.

¹⁴¹ C Stelzenmüller, 'COVID-19 Is a Severe Test for Germany's Postwar Constitution' (*Lawfare*, 16 April 2020) www.lawfareblog.com/covid-19-severe-test-germanys-postwar-constitution.

¹⁴² *ibid*.

¹⁴³ *ibid*, 624.

to better informed, more proportional and more transparent decision-making, allowed for comparison between different approaches and fostered political action closer to the field.¹⁴⁴ The German approach is altogether described as consensus-orientated and deliberative, carried by a high level of public support.¹⁴⁵

iii. Proven Ability of Federal Level to Gain Influence

While the execution of the measures lies with the *Länder*, the Federal state found ways to increase its influence during the crisis, for instance by making several decisive changes to the IPA,¹⁴⁶ but also by making more federal financial aid available.¹⁴⁷ The partial shift of power to the federal executive by the reform of the IPA is highlighted by some as not being permanent, but stressed to be evaluated within a year by *Bundestag* and *Bundesrat* (or it would otherwise expire).¹⁴⁸ This is a sign of the federalist structures having been able to find a workable short-term, non-permanent solution, in order to strengthen the federal level.

iv. Faster and Better Targeted Adaption Giving Room Also to the Local Level

The competition between the *Länder* gave federal and local actors space to assess conditions and possibilities.¹⁴⁹ In particular, the importance of local actors has been highlighted by some authors, as local actors, more so than *Bund* or *Länder*, could often adapt faster to changing local conditions than actors on higher levels.¹⁵⁰ In this way, Germany's federalist structure altogether allowed for a faster and better targeted adaptation.¹⁵¹ It focused on local crises so that measures could be tailored to regions where they were most needed,¹⁵² thereby avoiding unnecessary restrictions of fundamental rights in less affected areas.¹⁵³ One of the key advantages of federal over unitary systems is one of mutual learning and exchanging best practices,¹⁵⁴ which, according to some, proved very successful during the COVID-19 crisis in Germany.¹⁵⁵

¹⁴⁴ *ibid.*, 618.

¹⁴⁵ Stelzenmüller (n 141).

¹⁴⁶ G. Milbradt, 'Federalism and the COVID-19 crisis: A perspective from Germany' (*Forum of Federations*) www.forumfed.org/2020/04/federalism-and-the-covid-19-crisis-a-perspective-from-germany/.

¹⁴⁷ Aden, Arzt and Fährmann (n 79), 107.

¹⁴⁸ Siewert et al (n 137).

¹⁴⁹ *ibid.*

¹⁵⁰ Kropp (n 124).

¹⁵¹ Coatleven, Hublet and Rospars (n 127).

¹⁵² Kropp (n 137).

¹⁵³ Münch (n 110) 217.

¹⁵⁴ On the value of understanding country studies mutual learning in the EU specifically, see analysis at L. Hantrais, *Comparing and Contrasting the Impact of the COVID-19 Pandemic in the European Union* (Routledge, 2021).

¹⁵⁵ Kropp (n 124); Kropp (n 137).

v. Importance of Federal Courts

The federal court system, as one important aspect of federalism, gave citizens a web of multi-layered judicial protection.¹⁵⁶ Claimants were indeed rather often successful with their claims,¹⁵⁷ in several cases forcing policy change in the different *Länder* through the courts.

vi. Financial Inter-regional Solidarity

Finally, from a financial and economic perspective, Germany's system of interstate revenue equalisation transfers (*Länderfinanzausgleich*)¹⁵⁸ deserves special attention. While the crisis hit some regions significantly harder than others, this facet of German federalism is seen to help to equally distribute the COVID-19 related revenue shortfalls across all the *Länder* over time.¹⁵⁹ This signals strong inter-regional solidarity as a special dimension of German federalism.

V. The Way Forward: Options for Legal and Political Reform in Germany

A. Assessing the Role of Federalism

Altogether, the management of the COVID-19 pandemic combined decentralised decision-making, given the constitutional distribution of powers, with intergovernmental coordination, mainly instigated through the regular Prime Ministers Conferences.¹⁶⁰ When assessing the literature, it shows that the majority of authors gave Germany a slightly more positive than negative review for its performance in the COVID-19 crisis, although it must be noted that the literature so far concentrates on the first wave which Germany mastered rather well.

I generally concur with this finding, but would suggest some important caveats to keep in mind, before praising the role federalism played in Germany's COVID-19 all too hastily.

