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Europe's Democracies Temporarily in Emergency?

General Conditions, Political Responsibilities and Exit Scenarios from the Corona Crisis¹

This political science analysis of the outbreak and course of the corona crisis in Europe raises more questions than it can answer. The economically important member states of the European Union (EU) such as Italy, Spain, France and Germany are among the countries most affected by Covid-19 worldwide. They have functioning health systems and pandemic plans that they have developed with the World Health Organization (WHO). In addition, the EU finances European health agencies at supranational level, which have a protective function in the event of pandemics. The EU Member States are also democratic systems that involve their citizens in the political decision-making process.

Despite the spread of the coronavirus in northern Italy, all decision-makers in this complex EU system saw no danger of delay, but trusted their experts, who initially compared the novel coronavirus with seasonal influenza. When the WHO declared Covid-19 a pandemic, 20 out of 27 EU governments turned their course 180 degrees, first Italy and France, then Spain and Germany. However, they did not activate their pandemic plans to protect vulnerable population groups but quarantined the entire population and ordered a shutdown of all public institutions and private companies.

An increasing number of international experts are proving that these decisions were taken without any scientific knowledge about Covid-19 and without weighing the proportionality of the measures. The authorities refuse to investigate whether the reported deaths were caused by Covid-19 alone or with Covid-19. This shortcoming can be explained by the fact that European democracies are currently in a state of emergency, in which fundamental constitutional rights are restricted. While the Brussels EU institutions are primarily using the crisis to attract further decision-making powers, the Council of Europe has given its 47 member states guidelines to protect democracy and the rule of law even in the current difficult situation. Thus, the executive must not be allowed to take over uncontrollable powers indefinitely and without a legal framework.

At present it is not yet predictable how the EU member states will find their way out of the Corona crisis. Three scenarios are conceivable. The first scenario, the return to constitutional order, would require the lifting of all emergency measures. Parliaments will have to review the experiences from the Covid 19 pandemic, for example through committees of inquiry, in order to be better prepared for future cases. The second scenario would be an extension and adaptation of the emergency legislation and decrees, which, however, carries risks. Additional political instabilities pose dangers from competence disputes both at the national level (financial transfers between countries and regions) and within the European multi-level governance system.

The third possible scenario would be a regime change and thus moving away from democracy and market economy. To find out where the journey could take us, it is worth looking into transformation research. According to the current doctrine, the socialist model of centrally administered economies went down in history after 1990. According to the convergence theory, it would be reasonable to think that it survived and merged with capitalism. It remains to be seen whether Max Weber's term "state capitalism" fits. Nevertheless, it can be said for certain that in the new centrally administered economies the "demos" or the "nation" will be replaced by suitable social intermediaries. The prognosis is, however, that democracies cannot be abolished so easily.

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This political science analysis addresses the main question of the direction in which the European Union (EU) and the political systems of its member states will develop after the ending of the corona pandemic. Indeed, statements by responsible politicians such as the German President in the middle of the crisis make people think: "No, the world after that will be a different one." ([sueddeutsche.de](https://www.sueddeutsche.de), 11.4.2020) Aren't the emergency measures only temporary, as announced? Were the states not prepared for such an emergency, so that its consequences have become beyond control? If so, there is a loss of confidence in the ability of the entire EU system to act. Anyone who wants to avert an impending legitimacy crisis in our European democracies must look for the systemic weaknesses and point out alternatives for action.

Thus this article is divided into three chapters: The first part describes the general conditions at the beginning of the corona epidemic in early 2020 and discusses the responsibilities within the decision-making levels of the EU system, both for health policy in the narrower sense and for policy areas that have a direct impact on European health systems. The second chapter describes the course of the crisis at the beginning of the shutdown and uses Germany as an example to explain how it affected civil rights and narrowed the constitutional framework. It also recalls the role of the Council of Europe, which, with its foundation in 1950, gave the initial kick-off for European integration. He recently made it clear that even in a crisis, fundamental democratic rights and the rule of law cannot simply be suspended.

The third chapter finally shows which scenarios are conceivable for ending the corona crisis. In democracies, the elected representatives normally have the final say. They can change course at any time, learn from possible mistakes and limit the damage caused so far. But you can also delay a restart and thus increase the negative consequences that are already visible today. The worst thing, however, would be if the executive would not only temporarily turn its back on democracy, but introduce a new system. In this sense, this article is intended as a warning against a new authoritarian temptation in Germany and Europe.

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1 EU Member States on the Way into the Corona Crisis: Experiences, Political Responsibilities, General Conditions

1.1 Experiences of the EU Member States: Influenza, Dengue and Tuberculosis

EU Member States were well prepared for new pandemics in relation to other countries. In the political system of the European Union (EU), the Directorate-General for Health and Food Safety was set up specifically for this purpose at the supranational level. The DG SANTE, which reports directly to the European Commission, manages and supervises the following five EU agencies with its 778 employees: (SANTE, 12.5.2020):

- European Medicines Agency (EMA)
- European Food Safety Authority (EFSA)
- Community Plant Variety Office (CPVO)
- European Chemicals Agency (ECHA)
- European Centre for Disease Prevention and Control (ECDC)

An annual budget of 451.9 million euros is available for this purpose, which can, however, be supplemented by subsidies in the form of fees from the business community (Annual Activity Report 2018: 6).

Already in 2018, the topic "Strengthening EU preparedness for serious cross-border health threats" was a priority of DG SANTE for which the above-mentioned EU agency ECDC is responsible (ibid., p. 12). It provides information on all diseases that could develop into an epidemic or even a pandemic. One of the health threats to date is seasonal flu, which affects between 4 and 50 million EU citizens every year and causes between 15,000 and 70,000 deaths from influenza-related diseases (ECDC, Factsheet influenza, 13.5.2020).

These data are impressively confirmed by the World Health Organization (WHO), with which ECDC works in close cooperation. According to this study, there are well over half a billion people worldwide who could die from seasonal flu. However, it is stressed that these figures are only estimates because there is no reliable data on whether influenza was the sole cause of death or, in combination with other previous illnesses, led to death (see Figure 1).

Another health threat, particularly to the population in southern Europe, is dengue fever, which the ECDC considers to be "by far the most important mosquito-borne viral disease". World-

wide, dozens of millions of people are infected every year without any hope of finding an antidote (ECDC: Factsheet dengue, 13.5.2020). The mortality rate here is between 5 and 30 percent, depending on the supply situation, so that this viral disease is listed as the sixth most dangerous pathogen in the world, ahead of the corona SARS and HIV viruses (focus.de, 13.5.2020).

According to the German Centre for Infection Research (DZIF), tuberculosis is still one of the greatest health risks today. Worldwide, nine million people fall ill with bacterial TB pathogens every year, of which about 1.5 million die because of this infection. The fight against this disease is complicated by three factors: firstly, there is still no effective vaccine, secondly, TB often occurs as co-infection with the HIV virus, and finally, multi-resistant strains have spread, "increasingly especially in Eastern Europe, sub-Saharan Africa and Asia" (DZIF, Tuberkulose, 13.5.2020). As a result, the chances of recovery are diminishing

Figure 1:

WHO Europe: Influenza – estimating burden of disease

"During the winter months, seasonal influenza can infect up to 20% of the population, depending on which viruses are circulating, and can cause substantial mortality. A recent study found that worldwide up to 650 000 people die of respiratory diseases linked to seasonal influenza each year, and up to 72 000 of these deaths occur in the WHO European Region. [...]"

Some of the challenges of estimating burden of disease include:

- the difficulty of distinguishing influenza from other respiratory illnesses without good laboratory testing;
- the fact that much of the morbidity and mortality resulting from influenza is due to complications and infections not unique to influenza, many of which may not be captured in seasonal influenza surveillance data; and
- incomplete and low-quality surveillance data from which estimates are made."

Source: WHO, Regional Office for Europe, Influenza – estimating burden of disease [13.5.2020]; Blue highlighting: S.R.

even in EU Member States: Of the 55,337 tuberculosis patients from 2017, only about two thirds (67.6%) were successfully cured ([ECDC, Tuberculosis, 24.3.2020: 4](#)).

However, these figures are only the tip of the iceberg, because in fact every third person on earth already carries TB pathogens. According to information from the Médecins Sans Frontières network, they break out every tenth to twentieth, depending on the hygienic conditions under which the person concerned lives, how he or she feeds and possibly how his or her immune system is affected, or which diseases are added in the course of his or her life. This results in a particularly high risk for those people who do not have access to adequate medical care, such as in slums, prisons and refugee camps (see Figure 2). It is therefore not surprising that in Germany, for example, refugees and migrants account for 21 percent of new TB cases ([aerzteblatt.de, Tuberkulose, 30.10.2017](#)). According to this source, there is no increased risk for the local population. In contrast, the ECDC reports that "one third of TB cases across the EU are already of foreign

origin" and therefore additional costly measures such as screening for infection are needed ([ECDC, Tuberculosis, 24.3.2020: 34](#)).

This example illustrates the important role of the above-mentioned EU agencies in the early detection and prevention of health-threatening diseases. This includes not only the provision of data that can be compared across the EU, but also information on the legal contexts in which EU governments take protective measures in the event of a pandemic. However, the list provided on the national pandemic plans shows that the countries have only prepared for a pandemic caused by the influenza virus ([ECDC, Influenza pandemic preparedness plans, 13.5.2020](#)). These go back to a WHO initiative in 1999, which was supported by the EU through an "conceptual framework for a pandemic influenza planning" ([Nationaler Pandemieplan, 2.3.2017: 5](#)). The proclamation of an influenza pandemic is therefore in the hands of the WHO, which must have previously identified a PHEIC (public health emergency of international concern, *ibid.*: 7).

Although the EU Member States' pandemic plans relate to influenza infection, they should become relevant when the corona crisis breaks out. This comparison is also appropriate because coronaviruses (CoV), which have been known since the 1960s, cause similar disease symptoms in humans, namely "from the common cold to more severe lower respiratory infections such as pneumonia" ([ECDC, Coronaviruses, 13.5.2020](#)). Therefore, the EU Agency for the Control of Health Threatening Diseases saw no need for action until mid-January 2020. Despite the 1,700 people infected at the time in the Chinese province of Wuhan, there were still no epidemiological studies to assess the risk of the disease. However, the report goes on to say that "If a case is identified in the EU, rigorous infection prevention and control measures (IPC) should be applied." ([ECDC, Rapid Risk Assessment, 17.1.2020](#))

A few days later, China's National Health Commission confirmed that the newly discovered corona pathogen was transmissible from person to person and therefore there was a risk of infection ([Reuters, 20.1.2020](#)). The ECDC then corrected its assessment, although there was still no scientific research on the matter, but three first cases in France. Its head, the German doctor and former staff member of the Robert Koch Institute (RKI), Andrea Ammon, now assumed that the virus would spread globally, estimating the dangers for Asia as high, but classifying the introduction of the virus into the EU as moderately likely. Nevertheless, it considered that preventive measures

Figure 2:

Médecins Sans Frontières: Tuberculosis.

How does the infection with tuberculosis occur?

TB is a bacterial infectious disease caused by strains of mycobacteria – primarily the so-called *Mycobacterium tuberculosis*. Infection with the tuberculosis bacteria occurs via the respiratory tract. The tuberculosis particles are coughed up by patients as droplets. Via the air they enter the respiratory tract of other people. It takes six to eight weeks for the immune system to react measurably to the infection. Experts speak of an incubation period.

TB risk groups

Worldwide, one in three carries the bacteria. However, TB only breaks out in about every tenth to twentieth: Active tuberculosis threatens above all people with a weakened immune system. They mostly live in regions where war prevails, or health care and hygienic conditions are poor. Active TB also affects patients with malnutrition or HIV infection. Children under the age of five, the elderly and people in prisons, refugee camps, slums or regions with a high TB rate also have an increased risk of active tuberculosis.

Source: [Ärzte ohne Grenzen, Tuberkulose \[13.5.2020\]](#); Blue highlighting: S.R.

were already necessary in Europe: "the impact of the late detection of an imported case in an EU/EEA country without the application of appropriate infection prevention and control measures would be high, therefore in such a scenario the risk of secondary transmission in the community setting is estimated to be very high." (ECDC, Rapid Risk assessment, 26.1.2020: 1)

1.2 Health Policy and Corona are National Responsibilities

On 30 January 2020, the WHO declared a public health emergency of international concern (PHEIC), i.e. the precursor to a pandemic, whereupon it attracted the coordination of necessary crisis measures at UN level (aerzteblatt.de, 31.1.2020). But this did not force the EU Member States to activate their pandemic plans. This is because, regardless of global developments, they reserve the right to assess the risks at national and local level themselves: "This decoupling of national measures from the global phases is necessary because the global risk assessment by definition refers to the global situation and not to the situation in the individual Member States." (Nationaler Pandemieplan, 2.3.2017: 7).

