

COVID-19 response and human rights - comments from the German and European perspective

I. Introduction

1. COVID-19 restrictions and human rights: a question of law, not just of politics
 - pandemic no excuse for watering down the rights of the human being: modern human and fundamental rights doctrine allows precise and accurate assessment of the legality of any measure to fight COVID-19!
 - the mission of the courts to enforce these rights - even against COVID-19 restrictions
 - already more than 220 relevant court decisions in Germany until Oktober 2020
2. On terminology: human rights and fundamental rights
 - under common international terminology (which differs from Indonesian terminology)
 - "human rights" are the pre-legal ("natural") rights of the human being (according to philosophical doctrine) and also the rights guaranteed in international human rights treaties (who pretend just to reflect them), while
 - "fundamental rights" are the legal positions created by the implementation of this doctrine into the (constitutional) law
3. European and German human and fundamental rights doctrine as sources of inspiration in the global discourse
 - due to the rich and sophisticated *jurisprudence of the European Court of Human Rights* [= ECtHR] on the *European Convention on Human Rights* [= ECHR] and of the *German Federal Constitutional Court* [= FCC] on the fundamental rights in the *German Basic Law* [= BL], and to the innovative *Charter of Fundamental Rights of the European Union* [= ChFR]

II. Classical human and fundamental rights questions raised by the COVID-19 restrictions

1. The rights affected by the COVID-19 restrictions
 - a) Freedom of occupation (art. 12(1) BL, 15 ChFR)
 - severe restrictions of the free exercise of professions, which in some cases practically amount to temporary prohibitions of certain professions (such as hairdresser, masseur, physiotherapist, prostitute etc.)
 - b) Freedom to conduct a business (art. 12(1) BL, 16 ChFR)
 - severe restrictions of practical conduct of business, which in some cases virtually amount to temporary prohibitions of certain kinds of businesses (such as airlines, hotels, bars, discotheques etc.)
 - c) Freedom of movement (art. 11 BL, 2 Prot. 4 ECHR, 45 ChFR)
 - affected by travel restrictions, curfews, closures of public squares, parks and beaches etc.
 - restrictions preventing from meeting spouse and children also affect marriage and family life (cf. art. 6(1) BL, 8 ECHR, 7 ChFR)
 - bans from using own holiday homes also affect property (art. 14 BL, 1 Prot. 1 ECHR, 17 ChFR)
 - d) Personal freedom (liberty) (art. 2(2) phrase 2 BL, 5 ECHR, 6 ChFR)
 - affected in case of quarantine measures
 - e) Freedom of assembly (art. 8 BL, 11 ECHR, 12 ChFR)
 - bans on gatherings in large crowds make it impossible to exercise an essential right constitutive for democracy
 - f) Freedom of religion (art. 4(1, 2) BL, 9 ECHR, 10(1) ChFR)
 - bans on gatherings for public worshipping limit the free exercise of religion
 - g) Freedom of arts (art. 5(3) BL, 13 ChFR; part of freedom of expression under art. 10 ECHR)
 - affected by bans on public concerts, readings and theatre performances and forced closure of museums and galleries
 - h) Freedom of science (art. 5(3) BL, 13 ChFR)
 - affected in case of forced transition to online teaching and home office for researchers
 - i) Protection of / respect for family life (art. 6(1) BL, 8 ECHR, 7 ChFR)
 - affected by restrictions on family gatherings, wedding receptions, funerals etc.
 - j) Right of informational self-determination / to the protection of personal data (art. 2(1), 1(1) BL, 8 ChFR; part of right to respect for private life under art. 8 ECHR)
 - affected in case of compulsory testing or contact tracing
 - k) Other rights
 - general freedom of action (art. 2(1) BL - the right to do or not to do any activity you want; some aspects protected by right to respect for private life under art. 8 ECHR, 7 ChFR)
 - affected by mandatory mask-wearing, contact restrictions, sport restrictions, limitations of private parties etc.
 - equality rights (cf. art. 3 BL, 14 ECHR, 1 Prot. 12 ECHR, 20 et seq. ChFR)
 - in case of discriminatory or other unjustifiedly unequal COVID-19 restrictions
 - *virtually any freedom right* and most other rights can be affected by COVID-19 restrictions!

