Dealing with Uncertainties in the Pandemic

A German Perspective

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Article

ABSTRACT

The uncertainties experienced throughout the COVID-19 pandemic have posed major challenges both to the law itself and to its application. Prognostic uncertainties and gaps in knowledge about the new virus, on the one hand, and the need to act quickly, on the other, confronted the legislator and administrative courts with a challenge that could not be fully met by applying the hitherto existing Infection Protection Act. This contribution examines the legal responses to dealing with such uncertainties and illustrates them with examples of how the pandemic was handled in Germany. The focus is on aspects of legislation, followed by an analysis of the possibilities for judicial review of legislative decisions taken under uncertainty.

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I. Introductory Remarks

More than a year ago, the global pandemic caused by the infectious coronavirus disease (COVID-19) also made its way to Germany. Since the first case became known on 27 January 2020, we have been struggling with the permissible legal responses to the pandemic, even though we were well prepared from a legal point of view: Germany had a legal framework for infectious diseases even before the outbreak of the COVID-19 pandemic, with the Infection Protection Act (*Infektionsschutzgesetz*) at its heart. This law enables the health authorities to adopt measures to combat the spread of a disease. It formed the legal basis by which to authorise the measures taken during the pandemic. It turned out, however, that this initial legal basis was effective for a transitional period only. As the pandemic continued to last longer, changes were needed to put the measures, which deeply interfere with fundamental rights, on a sound, longer-term legal basis. In the process, prognostic decisions had to be made that were influenced by scientific uncertainties concerning this new type of virus. This article aims to examine the mechanisms that German law provides to deal with these uncertainties.

II. Knowledge Deficits as a Key Challenge – Legal Responses

In the state apparatus, knowledge[1] has the function of guiding state action.[2] Especially in many areas of administrative law, decisions must be made under uncertainty.[3] At least two different dimensions of uncertainty must be differentiated here: First, prognostic legal decisions are always subject to epistemological uncertainties.[4] This is true even for a police danger prognosis in a simple case, since a certain degree of uncertainty always remains. Second, legal decisions on legal facts may require the incorporation of expert knowledge.[5] This is evident, for example, in the case of new technologies.

1. Uncertainties in infectious disease law

Infectious disease law is another example of a legal area in which decisions have to be made under uncertainty.[6] During a pandemic, science, politics, the media, and the law are confronted with a high degree of non-knowledge.[7] Moreover, experiential knowledge from previous pandemics is only of limited use in addressing these knowledge gaps, because each virus can be unique and therefore raises a specific set of questions.[8] The COVID-19 pandemic has confirmed this once again because additional and new knowledge gaps emerged. Some of the questions could only be answered in the course of the pandemic; others are still open or at least controversial.[9] At the beginning of the pandemic, for example, it was not clear beyond reasonable doubt whether wearing masks mandatorily would help contain the pandemic. In the meantime, compulsory mask wearing has been recognised as a central means of combating the pandemic. Unanswered questions still remain, however, about transmission of the virus, protection against the virus, and duration of the disease, for which there is not yet sufficient scientifically validated data due to the novelty of the virus.[10] At the same time, there is enormous pressure to act, because important legal interests can be affected by a pandemic and the overload of the health system is a persistent concern.[11]

2. The role of the Robert Koch Institute as an authority for knowledge processing and knowledge bundling

Knowledge infrastructures have been created in response to knowledge gaps and the complexity of processing knowledge.[12] One example is the Robert Koch Institute (RKI). The Institute acts as a federal

authority of the German Federal Ministry of Health at the intersection of science and politics. Thus, the Institute has the task of developing and conducting epidemiological and laboratory-based analyses as well as research on the cause, diagnosis, and prevention of infectious diseases.[13] The Institute usually acts informatively and does not itself impose any rules. For example, the RKI issues reports on national infection statistics and the epidemiological situation on a daily basis. In addition, advice is published, e.g., treatment options or hygiene instructions.[14] However, it is possible that other decision-makers link legal consequences to the Institute's assessments, a classic example being the coronavirus risk areas. Classification as a risk area is made after joint analysis and decision by the Federal Ministry of Health, the Federal Foreign Office, and the Federal Ministry of the Interior. The classification of risk areas has an impact on persons entering Germany: if they have stayed in such a risk area at any time within the last 10 days prior to entry, they are obliged to isolate themselves in accordance with the respective quarantine regulations of the responsible *Länder*.