In mid-February 2020, Federal Minister of Health Jens Spahn presented to members of the German Bundestag his "Strategy for Prevention of the Corona Virus in Germany". It was based on the assessment of the Robert Koch Institute that the risk to the health of the population was low (Plenarprotokoll 19/145, 12.2.2020: 18083). This was in line with the assessment of the EU Agency for Disease Prevention and Control. However, the ECDC had already recommended preventive measures to reduce the risk of secondary transmissions, which was regarded as high. The Minister did not follow this recommendation but referred to the distribution of departure cards to passengers from the affected areas, who must indicate their whereabouts in Germany. Health checks were not considered, with the argument: "Measuring fevers at airports makes no sense". (Applause from most of the parties represented in the Bundestag, *ibid.*: 18084)

Prevention focused on measures to educate the population and to care for the German citizens who had been brought back from Wuhan. Otherwise, the Bundestag was informed that the Federal Government considered it important to "respond to this outbreak of coronavirus in an internationally coordinated manner", together with the Council of EU Health Ministers and the WHO (*ibid.*: 18085). In addition, Jens Spahn already announced in this speech a further "need to amend

the Infection Protection Act" (IfSG) of 20.7.2000 without going into details and although it had been amended two days earlier. The draft, which had been revised again, was to introduce the emergency measures a few weeks later, which resulted in a shutdown of the economy and society (see chapter 2.1).

The question therefore remains why the national pandemic plan and the Infection Protection Act were not activated at this time. After all, they serve two important objectives: "1. to prevent the introduction of threatening communicable diseases into the Federal Republic of Germany or their spread, 2. to take the necessary measures in the event of a local or temporal increase in the incidence of serious transmissible diseases or threatening diseases." (Infektionsschutzgesetz, IfSG § 5) The infection hygiene measures mentioned in the pandemic plan would already have made sense at this stage: "contact-reducing measures, behavioural measures, protective clothing, disinfection measures". (Nationaler Pandemieplan, 2.3.2017: 24).

In particular, staff in nursing homes, hospitals, other medical facilities and emergency services could have been provided with gloves, mouth and nose protection or FFP2 and FFP3 breathing masks and disinfectants in advance (*ibid.*: 27). There would have been sufficient time to follow the recommended phased plan at such an early stage of the spread of infection. The aim was first to delay the spread of the virus, then to focus protective measures on "vulnerable groups", i.e. on persons with an increased risk of serious and fatal diseases as well as medical staff, and finally to prevent overloading of supply structures by means of appropriate protective measures (*loc. cit.*: 24). Instead, the German government did not start supplying protective equipment until four weeks later in mid-March 2020 and discussed it at a crisis summit with representatives of the health and hygiene industry after a serious supply shortage had been identified (faz.net, 13.3.2020).

The Bundestag debate of 4.3.2020 shows that the Federal Minister of Health did not consider Corona to be any more dangerous than measles or influenza up to this date: "According to everything we know today, the vast majority of infections are symptom-free to mild. The pathogen is much less contagious than, for example, that of measles. [...] During the massive wave of influenza in 2017/18, the Robert Koch Institute estimates that there were about 9 million additional influenza-related visits to doctors here in Germany. Our health care system handled this." (Plenarprotokoll, 19/148, 4.3.2020: 18438f.). To this

must be added the figure of 1,674 laboratory-confirmed influenza-related deaths in exactly this season (RKI, *Influenza Saisonbericht 2017/18: 46f.*, see Figure 3). In addition, excess mortality, i.e. the deaths estimated by statistical methods that were associated with influenza, was at that time at a record level of 25,100 ([aerzteblatt.de, 30.9.2019](http://aerzteblatt.de/30.9.2019)).

Similar to Jens Spahn (CDU), the health policy spokeswoman of the SPD, physician Sabine Dittmar, argued. In her speech to the German Bundestag on 4.3.2020, she stressed that Corona does not represent a new challenge for the German healthcare system: "According to current knowledge, the infectious force is a bit higher than with influenza, but much lower than with measles, and it is not at all comparable with a virus like Ebola. More than 80 percent of infections are very mild, and the 3 to 5 percent of those with severe courses are often patients with previous illnesses. These severe courses can also be fatal." (*Plenarprotokoll, 19/148, 4.3.2020: 18448*). This position was most recently expressed in her press interview of 18.3.2020, in which she spoke out in favour of protecting risk groups such as older people and/or those with pre-existing illnesses in accordance with the Infection Protection Act: "If an otherwise healthy middle-aged person becomes infected, the risks to himself are manageable and the disease is unlikely to be worse than a more severe cold." (*Mainpost.de, 18.3.2020*)

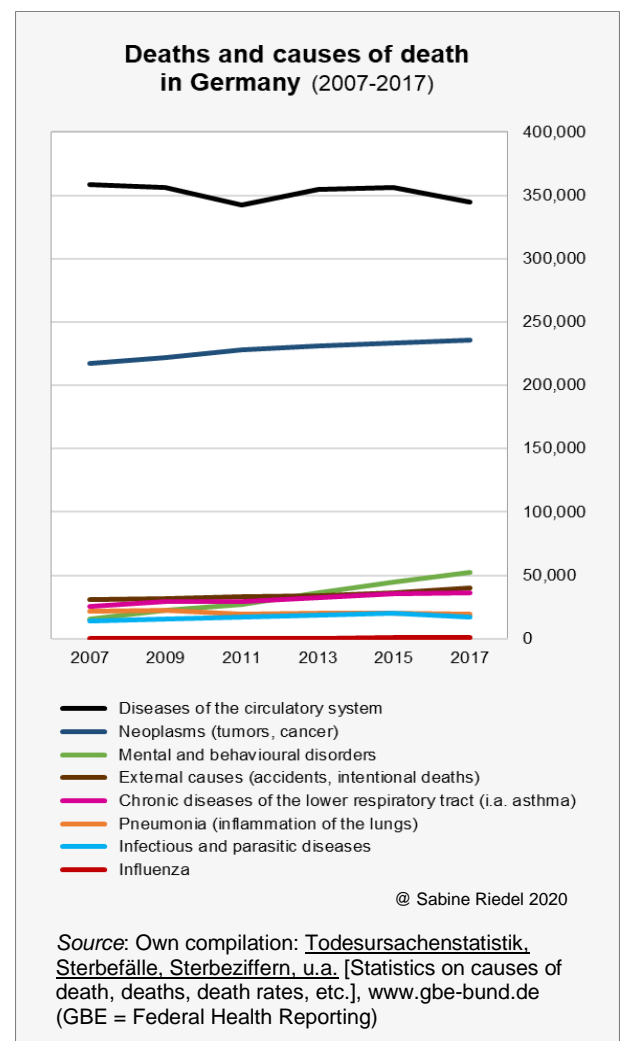
During the debate in the Bundestag on the combating of the coronavirus in Germany, the opposition parties also had their say. Many members of parliament were satisfied with the establishment of a crisis team on 27 February 2020 (*bundesregierung.de, 27.2.2020*), praised the federal government for its level-headed and transparent action (Bündnis 90/Die Grünen, cf. *Plenarprotokoll, 19/148, 4.3.2020*) and recommended "communication and education: So far they have been insufficient; because panic is spreading in Germany. The situation is not properly understood by many people." (FDP, (ibid.: 18449). So they felt that the danger posed by the coronavirus was overestimated and accused the media of using "panic headlines" to create "fear and uncertainty". (Die Linke, ibid.: 18445).

The criticism of fuelling fear and panic was particularly directed at the AfD parliamentary group, which described the comparison with the flu pathogen as a "misjudgement". It did not consider the media coverage to be exaggerated. It criticized the government for having abandoned the last antibiotic production facilities in Germany and demanded more decisive measures, including the

reintroduction of border controls, in the Bundestag debate on 4 March 2020 (ibid.: 18440f). The CDU member of parliament Rudolf Henke, specialist for internal medicine and representative of the German Medical Association replied: "[...] You claim that the mortality rate of the corona virus is 'ten times higher than that of the normal flu', [so] I wonder how you know that. Nobody knows that. It is slightly higher than the flu." (ibid.: 18452)

Apart from the question of whether the comparison between corona and influenza is true or not, the debates in the Bundestag left one question open: Although the Federal Minister of Health emphasized how important cooperation on a European and international level is to him. However, he did not inform MEPs about the report of the EU Agency for Disease Prevention and Control, which found that there had been a risk of secondary transmission in Germany since the end of January 2020 (*ECDC, Rapid Risk assessment*:

Figure 3:



26.1.2020: 1). Nor did it discuss measures that had already been decided at EU level: At the special meeting of the Council of EU Health Ministers on the Corona Crisis on 13.2.2020, the danger of supply bottlenecks for medicines, masks and protective clothing was at the centre of attention: "Most of the manufacturers of this equipment are located in China and now have no stocks themselves." ([euractiv.de, 13.2.2020](#)) The proposal by France, Belgium and the Netherlands to now act together did not find a majority. The ministers called on the European Commission, "in cooperation with the EMA and the national medicines agencies, evaluate the consequences of global health threats like COVID-19 for the availability of medicines within the EU and the security of supply chains;" ([Council of the EU, Conclusions, 16f. 12.2.2020](#)).

The Federal Minister of Health should have acted in accordance with the EU Health Ministers and submitted appropriate legislative measures to the Bundestag. In Germany, security of medical supply is based on the principle of voluntary commitment by pharmaceutical companies. They are merely involved in a pharmaceutical dialogue with the state authorities, in which they do not have to disclose any data.

However, the German Federal Institute for Drugs and Medical Devices (BfArM) is dependent on this information because it has no competence to investigate it: "The BfArM has no information about what quantities of the drugs concerned are still on the market." ([BfArM, Lieferengpässe, 13.5.2020](#)). It is also not its responsibility to collect such data. The focus of its work is the approval of drugs. The Federal Government could remedy the resulting lack of information if it were to take up the 2019 proposal of the German Medical Association to establish a national drug reserve for Germany. So far, only pharmacies and wholesalers are legally obliged to stockpile drugs for up to two weeks, but not the manufacturers or pharmaceutical companies ([DAZ, 15.7.2019](#)).

1.3 The Responsibility of Brussels' EU Institutions in the Corona Crisis

The example of drug safety illustrates the complexity of the current political system in the EU. When German politicians call for a "European response" to many political challenges, including the Corona crisis, they are demanding central decisions from Brussels authorities. This is often accompanied by a waiver of national sovereignty. As a result, such decisions at the national level either no longer appear necessary or they are discredited and suspected of pursuing a nationalist

or populist agenda, i.e. policies at the expense of other member states ([IEP, 20.3.2020](#)). However, this is not the case.

On the contrary, the articulation of one's own national interests and positions is a basic prerequisite for the functioning of the EU political system. Articles 3 to 6 of the Treaty on the Functioning of the European Union ([TFEU, EU Treaty 2016](#)) precisely define the competences between the national and supranational decision-making levels. This shows that most policy areas already fall under mixed competences, i.e. they are the responsibility of both the national and the supranational level. Political scientists describe this sharing of decision-making powers between national parliaments or their governments and the EU institutions in Brussels as a deepening of European integration. It would be the result of a progressive Europeanisation of political systems over several decades ([Benz 2003, Börzel 2007, Weidenfeld, Wessels 2019, bpb.de](#)). This has led to a kind of checks and balances, a mechanism to ensure democratic participation, control and transparency of decisions.

How is the EU Commission's statement to be understood against this background: "The EU states must stick together" and, with regard to the corona crisis, "develop a joint action plan for the time after the pandemic"? ([EU Commission, 25.3.2020](#)). These words come from a representative of the European Commission and thus from one of the supranational EU institutions, including the European Parliament, the European Council of the heads of state or government and the Court of Justice of the EU ([TFEU, EU Treaty 2016, Art. 13](#)). However, under the EU Treaty they do not have their own decision-making powers in health policy (see Figure 4). This is also clearly stated on the website of the EU Commission: "EU countries hold primary responsibility for organising and delivering health services and medical care." ([EU Health Policy](#), see Figure 5) The supranational level has only the duty to support the Member States in improving and modernising their health systems.

The supranational level's support is based primarily on the exchange of experience between EU Member States and financial assistance. Since the beginning of the Corona crisis, a whole series of initiatives have been taken in this context to coordinate measures to contain the pathogen ([European Council, Covid-19](#)). However, neither the Council of Ministers, the European Council of Heads of State and Government nor the European Commission can make their own decisions in the form of new legislation in the health

sector. They lack the skills to do this. Anyone who is now rashly calling for a "Europeanisation" of this policy field and wants to hand over competences to Brussels should know: Such a step would incapacitate the national parliaments as controlling bodies of their governments and make debates in the Bundestag, such as the one on the Corona crisis, de facto superfluous.

