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Constitutional Jurisdiction and the Corona Crisis: Some Aspects from the German Experience

1. Introduction

The Covid-19 pandemic is a serious challenge for public health and also for the law. The wide-ranging restrictions of individual freedoms, challenges which have been necessary to successfully fight against the virus, have reached unprecedented levels; almost all life situations and entire populations are affected, and for indefinite periods of time. It is, therefore, not surprising that judicial protection has become one of the most important questions.

The following reflections will, therefore, deal substantially with this issue and place emphasis on constitutional justice. Administrative jurisdiction, of course, is also important in this context. For a review of the restrictions that were largely imposed by executive actions, by regulations of the governments of the Federation's Member States, the *Länder*, and also by concrete but generally applicable actions, see the so-called general administrative acts (*Allgemeinverfügungen*).

Formal legislation adopted by Parliament serves as the legal basis for these administrative actions, both for regulations and for concrete acts, and it has also directly established numerous prohibitions and restrictions. The review of the constitutionality of these laws by constitutional justice is also of relevance in our context.

2. Judicial review of protection measures

It can be stated that judicial review essentially comprises, in our context, *executive action* (the adoption of *normative acts*, in particular regulations, as well as the issue of *concrete acts*) as well as formal legislation both of the Federation and the *Länder*. However, in judicial practice, the main focus of review has been, until now, on the executive actions, in particular on the regulations.

a) Executive actions – the *Länder* competence as the basic principle

According to the German federal system, executive actions are regularly in the hands of the *Länder* that are, according to the principle of art. 83 BL, competent to execute federal law as well as law adopted by the *Land* itself.

The main body of anti-corona regulations are those issued by the *Länder* governments (see, e.g., the Regulation of Bavaria on protection measures against infections concerning the corona pandemic of 27 March 2020[1]); additionally, there are also federal regulations issued by the Federal Ministry of Health on the basis of s. 5 of the Federal Act of Protection against Infections (API), (*Bundesinfektionsschutzgesetz*, *IfSG*), after the Federal Parliament declared the existence of an "epidemic situation of national scope" (see, e.g., Regulation on the maintenance and safeguarding of intensive-care hospital capacities of 8 April 2020, based on s. 5.2 no. 7 API[2]).

While these examples refer to regulations, examples should also be pointed out that concern concrete case-related administrative decisions (administrative acts) of the *Länder* authorities and, what is very exceptional and even constitutionally doubtful, of the Federation, specifically of the Federal Ministry of Health (see as an example from the *Land* of Bavaria: the general administrative act (*Allgemeinverfügung*) of the Bavarian Ministry of Health and Care of 19 June 2020 on the "Emergency plan corona pandemic: *Allgemeinverfügung* to cope with considerable numbers of patients in hospitals"[3] based on s. 28.1 1st sentence IfSG (API) as well as on art. 22.1 no. 1 Bavarian Act on hospitals. An example from the Federation is: orders of the Federal Minister of Health of 8 April 2020 on the obligation of persons entering Germany from abroad to disclose their identity, itinerary and contact details, etc.,[4] based on s. 5.2 nos. 1, 2 IfSG (API).

b) Legislation – the importance of concurrent competences

In the field of legislation, the main example is the previously mentioned Federal Act of Protection against Infections (IfSG) (API), with various modifications that have adapted its text to the challenges of the corona virus crisis.[5]

This law has been adopted according to art. 74.1 no. 19 BL as a matter of concurrent competence. This means that the legislative competence in this matter belongs originally to the *Länder* but can be federalized by the adoption of a federal law, according to art. 72.1 BL. The federalization of the protection against infections has been effectuated by the adoption of the IfSG (API). However, it is characteristic for the concurrent competence that the original *Länder* competence remains upheld until the moment

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1 https://lexcorona.de/lib/exe/fetch.php?media=rechtsakteland:bayern:baymbl-2020-158.pdf (accessed: 2020.08.01).