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2. COVID-19 restrictions as encroachments on these rights
 - encroachment by prohibition, issuing of conditions or specific official warning (e.g. not to attend public prayers at a certain place, not to take part in a certain demonstration or not to go shopping in a certain shopping mall)
3. The justification of the encroachments by the limits of the affected rights
 - a) The limitation of the rights by specific or general limitation clauses
 - specific limitation clauses (for each right) in BL and ECHR, mixed system in ChFR (cf. art. 52 ChFR)
 - limitation clauses allow restrictions by law or based on law to protect rights of others or to pursue certain or any (overriding) public interests
 - some rights guaranteed in the BL without explicit limitation can only be limited when colliding with other constitutional rights or values (so-called inherent limits)
 - b) The overriding interests protected by the COVID-19 restrictions
 - aa) The fellow citizens' **right to life** (art. 2(2) phrase 1 BL, 2 ECHR, 2 ChFR)
 - bb) The fellow citizens' **right to physical integrity / protection of health** (art. 2(2) phrase 1 BL, 3 ChFR, 11 no. 3 European Social Charter; some aspects protected under art. 8 ECHR)
 - see also the right of workers to working conditions which respect their health and safety (art. 31 ChFR)
 - cc) **Public health** (cf. art. 8(2), 9(2), 11(2) ECHR, 2(3) Prot. 4 ECHR; see in particular art. 5(1) lit. e ECHR)
 - vital for any modern society and economy; in particular prevention of collapse of healthcare system
 - dd) Others
 - public safety, public order, economic well-being of the country etc. (depending on concerned right)
 - note the double effect of COVID-19 restrictions on the economy: they may hinder economic activities but eventually serve to sustain them during the pandemic
 - c) The need of the COVID-19 restrictions to comply with the "limits of limits" ["Schranken-Schranken"]
 - aa) No encroachment on the essence of the affected rights (art. 19(2) BL, 52(1) phrase 1 ChFR)
 - excludes a total ban of political demonstrations for a longer period
 - bb) Limitation of encroachments by the principle of proportionality (general remarks)
 - the most important sub-principle of the rule of law and element of any human/fundamental rights doctrine
 - traditionally different structure of the examination in European and German law
 - the requirements of proportionality: legitimate aim, suitability (adequacy), necessity and proportionality in the strict sense (appropriateness) of the measure
 - cc) No unequal treatment in the restriction of human and fundamental rights
 - no discrimination with regard to personal characteristics (art. 3(3) BL, 14, ECHR, 1 Prot. 12 ECHR, 21 et seq. ChFR)
 - no other (unjustified) unequal treatment (general principle of equality - art. 3(1) BL, 20 ChFR)

III. COVID-19 and the second dimension of human and fundamental rights: the state's duties of protection (positive obligations)

1. The doctrine of "positive obligations" of the European Court of Human Rights
 - e.g. ECtHR, 23.07.1968, Belgian linguistics; 13.06.1979, Marckx v. Belgium; 28.10.1998, Osman v. UK; 20.12.2011, Finogenov a.o. v. Russia
 - state must not only refrain from encroaching on the rights but also engage in activity to secure their effective enjoyment; this includes substantive measures for their protection against threats
2. The doctrine of "duties of protection" ["grundrechtliche Schutzpflichten"] of the Federal Constitutional Court
 - see in particular BVerfGE 88, 203²; 115, 118; 121, 317
 - The fundamental rights represent an *objective system of values*, which must be realized in all spheres of life. The *state must not only respect them but also protect them by active intervention* against threats emanating from other persons or nature. This obligation also derives from the guarantee of *human dignity*, to which the fundamental rights are closely related. Under art. 1(1) phrase 2 BL it is the duty of all state authority "to respect and protect" human dignity.
3. The problem to define clear standards and to determine violations in complex situations such as the coronavirus crisis
 - The state must undertake measures for an adequate and effective protection but also take into account the conflicting legal interests, enjoying a *wide margin of appreciation and discretion*, whose limits are still diffuse. While the ECtHR focuses on the individual case, the FCC postulates a *prohibition of insufficient means* ["*Untermaßverbot*"] whose contours and relation to the prohibition of excessive means ["*Übermaßverbot*"] are unclear. A constitutional complaint against the easing of COVID-19 restrictions was not even admitted for decision (FCC, 12.05.2020, 1 BvR 1027/20).
 - In complex situations, where different authorities take various measures that complement each other and have a serious impact on economic, social and private life, these doctrines allow *only* to identify *obvious and serious failures* of protection.
 - example: premature easing of lockdown in Florida and East Java despite soaring infections and fatalities
 - They are, however, important for the assessment of the proportionality of COVID-19 restrictions, notably the balancing of the restricted and protected rights.
 - a horrible special problem: legislator obliged to pass regulations on coronavirus triage?

² Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 88, p. 203 ff.; English translation at <https://germanlawarchive.iuscomp.org/?p=1190>.