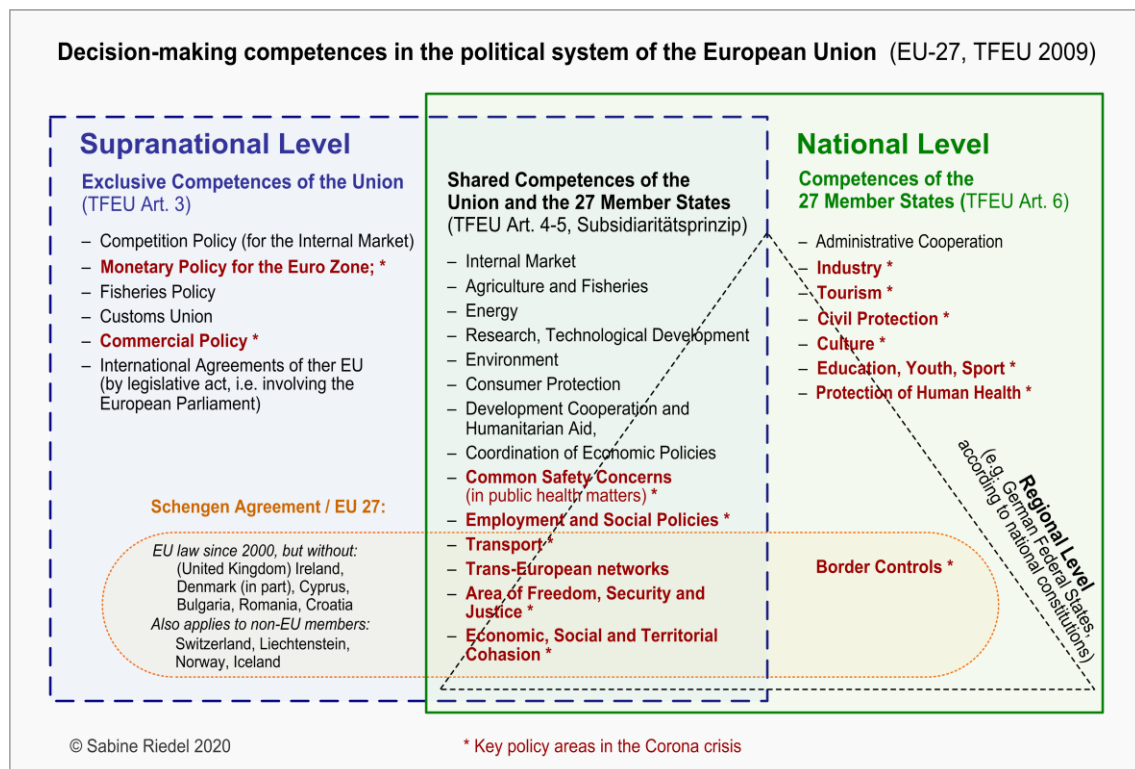
The elected representatives in the European Parliament could not in any way compensate for this democratic deficit. Since there is no separation of powers at the supranational level of the EU, the representatives sent to Brussels have only limited rights of control and participation. This could be seen very clearly in the debate on the herbicide glyphosate. While the majority of the European Parliament was in favour of a ban (eu-parl.europa.eu, 29.11.2017) and 1.3 million EU citizens supported this in a signature campaign, the EU Commission nevertheless recommended to the European Council to extend the approval until 2022 (tagesspiegel.de, 27.11.2017).

This example shows very clearly that although the supranational level cannot determine national health policies, it influences them indirectly. Thus, decisions of the Common European Agricultural Policy (CAP) at the supranational level have a di-

rect impact on the health of all EU citizens. This ranges from food production and food safety to environmental and nature conservation issues (umweltbundesamt.de, 17.6.2019). As the CAP goes back to the beginnings of European integration, it now covers around 40 percent of the EU's total financial budget. The distribution of these funds gives rise to constant discussions about the eligibility criteria, i.e. the question of how, whether and to what extent ecological and health-promoting criteria should play a role (bund.de, 13.5.2020).

The EU institutions have exclusive competence in commercial or trade policy, which sets decisive framework conditions for health care: "Speaking as one voice, the EU carries more weight in international trade negotiations than each individual member would." (europa.eu, Trade, 13.5.2020) As a result, its foreign trade doubled between 1999 and 2010, so that today it accounts for about 30 percent of its gross domestic product (GDP). This also benefits the chemical pharmaceutical industry. As its German trade association recently announced, the 1,700 member companies exported products worth around 200 billion euros in 2018, half of which to the EU single market ([Verband der Chemischen Industrie, VCI](http://verband-der-chemischen-industrie.vci), 27.2.2020). However, imports in this sector

Figure 4:



Source: Own compilation: [8](http://Treaty on the Functioning of the European Union (TFEU, EU Treaty 2016) [13.5.2020]</p>
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have also risen to 147 billion euros, resulting in a total export surplus of 56 billion euros. It is based primarily on "refining of intermediate input imports (raw materials, intermediate products and technologies) and further exports to third countries". (op. cit.). This international value chain has a direct impact on health policy because it affects the supply of medicines and protective equipment to EU citizens. Representatives of the EU institutions see the main advantages here: "More competition means lower prices" ([ec.europa.eu, 13.2017](https://ec.europa.eu/13.2017)). However, the disadvantages include not only the relocation of many jobs abroad, but also the EU's increasing dependence on imports of pharmaceuticals. Whereas in the 1990s about 80 percent of these were manufactured in Europe, today 80 percent come from India and China ([Arzneiverordnungs-Report 2017: 193](#)).

A decisive factor in the outbreak of the Corona crisis was the Schengen Agreement, which dates back to 1985. Today, it includes 24 EU Member States and four other European countries, which have created an internal area without borders for the movement of people and goods (see Figure 4). In 2000 it became EU law and could therefore be slightly modified by the Brussels institutions by means of a regulation. However, to this day there is no supranational organisation that can control the Schengen external borders. Even the European Border and Coast Guard Agency Frontex

([Frontex, 13.5.2020](#)) has no sovereign rights, but may only offer support services.

The burden of managing the common external borders therefore remained the responsibility of the EU Member States concerned. Article 15 of the Schengen Agreement states that "Member States shall deploy appropriate staff and resources in sufficient numbers to carry out border control at the external borders." ([Schengen Agreement 2016: 17](#)). Should this not be guaranteed by a Member, other States may reintroduce national border controls ([Chapter II, Deutscher Bundestag, 10.04.2019: 11](#)). Several countries have already been exercising this right since summer 2015, first France, then Austria, Germany and finally Denmark, Sweden and Norway (as a non-EU member). Up to spring 2020, all of them had re-introduced internal border controls to varying degrees and notified the EU Commission of this in accordance with the Treaty (for details see: [ec.europa.eu, 13.5.2020](https://ec.europa.eu/13.5.2020)). In the case of France and Sweden it even affected all border crossings.

As a reaction to the continuing tensions between the national and supranational levels over responsibilities for securing the Schengen external borders ([welt.de, 13.9.2018](#)), Brussels had secured a special say in the last treaty reform in 2016 by means of a regulation. Article 29 (2) provides that, in exceptional circumstances, even the European Council, acting on a proposal from the Commission, may "recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders" ([Schengen Agreement 2016](#)). The other Contracting States may address this request directly to the Commission for action.

Despite the outbreak of the Corona crisis in Italy and the declaration of a national emergency on 31.1.2020, the EU and its member states renounced to temporarily control the external borders in order to contain the spread of the pathogen. On 24 February 2020, six EU Health Ministers met in Rome for a crisis meeting hosted by the Italian government. Despite the increase to 200 Corona cases in the northern Italian provinces, the outcome of this meeting was: "We share the view that at this time, now, restricting travel or even closing borders would not be an appropriate, proportionate measure." (Jens Spahn, [mdr.de, 25.2.2020](#)). In addition, Italian Prime Minister Giuseppe Conte declared that temporary border controls would have a negative impact on the Italian economy. They were supported by the European Commission, which confirmed "that the imposition of restrictive border measures in the Schengen area is the responsibility of the Mem-

Figure 5:

EU Health Policy – Overview

EU countries hold primary responsibility for organising and delivering health services and medical care. EU health policy therefore serves to complement national policies, and to ensure health protection in all EU policies.

EU policies and actions in public health aim to:

- Protect and improve the health of EU citizens
- Support the modernisation of health infrastructure
- Improve the efficiency of Europe's health systems.

Strategic health issues are discussed by representatives of national authorities and the European Commission in a senior-level working group on public health. EU institutions, countries, regional and local authorities, and other interest groups contribute to the implementation of the EU's health strategy.

Source: European Commission, [EU Health Policy](#), [10.4.2020]; Blue highlighting: S.R.

ber States". ([euractiv.de, 24.2.2020](https://euractiv.de/24.2.2020)) However, it did not make use of its right to recommend the reintroduction of internal border controls either.

This decision was relevant because important decisions to contain a dangerous pandemic can be made in the early stages. This is the result of a "Risk analysis in civil protection" of the German Bundestag from the year 2012. As one of three scenarios, it describes the outbreak of a "pandemic caused by Virus Modi-SARS", a coronavirus. The analysis makes it clear that anti-epidemic measures must be introduced as early as possible to limit the number of infected and dead. It says: "Once it has been recognised that the pathogen is transmissible via the respiratory tract, the population is informed very quickly about general protective measures (e.g. follow hygiene rules, avoid mass gatherings, avoid public transport, follow the measures ordered under the IfSG)." ([Bevölkerungsschutz 2012, 3.1.2013: 67](#))

1.4 "Europeanization" of Health Care by "Economization"?

Before the path into the corona crisis is outlined, one last framework condition relevant to the corona pandemic should be mentioned, which is the responsibility of the supranational level. Thus, monetary policy is like commercial policy one of the few areas in which only Brussels has decision-making powers (see Figure 4). The 19 of the 27 EU member states that have already adopted the euro as their currency have had to cede their national sovereignty in this respect to the supranational level. Although they retained their budg-

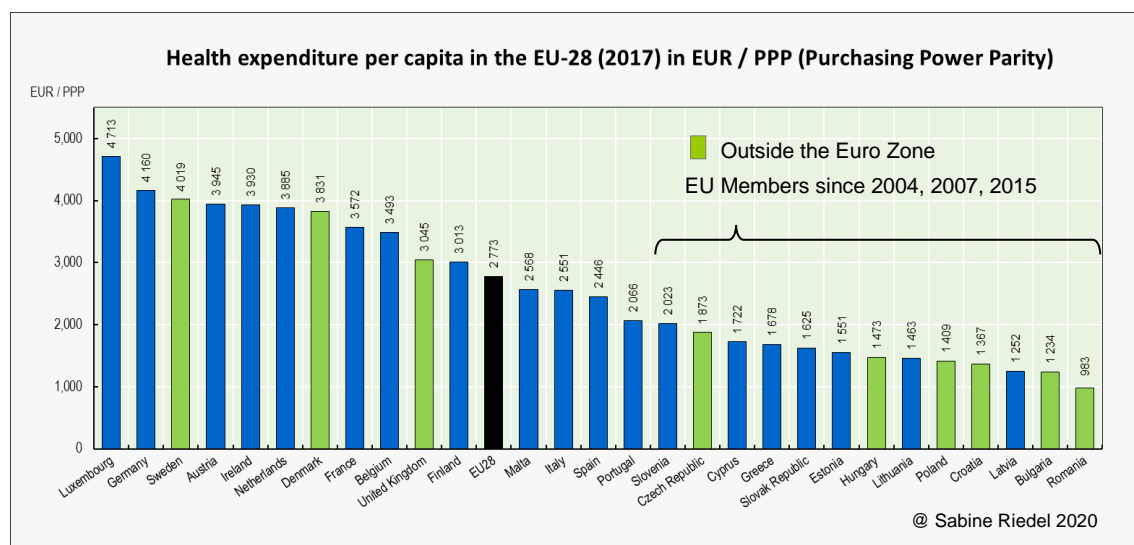
etary sovereignty, they must subordinate their national budgets to the guidelines of the guardians of the currency and thus the European Central Bank (ECB). It is obvious that this will restrict the financial scope of European healthcare systems.

Italy is also a good example of this. With the introduction of the euro, the country has had to decide on cuts in the national budget year after year in order to meet the stability criteria. In 2014, for example, the government of Matteo Renzi was only able to implement the promised tax cuts by saving 4.5 billion euros ([spiegel.de, 9.4.1014](https://www.spiegel.de/9.4.1014)). Three years later it was already lacking 35 billion euros, which resulted in new debt and thus a violation of the European Stability Pact ([spiegel.de, 19.4.2017](https://www.spiegel.de/19.4.2017)).

Since then, the health care system has had to make the biggest losses, namely cuts amounting to 10 billion euros by 2020 ([sn.at, 29.7.2015](https://www.sn.at/29.7.2015)). The result has been structural deficiencies in the national health system, in the supply of medicines as well as in personnel care. Doctors and nursing staff are concerned about the increasing violence in hospitals, which began even before the corona crisis started: "A decisive reason for the aggressive reactions is the frustration of patients or their families about system deficiencies and long waiting times, especially when visiting overloaded emergency wards. This is where disputes quickly arise – for example because of the strict regulations on triage [...]" ([nzz.ch, 2.11.2019](https://www.nzz.ch/2.11.2019))

The situation of the health care system in Greece is even more dramatic, which is still suffering from the consequences of its national debt

Abbildung 6:



Source: Own compilation, see the data: [Health at a Glance 2019. OECD INDICATORS](#), p. 151 [10.4.2020]

crisis in 2010. Two years after the country had received international aid funds of 270 billion euros to avert national bankruptcy and to be able to remain in the euro zone, 30 percent of the Greek population was no longer covered by health insurance ([Bundesregierung, 26.9.2012](#)). From now on, they will have to pay for the expensive services themselves. The creditors' conditions caused a massive cutback in the social system, which halved public spending between 2009 and 2016, including on health care. In the course of the closure of 54 hospitals, 18,000 doctors and 26,000 employees were laid off in this period, many of whom emigrated to other EU countries. ([berliner-griechenlandhilfe.de, 14.7.2019](#)).

The health care system in Spain is much better. But here, too, a similar development as in Italy is apparent. In 2012, the aftermath of the international financial crisis triggered a massive collapse in public finances, leaving a budget gap of 27 billion euros. In order to meet the stability criteria of the euro, Prime Minister Mariano Rajoy was forced to cut spending alone by 10 billion euros in the education and health systems ([zeit.de, 9.4.2012](#)). As a result, many hospitals were privatized and the public health system was thinned out in terms of personnel and material. Not least because of this, Spain was very badly prepared for the Corona crisis ([taz.de, 18.3.2020](#)).

