

Basic rights in times of Corona

- some call it „Weimarer Zustände“ (“Weimarian conditions”)
- ONLY TEMPORARY!!
- we do not have the luxury to wait until we have enough scientific evidence
- It seems as through the „lockdown“ hasn’t actually driven the reproduction numbers down at all
 - → rise at the beginning mostly symbolizes the local outbreaks, scientifically it can be assumed that there would have been a steep increase throughout Germany without nationwide measures
 - It gets more and more difficult to get even lower from an already low level
 - important: parts of public life have already been widely shut down before the official lockdown
- Is a pure information of the population about the dangers sufficient for voluntary protection measures
- Monopolies?

According to Schäuble, the only thing you can describe as an absolute value, is the dignity of man. But this dignity does not exclude that we must die.

- Emergency laws
 - Basic rights continue counting
 - Admissibility according to the constitution
 - SUIABILITY → there cannot be a milder alternative
 - there cannot be an absolute ban on assembly (lines in front of bakeries, auto corsos)
 - thesis: the protection of basic rights is superior, behind it, all other rights must be set back
 - When a lack of alternatives is propagated, then there can be no more proportionality → proportionality always checks whether there are other means which intervene less strongly in the basic right.
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 - Also, the protection of life and inviolability is no basic right, which could not be limited (speed limit, organ donation) → we decide in certain life situations to take certain life dangers, because we think they are socially responsible. → politically always political scope for decision making
 - Informational self-determination
 - Intervention generally possible, app would be such an example

1.) What do basic rights mean?

- basic rights are essential rights which are guaranteed to the members of society as consistent, permanent and enforceable. (defense rights of the citizens against the state)
- formulated in the constitution or only derived from general right principles.
- Closely connected to the idea of human rights, human rights are not made through legislation. (not in need of constitutive reasoning, are regarded as fundamental)
- Three types of basic rights:
 - Basic freedom rights (freedom of speech, press, and information) → governmental omission
 - Basic equality rights
 - participation rights (participation rights in relation to state behavior) → e.g. through right of petition

2.)

- postponement of separation of power →
- The state is only allowed to intervene in our basic rights when it is proportionate, i.e. measures for vaccination protection are not automatically legal
- Infektionsschutzgesetz (spezielles Gesetz zur Gefahrenabwehr) ist Bundesgesetz, Vollzug ist jedoch Ländersache protection against infection law (special law for danger prevention) is federal law, execution is a matter of lands/states
 - quarantine regulations , curfews, and employment ban
 - There are uniform regulations in federal and state-agreements
- Which basic rights are restricted?
- Art. 2 Abs. 1 GG: Free development of personality
- Art. 4 Abs. 1 und 2 GG: freedom of religion
- Art. 8 GG: freedom of assembly
- Art. 11 Abs. 1 und 2 GG: freedom of movement
 - Entry restrictions
- Art. 12 Abs. 1 GG: freedom of occupation
- Art. 13 Abs. 1 GG: right of invulnerability of the home
- No declaration of emergency as in many other European states, emergency laws which have been declared in the 60s and are not applicable on the Corona pandemic
- There were more than 1,000 urgent requests in relation to the restrictions during the Corona pandemic, almost all cases were judged as lawful
- Discussion about the absolute protection of life

- **Restrictability of basic rights**

- Acc to. Art. 19 Abs. 1 S. 1 GG only possible through a law or because of a law (legal reservation)
- Furthermore, fundamental rights are subject to constitutional restrictions, i.e. in the case of conflicting constitutional law they can be mutually restricted to the extent that all conflicting fundamental rights can be exercised in principle despite collision (practical concordance). Also in this respect, however, a law is required in order to optimally align the conflicting legal interests (reservation of the law).
- violation of basic rights of freedom when state intervention is not justified in the protected area
 - three-step examination
 - disproportionality over legal basis
- in the event of an epidemic situation of national importance §5 → Powers for the Federal Ministry of Health to itself issue ordinances or general decrees (!no laws, legislative competence is NOT transferred to the executive), if a similar situation has been established beforehand (partial transfer of legislative competence)

- ! regelmäßig müssten Regelungen in Hinblick auf die Verhältnismäßigkeit überprüft werden !rules must be regularly reviewed in regard to their proportionality

Sovereignty of the people

Rule of Law

- double function as guarantor of the freedom of the citizens and warranty of their safety through a state monopoly on the use of force (balance)
- separation of powers!

Meinungsfreiheit in Zeiten von Corona → nur Versammlungsfreiheit betroffen, nicht die Meinungsfreiheit! Freedom of expression in times of Corona → only freedom of assembly is concerned, not the freedom of expression

- Equality and justice → some population groups are more affected
 - factual reasoning available, within the framework of proportionality, a disadvantage for certain groups is allowed
 - v.a. im Hinblick auf die allgemeine Wirtschaft, Anzahl der Arbeitsplätze Lufthansa, decision not only on the basis of justice, but also especially in relation to the general economy, numbers of jobs
 - equal opportunities and educational justice

- freedom of religion
 - complete abolition would be against the constitution
 - churches were still open
 - practice → church services are still available online
- To respect and PROTECT human rights is the duty of the public authority → basic right to life and physical invulnerability
- dignity of man relates to the right to a self-determined life with a ?
- limitation!
- Alternative
- criteria of weighing up must be made publicly visible
- problematic in times of Corona, more than ever: Data protection

o Danger here above all of a restriction of the basic rights also after the end of the Corona measures, since the security authorities would have here already now already more authority

2 examples which are to emphasize the difficulties with the weighing up :

- **example 1: For example, is the restriction of the freedom of movement of an infected and thus contagious person outweighed by the fact that it prevents the infection of other people? So what takes priority here: the protection of life and the basic right to physical integrity (guaranteed in Article 2 of the German Constitution), or is there a possibility that the restriction of the freedom of movement for those affected could lead to even more serious violations of other rights?**
- **Example 2: How far may state coercion go in view of Article 1 of the Basic Law, according to which human dignity is inviolable? This article 1 is a very special basic right because it does not allow any exceptions. But is not the dignity of an old person in a nursing home affected if he or she has to die in involuntary isolation without being able to be visited by relatives?**
- Principle of proportionality → first, measures must be appropriate to reach a set goal, ; different measures can be considered, to reach a goal the state must choose the version which is easiest on freedom; examination of proportionality must be repeated as soon as the situation changesAllgemeiner Gleichheitssatz
- Legal reservation in connection with the determination commandment (only with legal authorization, laws must let content, purpose and extent show)

Three concrete dangers

- 1.) Restrictions in the ban on assembly make public-effective demonstrations more difficult
- 2.) Democratic participation: civil society participation opportunities are significantly restricted by accelerated legislative procedures

3.) new surveillance technologies → dangers for civil society actors

Situation at the beginning of the Corona crisis

- self-disempowerment of the parliament
→ emergency situation according to the federal Infection protection act (power for executive authority)
→ opposition has not questioned the measures, neither has the press (fourth force), at the beginning measures were also accepted by the judicial authorities → with that, Germany basically didn't have any separation of powers for a short amount of time

For the protection of the abuse of these extensive possibilities in the context of the infection protection law it needs a watchful civilian population for control

Were the measures necessary? (from an epidemiological perspective):

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