¹⁵⁶ *ibid.*

¹⁵⁷ *eg* BVerfG, 15 April 2020, Az. 1 BvR 828/20; VGH Baden-Württemberg, 5 February 2021, 1 S 321/21; VG Aachen, 8 February 2021, 6 L 82/2; OLG NRW, 10 February 2021, 13 B 1932/20.NE. Also several claims to the BVerfG were successful, see regarding the high number of cases: www.lto.de/recht/nachrichten/n/bverfg-bundesverfassungsgericht-corona-covid19-krise-pandemie-eilantraege-rekordwert-2020-verfassungsbeschwerde/.

¹⁵⁸ Bundesministerium der Finanzen, 'Länderfinanzausgleich', www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Foederale_Finanzbeziehungen/Laenderfinanzausgleich/laenderfinanzausgleich.html.

¹⁵⁹ OECD (n 4) 31.

¹⁶⁰ Schnabel (n 120).

Empirical studies do not support the broader thesis that federal States generally do better than unitary States in coping with pandemics. This is in line with the finding that the state which did the worst of all during the pandemic (the USA) is a highly federalist state, while other federalist states performed rather well, for instance Canada or Australia.¹⁶¹ It is a variety of many factors, such as geographical, political, economic and cultural ones that determine the performance of a state during a pandemic – its federal or unitary character per se is of secondary importance.

In this regard, it is important to note, that the first wave of COVID-19 hit Germany at a time of political calmness, financial stability and economic prosperity. There was neither a particularly important upcoming election nor a sharp political conflict between government and opposition. The German Government was led by a Grand Coalition continuously since 2013. In the year 2020, 14 out of the 16 German *Länder* were spearheaded by a Prime Minister being member in one of the two parties constituting also the federal government. Not a single of the *Länder* had a government without the involvement of at least one of the two governing parties at the federal level. To put it rather cynically, the crisis hit Germany during a time of political monotony. Politicians during the first wave levels concentrated on finding constructive solutions, with little incentive to make immediate political gains with the pandemic. Cooperative federalism only very occasionally turned into an overly competitive or dualistic¹⁶² form of such federalism.¹⁶³

In the second wave, the tables turned. The German economy was significantly compromised and the financial situation became stable,¹⁶⁴ with federal elections coming up in fall 2021¹⁶⁵ and with several Prime Minister of the *Länder* having high political personal ambitions in this election. It comes as no surprise that the tone between *Bund* and *Länder*, and between different political parties, roughened up. The political ‘good will’, praised during the first wave, had started to erode.

¹⁶¹ MJ Rozell and C Wilcox, ‘Federalism in a Time of Plague: How Federal Systems Cope With Pandemic’ (2020) *The American Review of Public Administration*: factors for the particularly poor performance of the US discussed here include the high number of States, neoliberal welfare policies (including the lack of universal healthcare), partisan polarisation and the failure of national political leadership. Also see: T Büthe et al, ‘Patterns of Policy Responses to the COVID-19 Pandemic in Federal vs. Unitary European Democracies’, papers.ssrn.com/sol3/papers.cfm?abstract_id=3692035.

¹⁶² N Behnke, ‘Föderalismus in der (Corona-)Krise? Föderale Funktionen, Kompetenzen und Entscheidungsprozesse’ (*Bundeszentrale für politische Bildung*, 21 August 2020) www.bpb.de/apuz/314343/foederalismus-in-der-corona-krise.

¹⁶³ R Sturm, ‘Der deutsche Föderalismus in Corona-Zeiten, Blog des Institut für Föderalismus’ (*Institut für Föderalismus*, 18 May 2020) www.foederalismus.at/blog/der-deutsche-foederalismus-in-corona-zeiten_236.php?&title=der-deutsche-foederalismus-in-corona-zeiten&id=236.

¹⁶⁴ M Clemens et al, ‘Zweite Corona-Infektionswelle: Deutsche Wirtschaft wird zum Jahresende schrumpfen’ (2020), *Deutsches Institut für Wirtschaftsforschung*, www.diw.de/de/diw_01.c.801919.de/publikationen/diw_aktuell/2020_0055/zweite_corona-infektionswelle_deutsche_wirtschaft_wird_zum_jahresende_schrumpfen.html.

¹⁶⁵ Der Bundeswahlleiter, ‘Wahl zum 20. Deutschen Bundestag am 26. September 2021’, www.bundeswahlleiter.de/bundestagswahlen/2021.html.

If we assume that the effectiveness of responses is proportional to the political, institutional, and procedural quality of the cooperation among the different levels of government,¹⁶⁶ one cannot assume that Germany will perform equally well in future public health crises. This will be highly dependent on the political climate during which a new pandemic will hit. We have witnessed such under-performance of the German system already during the second and the third wave, and particularly with regard to the poorly-performing national vaccination campaign. This shows that the German federalist model can, but will not automatically, function well in times of crisis.