Nevertheless, Spain's health care system is praised in scientific studies because it is one of the pioneers in terms of digitalisation. According to the Bertelsmann Foundation's Digital Health Index, it ranks fifth among the seventeen European countries studied. Switzerland, France, Germany and Poland are placed 14th to 17th in this ranking ([Bertelsmann-Studie, 29.11.2018](#)). At the meantime, the same foundation is recommending to the German government that 800 of a total of 1,400 hospitals be closed for reasons of efficiency ([nordkurier.de, 29.3.2020](#)). It even defended this proposal in the Corona crisis with the argument: "Less, but better resourced and more specialised clinics – that was and is our goal". ([Bertelsmann-Studie, 15.7.2019](#))

The "privatisation" concept has been booming in the system transformation of Central Eastern and South Eastern Europe. The name Leszek Balcerowicz, former Polish Minister of Finance and temporary head of the National Bank of Poland, stands for this political programme today. With his "shock therapy" in 1990, he wanted to transform Poland from a socialist planned economy to a market economy virtually overnight, but "without adjectives" ([nzz.ch, 19.09.2012](#)), i.e. without social systems that would justify the addition

of "social". His successor in office, Jacek Rostowski, continued this course with the aim of approaching the "golden standard" ([tagesspiegel.de, 14.6.1997](#)), i.e. to introduce the euro, to which the reform states had, in fact, contractually committed themselves when they joined the EU. That made Poland a pioneer and "the only country in the EU which anchored a debt brake in the constitution to ensure budgetary discipline". ([Bingen, 2011](#))

The other side of this privatisation strategy, which does not take account of public welfare interests, is evident in the current state of the Polish health care system. The shock paradigm does not

Abbildung 7:

The Polish "Shutdown" in 1990

"The results of the Polish reform measures of 1990 were extremely bitter and far exceeded the fears of their critics. As a result of the forced privatisation of state property within a few months, the gross domestic product collapsed by 50 percent. This led to mass layoffs and an average 43% decline in real incomes according to official statistics.* At the same time, however, contrary to expectations, galloping inflation developed into hyperinflation of 78.6 percent for January 1990 only, partly because farmers were speculating on higher food prices, partly because in the energy sector state subsidies and the last price controls were removed.* Even Jeffrey Sachs conceded conceptual deficiencies in his report to the World Bank (1991). For example, it would have failed to introduce an insolvency law in time, so that insolvent large state enterprises could not be closed down. Their management took the opportunity to '[...] milk these companies to the extent that it was possible in the short time. [...] The result is an uncontrolled bleeding of state property, which will cost the state budget heavily and lead to decisive misallocation of capital resources.' * Despite these findings and the increase in foreign debt by 8 to 48.5 billion US dollars in 1990, Sachs recommended speeding up privatization."

Source: Sabine Riedel, [Die kulturelle Zukunft Europas. Demokratien in Zeiten globaler Umbrüche](#), Wiesbaden 2015, S. 112, * References in original text, blue highlighting: S.R.
Cf. the summary of the book in English: Sabine Riedel, [The Cultural Future of Europe. Democracies at Times of Global Changes](#). Introduction. The Convergence Theory as a Socio-scientific Approach, in: [Forschungshorizonte Politik und Kultur \(FPK\)](#), Vol. 1, No. 1 (2017 July 21), 13 pages.

apply to them, they are rather exposed to permanent privatisation pressure: shortly before the outbreak of the Corona crisis, one third of Polish hospitals were about to close ([deutschlandfunk.de, 3.2.2020](https://www.deutschlandfunk.de/3.2.2020)), although almost all doctors are working or have to work overtime. Young doctors, in particular, earn an average of only 500 euros per month (as of 2017), which means that they are obliged to earn more. Poor pay and a working week of up to 75 hours ([deutschlandfunk.de, 6.12.2017](https://www.deutschlandfunk.de/6.12.2017)) is forcing many to look for a better job in other European countries. Their organisation complains: "We've been missing a whole generation. We have young doctors and doctors who are over 50 years old. Those who are between 35 and 50 years old emigrated en masse some time ago. And many of the young people want to leave too." ([deutschlandfunk.de, 2.10.2017](https://www.deutschlandfunk.de/2.10.2017))

Since April 2019, the Polish government has changed its priorities: "The euro is good for the countries that are strong" is its argument for postponing entry to the euro zone for an unlimited period ([n-tv.de, 13.4.2019](https://www.n-tv.de/13.4.2019)). Critics in the Brussels EU institutions believe that this is a national strategy for EU withdrawal. The European Council therefore reacted with counter-pressure by considering "withdrawing Poland's voting rights or cancelling its membership". ([bpb.de, 5.10.2017](https://www.bpb.de/5.10.2017)). However, it is not the dispute over the postponed accession to the euro zone that is at issue here, but rather Polish legal reforms. But what applies to Poland obviously does not have to apply to other EU member states. Bulgaria's judicial system, for example, has also shown substantial deficiencies since its accession to the EU in 2007 and was therefore under constant observation. In the current progress report of the European Commission, however, the Balkan country is now being spared ([dw.com, 22.10.2019](https://www.dw.com/22.10.2019)), although no real trend reversal is in sight ([wirtschaftsblatt.bg, 25.11.2019](https://www.wirtschaftsblatt.bg/25.11.2019)).

However, in the last two years the Bulgarian government has intensified its efforts to join the euro zone as soon as possible ([derstandard.de, 6.2.2019](https://www.derstandard.de/6.2.2019)). This also obliges them to make tough cuts in social spending and health care. According to a report by the European Commission on the state of health care in the EU, Bulgarians bear the highest burden of co-payments among all EU citizens, namely 47%: "A significant proportion of this was for pharmaceuticals. Then came the costs of outpatient care and those that were paid under the table." ([wirtschaftsblatt.bg, 16.12.2019](https://www.wirtschaftsblatt.bg/16.12.2019); Dimova u.a. 2019). The case of Bulgaria confirms the trend of migration of young doctors from Eastern Europe to other EU Member States (Figure 8).

In conclusion, it can be said that, in view of the completely different social systems within the EU, a "Europeanisation" of the health care system is hardly possible. It is true that financial aid flows from Brussels to those countries whose health systems are in deficit. But this can hardly remedy the actual causes of the crisis. These lie, on the one hand, in the growing national debt, which leaves the countries hardly any financial leeway. On the other hand, however, the money from Brussels flows less into the necessary basic supply and more into the investment in medical technology and the renewal of the infrastructure. Finally, the negative effects of labour migration in the health care sector have hardly been seen so far. The brain drain within the EU will only come to a standstill when people in their home countries have a real life perspective for themselves and their families.

Abbildung 8:

Sick system: Bulgarian health crisis leaves patients vulnerable [...]

Bulgaria is in the grip of a health crisis as thousands of doctors and nurses leave for better paid jobs in western Europe.

Three out of four Bulgarian medical students say they are tempted to leave. The main destinations are Germany, Austria and Scandinavian countries.

The European Union has given Bulgaria extensive funding to upgrade its medical infrastructure. But it hasn't helped address the crisis in manpower.

[... Kristina Mancheva] told Unreported Europe: "The main problem is the lack of medical staff, everywhere – but particularly in the emergency units. We are in dire need. We work with less than half the staff we really need." [...]

She told Unreported Europe: "The main problem is the lack of medical staff, everywhere – but particularly in the emergency units. We are in dire need. We work with less than half the staff we really need."

Last autumn, Bulgarian health workers took to the streets in protest. Protesters were demanding a minimum wage of 460 euros for nurses and at least 600 euros as a starting salary for doctors. [...]

Mancheva, the emergency unit doctor, said: "We have really good doctors in Bulgaria and it really hurts to lose those colleagues. To those who left, I say 'Come back to your country, come back home, come back to Bulgaria'."

Source: [euronews.com](https://www.euronews.com), 24.1.2020, see [bulg.wirtschaftsblatt.bg](https://www.bulg.wirtschaftsblatt.bg), 27.1.2020

2 Europe's Democracies in Standby Mode: EU and Council of Europe set Limits to their Member States

2.1 Instead of activating pandemic plans to Cut Constitutions and Civil Rights?

The previous chapter described the political conditions within the EU that existed before the outbreak of the Corona crisis. It was shown that the Member States were organisationally prepared for a possible pandemic, despite a number of deficits in the health care system. All of them had developed plans against a new dangerous influenza virus in cooperation with the World Health Organization (WHO) and the EU for Disease Prevention and Control (ECDC). They therefore knew what to do in such an emergency situation. This chapter therefore aims to understand how and why many Member States, after initial hesitation, did not activate their pandemic plans in mid-March 2020, but immediately declared a national emergency. The existing legal measures did not seem to go far enough for them. Rather, they considered it necessary to intervene in the constitutions immediately and to restrict a large number of fundamental democratic rights. They agreed on this objective, but they took very different approaches.

That in Germany 75 years after the end of the National Socialist dictatorship, basic democratic rights would again be restricted was unthinkable only a short time ago. This could actually only happen in a European consensus in which Germany does not follow a "special path". Nevertheless, no one would have expected this from a government that only a few months ago brought a package of measures against right-wing extremism through the Bundestag ([spiegel.de](https://www.spiegel.de), 30.10.2019). It wants to fight a form of political extremism that seeks to restrict the constitutional rights of citizens. Through their political ideology, extremist ideologies feel called upon and legitimized to question or even eliminate the plurality of society in the name of the common interest. ([bpb](https://www.bpb.de), 13.5.2020).

Because of its specific historical experience of authoritarian and totalitarian systems, Germany - unlike France, for example - has no legal instruments for declaring a "state of emergency". This would allow for a transfer of powers from parliament (legislative) to the government (executive). In order to be prepared for internal or external threats, so-called emergency laws were passed in 1968. Their aim is "to ensure the functioning of the parliamentary system and the observance of fundamental rights in the event of an emergency"

([Notstandsgesetze, 1968](#)) Subsequently, paragraphs were inserted into some articles of the Basic Law which allow the Bundestag to temporarily restrict a few basic freedoms by law. These include, first of all, the right to physical integrity ([GG Art. 2](#), see Figure 9), which plays a role not only in protection against infectious diseases, but also in the issue of compulsory vaccination, as in the current case of measles ([lto.de](#), 2.3.2020). Also relevant are the right to freedom of assembly, which includes the freedom to demonstrate

Abbildung 9:

The German Basic Law

Art. 2

- (1) Every person shall have the right to free development of his personality, [...].
- (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Art. 8

- (1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.
- (2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

Art. 11

- (1) All Germans shall have the right to move freely throughout the federal territory.
- (2) This right may be restricted only by or pursuant to a law, and only in cases [...] in which such restriction is necessary to avert an imminent danger [...] to combat the danger of an epidemic, to respond to a grave accident or natural disaster [...].

Art. 12

- (1) All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.
- (2) No person may be required to perform work of a particular kind except within the framework of a traditional duty of community service that applies generally and equally to all.

Art. 13

- (1) The home is inviolable. [...]
- (7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public [...] or, pursuant to a law, [...] to combat the danger of an epidemic [...].

Source: Basic Law for the Federal Republic of Germany, 23.5.1949 [Blue highlighting: S.R.]

(GG Art. 8) and the right to freedom of movement, i.e. to free travel (GG Art. 11). Finally, it is about the right to free exercise of professions, which is based on the right to freedom of trade and industry and the prohibition of service obligations, e.g. of doctors and nursing staff (GG Art. 12), and the inviolability of the home (GG Art. 13).

In order to restrict these fundamental rights, special laws have therefore been needed since 1968 and thus a clear and verifiable legal basis. With the Infection Protection Act (IfSG) of 2000, the public health authorities already have an important framework for action to effectively protect the population from communicable diseases. Article 6 lists the "notifiable diseases" that represent a health threat with possible fatal consequences. In addition, Article 7 contains the list of "notifiable evidence of pathogens", which "indicate an acute infection" (IfSG, 27.3.2020). The authorities responsible for this, which must take initial measures to contain the infectious disease if it is suspected, are the approximately 400 public health authorities in Germany (IfSG Art. 16).

Already at the end of January 2020, the Federal Ministry of Justice made the "novel coronavirus ('2019-nCoV')" notifiable under Articles 6 and 7 of the IfSG, whereby this regulation only applies until 31.1.2021 (Verordnung 30.1.2020). This time limitation could explain why Covid-19 has not yet been included in the two IfSG lists of notifiable diseases or pathogens, not even in the revised text of 27.3.2020. Instead, this new revision contains several amendments, such as Article 5 (1), which gives the German Bundestag the right to identify and withdraw "an epidemic situation of national concern". Paragraph (2) authorises the Federal Ministry of Health in such a special situation to issue a number of legislative decrees without the consent of the Bundesrat (IfSG, 27.3.2020). This includes measures for drug supply, nursing and medical care, vaccination and patent protection of drugs and the collection of disease data. In paragraph (5) it is added that all these measures may restrict "the fundamental right of physical integrity" (GG Art 2). Therefore a law, which should serve the protection of health, restricts the patient's right to self-determination (aerzteblatt.de, 18/2012).

A relevant new provision is also contained in Article 28 (1), according to which the right to physical freedom of movement is significantly restricted. According to this article, a person may be prevented from leaving or entering a location. But this article also says that the restriction of fundamental rights only applies to a certain group of people and not to whole population. They only

concern "sick people, suspected illnesses, suspected contagion or excretors" (IfSG Artikel 28 (1), see Figure 10). The focus on risk groups reflects the actual aim of the IfSG, namely to stop the spread of an infectious disease and to provide special care for those affected.