2 https://www.buzer.de/gesetz/13878/index.htm (accessed: 2020.08.01).

3 https://www.verkuendung-bayern.de/baymbl/2020-347/ (accessed: 2020.08.01).

4 https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Transport/Anordnung_BMG_08_04_2020.pdf?__blob=publicationFile (accessed: 2020.08.01).

5 https://www.gesetze-im-internet.de/ifsg/ (accessed: 2020.08.01).

of the federalization, that is until the moment of the entry into force of the federal law, and, what is important in our context, it is also upheld in those fields or issues that are not covered by the federal law. This indeed has given an impulse for a legislative initiative of Bavaria to adopt a Bavarian law filling in the gaps that were deemed to be left unregulated by federal law. This Bavarian Act on Protection against Infections[6] of 25 March 2020 authorizes the Bavarian government to declare the situation of a "health emergency" if the infections in Bavaria are very numerous or of a very serious type. This declaration is the basis for the specific measures provided by this law. It is possible under this law that the competent authorities secure the supply in particular of medical, care-related and sanitary material, can seize such material if necessary and order plants to produce such material. Furthermore, it is allowed to oblige organizations such as firefighters to provide support services.

Another example for legislation of the *Länder* in this context is the Bavarian Act of the Protection against Catastrophes that has complementary significance to the infection protection legislation. The legislative competence for taking measures to overcome catastrophes has remained in the exclusive competence of the *Länder*. Thus, Bavaria adopted such a law in 1996,[7] defining such a catastrophe generally in art. 1.2 of the law. It is foreseen by this law that emergency plans must be prepared and assistance must be provided. Specific measures are not foreseen so that it would not be a sufficient legal basis for the protection against infections that would require a multitude of specific measures and interventions into personal freedom.

c) Administrative and constitutional jurisdiction – Some introductory remarks

(1) Short overview

Questions of judicial protection arise with respect to executive actions as well as to legislation. The review of executive actions is primarily in the hands of administrative courts, while the review of formal legislation is up to constitutional courts.

It is evident that administrative action has to be compatible with formal legislation as well as with the Constitution. The primacy of the Constitution, the central element of rule of law, requires that all public power actions have to conform with constitutional law. Therefore, administrative courts have to examine both legality *and* the constitutionality of the impugned actions.

Legislation can be federal or *Länder* legislation. This latter type of legislation must be compatible with the *Land* Constitution and also with federal law, especially with the Federal Constitution. Of course, compatibility with federal legislation or even federal regulations must also be given. However, this question does regularly not arise due to the alternative competence distribution between the Federation and the *Länder*.

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[6] https://www.gesetze-bayern.de/Content/Document/BayIfSG?AspxAutoDetectCookieSupport=1 (accessed: 2020.08.01).

[7] https://www.gesetze-bayern.de/Content/Document/BayKatSchutzG (accessed: 2020.08.01).

The review of federal legislation is reserved to the Federal Constitutional Court (FCC) while that of *Länder* legislation is effectuated either by the Constitutional Court of the Land (examining compatibility with the Land Constitution) or of the Federation (examining compatibility with the BL). However, it is also possible to launch both remedies.[8]

(2) Review of regulations according to s. 47 Code of Administrative Justice (CAJ)

As to administrative justice, *regulations* of the *Länder* governments or other *Länder* authorities can be reviewed by the superior administrative courts of the *Länder* according to s. 47 Code of Administrative Justice (CAJ) if this remedy has been introduced into the legal order of the *Land*. This is the case in 13 of 16 *Länder*; in the remaining three *Länder* the regulation can be reviewed incidentally in an ongoing proceeding if the validity of the regulation is relevant for the final decision of the court. A further possibility is a declaratory judgment according to s. 43 CAJ.

It should be said that the instrument of s. 47 CAJ is not applicable in the case of federal regulations, such as those issued by the Federal Ministry of Health in accordance with s.5 API; to have them reviewed is only possible by an incidental control or a declaratory judgment, as mentioned above.