It turned out that the expertise of the RKI has been of crucial importance for the legislator as well as for the courts. It is regularly consulted as a source. The preparation of the state of knowledge and assessment of the risk situation facilitates the work in legislation and judicial proceedings. This is illustrated, for instance, by §§28a and 28b, which were inserted into the Infection Protection Act (further details below) and which link the adoption of protective measures against the spread of the coronavirus disease to the published infection figures of the RKI.

3. Suitability (*Geeignetheit*) and prerogative of assessment (*Einschätzungsprärogative*)

A central aspect of the constitutionality of a law is the question of proportionality,[15] namely whether the law pursues a legitimate purpose and whether it is suitable, necessary, and appropriate to achieve its purpose. During the pandemic, the suitability of measures has been an ongoing issue. An objective standard applies when assessing suitability.[16] It is therefore not a question of whether a public authority considers a measure to be suitable but rather whether a measure is actually suitable.[17] This is the case if it *promotes* the legitimate purpose at which the measure is aimed. It is not necessary that the goal is achieved.[18]

The suitability test is also the gateway for non-law expertise. Thus, the necessity requirement is always a gateway for interdisciplinary cooperation between lawyers and experts from other disciplines, e.g., from the fields of economics or science. This has also been clearly demonstrated throughout the pandemic. From the very beginning, the political and legal debate was supplemented with findings from the sciences, especially the knowledge and findings of epidemiologists.

Due to the novelty of the virus, however, the scientific community was also confronted with great uncertainties, as mentioned above. This is reflected in legislation. The law has an answer to such uncertainties: the legislature's prerogative of assessment.[19] German law generally confers on the legislator a broad prerogative of assessment but, at the same time, requires that this prerogative of assessment is supported by knowledge.[20] In other words, the extent of the prerogative depends on the existing state of knowledge. If there is little knowledge of an issue or if the findings are controversial, the prerogative of assessment is broad. This has also been emphasised by the courts during the pandemic. They regularly clarified that legislative decisions can only be reviewed to a limited extent.[21] According to the case law of the Federal Constitutional Court, the creative leeway is only exceeded if a consideration is so obviously flawed that it cannot reasonably form a basis for the measures taken.[22]

III. Uncertainties in Pandemic Legislation

Against this background, the following section analyses to what extent these principles have been adhered to in the current situation and whether they have served their purpose. After a brief introduction to the relevant provisions of the Infection Protection Act, two examples will illustrate how difficult it is to deal with knowledge in the legislative process and how far the legislature's prerogative of assessment extends. As a result, I will show that the prerogative of assessment is the central instrument for responding to the issue of uncertainty.

1. Legal bases of infectious disease law

The infectious disease law includes all regulations that govern the state's handling of infectious diseases. As mentioned in the introduction, the core of this legal area in Germany is the Infection Protection Act (*Infektionsschutzgesetz*). The Infection Protection Act regulates measures to prevent and control infectious diseases, including COVID-19. It is applicable irrespective of whether an epidemic or pandemic is involved. Throughout the COVID-19 pandemic, the provisions in the section on the control of an infectious disease have been key. This section operates with a general clause (*Generalklausel*) and standard powers (*Standardermächtigungen*). General clauses determine general requirements for a large number of measures that have not yet been specified in detail.[23] Standard powers set conditions for a specific measure, such as the isolation (*Absonderung*) of sick persons in §30 of the Infection Protection Act. The general clause of §28 was particularly relevant. It stipulates that, if an infectious disease is detected, the competent authority "may take all necessary protective measures," i.e., it is granted discretionary powers. On the basis of this provision, various measures were taken in practice, e.g., bans on leaving or contact restrictions.