This original orientation of the IfSG has therefore been reversed by its new wording and by declaring an "epidemic situation of national concern". Strictly speaking, the Bundestag passed this amendment on 27.3.2020 after the federal states had already decreed their own emergency measures (spiegel.de, 21.3.2020). These should afterwards be "legalized" by a federal law. Even though many of the measures taken by the federal states were already covered by the first version of the IfSG from the year 2000, the state governments extended the restriction of basic rights to all citizens in an inadmissible manner through idiosyncratic interpretations of the legal text. Sud-

Figure 10:

Law on the Protection of the Population in the Event of an Epidemic Situation of National Concern, 27.3.2020 – Amendment of the Infection Protection Law (20.7.2000)

§ 28 Paragraph 1

"(1) If sick people, suspected illnesses, suspected contagion or excretors are found or it turns out that a deceased person was sick, suspected of illness or excretor, the competent authority takes the necessary protective measures, in particular those mentioned in §§ 29 to 31, as far and as long as it is necessary to prevent the spread of communicable diseases is required; it may, in particular, oblige persons not to leave the place where they are located, or only to leave it under certain conditions, or not to enter certain places or public places designated by it, or only to enter them under certain conditions. Under the conditions set out in sentence 1, the competent authority may restrict or prohibit events or other gatherings of people and close bathing establishments or community facilities mentioned in § 33 or parts thereof. No therapeutic treatment may be ordered. The fundamental rights of freedom of the person (Article 2 (2) second sentence of the Basic Law), freedom of assembly (Article 8 of the Basic Law), freedom of movement (Article 11 (1) of the Basic Law) and the inviolability of the home (Article 13 (1) of the Basic Law) are restricted in this respect."

Quelle: Infection Protection Act IfSG 20.7.2000, Amending Act: BGBl Teil 1, Nr. 14, 27.3.2020, Consolidated Text, 27.3.2020
[Highlighting blue: S.R., red are additions].

denly, other basic rights were put at the disposal or the discretion of the state authorities, which the IfSG itself does not list in its new version, such as freedom of trade or freedom of religion.

At this point selected examples should suffice: The Free State of Bavaria, for example, already declared a "disaster situation" on 17.3.2020, four days after the first corona death had been reported in this federal state. In this way, the Bavarian government secured new "possibilities for intervention and enforcement" beyond the right of the state parliament to have a say ([stm.gp.bayern.de, 30.4.2020](https://stm.gp.bayern.de/30.4.2020)). This step was justified with the new risk assessment of the Robert Koch Institute (RKI), which Covid-19 now classified as "very infectious". At a press conference with Federal Health Minister Jens Spahn, State Premier Markus Söder confirmed that 80 percent of those infected only had mild symptoms, but that drastic measures were necessary to protect the risk groups ([Pressekonferenz, 17.3.2020, 3:30 min](https://pressekonferenz.17.3.2020)). In order to legally protect this, the Bavarian State Parliament passed its own Infection Protection Law, but only on 25.3.2020 and thus under the conditions of the disaster situation. ([Baylfs, 26.3.2020](https://baylfs.26.3.2020)). In contrast to the IfSG of the Federal Government, however, it ends on 31.12.2020.

For the Berlin Senate Administration, the way to restrict fundamental rights was shorter. It announced its SARS-CoV-2 Containment Measures Decree on March 14, 2020 ([berlin.de, 14.3.2020](https://berlin.de/14.3.2020)). But tightened it three days later ([berlin.de, 17.3.2020](https://berlin.de/17.3.2020)), only to announce a new wording after another four days ([berlin.de, 22.3.2020](https://berlin.de/22.3.2020)), which appeared in ten other languages ([Berlin, Corona, 22.3.2020](https://berlin.corona.22.3.2020)). In doing so, the state of Berlin referred to the IfSG of the federal government, so that it did not write its own law and therefore did not depend on the approval of the Berlin House of Representatives.

In the case of Germany, therefore, the state governments have taken the initiative to decree immediate measures, partly without any parliamentary control, that restrict fundamental rights beyond the given legal framework. Only a few have protected themselves by state laws, but these laws also raise questions and will increasingly concern the Federal Constitutional Court. At present, it still rejects lawsuits for formal reasons, such as against the Berlin Senate Decree ([BVerfG, 31.3.2020](https://bverfg.31.3.2020)). But the higher the consequential damages add up, the more pressure will arise to examine the facts presented by the RKI in the first quarter of 2020. Because it referred for the first time on 4.3.2020 to measures of the national pandemic plan ([RKI, 4.3.2020](https://rki.4.3.2020)), at a time

when most members of the Bundestag still compared Covid-19 with a common influenza infection (see Chapter 1.1).

2.2 Values and High Standards are Lost by Limiting Democracy

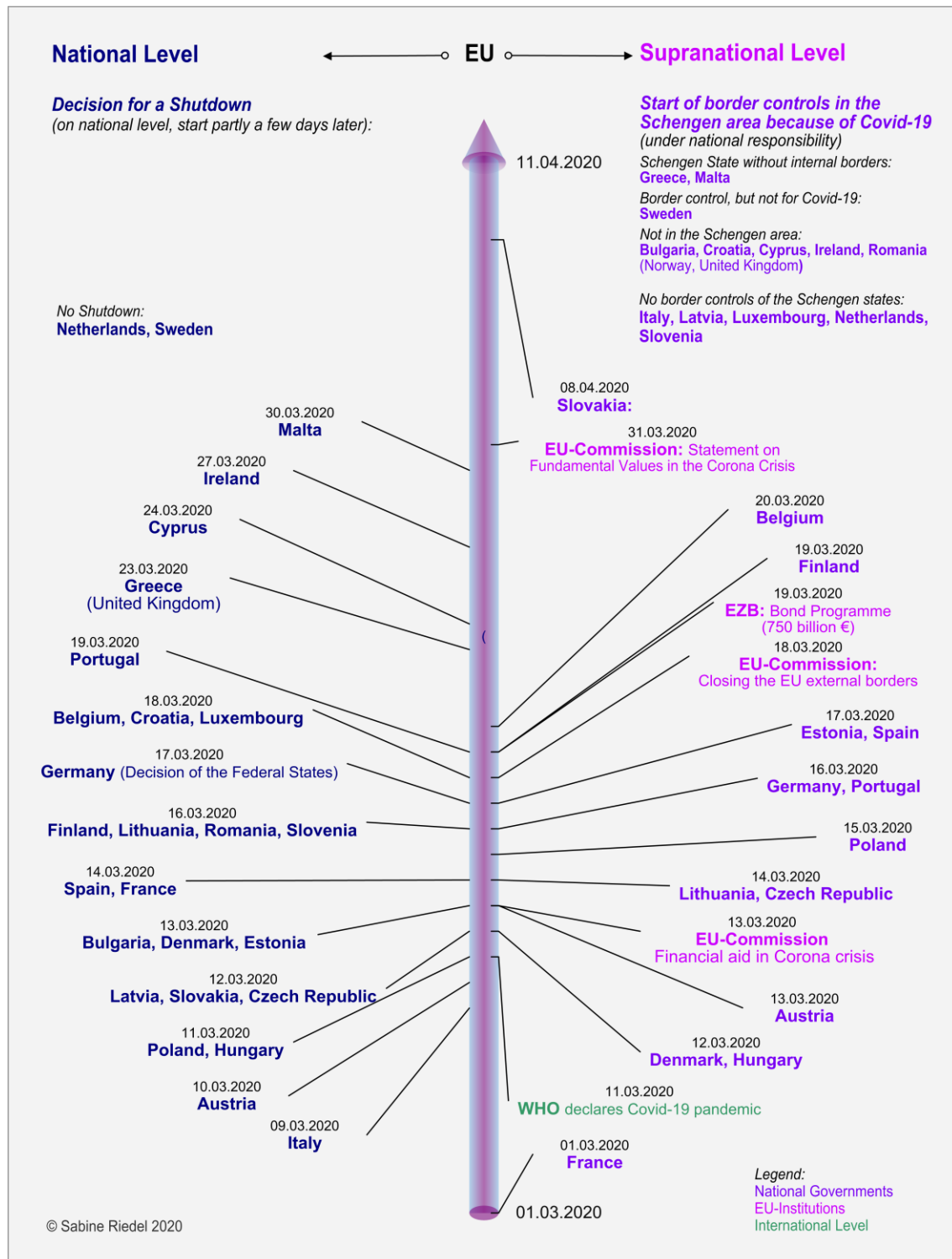
Between March 4 and 13, 2020, the German governing parties suddenly turned the lever and assessed Covid-19 as a great danger. In doing so, they took over arguments of the opposition, which they had rejected the day before in parliamentary debates, including those of the AfD, which in their eyes would stir up panic with Corona. How did this change of opinion come about? This is a question that many scientists will address in the future. Because not only the Federal President fears: "No, the world after will be a different one." ([sueddeutsche.de, 11.4.2020](https://sueddeutsche.de/11.4.2020)) In his speech at Easter, which for the first time was celebrated without church services, he recalled the effects of the Corona crisis in other European countries. In doing so he referred to an important external factor that had apparently forced the CCI to carry out a new risk assessment: many EU members reacted immediately by introducing emergency measures after the WHO declared Covid-19 a pandemic on 11.3.2020 ([WHO, 11.3.2020](https://who.11.3.2020)). Germany was not among the first this time.

Since in many EU Member States the introduction of emergency measures was a gradual process, Figure 11 shows only the decision for a nationwide shutdown or lockdown. Some of the concrete measures started a few days later and varied in scope from country to country. However, they all agreed on two basic decisions, firstly to quarantine the entire population (exit ban, curfews, contact bans, etc.) and secondly to close all public institutions and private services nationwide. In addition, Figure 11 contains information on the start of the reintroduction of border controls within the Schengen area, which the EU Member States justified to the European Commission by combating Covid-19 ([ec.europa.eu, 13.5.2020](https://ec.europa.eu/13.5.2020)).

The compilation of this information results in a number of interesting findings, only a few of which are selected here. Italy continues to play a special role in combating of coronavirus. It was the first country in Europe in which regional administrations sealed off and quarantined certain cities and municipalities from 21.2.2020. At that time there were about 200 officially confirmed Corona cases throughout Italy ([tageszeitung.it, 21.2.2020](https://tageszeitung.it/21.2.2020)). Three weeks later, the central government decided on a nationwide shutdown by decree of 9.3.2020 ([salute.gov.it, 13.5.2020](https://salute.gov.it/13.5.2020)), after the number of infected had risen to over 6000. But this

Figure 11:

Timetable for the Start of Shutdown and Border Controls within the EU / Schengen Area



Source: Own compilation, among others: newspaper reports, websites, governments, EU Commission: Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code, ec.europa.eu, 13.5.2020, europarl.europa.eu, 27.4.2020

radical measure could not prevent its spread. By 28.4.2020, i.e. in the course of another seven weeks, the number of people infected with corona rose to 201,505, of which 117,506 (or 58.3 percent) come from three of the 20 Italian regions where quarantine was ordered three weeks earlier, namely Lombardy, Piedmont and Veneto (salute.gov.it, 28.4.2020).

Moreover, Italy has so far avoided controls on its borders within the Schengen area. It relies on the voluntariness and honesty of travellers, who must report to the competent health authority at the border crossing and provide information on their state of health (ahk-italien.it, 4.5.2020). In contrast, France has notified the European Commission that it has been implementing border controls as early as 1 March 2020 to limit the spread of Covid-19. It was the pioneer in the EU for this measure, while it ordered the shutdown of all public facilities on 14.3.2020 and a general curfew on 16.3.2020. Despite its decrees, France, with 178,060 corona infected persons (as of 14.5.2020), is in seventh place worldwide, behind the USA, Spain and Italy (worldometers.info, 14.5.2020).

Spain ranks second in the world with 271,095 Corona people (status: 14.5.2020), although it decided to shut down a few days after Italy (14.3.2020) and reintroduced controls at its EU internal borders (17.3.2020). Although Poland (37.9 million inhabitants) reacted a few days faster than Spain (46.9 million), its number of corona-infected persons remained much lower at 17,469 (worldometers.info, 14.5.2020). Finally, a comparison between Austria (8.8 million) and Sweden (10.2 million) is interesting: The infection rates here are currently 15,997 and 27,909, respectively, and are at a similarly high level taking into account the number of inhabitants, even though Austria ordered a shutdown on 10.3.2020 and Sweden did without this measure completely (Figure 11). In contrast, Sweden has been controlling its border crossings since the migration crisis of 2015, while Austria will resume border controls from 12.3.2020.

At this point, a first conclusion can be drawn that has to be checked by further research. There are already good reasons to assume that the quarantine of the entire population and the closure of all public institutions and private service companies had hardly any effective effect on the containment of the virus. It will be therefore necessary to consider back to whose initiative these drastic measures, which are themselves not provided for in the pandemic plans. An objection can already be refuted that this could not be determined afterwards. Since the EU member states reacted differently despite the common European

legal framework, a number of different comparative analyses are available.

The initiating factor for a shutdown of the entire economy came either from within the EU itself, specifically from Italy or France (see Figure 11), or from outside, possibly from China, which was the first country to take these drastic measures. In addition, there were decisive factors such as the WHO declaration of March 11, 2020, classifying Covid-19 as a pandemic ([WHO](https://who.int), 11.3.2020). For this quite obviously led to a chain reaction, which was first followed by Denmark, Austria, Hungary and Poland. Not forgetting the role of the EU institutions, which reacted quickly and officially announced already on 13.3.2020: "This Communication outlines the Commission's immediate response to mitigate the economic impact of COVID-19." ([EU Commission](https://ec.europa.eu), 13.3.2020: 1) This assurance may have encouraged other states to follow the same path of shutdown in order to become eligible for financial assistance. This is because those EU members that got into financial difficulties after the 2008/09 financial crisis were initially reluctant to take such drastic measures, such as Greece, Cyprus and Ireland.