(3) Review of administrative acts

Administrative acts related to a particular case or certain types of cases (orders – *Anordnungen*, general orders – *Allgemeinverfügungen*) can be impugned by the action of annulment (s. 42.1 CAJ), under the condition that the plaintiff claims the violation of his/her own subjective right (which can be a legal or constitutional subjective right).

It must be mentioned in this context that in the event of a negative decision of the first instance court, an appeal to the Superior Administrative Court (SAC) of the *Land* can be made and if this is unsuccessful, a revision (which must be admitted) to the Federal Administrative Court. After having exhausted these legal remedies, the claimant can lodge an individual constitutional complaint to the FCC.

An individual complaint to the FCC is also possible after having launched the s. 47 CAJ remedy without success. Of course, the regulation in question must affect the complainant directly and individually in his/her fundamental right.

(4) Constitutional review of legislation

Constitutional justice is involved in various respects. As already pointed out, the review of formal legislation can only be carried out by a Constitutional Court. Federal legislation is subject to the examination exclusively by the FCC, legislation of the *Länder* can be reviewed both by the Constitutional Court of the *Land* (which cannot, of course, examine federal legislation) and the FCC. The criteria of the review are mani-

[8] See s. 90.3 Act on the FCC as well as K. Schlaich, St. Koritoth, *Das Bundesverfassungsgericht*, 11th ed., C.H. Beck 2018, Rn. (par.) 349, p. 270–271.

festly different: the BL for the review of the FCC, the constitution of the *Land* for the constitutional court of this *Land*.

Before the FCC, the review of formal legislation can be initiated by certain State institutions (the Federal Government, the Government of one of the 16 *Länder* or on the demand of a quarter of Federal Parliament members, art. 93.1 no. 2 BL, abstract control of norms) or by request of a court claiming the unconstitutionality of formal legislation that the court has to apply (art. 100.1 BL, concrete control of norms). Furthermore, an individual constitutional complaint can be launched against formal legislation if it affects directly, individually and presently the complainant's fundamental rights or other subjective constitutional rights enumerated in art. 93.1 no. 4a BL. If there is a dispute between the Federation and a *Land* regarding the alleged violation of a constitutional obligation, that is a federal dispute in the sense of art. 93.1 no. 3 BL, and a piece of legislation can also be involved.

It is evident that administrative as well as constitutional jurisdiction offer a large spectrum of remedies that can be used for the review of coronavirus protection measures. This corresponds to art. 19.4 BL that requires, as a fundamental right, the existence of an adequate and efficient judicial protection system.

d) Judicial review with regard to anti-coronavirus measures

In the following analysis emphasis will be placed on some of the typical constellations of court proceedings that have played a role in practice.

It can generally be said that judicial actions against anti-coronavirus restrictions have been rather frequent but to a great extent unsuccessful. Since the most important and consequential measures where those established by regulations, the abovementioned instrument of the administrative judicial review of regulations (and bylaws) according to s. 47 CAJ was the most widely used. This is the reason why those judgments that considered the restrictions to be disproportionate came, to a large extent, from the administrative courts, specifically from the SAC of a *Land*. Since the regulations were quickly changed and adapted to the dynamically developing infection processes, there was a real need for interim decisions of the court, as it is foreseen in this type of proceedings by s. 47.6 CAJ. In cases in which the application addressed to the SAC was unsuccessful, the FCC was then requested to issue a preliminary injunction according to s. 32 Act on the FCC.

3. Constitutional and administrative jurisdiction in the pandemic context – procedural aspects

In the following, selected jurisdictional aspects are considered, in particular with regard to the FCC and, as there is a frequent connection in the practice of the SAC. A quick look at the system of jurisdiction, in particular the interaction of administrative and constitutional jurisdiction, follows.

In this context, it is only possible to deal with a very few decisions, in particular with those of the FCC that were (in part) successful for the complainant. It should be noted that almost all of the constitutional complaints to the FCC against anti-coronavirus measures have been unsuccessful.