2. Amendments to the Infection Protection Act

The general clause can be used by the authorities if no further specific regulations are available to the legislature.[24] Due to the gaps in knowledge already described, it was necessary to base many – even far-reaching – measures on the general clause at the beginning of the pandemic. As the pandemic progressed, legal scholars increasingly criticised that the fact that the general clause was no longer sufficient for the profound interference with fundamental rights.[25] Courts have also shared these arguments.[26]

Therefore, the general clause in §28 of the Infection Protection Act has already been amended twice during the COVID-19 pandemic: In March 2020, it was supplemented by very extensive fundamental rights interventions, such as the curfew.[27] With the amendment in November 2020, the legislator has largely included the measures previously taken in the context of the COVID-19 pandemic in §28a of the Infection Protection Act. In so doing, it identified them as mere examples of measures that could be enacted under the general clause of §28(1) of the Infection Protection Act. As a result, the Infection Protection Act continues to deviate from the regulatory technique that is customary in security law, i.e., defining standard measures as independent authorising elements.[28] Some legal scholars argue that this exemplary enumeration is insufficient because the measures are still not linked to further-reaching elements.[29] These considerations probably stem from security law doctrine, which establishes that more restrictive prerequisites are needed for intervention-intensive measures; one example is that, instead of a danger, an *immediate* danger is required in general police law for flat searches.[30] In this context, however, it should be called to mind that even the standard powers in the Infection Protection Act are not always subject to stricter criteria. Furthermore, the legislature has a prerogative to assess the regulatory system, which has not been exceeded here.[31] The new provision in §28a of the Infection Protection Act only creates examples and not separate standards powers; the legislature clarified which measures it considers permissible and under which conditions they are per-

missible.[32] Thus, as with standards powers, recourse to the general clause is no longer possible without further ado.

3. First example: link to incidence rates in the Infection Protection Act

With the incorporation of §28a and §28b into the Infection Protection Act, incidence thresholds have also been added to the law. They are linked to the R-values published by the RKI. This once again demonstrates the importance of a specialised scientific institute when drafting legislation. The link to incidence rates (*Inzidenzwerte*) has been criticised in many respects.[33] I argue that the link to incidence rates is not generally impermissible, but the current regulations are poorly designed and unclear and therefore unconstitutional.

a) Content of the regulations and link to different incidence rates

§28a (3) of the Infection Protection Act states that if a threshold of more than 35 new infections per 100,000 inhabitants within seven days is exceeded, "broadly based protective measures" (*breit angelegte Schutzmaßnahmen*) are to be taken in order to rapidly reduce the incidence of infection. If a threshold rate of more than 50 new infections per 100,000 inhabitants within seven days is exceeded throughout the country, nationally coordinated "comprehensive protective measures" (*umfassende Schutzmaßnahmen*) must be taken that can be expected to effectively contain the incidence of infection. With the reform in mid-April 2021, §28b was inserted into the Infection Protection Act, which also refers to the incidence rate as a measure of frequency. However, two things are noteworthy here: First, the standard in §28b is exclusively linked to incidence rate, unlike §28a, which also includes the functionality of the health care system and the protection of life and health as substantial requirements. Secondly, the norm is self-executing. This means that the measure comes into force without any intervening state act, e.g., without the enactment of a law or a legal ordinance.

b) Suitability of the link to incidence rates

Legal scholars are in debate over whether it makes sense to use incidence rate in law at all. With regard to the legitimate purpose of including them, it was pointed out that relieving the burden on hospitals and intensive care units must be considered. Scientific findings indicate that COVID patients are getting younger and need to be treated there longer.[34] Even if the inclusion of incidence rates in the law is considered reasonable, this raises the question of which incidence thresholds should be meaningfully inserted into the law. In this context, *Kießling* points out that the link to an incidence rate of 100 is insufficient to effectively reduce the incidence of infection.[35] This may be scientifically correct, but it does not answer the question of whether the legislature's prerogative of assessment has been exceeded. In my view, it is constitutionally unobjectionable to create a legal link to incidence rate. It is undisputed that the purpose of the regulations is to protect hospitals from overload, so the incidence rate alone cannot be decisive for this issue because, for example, the capacity of the intensive care beds is also a decisive factor. Nevertheless, the incidence rates reflect a trend in the pandemic's development, meaning that they provide at least an indication of which measures are necessary. Here, we should again recall the legislature's prerogative of assessment: it is necessary, but also sufficient, to promote the purpose of the legislation. This is the case here.

c) Link to published incidence rates of the RKI – influence on clarity and certainty of the law