As was shown above in the case of Germany and its federal states, the way to the shutdown in most states was via government decrees, some of which were secured by law only afterwards, with the participation of the national parliaments. From the large number of examples, only a few of them will be picked out here. In order to remain at the supranational EU level for the moment, it should be mentioned that on 31.3.2020 the Commission published a Statement on compliance with the fundamental values of the EU even in the Corona crisis (ec.europa.eu, 31.3.2020). In it she mentions three principles which must be respected regardless of emergency measures, namely their proportionality, time limitation and verifiability. Just two days later, 19 Member States signed a declaration to this effect, in which they delegate to the EU Commission the right to monitor compliance with these three principles ([France Diplomacy](https://france.diplomacy), 2.4.2020, see Figure 12).

For various reasons, this declaration has divided rather than brought Member States closer together. Although it was only signed by 19 of the 20 EU member states with emergency measures, it empowers the EU Commission to intervene in their internal affairs. According to Article 4 of the EU Treaty, she is actually not permitted to do so, because it conversely obliges her to respect the "fundamental structures, political and constitutional" of the Member States ([EU Treaty 2016](https://europa.eu), Art. 4 (2)). Only in the event of infringements of the

Treaty can and should the Commission intervene as "guardian of the Treaties". These concerns were certainly shared by Croatia, Austria, Poland, Slovenia, the Czech Republic and Cyprus, who did not want to justify a shutdown to Brussels.

Apparently, there was a lot of pressure from some influential EU states to join this declaration. In the text version one day before, Bulgaria, Romania and Hungary were still missing in the list of signatory states (see [vnk.fi](#), [diplomatie.belgium.government.nl](#), [mfa.gr](#), 1.4.2020). Some sources therefore incorrectly reported that this statement contained a critique of the Hungarian government's catalogue of measures, which had previously brought a legislative package through parliament ([euractiv.com](#), 1.4.2020, [portfolio.hu](#), 2.4.2020, [Reuters](#), 2.4.2020). The tone of the reporting has hardly changed since Hungary joined the Declaration. His commitment to the above principles has been successful. After reviewing the "Hungary case" ([Beck.de](#), 6.4.2020), the EU Commissioner for Justice, Věra Jourová, concluded: "Hungary's recently-adopted emergency

measures giving the government indefinite rule-by-decree powers do not warrant EU scrutiny yet." ([euobserver.com](#), 29.4.2020)

In the background, there had apparently been disputes about the criteria to be used to assess the principles of "proportionality, time limitation and verifiability". The Hungarian Minister of Justice, Judit Varga, defended herself that her government was using emergency measures against the spread of the coronavirus to weaken "its own opposition and the Hungarian constitutional state" ([tagesschau.de](#), 31.3.2020). She referred to other members and said: "Hungary only does what everyone in Europe does". ([welt.de](#), 12.4.2020) However, the critics argue that the indefinite encroachment on the fundamental rights of Hungarian citizens violates the above-mentioned principles of the EU Commission.

However, other Member States also have significant deficits on this issue. For example, Italy's Prime Minister Giuseppe Conte came under fire because he has been ruling over decrees since 9.3.2020 ([ahk-italien](#), Corona 4.5.2020) and unwillingly extended the emergency measures ([fr.de](#), 29.4.2020). This puts the time limit at the disposal of the government and removes it from parliamentary control. The situation is comparable in France, where the government also decides on its own authority since the Senate and National Assembly agreed to a "health emergency" in mid-March 2020 ([KAS](#), 14.4.2020). President Emmanuel Macron called it the "war against the coronavirus" ([deutschlandfunk.de](#), 28.3.2020). In mid-April the government again extended curfews until 11.5.2020 ([spiegel.de](#), 14.4.2020). In Spain, the shutdown also began in mid-March with a decree under Prime Minister Pedro Sánchez ([euronews.com](#), 14.3.2020), followed by other Royal Decrees ([ahk.es](#), 14.5.2020). Again, the Parliament only plays an extra role in extending the emergency twice.

Hungary's comment that the other Member States do not deal with emergency measures much differently is therefore not entirely unfounded. This controversy will intensify with its gradual removal ([welt.de](#), 29.4.2020). This makes it all the more clear that the guarantees given to safeguard democracy and the rule of law are no more than a declaration of intent. From a legal point of view, they are irrelevant, especially for EU citizens, whose fundamental rights and health well-being are the subject of the exception rules. They will increasingly call into question the role of the EU Commission as a controlling authority whose political legitimacy is not derived from democratic structures.

Figure 12:

Statement, 2.4.2020

by Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain and Sweden

In this unprecedented situation, it is legitimate that Member States adopt extraordinary measures to protect their citizens and overcome the crisis. We are however deeply concerned about the risk of violations of the principles of rule of law, democracy and fundamental rights arising from the adoption of certain emergency measures.

Emergency measures should be limited to what is strictly necessary, should be proportionate and temporary in nature, subject to regular scrutiny, and respect the aforementioned principles and international law obligations. They should not restrict the freedom of expression or the freedom of the press.

We need to jointly overcome this crisis and to jointly uphold our European principles and values on this path. We therefore support the European Commission initiative to monitor the emergency measures and their application to ensure the fundamental values of the Union are upheld and invite the General Affairs Council to take up the matter when appropriate.

Source: [France Diplomacy](#), 2.4.2020, [Highlighting in blue font: S.R.]

2.3 Council of Europe: Rule of Law and Democracy also Apply in Emergencies

At the supranational EU level, Union citizens have no body to which they can complain about the restriction of their fundamental democratic rights at national level. Even the EU Agency for Fundamental Rights (FRA), based in Vienna, is not competent for this purpose, although its aim is "To help safeguard the rights, values and freedoms enshrined in the EU's Charter of Fundamental Rights" (fra.europa.eu). However, as the EU Charter of Fundamental Rights only applies to the supranational level within the framework of European law, its powers are purely advisory in nature. With its latest report on the Corona crisis, the EU agency also promotes its image as a defender of fundamental rights (derstandard.de, 8.4.2020). However, it justified the emergency measures in general terms with the argument: "International human rights law allows for the limitation of certain rights, especially when addressing a major health crisis." (fra.europa.eu, 4/2020: 7)

It is true that the FRA report lacks relevant legal sources from one of the 18 UN human rights documents (ohchr.org). Instead, it refers to the 1950 European Convention on Human Rights (ECHR) of the Council of Europe (fra.europa.eu, 4/2020: 13). However, the mentioned Article 15 merely confirms the right of Member States, in the event of war or "public emergency", to take measures "derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation". (ECHR 1950 Art. 15 (1)). Because other articles of the ECHR are also relevant to the Corona crisis, the Secretary General of the Council of Europe, Marija Pejčinović Burić, in consultation with the relevant legal experts, published "Guidelines to governments on respecting human rights, democracy and the rule of law" on 8.4.2020 (COE, 8.4.2020).

The key message is that the Council of Europe regards itself as a "forum for collectively ensuring that these measures remain proportional to the threat posed by the spread of the virus and be limited in time" (COE, Toolkit, 7.4.2020: 2). The text itself is divided into three sections on different thematic priorities. In the first part, the principle is formulated that each state decides on emergency measures itself. This is not without importance in view of the cooperation of EU Member States at supranational level. In addition, the exceptions must be based on a legal basis that does not contradict the Constitution (see Figure 13). If the principles in section 2 on respect for the rule of law and democratic principles are also taken into account, it becomes clear that many EU Member

States are in breach of them. These include Hungary with its unlimited emergency measures as

Figure 13:

Council of Europe

Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, 7.4.2020

1. Derogation in time of emergency

(Art. 15 EMRK)

- It is for each state to assess whether the measures it adopts warrant such a derogation.
- At the same time, any derogation must have a clear basis in domestic law in order to protect against arbitrariness.
- Every effort should be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.

2. Respect for the rule of law and democratic principles in times of emergency

- Any new [emergency] legislation should comply with the constitution and international standards and, where applicable, be subjected to review by the Constitutional Court.
- Prolongation of the state of emergency regime should be subject to the control of its necessity by parliament. An indefinite perpetuation of the general exceptional powers of the executive is impermissible.
- any legislation enacted during the state of emergency should also include clear time limits on the duration of these exceptional measures.
- As a general rule, fundamental legal reforms should be put on hold during the state of emergency.
- Parliaments, however, must keep the power to control executive action in particular by verifying, at reasonable intervals, whether the emergency powers of the executive are still justified

3. Relevant human rights standards

- Restrictions on them are only permissible if they are established by law and proportionate to the legitimate aim pursued, including the protection of health.
- The freedom of expression, including free and timely flow of information, is a critical factor for the ability of the media to report on issues related to the pandemic.
- At the same time, official communications cannot be the only information channel about the pandemic. This would lead to censorship and suppression of legitimate concerns.
- Journalists, media, medical professionals, civil society activists and public at large must be able to criticise the authorities and scrutinise their response to the crisis.

Source: COE, Toolkit, 7.4.2020

Summery and highlighting in blue font: S.R.

well as Italy, France and Spain, whose governments extended emergency measures without the required parliamentary controls.

But Germany's emergency measures also fail to meet these guidelines of the Council of Europe. Because the relevant "Act for the Protection of the Population in the Event of an Epidemic Situation of National Concern" was presented to the Bundestag and Bundesrat only on 24.3.2020 ([IfSG-Entwurf, 24.3.2020](#)), a few days after most of the state governments had already ordered a shutdown. This put the members of parliament in the state parliaments as well as in the Bundestag under pressure, which considerably restricted their rights of co-determination and control. This law also has some legal weaknesses, which were only discussed on a single day. Thus, the number of critics from the various parties remained small. However, some objections are substantial, such as that the time limit only applies to some of the measures: "On a weighing-up, this draft law is not proportionate because it massively restricts the fundamental rights of citizens. It furthermore centralises important decisions from the Länder to the Federal Government and from Parliament to the Minister of Health. I think that's wrong." ([Sauter, Schäffler, 25.3.2020](#))

The violation of relevant human rights standards becomes even clearer if the criteria for the protection of freedom of opinion and information are reviewed. (see point 3, Figure 13). From mid-March 2020, the governments and parliaments of the German federal states and the Bundestag discussed a possible shutdown with quarantine measures for the entire population and closure of public facilities and private service providers. But just a few days before, most of them believed that Corona is no more dangerous than a flu infection (Chapter 1.2). They obviously relied on reports in the relevant press: "The number of corona-infected people in Germany is rising, but there is no reason to panic." ([tagesschau.de, 10.3.2020](#)) The same source still wrote about breathing masks at that time: "Here the research agrees: it makes no sense for healthy people to wear a mask."

Only a week later, the same media criticised all those scientists and medical professions who had not changed their minds and could not understand the turn-around in politics. However, these journalists did not explain to their audience why they suddenly disagreed but disqualified those experts on whose knowledge they had relied until then. Their professional expertise has now been disqualified by a journalistic "fact check" as "rumours and false reports": "All just scaremongering? [...] Coronavirus no more dangerous than

flu?" ([tagesschau.de, 19.3.2020](#)). At first, the physician and virologist Wolfgang Wodarg became a target because he made himself known with a YouTube video and cautioned against panic ([Wodarg, 13.3.2020](#)). Media journalists were not afraid to discredit his arguments with the fact that they were spread further on the net by "conspiracy theorists" ([spiegel.de, 20.3.2020](#)). In another medium he was even directly attacked as a "conspiracy theorist" ([welt.de, 19.3.2020](#)).

It is not only the method of discrediting individuals who use their many years of professional experience and have no selfish interests to speak out their concern. Above all, it is unacceptable that individual journalists presume to deprive the reader of the right to form their own opinions. They feel they have to "help" him: "If absurd individual opinions are apparently compared with recognized facts on an equal footing, a false impression arises - a so-called false balance or wrong weighting. Avoiding them is particularly important in times of crisis." ([spiegel.de, 20.3.2020](#)) This is contradicted by the guidelines of the Council of Europe for respecting democratic values in times of emergencies, because: "This would lead to censorship and suppression of legitimate concerns." ([COE, Toolkit, 7.4.2020](#), Figure 13)

As for the comparison between Covid-19 and the influenza virus, it has been confirmed in The New England Journal of Medicine. Accordingly, the consequences of a Covid 19 disease would be more similar to those of seasonal or pandemic influenza than to a disease such as SARS or MERS ([Fauci a.o. 2020](#), Figure 14). The ENT physician Dr. Bodo Schiffmann drew attention to these research results ([Schiffmann, 30.3.2020](#)). Microbiologist Prof. Dr. Sucharit Bhakdi also refers to these and other studies when he criticises the measures taken to combat Covid-19. He published an open letter to Chancellor Angela Merkel as a videotape that reached more than 2 million viewers ([Bhakdi, 29.3.2020](#)). Media journalists also reduced his expertise in their "fact check" to a personal opinion and put it in line with "lies and wrong facts" ([swr3.de, 8.5.2020](#)).