Main subject of judicial review: *Länder* regulations

Regulations are the main instrument for establishing restrictions of individual freedom. They are normative actions adopted by the executive on the basis of an authorization by formal legislation. Despite their normative character they fall within the category of executive actions. They can be reviewed by the regional SAC under s. 47 CAJ.

(1) Review according to s. 47 CAJ

This is the procedure of direct judicial review of executive normative actions (*Normenkontrolle*) that can be established in accordance with s. 47 CAJ by the *Länder*. Thirteen of the 16 member states of the German Federation (among them Bavaria, Baden-Wuerttemberg, Saxony) have introduced this judicial remedy, while the remaining three states use the indirect review of normative executive actions (that is the incident review of such action in an ongoing legal proceedings) or the action for a declaratory judgment according to s. 43 CAJ instead of a remedy according to s. 47 CAJ.[9]

(2) Authorizations for the issue of regulations (art. 80.1 FL)

The remedy according to s. 47 CAJ is of central importance for the judicial control of anti-corona measures. This results from the fact that, according to the federal system in Germany, the execution of federal law, that is in our context the Federal Act of Protection against Infections (API) (*Bundesinfektionsschutzgesetz*, *IfSG*), is in the hands of the member states' executives (art. 83 BL). The federal law provides, what is necessary according to art. 80.1 Basic Law (BL), the authorization for the *Länder* governments to adopt regulations (as a means of the execution of the federal law) by s. 32 API. These regulations must be predetermined in their contents, objectives and extents by the federal law itself, as art. 80.1 BL explicitly requires. In Germany, there is no room for autonomous regulations by the executive; only authorizations by formal legislation (of the Federation or of the member state, according to the distribution of legislative competence) given to the executive for issuing regulations are constitutionally allowed. These authorizations must be clear and detailed enough to satisfy the requirements of the rule of law. This corresponds to this idea that art. 80.1 BL explicitly requires the legislator to determine in advance the possible "program" (that is, as stated above, the content, objective and extent) of the regulations. This must be expressed by the legislator explicitly or in a way that it can be recognized by interpretation.[10] The more fun-

[9] T. Würtenberger, D. Heckmann, *Verwaltungsprozessrecht*, 4th ed., C.H. Beck 2018, par. 507, p. 206; see also: footnote 1060.

[10] FCC vol. 58, 257, 277.

damental rights are interfered with, the more the authorization must be determined.[11] Furthermore, the regulations as normative executive action are not allowed constitutionally to regulate "essential issues"; this is reserved to the formal legislator, the Parliament, according to the so-called *Wesentlichkeitstheorie*.[12] It must also be mentioned in this context that the formal law as a legal basis for the adoption of regulations has to express the addressees of this authorization; art. 80.1 BL clearly says that the Federal Government, a Federal Minister or the *Länder* Governments can be authorized for this.[13] S. 32 API gives the authorization to adopt regulations to the *Länder* Governments and enables them to transfer the authorization, through regulation, to other executive units (s. 32, 2nd sentence).

(3) Admissibility requirements of the s. 47 CAJ remedy

The remedy established on the basis of s. 47 CAJ is destined to examine *Länder* law *inferior to formal legislation* of the *Länder*. This means that *regulations* (*Verordnungen*) issued by an authority of the *Land* (Government or administration below the Government) as well as *by-laws* (*Satzungen*)[14] issued by a legal person of the *Land* can be reviewed by this remedy. These types of executive action have normative character and are ranked below formal *Länder* legislation that is adopted by *Länder* Parliaments.

The further requirements for the remedy according to s. 47 CAJ is the standing to make the application that is possible for a natural or legal person, within a year from the issue of the impugned provision, aggrieved (or being aggrieved foreseeably in the future) in his/her subjective rights[15].