Notwithstanding, friction regarding the clarity and certainty of a norm can arise when findings from other scientific fields are incorporated into well thought-out legislation . One example is §28b of the Infection Protection Act, which raises considerable concerns over specificity and clarity. In general, it is necessary that norm addressees can find out what the law requires from them without excessive effort.[36] The requirements for certainty and clarity are particularly high if the norm extensively interferes with fundamental rights. The link to incidence rate itself is unobjectionable from a constitutional point of view. This applies at the

minimum if the state is authorised to adopt concrete measures on the basis of incidences. However, the limit of definiteness and clarity has been reached with §28b: No official announcement is made on the individual measures that ensue once certain thresholds are exceeded. Instead §28b of the Infection Protection Act is directly linked to the incidence thresholds published by the RKI. The legislator thus assumes that all citizens will visit the Institute's website every day to look at the figures relevant to them and to check whether the measures listed there apply to them. The measures only apply on the day after the next – citizens also need to keep that in mind to find out whether the measures came into force. This inevitably leads to great uncertainty as to which measures apply where and when – an untenable legal situation.

4. Second example: night-time curfews

The biggest dispute in Germany with regard to the proportionality of measures against the coronavirus disease occurred over night-time curfews. In the explanatory memorandum to the law, the German legislator pointed out that the curfew restrictions were necessary to prevent private gatherings with too many people and the resulting emergence of new infection hotspots. The legislator made reference to studies that underpin this assessment.[37] Legal scholars differ as to the question of whether the suitability test has been met. *Möllers*, for instance, points out that the legislator does not have to prove the necessity of measures in detail. He argues, however, that the burden of proof increases when an obviously less severe measure comes into question, namely contact bans.[38] *Kingreen* contends that the studies, by means of which the legislator intends to prove suitability, have been chosen selectively and that they are controversial.[39] He additionally asserts that even the selected studies indicate that curfews have a moderate effect at best, possibly even no effect at all, on the incidence of infection.[40]

It is indeed doubtful whether a night-time curfew is actually suitable for combating the pandemic and relieving the burden on the health system. However, it is precisely this uncertainty that justifies the broad prerogative of assessment on the part of the legislature. The only decisive factor is whether it is at all plausible that a night-time curfew leads to lower infection rates. In my view, this is not the case because the night-time curfew at least has an additional effect on private meetings and thus also on the infection rates.

This conclusion does not imply that the curfew is constitutional because examination of the proportionality requirement for suitability is followed by examination of the requirements for necessity and appropriateness (see above). A measure is considered necessary if a milder but equally suitable means is available. Legal scholars often refer to contact bans as a less intensive measure. Although contact bans are probably a milder necessary measure, effective enforcement mechanisms are also needed to make them an equally appropriate measure. It should be taken into account that, in the case of contact bans, the authorities can no longer check people in public and question them about their reasons to be outside. Instead, enforcement shifts into the private sphere, since the authorities have to carry out the checks in private rooms – a considerable invasion of privacy. This line of argument was also emphasised in a recent decision of the Federal Constitutional Court.[41] Another argument in favour of necessity is that the legislature has the prerogative to make an assessment in the context of necessity. As regards the requirement of appropriateness, there are many indications that a night-time curfew is unconstitutional.[42] The answer to this question would necessitate a longer analysis which is not possible within the scope of this article. It should be pointed out here, however, that "knowledge" is not the decisive factor but rather the weighing up of individual fundamental rights with public interests.

IV. Judicial Review in the Pandemic

Knowledge and knowledge deficits are not only relevant for legislation, but also for jurisprudence. According to German legal doctrine, it is not necessary for judges to have the same level of knowledge as the legislator does when making a decision requiring a review of proportionality.[43] The courts are not supposed to put themselves in the place of the legislature but rather to check whether it has respected the limits of the law, in particular whether it is proportionate.[44] The courts must decide, however, whether a measure is suitable. This means that the courts are faced with the same knowledge deficits that the legislator had to cope with. In the COVID-19 pandemic, this became a crucial issue before German courts. Case law shows that, in particular, the necessity of the protective measures has been subject to critical judicial examination.[45] This is not surprising, as the authorities were extremely challenged during the first few months of the pandemic and, when in doubt, opted for more far-reaching and blanket measures rather than finely tuned and differentiated measures.[46] With increasing experience and a growing knowledge of the mechanisms of the spread of the virus, some measures have proven to be too excessive and have been corrected by the courts.[47] Notwithstanding, the courts very often referred to the legislature's prerogative of assessment and upheld measures even when their effectiveness was disputed. Conversely, case law has shown that judicial review can also be effective in the case of uncertainties and prerogatives of assessment, because the judicial control of reasonableness remains even in the case of knowledge deficits. Here, the judicial examination is not only a matter of factual knowledge but also of weighing up fundamental rights. Although uncertainties can be considered here, the core aim is to strike a careful balance between conflicting fundamental rights. Case law has made extensive use of this approach. It has been pointed out, for instance, that the freedom of assembly is one of the highest goods within the German constitution and therefore bans without exception are unconstitutional.[48] The authorities picked up on this and took other measures, which then proved to be – at least partially – lawful.[49]