However, critical doctors and scientists are concerned with nothing less than exact figures on the number of people who died of Covid-19. They seek an answer to the question of whether the patients died *from* or *with* the new coronavirus. Because: "The Robert Koch Institute (RKI) had warned against autopsies of Corona deceased people in order to protect the medical profession from infection." ([sueddeutsche.de, 21.4.2020](#)). This recommendation was only lifted at the end of April 2020, after some pathologists got to work

and found: "All corona deaths who had been induced had previous illnesses" ([forschung-und-lehre.de, 22.4.2020](#)). Nevertheless, this further access of the RKI cannot really be understood. According to the Infection Protection Act, the tasks of the RKI include "the development and implementation of epidemiological and laboratory-based analyses as well as research on the cause, diagnosis and prevention of communicable diseases" ([IfSG 27.3.2020 Art. 4](#)). The RKI must consequently differentiate between laboratory-supported data and extrapolations (excess mortality) when reporting corona deaths, as in the case of the flu.

2.4 Laws and EU Treaties are Violated in the Standby mode of the Parliaments

This sub-chapter is intended to refer to another important guideline of the Council of Europe on respect for human rights, democracy and the rule of law in certain emergency situations, namely "Fundamental legal reforms should be put on hold during the state of emergency." ([COE, Toolkit, 7.4.2020](#)) It justifies this recommendation by the "principle of necessity", according to which "that emergency measures must be capable of achieving their purpose with minimal alteration of normal rules and procedures of democratic decision-making". This principle is intended to prevent the Executive from seeing the emergency decrees as a *carte blanche* to push through legislation for which it would otherwise not obtain majorities.

Many EU member states have barely heeded this guideline, but in the background of the Corona crisis have introduced legislative packages that would have met with resistance under other circumstances. Germany again provides a vivid example of this: On 25.3.2020, the Federal Parliament not only discussed the reform of the Infection Protection Act as a supplementary law under the title "Act to protect the population in the event of an epidemic situation of national concern". ([IfSG, 27.3.2020](#)). At the same time, the federal government initiated further laws to cushion the economic and social consequences of the lockdown already initiated by the federal states.

This included the Supplementary Budget Act 2020, which plays a central role ([Nachtragshaushaltsgesetz, 27.3.2020](#)). After all, it made it possible for the federal government to take on new debt, for which Article 115 of the German Constitution had built in a high obstacle, namely the debt brake. This states that the credit limit may only be exceeded "in cases of natural catastrophes or unusual emergency situations beyond governmental control" ([GG Art. 115 \(2\)](#)). So first, the Bundestag had to determine a financial emergency. The

ruling factions have now presented a resolution to this effect, which states: "The scale of emergency is exceptional and unprecedented, its occurrence is beyond the control of the State and it is seriously affecting the State's financial situation." ([Beschluss, 24.3.2020](#)). It found a large majority in the Bundestag on 25.3.2020. In a [roll-call vote](#), 469 Members present voted in favour, 3 against and 55 abstentions. This paved the way for borrowing "which exceeds the standard limit under Article 115 (2), sentences 2 and 3 of the Basic Law by EUR 99.755 billion" ([Beschluss, 24.3.2020](#)).

Only a few MEPs expressed their concerns in this respect. Nevertheless, a few objections by opposition parties will be discussed here to document the relevance of the laws. For example, one FDP MP was of the opinion, that the government would "hold back a reserve of 38 billion euros", even though he agreed to it. "In view of this fact,

Figure 14:

New England Journal of Medicine: Covid-19 – Navigating the Uncharted, 26.3.2020

Editorial: Anthony S. Fauci, M.D., H. Clifford Lane, M.D., and Robert R. Redfield, M.D.

The latest threat to global health is the ongoing outbreak of the respiratory disease that was recently given the name Coronavirus Disease 2019 (Covid-19). [...]

In their *Journal* article, Li and colleagues provide a detailed clinical and epidemiologic description of the first 425 cases reported in the epicenter of the outbreak: the city of Wuhan in Hubei province, China. [...]

On the basis of a case definition requiring a diagnosis of pneumonia, the currently reported case fatality rate is approximately 2%. In another article in the *Journal*, Guan et al. report mortality of 1.4% among 1099 patients with laboratory-confirmed Covid-19; these patients had a wide spectrum of disease severity. If one assumes that the number of asymptomatic or minimally symptomatic cases is several times as high as the number of reported cases, the case fatality rate may be considerably less than 1%. This suggests that the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza (which has a case fatality rate of approximately 0.1%) or a pandemic influenza (similar to those in 1957 and 1968) rather than a disease similar to SARS or MERS, which have had case fatality rates of 9 to 10% and 36%, respectively.

Source: Fauci a.o., *n engl j med* 382:13 [nejm.org](#), 26.3.2020.

it would now be a good idea for the Federal Government to make an advance payment and to release this reserve in order to use it to overcome the Corona crisis and the economic crisis in Germany." (Dürr, [PP 25.3.2020](#)) Members of Bündnis 90/Die Grünen also criticised some aspects of the legislative measures, even though they largely supported them, for example: "Here, in turn, there is a threat of abuse and deadweight effects, as in the banking crisis, when subsidised banks used state aid for manager bonuses. Even then, the finance minister did not use the mere authorization to issue regulations." Bayram, [PP 25.3.2020](#))

The Die Linke MPs also supported most of the legislation, but put it on record: "Nevertheless, we cannot give our unconditional support to the proposed legislation. [...] There is no answer to the question of who will end up paying for the high extraordinary state expenditures. But without the use of large assets, there is a danger that further savings will be made in the public sector afterwards. It is important to do what is necessary in this situation, while respecting the proportionality of the means. This situation must not be exploited to decide on violations of fundamental rights that

go beyond the immediate management of the Corona crises." (Die Linke, [PP 25.3.2020](#)) The harshest criticism came from the AfD MPs, although most of them abstained: "Nobody who wants to preserve the social market economy in Germany, social benefits in the future and the value of our money can agree to the rescue fund and a national debt of this size, which is to be repaid over the next 20 years, almost up to my own retirement age. Anyone who tolerates this flood of money for more than a month must consequently accept inflation and ultimately affirm a radical currency reform with the devaluation of a large part of the assets and debts." (Kleinwächter, [PP 25.3.2020](#))

From a political science perspective, a whole range of questions arise, of which only a few are picked out here: It is not credible that the MPs were able to form their own independent opinion on the 9 laws presented and on other decisions and regulations in this short time ([bgb.de, 27.3.2020](#)). How could they examine all the bills, amendments and comments if they had received these documents only one or two days earlier? This also contradicts the rules of procedure of the German Bundestag ([GDB Art. 78 \(5\)](#)). It is doubt-

Figure 15:

Simultaneity of two decisive legislative procedures after the start of the shutdown:
The Act on the Epidemic Situation of National Concern and the Supplementary Budget Act 2020

Notes: 17.3.2020	Decisions of many state governments for a shutdown, i.e. quarantine for the entire population and closure of all public facilities and private service providers, starting from 21.3.2020 (spiegel.de , 21.3.2020, Link)		
Date	Institution	Reform of the Infection Protection Act (IfSG 2000)	Supplementary Budget Act 2020
		New version of the Infection Protection Act: Act for the Protection of the Population in an Epidemic Situation of National Concern	Act on the Adoption of a Supplement to the Federal Budget for the Financial Year 2020 (Supplementary Budget Act 2020) Decision based on Article 115 (2) sentence 6 of the Basic Law (GG, new indebtedness)
20.03.2020	Federal Government (BGM)	Wording aid for the CDU/CSU and SPD parliamentary groups for a bill (Link)	
23.03.2020	Federal Government (BMF)		Decision of the Federal Government on the draft law (Link), Forwarding to the Bundestag (Link) Bill goes to the Bundesrat (Link)
24.03.2020	Federal Government	Bill of the CDU/CSU and SPD factions goes to the Bundestag (Link)	Draft resolution (CDU/CSU and SPD factions) on Article 115 (GG) (Link) to the Budget Committee
25.03.2020	Bundestag Bundesrat	1. Reading in the Bundestag (Link) Draft to the Health Committee (Link) 2. Reading in the Bundestag (Link) 3. Reading in the Bundestag (Link) and adoption	1. Reading in the Bundestag (Link) 2. Reading in the Bundestag (Link) 3. Reading in the Bundestag (Link) and adoption Recommendation of the Budget Committee to the Bundestag on Article 115 of the GG (Link) Adoption of the decision (Art. 115 GG) by roll-call vote: 469 in favour, 3 against, 55 abstention (Link). Bundesrat session: adoption without consultations (Link , 18 members, except Baden-Württemberg)
27.03.2020	Bundesrat	Einstimmige Annahme der Gesetzesvorlage (Link , 21 Teilnehmer) ohne Ausschussberatung Veröffentlichung des Gesetzes (Link)	Einstimmige Annahme der Gesetzesvorlage (Link , 21 Teilnehmer) ohne Ausschussberatung Veröffentlichung des Gesetzes (Link)
Note:	Own compilation based on original source texts (Links): Legislative procedures to the Epidemic Situation (Link) and Legislative procedures to the Supplementary Budget Act (Link) @ Sabine Riedel 2020		

ful whether he may pass laws of this importance in a single day. This is mentioned in the rule for supplementary budgets, whose "final consultation [...] may take place at the earliest three weeks after submission", unless the Bundesrat agrees earlier (GDB Art. 95 (2)). But is it legal for the Bundesrat to meet in parallel with the Bundestag in a special session and adopt a supplementary budget for 2020 that was sent two days before, and this without consultations and debates on possible objections? (Plenarprotokoll, 25.3.2020: 95, Figure 15). The Federal Council has thus made itself an extra of parliamentary democracy. It did not make adequate use of its control rights and thus bears part of the responsibility for Germany's indebtedness for the coming decades.

Germany's new indebtedness will also have consequences for the EU and the euro. Indeed, the provisions of the 2013 Treaty on Stability, Coordination and Governance in Economic and Monetary Union have been ignored. It was concluded in response to the sovereign debt crisis in 2010 and committed the contracting states to budgetary discipline. Accordingly, their debt must not exceed 60 percent of gross domestic product (GDP, Figure 16). Countries can be exempted from the rule of a balanced budget "in exceptional circumstances". But this is only temporary (Fiscal Compact WWU, 10.3.2014). Above all, the contracting states can be sued before the European Court of Justice (ECJ). Germany's debt ratio was just below 60 percent of its GDP and only made itself vulnerable with its new borrowing.

The German government is counting on other EU member states also getting into debt and there will be no claimant. But Sweden, the Netherlands, Austria and Denmark, together with Germany, are net contributors to the EU (bpb.de, 26.11.2019). They could have an interest in halting the rising debt of the euro zone by bringing an action before the ECJ, especially since Sweden and the Netherlands did not choose the path of a shutdown in the Corona crisis. Germany can still rely on the EU Commission President Ursula von der Leyen, who already declared on 20.3.2020 that she would allow the EU countries to increase new debt. (zeit.de, 20.3.2020). However, she is not outside the Treaties, but only has discretionary powers in the interpretation of the Treaties.

The course towards an increasingly incalculable national debt is supported by the recent change of course of the European Central Bank (ECB). Against the background of the Corona crisis, the new President Christine Lagarde has announced to suspend the limit for the purchase of government bonds and to increase the aid pro-

gramme to 750 billion euros (faz.net, 26.3.2020). The question whether this decision is covered by the existing EU Treaties will have to be addressed by the courts. According to the latest ruling of the Federal Constitutional Court, they contradict the Basic Law in parts (sueddeutsche.de, 5.5.2020).

The southern EU members with national debts between 95 (Cyprus, Spain, France), 135 percent (Italy) and 177 percent (Greece) of the GDP have already put pressure on the other euro states and called for "European solidarity". In the Corona crisis they revived their old demand for Eurobonds, i.e. joint debts. This proposal did not find a majority in the European Council of Heads of State and Government. Instead, they adopted an aid package of 540 billion euros from the European Stability Mechanism (ESM) (dw.com, 6.4.2020). This could entail incalculable risks for the German federal budget, the Federal Audit Office warned (bundesrechnungshof.de, 27.5.2019).

Figure 16:

The Fiscal Compact, valid from 1.1.2013

Summary of:

Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

What is the Aim of the Treaty?

The aim of this intergovernmental agreement is to reinforce the budget discipline of euro area governments following the sovereign debt crisis that started in 2010.

Key Points

This 'fiscal compact' imposes **requirements on euro area countries concerning their budgetary policies**. Other EU countries may participate if they wish. Of the 28 EU countries, only the Czech Republic, Croatia and the United Kingdom have not signed the accord. It buttresses the reformed Stability and Growth Pact, under which:

- national deficits must not exceed 3% of gross domestic product (GDP),
- national public debt must remain below 60% of GDP.

The intergovernmental agreement has 3 main objectives:

1. To ensure national budgets are balanced or in surplus. [...]

Countries may be **temporarily exempted** from the balanced budget rule **in exceptional circumstances**, such as a severe economic downturn. [...]

EU countries may be brought before the European Union's Court of Justice if they fail to abide by these requirements. The Court may impose financial sanctions on countries that do not comply with its judgments.

Source: Fiscal Compact WWU, 10.3.2014
[Blue highlighting: S.R.]