The subjective rights mentioned are particularly the fundamental rights that are restricted to a great extent by the anti-coronavirus protection measures of the public power. These are clearly the fundamental rights as guaranteed by the Federal Constitution, the BL, possibly also the parallel fundamental rights as embodied in the *Länder* Constitutions.

The finality of the remedy is to examine the validity of regulations or of the by-laws and, if necessary, to declare them void with effect *erga omnes*. If the impugned provision is contrary to law that is superior to it, it has to be regarded as void, without legal effect. This results from the hierarchy of norms. These norms are ordinary legislation of the *Länder* and ordinary and constitutional law of the Federation.

(4) Fundamental Rights parallelism in the German federal system

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11 FCC vol. 62, 203, 210; see also: A. Haratsch, in: H. Sodan, *Grundgesetz*, art. 80 Rn. (par.) 14.

12 German Federal Constitutional Court (FCC) vol. 49, 89, 126; vol. 61, 260, 275; vol. 78, 249, 272; vol. 136, 69, 114; vol. 139, 19, 47; vol. 150, 1, 99.

13 A sub-authorization (sub-delegation) to further executive units is also possible if the formal law of authorization allows it (art. 80.1 4th sentence BL).

14 See T. Maunz, G. Dürig, V. Mehde, *90th Suppl*., Febr. 2020, *GG*, Art. 28 Rn. (par.) 63.

15 Furthermore, it is possible that a public authority which has to apply to provision in question, makes an application for review (s. 47.2 1st sentence). This is hardly relevant in our context.

As to the review of the anti-corona virus regulations by the SAC, a violation of fundamental rights could occur both under the perspective of the *Land* Constitution and of the Federal Constitution. Normatively, the guarantees of both Constitutions coexist according to art. 142 BL, as far as they give equal protection or offer a higher degree of protection and also if they give less protection.[16] Only in the case of contradiction does federal law prevail according to art. 31 BL.[17]

Independently from the parallel existence of fundamental rights in the German federal system, there is a specific problem resulting from the overlap of administrative and constitutional jurisdiction in this context. The question arises of whether fundamental rights of the *Land* Constitution are exclusively examined by the *Land* Constitutional Court or can also be examined by the regional SAC in proceedings according to s. 47 CAJ. The answer is that the administrative jurisdiction is subsidiary, in this respect, to the constitutional jurisdiction. As, for example, in Bavaria, art. 98 4th sentence of the Bavarian Constitution establishes the so-called *actio popularis* (*Popularklage*), which enables anybody to address the Bavarian Constitutional Court claiming the incompatibility of a Bavarian law (legislation and regulations as well as bylaws) with the fundamental rights embodied by the Bavarian Constitution. The complainant must not necessarily be affected in one of his/her fundamental rights but is regarded as a guardian of the fundamental rights protection with respect to Bavarian law. This *actio popularis* is seen as an exclusive jurisdiction on Bavarian legal norms for their conformity with the fundamental rights provisions of the Bavarian Constitution. The remedy according s. 47 CAJ does therefore not include the review of regulations under the criteria of Bavarian fundamental rights. It must be noted that the *actio popularis* is unique in Bavaria and that this sort of subsidiarity is not applied in most of the *Länder*.[18]

(5) Provisional orders according to s. 47.6 CAJ

It is important to note that s. 47. 6 CAJ establishes the possibility that the SAC issues a provisional order in order to prevent serious disadvantages or for other important reasons that urgently require such an order.

(6) S. 47 CAJ remedy and the exhaustion of all relevant recourses according to s. 90.2 Act on the FCC

A further question arises of whether the application according to s. 47 CAJ is necessary to exhaust the legal remedies before lodging an individual constitutional complaint to the FCC. An individual complaint to the FCC is an extraordinary, subsidiary recourse for the defense of the fundamental rights guaranteed by the BL. As s. 90.2 Act on the FCC stipulates, the claim for fundamental rights violation must be brought to every competent court, from the first instance on. Fundamental rights are so impor-

16 See H. Sodan [in:] *eadem*, *Grundgesetz*, Art. 142 Rn. (par.) 45.
17 See T. Maunz, G. Dürig, St. Korioth, *GG*, Art. 142 Rn. (par.) 13–15.
18 See T. Würtenberger, D. Heckmann, *Verwaltungsprozessrecht*…, (note 1), Rn. (par.) 530; see also: footnote 1130.

tant that their violation must be remedied as soon as possible, that means by all the competent courts within the whole range of existing legal recourses, before the FCC speaks the final word in this matter. To have a regulation examined by the SAC is a presupposition for access to the FCC.