Of crucial importance is the balanced interplay of two developed features of German federalism: executive federalism and cooperative federalism. It is a dangerous development if the federal state restricts the role of the *Länder* and the *Bundesrat* (as in the recent IPA reforms) severely from the perspective of executive federalism. It is, however, an equally dangerous development, from the perspective of cooperative federalism, if the *Länder* either deviate from agreements with the federal state or portray their compliance as pure political goodwill rather than an obligation as part of their unwritten, but nonetheless binding *Bundestreue*.

In order to ensure the balance between executive federalism and cooperative federalism in future crises, certain legal and policy reforms should be considered.

From the perspective of federalism, the format of high-level meetings of the federal government with the Prime Minister of the *Länder* remains highly unregulated. Given the enormous de facto power this institution enjoys, it needs public discussion and a transparent regulation of how these meetings are constituted, who can participate in these meeting and how the body makes decisions. For instance, the role of governmental units below the level of the *Länder*, eg districts and free cities, should be strengthened. They often carry some of the harshest (financial) burdens during times of crisis – but they are not at the table, as they are seen as part of the *Länder*, while they have their very own set of interests and experiences. Additionally, in the preparation of such meetings, more institutionalised exchange formats with representatives of particularly affected groups (for the current crisis, eg representatives of the elderly, children, patients or medical personnel) should be established in order to have the interests and needs of these groups more clearly articulated before making decisions.

B. Assessing the Future Role of the Constitution and the Parliaments During Pandemics

The constitution lacks suitable provisions on the derogability and restrictability of fundamental rights during times of pandemics. Such provisions should be established at the level of the constitution, not to enable more frequent or more

¹⁶⁶ Palero (n 123).

severe restrictions, but rather to contain them to the minimum necessary level and continuously remind policy makers of their exceptional character. Equally, rules for slimmer, faster or even remote/virtual forms of law-making in the *Bundestag* are almost entirely absent.

Thus, more explicit rules for internal state emergencies (both with regard to the temporary restrictability of rights and the temporary simplification of the legislative process) must be established, preferably at the level of the constitution. So far, the constitution holds comparable rules on externally-induced emergencies, but remains silent on internal emergencies (such as pandemics). This is inapt, as both scenarios are in many ways comparable in their effects on citizens and state organs.

Such new rules to enable slimmer legislative procedures must, however, not be misunderstood as rules in which the legislature is replaced by the executive. This was the unfortunate effect of some of the 2020 IPA reforms. These changes are equally problematic with regard to the separation of powers and the principle of democracy. Any forms of law-making circumventing the Parliament (eg, by widening the competencies of individual ministers to make them a *de facto* legislator in times of crisis) should not be part of any future reform efforts. In fact, some of the changes of the recent IPA reforms must be reversed.

If future reforms of the IPA should aim to strengthen the federal level further, as Chancellor Merkel audaciously announced at the beginning of the third wave¹⁶⁷ in order to avoid a future cacophony of *Länder* responses, such reform must empower not only the federal executive, but also the federal legislative.

The authorisation to issue statutory instruments (*Verordnungsermächtigung*) could, for instance, be made subject to the approval of the *Bundestag*, if the federal government (or even a single ministry) is given the competence to issue statutory instruments that interfere directly with the exercise of fundamental rights. Such intensive state measures require a high level of democratic legitimisation – a level that is not satisfied if the government or a ministry alone take such decisions.

A second beneficial change would be to strengthen the democratic legitimacy of the meetings of the Prime Ministers with the federal government. Even if it is an unofficial state organ that cannot create binding decisions, the platform has gained an enormous amount of *de facto* power. Much more than the *Bundestag*, the meetings of the Prime Ministers with the federal government have made the most crucial decisions for Germany during the crisis. Therefore, the stronger involvement of democratically elected representatives appears necessary (eg, via the chair(wo)men of the groups (*Fraktionen*) in the *Bundestag*, selected representatives of the *Länder* Parliaments or via members of the *Bundestag*'s Health Committee). This would also ensure a more balanced representation at the meetings as representation through heads of governments alone largely favours big parties.

¹⁶⁷ cf 'Merkel zur Pandemiebekämpfung' (*Tagesschau*, 29 March 21) www.tagesschau.de/inland/corona-lage-merkel-soeder-101.html.

Altogether, while a shift to the federal level in times of emergency is needed (but must be established clearly and transparently), strengthened democratic safeguards are all the more essential in these times. Otherwise the separation of power is loosened on both ends of the equation: in its vertical dimension (where power shifts from the *Länder* to the *Bund*) and in its horizontal dimension (where power shifts from the legislative to the executive). Both such shifts *at the same time* must be avoided.