V. Conclusion

The COVID-19 pandemic has posed major challenges to the law itself and to the application of the law in Germany. The Infection Protection Act is the central piece of legislation upon which measures against the spread of the pandemic could be based. Since this Act had been legally and practically irrelevant for many years, it had to be (rapidly) adapted to the emerging new health challenges. From a legal point of view, both decision-making pressure and uncertainties have been the major aspects in the legislative process. German law provides mechanisms to ensure that the legislature remains capable of acting, on the one hand, but, on the other, that judicial control nevertheless remains possible. This has proven its value in our recent challenging times.

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1. On the concept of knowledge, see L. Münkler, "Wissen – ein blinder Fleck des Rechts? Aspekte eines Spannungsverhältnisses", in: L. Münkler (ed.), *Dimensionen des Wissens im Recht*, 2019, p. 3, 5-10; B. J. Shapiro, *A culture of fact*, 2000, p. 12; P-T. Stoll, "Wissensarbeit als staatliche Aufgabe – Wissen als Leitbegriff für Reformüberlegungen", in: I. Spiecker gen. Döhmann and P. Collin (eds.), *Generierung und Transfer staatlichen Wissens im System des Verwaltungsrechts*, 2008, p. 34, 35-38.↩
2. B. Fassbender, "Wissen als Grundlage staatlichen Handelns", in: J. Isensee and P. Kirchhof (eds.), Handbuch des Staatsrechts, Band IV, 3rd ed. 2006, pp. 244-259.↩
3. C. Kremer, "Ungewissheit im Sicherheitsverwaltungsrecht", in: I. Augsberg (ed.), *Extrajuridisches Wissen im Verwaltungsrecht*, 2013, p. 195, 198.↩
4. See M. Goldhammer, "Zwischen Prophetie und Prognose – zur Eigenlogik der hoheitlichen Vorhersage", in. L. Münkler (eds.), *Dimensionen des Wissens im Recht*, 2019, p. 217, 228-231.↩
5. L. Münkler, *op. cit.* (n. 1), p. 14.↩
6. A. Klafki, *Risiko und Recht*, 2017, pp. 13-15.↩
7. H-H. Trute, "Ungewissheit in der Pandemie als Herausforderung", (2020) *Zeitschrift für das Gesamte Sicherheitsrecht (GSZ)*, 93.↩
8. H-H. Trute, *op. cit.* (n. 7), 93-95; A. Klafki, *op. cit.* (n. 6), p. 13.↩
9. H-H. Trute, *op. cit.* (n. 7), 95.↩