This applies to regular proceedings on the merits as well as for preliminary injunction proceedings according to s. 32 Act on the FCC. In the practice of anti-corona regulations, this point has played an essential role. Requesting a preliminary injunction from the FCC has been dependent on the fact that the applicant first tries to get a temporary (preliminary) injunction (or even a decision on the merits) from the SAC.

The fact that anti-corona measures have often only been valid for a limited time and have been rapidly replaced by new regulations has not been a hindrance for a review either for the SAC or the FCC. The reason is that regulations or other acts of public power have been so important for its interference with fundamental freedoms or have had effects that continue into the present. This has been regarded as a justification to examine the constitutionality of these measures even after their expiry dates.

(7) Individual constitutional complaint

The constitutional complaint (*Verfassungsbeschwerde*) according to art. 93.1 no. 4a BL is the instrument for defending fundamental rights before the FCC, after having exhausted the legal remedies, against all types of public power, legislation, executive action and judicial decisions. The precondition is that the complainant alleges to be violated individually, directly and presently in his/her fundamental right (or another right as mentioned by art. 93.1 no. 4a BL). As far as formal or substantive legislation is concerned, the direct impact on fundamental rights could be doubtful because it is only given if this impact is not effectuated by an action executing the legislation but by the legislation itself. Legislation in our context can be formal anti-corona legislation both federal (such as the API) or of the *Land* (such as the Bavarian API) or anti-corona regulations as mentioned before.

The most crucial point is the subsidiarity of the constitutional complaint as an extraordinary remedy that has already been mentioned in the context of s. 47 CAJ application. Subsidiarity means that all relevant remedies or even extrajudicial remedial possibilities must be exhausted before the FCC comes into action.[19]

Furthermore, the complaints have to be admitted to be dealt with by the FCC itself, regularly by committees of three judges that give access only if the matter is important for the development of constitutional law or non-admittance would cause irreparable damage to the complainant. More than 92% of all complaints are refused *a limine* in this way.[20]

(8) Preliminary injunction according to s. 32 Act on the FCC

[19] See K. Schlaich, St. Korioth, *Das Bundesverfassungsgericht*…, note 8, Rn. (par.) 244 *et seq*.
[20] See H. Lechner, R. Zuck, *BVerfGG*, 7th ed., C.H.Beck 2015, p. 797 *et seq*.

In practice, the adequate remedy during the corona crisis is to require a provisional decision by the FCC by means of a preliminary injunction. An example for such a request is the decision of the 2nd Chamber (composed of three judges, see § 93 d. 2 Act on the FCC) of 7 July 2020[21] that refused to issue a preliminary injunction against the Regulation on combating the corona pandemic adopted by the member State *Saarland*.[22]

The request for a preliminary injunction leads to a summary proceeding that weighs up the consequences in case the request is granted with those in case it is refused. The FCC is obliged to issue such an injunction if this is urgently required to avert serious disadvantages, to prevent imminent violence or for another important reason for the common good. The request is based on the assertion that the regulation interferes in a disproportionate way with the fundamental rights embodied by art. 1.1 and 2.1 and 2 BL, in particular by means of contact limitations, contact tracing and the obligation to wear mouth and nose coverings. Weighing up the consequences of the issue of the injunction on the one hand and the refusal on the other hand, the FCC clearly gives preference to the refusal with regard to the serious consequences for the expansion of infections if the injunction is issued.