IV. The special problems of the proportionality of COVID-19 restrictions

1. Individual assessment with regard to the specific circumstances
 - no general assessment of types of measures but individual examination of the individual measure, as such and in context, with regard to the specific circumstances of place and time and of available epidemiological expertise
 - identical measures in different countries, regions or cities, at different phases of the pandemic or under different knowledge about the virus may need to be evaluated differently
 - example: business lockdowns need to be shorter in countries without or with weaker social security systems
 - measures that were proportional at one time may be unproportional at another time and vice versa
 - example: second lockdown more difficult to justify, considering the grown knowledge, experience and alternatives
 - measures may be proportional at first but become unproportional as the epidemiologic, economic, social, public security or weather situation or the understanding of the coronavirus progresses
2. The legitimate aim of the restriction (→ see supra, II.3.b)
 - fight against pandemic must be the essential objective of the measure
 - example: no prohibition of demonstrations to prevent criticism of the government...
3. The suitability of the restriction to pursue that aim
 - measure must be conducive to fight COVID-19
 - authorities enjoy wide *margin of appreciation and evaluation* (assessment must be → *tenable*)
 - all measures ensuring physical distance between human beings are suitable, even if they are harsh
 - former doubts concerning mandatory mask-wearing were cleared up by science
 - cf. Higher Administrative Court Koblenz, 06.06.2020 - 6 B 10669/20; Higher Admin. Court Weimar, 13.06.2020, 3 EN 374/20; Higher Admin. Court Münster, 29.07.2020, 13 B 675/20.NE)
4. The necessity of the restriction to achieve the pursued aim
 - measure must be the least intrusive act of intervention that is equally conducive (→ no milder alternative)
 - here, too, margin of appreciation and evaluation
 - no obligation to wear a face-mask when alone in a car (milder alternative: obligation to close the car window...)
 - measures must be *limited in time*: increasing duration requires increasingly sustainable fact-based evidence of risks feared from repealing or moderating them (Saarland Constitutional Court, 28.04.2020, LV 7/20)
 - no curfew if contact and gathering restrictions are sufficient
 - no comprehensive prohibitions if *targeted restrictions* are sufficient
 - no ban of public demonstrations and religious events if precautions in special health protocols (limited number of participants, physical distancing, mask-wearing, no singing or praying aloud together etc.) can avoid infections and compliance is ensured
 - FCC, 15.04.2020, 1 BvR 828/20; 17.04.2020, 1 BvQ 37/20: discretionary decision required about approval under conditions with regard to the specific circumstances
 - FCC, 29.04.2020, 1 BvQ 44/20: *no total ban of Friday prayers in Mosques* (this decision also paved the way to resume Christian church services)
 - no complete lockdown of restaurants in the early days of the pandemic but limitation to selling food for take-away
 - no lockdown of shisha bars if elaborate precautions (exclusive use of shishas, disposable mouthpieces, intensive room ventilation etc.) can avoid infections (Higher Admin. Court Lüneburg, 27.07.2020, 13 MN 272/20)
 - no general ban of drive-in cinema shows, even with large audiences (Higher Admin. Court Berlin-Brandenburg, 21.07.2020, OVG 11 S 65.20)
 - however, total lockdown of discotheques still necessary (Higher Admin. Court Münster, 08.07.2020 - 13 B 870/20)
 - special restrictions for vulnerable groups no conducive alternative to general restrictions because everybody can spread and suffer from the coronavirus
 - limitation of wedding parties to 50 participants necessary because partying typically leads to closer physical contact of larger number of persons (Higher Admin. Court Lüneburg, 13.08.2020, 13 MN 290/20)
 - problem: necessary to close borders with little affected neighbouring states?
5. The proportionality of the restriction in the strict sense to pursue its aim
 - burden imposed must not be out of proportion to aim in view (requires → *thorough balancing*)
 - here, too, margin of appreciation and evaluation, depending on the value of the affected right
 - state's crucial duty to protect life and health justifies *even very severe restrictions*, notably of economic activities
 - but not measures endangering life and health themselves (e.g. by hindering access to medical care)
 - *exceptions* from general prohibitions avoid excessive burdens
 - *accompanying state support measures* for companies, freelancers, workers etc. strengthening their economic viability can alleviate the severity of restrictions
 - measures must be *limited in time*: even essential measures to fight COVID-19 will cause unbearable burden in the long run and therefore need to be repealed, moderated or replaced by alternatives over time
 - example: no permanent total lockdown of airports, restaurants, bars etc. but reopening with strict health protocols
 - controversial: ban on hotel accommodation of guests from Corona hotspots (*divergent court decisions*)
 - problem: proportional to sustain travel restrictions separating unmarried life partners over a long period of time?
 - problem: proportional to keep dying patients in absolute isolation, separated from families and friends?

V. Conclusion

- the need for a permanent critical monitoring and discussion of all COVID-19 restrictions, individually and in context, going into the details and keeping both dimensions of human and fundamental rights in mind
- resolute and sophisticated application of the principle of proportionality crucial for a successful harmonisation of public health and individual rights in the pandemic
- scientific progress will help: already a reliable and cheap ad hoc coronavirus test, which delivers results immediately, would allow to ensure virus-free venues and events by simple entrance controls, rendering most COVID-19 restrictions obsolete...

Further Reading

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- Podsadny, Luisa*: Corona and Fundamental Rights, 2020, <https://freiheitsrechte.org/corona-and-fundamental-rights> (presentation of legal and fundamental rights backgrounds of the COVID-19 restrictions in Germany)