10. See <https://www.infektionsschutz.de/coronavirus/fragen-und-antworten.html>, accessed 12 May 2021.↩
11. O. Lepsius, "Vom Niedergang grundrechtlicher Denkkategorien in der Corona-Pandemie", *Verfassungsblog* <https://verfassungsblog.de/vom-niedergang-grundrechtlicher-denkkategorien-in-der-corona-pandemie/> accessed 12 May 2021.↩
12. See, generally, L. Münkler, *op. cit.* (n. 1), pp. 22-23.↩
13. Hollo, in: Kießling (ed.), IfSG Commentary, 2020, § 4, mn. 6-7.↩
14. An overview is available here: <https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/nCoV.html> accessed 12 May 2021.↩
15. G. Lübbe-Wolff, "The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court", (2014) 34 *Human Rights Law Journal*, 12-17.↩
16. See, generally, G. Warg, "Prognosegrundlage bei der Gefahrenabwehr nach dem IfSG", (2021) *Neue Juristische Online-Zeitschrift (NJOZ)*, 257-260.↩
17. BVerfG, Official Case Reports, E 115, 276, 308; E 117, 163, 188.↩
18. H. Jarass, in: H. Jarass/B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland - Kommentar*, 16th ed., 2020, Art. 12, mn. 42.↩
19. See, generally, J. Bethge, "Wessen (Un-)Wissen? Zur Tatsachengrundlage der Einschätzungsprärogativ", in: L. Münkler (ed.), *Dimensionen des Wissens im Recht*, pp. 201-215.↩
20. B. Fassbender, *op. cit.* (n. 2), p. 254.↩
21. J. Bethge, *op. cit.* (n. 19), pp. 201-215; L. Münkler, *op. cit.* (n. 1), p. 21.↩
22. BVerfGE 30, 292, 317.↩
23. BVerfGE 105, 279 (305); A. Kießling, in: A. Kießling (ed.), IfSG Commentary, 2020, § 28, mn. 55-61;↩
24. R. Poscher, "Das Infektionsschutzgesetz als Gefahrenabwehrrecht", in: S. Huster and T. Kingreen (eds.), *Handbuch Infektionsschutzrecht*, 2021, pp. 117, 133.↩
25. See, for example, K.F. Gärditz and M.K. Abdulsalam, "Rechtsverordnungen als Instrument der Epidemie-Bekämpfung", (2020) *Zeitschrift für das Gesamte Sicherheitsrecht (GSZ)*, 108, 109-110.↩
26. See, e.g., VGH München, Beschluss vom 29.10.2020, Az. 20 NE 20.2360, mn. 20.↩
27. A. Sangs, "Das Dritte Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite und Gesetzgebung während der Pandemie", (2020) *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, 1780-1785.↩
28. R. Poscher, *op. cit.* (n. 24), p. 144.↩
29. H. Eibenstein, "Die (vertane) Chance des § 28a IfSG", (2020) *COVuR* , 856, 858-859.↩
30. See, e.g., § 36 of the Police Code Baden-Württemberg and § 45 of the Federal Police Act.↩
31. See H. Greve, "Infektionsschutzrecht in der Pandemielage – Der neue § 28 a IfSG", (2020) *NVwZ*, 1786, 1788.↩
32. R. Poscher, *op. cit.* (n. 24), p. 144.↩
33. See, e.g., A. Kießling, "Stellungnahme zum Entwurf eines Vierten Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite", BT-Drs. 19(14)323(6), pp. 3-5; H. Eibenstein, (2020) *COVuR, op. cit.* (n. 30), 858.↩
34. T. Kingreen, "Stellungnahme zum Entwurf eines Vierten Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite", Ausschuss-Drs. 19(14)323(19), p. 9.↩
35. A. Kießling, *op. cit.* (n. 33), p. 4.↩
36. E. Denninger, "Die Polizei im Verfassungsgefüge", in: H. Lisken/E. Denninger, *Handbuch des Polizeirechts*, 6th ed., 2018, Chapter B, paras. 61-64.↩
37. BT-Drs. 19/28444, p. 12.↩
38. C. Möllers, "Stellungnahme zum Entwurf eines Vierten Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite", Ausschuss-Drs. 19(14)323(2), p. 6.↩
39. T. Kingreen, *op. cit.* (n. 34), pp. 7-8.↩
40. T. Kingreen, *op. cit.* (n. 34), p. 8.↩
41. BVerfG, Decision of the First Senate of 5 May 2021, 1 BvR 781/21, para 38.↩
42. See, e.g., F. Schmitt, "Die Verfassungswidrigkeit der landesweiten Ausgangsverbote", (2020) *Neue Juristische Wochenschrift (NJW)*, 1626, 1627-1631.↩
43. B. Fassbender, *op. cit.* (n. 2), p. 254.↩
44. Ibid.↩
45. See, e.g., BVerfG, NVwZ 2020, 783.↩
46. R. Poscher, *op. cit.* (n. 24), p. 160.↩
47. Ibid.↩
48. BVerfG, NVwZ 2020, 711, 712.↩
49. R. Poscher, *op. cit.* (n. 24), p. 161.↩

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