In other cases the FCC examines, before weighing up the consequences in the above mentioned sense, whether the main proceedings will be *evidently* successful or unsuccessful. If the main proceeding, the individual complaint proceedings, would be clearly inadmissible or unfounded, the request for a preliminary injunction would be refused by the FCC. It must be underlined that the success of the main process is *not* examined in the preliminary injunction proceedings that are of a summary nature. However, if there is an *evident* hindrance for the admissibility of the main proceedings, the request for the preliminary injunction must be refused. This occurred various times in cases in which the complainants had not tried previously to get a preliminary injunction by the SAC according to s. 47.6 CAJ. If the requirement that all remedies must be exhausted before lodging a constitutional complaint is not fulfilled for the main proceedings (which are closely connected with injunction proceedings[23] even if they are not necessarily already pending at the time), the injunction proceedings would be refused as evidently inadmissible.[24]

(9) FCC and the principle of proportionality

Proportionality is the most frequently applied concept of constitutional law. Restrictions of fundamental rights must respect this principle that says that only really necessary interventions in an individual's freedom are constitutionally legitimized. Proportionality indicates the frontier line between freedom and restriction. It is ap-

[21] http://www.bverfg.de/e/rk20200707_1bvr118720.html (accessed: 2020.08.01).

[22] This request was combined with an individual constitutional complaint against the SAC *Saarland* decision, in a preliminary proceedings according to s. 47.6 CAJ that was directed against the Regulation mentioned in its previous version. The above analysis is limited to the argumentation within the proceedings according to s. 32 Act on the FCC.

[23] See K. Schlaich, St. Korioth, *Das Bundesverfassungsgericht*…, note 8, Rn. (par.) 464 (p. 355).

[24] See H. Lechner, R. Zuck, *BVerfGG*…, (note 20), § 31 Rn. (par.) 21, footnote 50.

plicable for the legislator that is authorized by the Constitution to restrict a fundamental right (reservation for restrictions through legislator) as well as for indicating the inherent limits of fundamental rights that are restricted not by the legislator but by the Constitution itself, that is by constitutional norms and principles other than the fundamental right (inherent limitations of a fundamental right).

As already mentioned, only a few judicial decisions have stated the partial unconstitutionality of the anti-corona measures. The decision of the FCC of 29 April 2020[25] declared inapplicable the regulation of the *Land* of Lower Saxony insofar as it excluded any exceptional permission, even if adequate protective measures would be taken, to participate in a religious reunion in churches and other places of worship. The high importance of freedom of religion (which is expressed also by the fact that art. 4 BL cannot be restricted by the legislator but only other constitutional provisions have impact on this freedom and can provide limits) was taken into account.[26]

Another request for a preliminary injunction to the FCC concerning the prohibition of an assembly was successful because it violated, in the opinion of the FCC, *manifestly* the freedom of assembly (art. 8.1 BL). This prohibition, a unilateral administrative act, was based on the relevant regulation of the *Land Hesse* that had not foreseen a strict prohibition of assemblies of more than two persons not belonging to the same house stand but had provided a discretionary power for the authority to prohibit it. In essence, the authority when prohibiting the assembly did not duly exercise its discretionary power and therefore violated the fundamental right. The administrative courts that were addressed by the concerned person confirmed this prohibition. This means that the legal remedies have been exhausted and a provisional injunction could be requested, with success.

It must be noted that the FCC rejected requests in nearly all cases so the abovementioned decisions stand out as specific cases that were successful even in the context of provisional injunction proceedings.[27]

4. Conclusion

Judicial protection within the corona virus crisis was and is of high importance and a pillar of the rule of law. It can be said that the judiciary has remained without any limitation of its function. The confidence of the population in the judiciary and in particular in the Federal Constitutional Court is highly significant. All kinds of anti-corona measures are subject to the jurisdiction of the courts. The principles of legality and constitutionality apply in their full dimensions. However, the analysis of the jurisprudence shows the clear tendency that most of the measures are considered as con-

[25] http://www.bverfg.de/e/qk20200429_1bvq004420.html (accessed: 2020.08.01).

[26] See also: FCC http://www.bverfg.de/e/qk20200410_1bvq002820.html (accessed: 2020.08.01).

[27] See the jurisprudence of a few: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=2020-04-15&Aktenzeichen=1%20BvR%20828/20 (accessed: 2020.08.01).

forming to the Constitution. The principle of proportionality as a flexible instrument of distinction between freedom and restriction has evidently been used appropriately.

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Summary

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**Constitutional Jurisdiction and the Corona Crisis:
Some Aspects from the German Experience**

The fight against the Covid-19 crisis is being conducted in Germany on the basis of the Federal Law on Protection against Infectious Diseases and has led to numerous restrictions, particularly in the area of fundamental rights. Nevertheless, the requirements of the Rule of Law have been respected. Fundamental rights have been restricted in accordance with the rules of the Basic Law and jurisdiction has been fully maintained. The constitutional justice has the final say on the constitutionality of the restrictions. In accordance with the German federal system, measures to combat the restrictions based on the above-mentioned federal law are implemented by the executive authorities of the *Länder*, the Member States of the Federation, mainly by means of regulations. These are executive normative acts which are reviewed by the Supreme Administrative Court (SAC) of the *Land* (the Member State) in accordance with par. 47 of the Code of Administrative Justice (CAJ) and, if this is unsuccessful, by the Federal Constitutional Court by means of a constitutional complaint, as a rule in a preliminary procedure. However, a number of such procedures have failed due to the subsidiarity of the constitutional complaint. The analysis of the jurisprudence shows the clear tendency that most of the measures are considered as conforming to the Constitution.

Keywords: restrictions of Fundamental Rights, requirements of Rule of Law, regulations, constitutional complaint, Federal Constitutional Court, Supreme Administrative Court of the *Land*, preliminary procedure, subsidiarity of the constitutional complaint

Streszczenie

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Sądownictwo konstytucyjne a kryzys związany z koronawirusem: niektóre aspekty w świetle doświadczeń niemieckich

Walka z kryzysem spowodowanym Covid-19 jest prowadzona w Niemczech na podstawie federalnej ustawy o ochronie przed chorobami zakaźnymi. Wprowadzone środki doprowadziły do licznych ograniczeń, zwłaszcza w zakresie praw podstawowych, niemniej jednak wymogi praworządności były przestrzegane. Ograniczenia praw podstawowych wprowadzane były zgodnie z przepisami Ustawy Zasadniczej, a jurysdykcja Federalnego Trybunału Konstytucyjnego w pełni zachowana. Ostateczne słowo w sprawie zgodności ograniczeń z Ustawą Zasadniczą miał Trybunał Konstytucyjny. Zgodnie z niemieckim systemem federalnym, ograniczenia wynikające z ustawy federalnej są realizowane przez władze wykonawcze krajów związkowych Federacji, głównie w drodze rozporządzeń. Są to wykonawcze akty normatywne kontrolowane przez Naczelny Sąd Administracyjny kraju związkowego, zgodnie z § 47 kodeksu sądownictwa administracyjnego, a w przypadku gdyby okazało się to bezskuteczne, przez Federalny Trybunał Konstytucyjny w drodze skargi konstytucyjnej, co do zasady w postępowaniu przygotowawczym. Niemniej jednak, szereg takich procedur zakończył się niepowodzeniem ze względu na pomocniczość skargi konstytucyjnej. Analiza orzecznictwa wskazuje też na wyraźną tendencję do uznawania większości środków za zgodne z Konstytucją.

Słowa kluczowe: ograniczenia praw podstawowych, wymogi praworządności, rozporządzenie, skarga konstytucyjna, Federalny Trybunał Konstytucyjny, Naczelny Sąd Administracyjny, procedura wstępna, pomocniczość skargi konstytucyjnej