3 Three Exit Scenarios from Standby Mode of Democracy: Restart, Adaptation or Regime Change?

3.1 Scenario 1: A Restart of Democracy with more Rights to Health

First of all, it should be noted: In mid-March 2020, the political decision-makers in Germany made a 180-degree U-turn in their assessment of the danger posed by Covid-19. Until then, they were convinced that this novel virus was comparable to flu, i.e. seasonal influenza ([tagesschau.de, 10.3.2020](https://www.tagesschau.de/10.3.2020)). The Robert Koch Institute (RKI) hastily changed its assessment of the situation and wrote in its situation report: "The COVID risk assessment of the RKI was rated high" due to 12 deaths and 7,156 infected ([RKI, 17.3.2020](https://www.rki.de/17.3.2020): 1f). On the same day, the state governments, supported by the Federal Ministry of Health, decided on a historically unique shutdown ([Pressekonferenz, 17.3.2020](https://www.pressekonferenz.de/17.3.2020)): The entire population was quarantined and all public and private service facilities were closed.

However, the citizens and thus the addressee of the emergency measures were not allowed to know on the basis of which findings the RKI completely reassessed the situation. To date, there is no laboratory-based information on whether the 7,634 deaths (status: [RKI, 13.5.2020](https://www.rki.de/13.5.2020): 1) died "because of" or "with" Covid-19. Pathological examinations, so far, indicate that other diseases may have been the decisive cause of death ([tagesspiegel.de, 10.4.2020](https://www.tagesspiegel.de/10.4.2020)). As an immediate measure, the disclosure of the relevant data on the clinical picture of the deceased is therefore essential. This is the only way to adequately assess the proportionality of the shutdown afterwards. It is needed for the simple reason of having a better basis for decision-making for future crises, especially if a second wave of corona infection is expected. ([spiegel.de, 24.4.2020](https://www.spiegel.de/24.4.2020)).

A realistic assessment of the proportionality of the emergency measures also includes a comprehensive review of the consequential damage that is already becoming apparent. In health policy, this begins with the simple question of how many (death) victims the prioritisation of corona patients has caused, for which hospitals have had to reserve capacities. How many needed operations have been postponed and what consequences did this have for the patients concerned? ([zeit.de, 10.4.2020](https://www.zeit.de/10.4.2020)) How many old people have died prematurely in nursing homes due to fear or lack of care capacity? ([tagesspiegel.de, 3.4.2020](https://www.tagesspiegel.de/3.4.2020), [Presseerklärung, 11.5.2020](https://www.presseerklarung.de/11.5.2020)) The topic of health

also concerns prevention: What negative effects did the quarantine have on the immune system and the psyche of healthy people? ([dw.com, 28.3.2020](https://www.dw.com/28.3.2020))

Since almost all age groups and social classes were affected by the emergency measures, this list of questions could be expanded any time. It should include the education system and allow assessments of the consequences of the missed daycare and schooling for children and adolescents. So far, only the advantages of e-learning have been seen ([bitd.digital, 20.3.2020](https://www.bitd.digital/20.3.2020)). Medium-sized companies and independent professions suffer a great deal of damage. The emergency measures have brought many of them into existential distress, from which they can hardly escape despite state aid ([bitmi.de, 23.3.2020](https://www.bitmi.de/23.3.2020)). In Italy, a third of companies are about to go out of business ([kleinezeitung.at, 18.4.2020](https://www.kleinezeitung.at/18.4.2020)). Just as many workers are suffering: the official figure of 10.2 million short-time workers in Germany was published at the end of April ([tagesschau.de, 30.4.2020](https://www.tagesschau.de/30.4.2020)). Should they not be able to return to work, this would lead to social upheavals.

The consequences of the emergency measures outlined here make urgent reappraisal, possibly in a parliamentary committee of inquiry. This should be of particular interest to the responsible politicians themselves, because in democracies they have to answer to their voters. Only with openness and honesty towards their own misjudgments will they survive the crisis of confidence that is already apparent today. Opinion polls seem to confirm that the governing parties are profiting from the Corona crisis. However, they were made in an exceptional situation, in a situation of fear and mutual mistrust. They can quickly turn into the opposite when the social and economic results become more visible. The population will recognise that social challenges can only be mastered with solidarity and that the "social distancing" that has been decreed creates additional obstacles. Therefore, the MPs should take the right that the reformed Infection Protection Act gave them: "The German Bundestag cancels the declaration of the epidemic situation of national concern if the conditions for its determination no longer exist." ([IfSG Art. 5, 27.3.2020](https://www.ifsg.de/Art.5/27.3.2020)). It is ultimately up to them to end the emergency mode and restore constitutional order with all its fundamental democratic rights.

After all, a health policy that serves the well-being of people and society and must not be misused for political and economic interests is best kept in a democracy. It alone offers a system of checks and balances and thus a regulated framework for discourse on health protection. By contrast, authoritarian, centrally controlled political systems, as well as systems in a state of emergency, are particularly vulnerable to the influence of lobbyists of all types. Functioning democracies, however, set them limits and oblige them to be transparent (lobbycontrol.de, 3.4.2020). After all, only democratically constituted societies are capable of asserting and enforcing ethical principles in medicine. These include the four principles made popular by the two US philosophers Tom L. Beauchamp and James F. Childress (Principles of Biomedical Ethics 2009), namely autonomy, prevention of harm, care and justice (Figure 17).

Figure 17:

The four principles of medical ethics

Quotes from: Georg Marckmann:
What exactly is principled medical ethics?

"Beauchamp and Childress reconstruct four principles for the biomedical field, which are now considered the classical principles of medical ethics.

[...] Respect for the autonomy or self-determination of the patient. The **principle of autonomy** grants everyone the right to have his own views, make his own decisions, and perform actions that correspond to his own values. [...]

The **principle of prevention of harm** [...] The principle of prevention of harm [...] The doctor should not harm the patient. At first this seems to be self-evident. However, in the case of an incurable cancer at an advanced stage, for example, the question may arise whether further chemotherapy does not harm the patient rather than benefit him and should therefore be avoided. [...]

The **principle of care** [...]: The physician should promote the well-being of the patient and benefit the patient. This includes the doctor's obligation to treat or (preventively) avoid diseases, to alleviate symptoms and to promote the well-being of the patient.

The **principle of justice** [demands] a fair distribution of health services. [...] Equal cases should be treated equally, and unequal cases should be treated unequally only in so far as they show morally relevant differences."

Source with a critical review of these four principles: Marckmann, Georg, ÄBW 12/2000: 74f.
[Translation and Highlighting bold font: S.R.]

It is also advisable to end the emergency measures as quickly as possible because in any crisis situation there are always free-riders who rely on deadweight effects. This affects not only a number of economic companies, but also political actors. Their aspirations for increased power can only be stopped on the basis of the rule of law and compliance with treaties at national and European level. The statements of the current EU High Representative for Common Foreign and Security Policy, Josep Borrell, illustrate this well. He hopes "that this crisis will lead to a new push for integration" (zeit.de, 15.4.2020) and believes that health issues are also security issues, which we cannot therefore "only deal with inside national borders". The crisis should therefore be resolved by handing over further national sovereign rights to EU institutions, which he represents. As was shown in Chapter 1.3, the supranational level already bears indirect responsibility for health policies in the EU. It had allowed the member states to pursue a policy of austerity and economisation of their national health systems for years, so that countries such as Italy and Spain were poorly prepared for the Corona crisis. So what does Borrell expect from a European solution? Should health policy in the future give way not only to financial policy, but also to security policy priorities? This would ultimately mean that the individual health protection of EU citizens would be subordinated to the collective interests of the EU member states or directly of a future superstate.

3.2 Scenario 2: Extension by Adaptation of Emergency Measures

It does not look currently as if the political leaders are drawing a line under emergency measures. Instead of accepting that the corona pandemic is ebbing - due to the RKI there were only 1,018 new cases reported on 27.4.2020 ([RKI](https://rki.de), 27.4.2020: 1) – all state governments made the wearing of respiratory masks an obligation on that day for an indefinite period (mnd.de, 26.4.2020). Why does top medical research in Germany not take note of the latest international research that considers the comparison between Covid-19 and an influenza infection to be valid? (vgl. [Fauci a.o.](https://fauci.a.o) 2020 und lonannidis 17.3.2020). Why do politicians not expect this from their scientific advisors? Apparently the emergency measures are currently to be kept in a state of suspense. Because as long as they continue to exist, there is no need for a review.

As already described above, the "epidemic situation of national concern" based on Article 5 of the Infection Protection Act ([IfSG](https://ifsg.de), 27.3.2020) may only be lifted by the Bundestag. As long as this

does not happen, the state governments believe they are entitled to withdraw or weaken emergency measures at their discretion. There is no federal regulation on this issue. This is not only a failure of the federal government, it also contradicts the guidelines of the Council of Europe of 8.4.2020 (Figure 13). According to this, extensions of emergency measures also require a clear legal basis and thus the consent of the elected representatives. But why are there hardly any objections or criticism from their side? Apparently, they are on the political defensive at the moment.

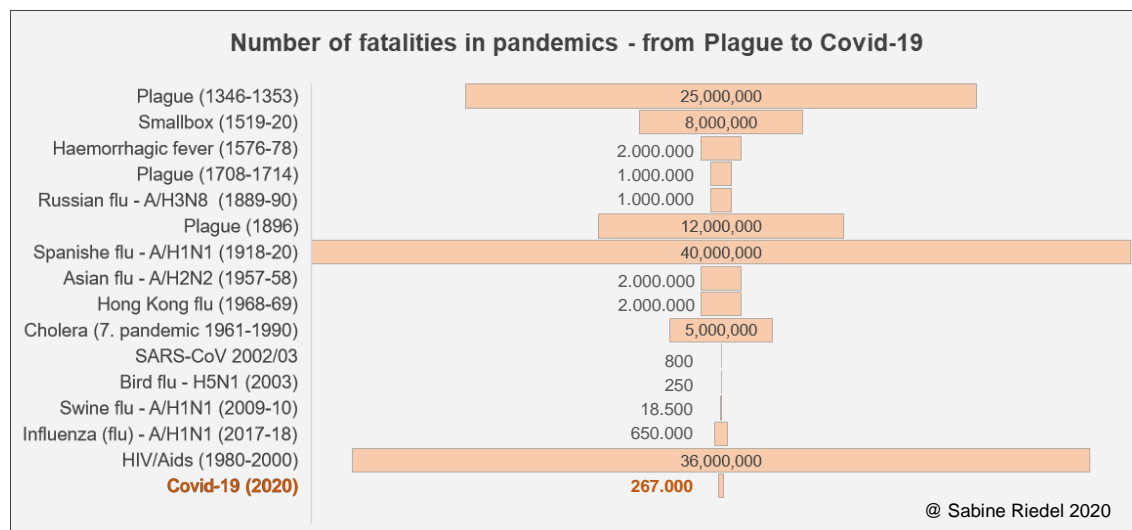
One explanation is that in the current emergency, the MPs are faced with an extremely strong executive power. Beyond the parliaments, the regional and federal levels are taking decisions that are relevant to the future. This vertical division of power offers the countries in crisis additional scope for action. They govern by emergency decrees at the expense of the traditional separation of powers between the Executive, Legislative and Judiciary. The modification of the federal system by such informal power agreements between the levels of government weakens the legislative power and restricts their democratic rights of control.

Should this current limbo continue, not only the fundamental rights of German citizens would be endangered in the long run, but also the political system itself. The shift in power between the decision-making levels of the federal and state governments could continue and disrupt the current

balance in the long term. This leads to the obvious political science question of whether the two decision-making levels of the executive branch might be able to delay an end to the emergency situation in order to gain further competencies and save them for the time afterward. It is still completely open at present in which favour this dispute could be decided.

Some media reports only describe the "struggle for competence between the federal and state governments in the Corona crisis" ([businessinsider.de, 12.3.2020](https://www.businessinsider.de/12.3.2020)) and see German "federalism on the test bench once again" ([rnd.de, 5.5.2020](https://www.rnd.de/5.5.2020)). Other voices, however, blame federalism for the spread of Covid-19 ([Cicero, 11.3.2020](https://www.cicero.de/11.3.2020)) and express doubts about the "patchwork corona rules" ([tagesschau.de, 27.3.2020](https://www.tagesschau.de/27.3.2020)). However, not only an increase in the power of the federal government is conceivable. Considering the popularity of independence movements in Europe, a strengthening of the state governments is also possible. Examples such as Scotland or Catalonia show that separatist forces see themselves as a response to the recent economic crises (Riedel 2018). If the Corona crisis should also cause a major shift in economic weight within Germany, this could lead to a loss of solidarity in the form of a termination of the fiscal equalisation scheme between the Länder. Historical role models, social networks and the corresponding party programmes already exist in the EU and extend into the federal states. (Riedel 2019).

Figure 18:



Source: Own compilation of data: List of epidemics, vgl. [wikipedia, 15.5.2020](https://www.wikipedia.de/15.5.2020). The figure does not include the ratio of fatalities to the total world population. In the 14th century, this was approximately 0.5 billion people, currently 7.79 billion. About 6 percent of the world population died of the Plague, about 2.4 percent of the Spanish Flu and about 0.0034 percent of Covid-19.[status: 15.5.2020].

There are currently many indications that this second scenario of an extension and adjustment of emergency measures seems to be successful. For the present, the federal and state executives have postponed the end of the emergency measures by one month to 5.6.2020. However, the words of the German Federal Chancellery let it be noted: "We have passed the very first phase of the pandemic." ([spiegel.de](https://www.spiegel.de), 6.5.2020) Thus, Angela Merkel openly admits that the emergency situation remains despite the end of the infection wave. This is based on the speculation that there will be further outbreaks of infection. She relies on the expertise of the president of the RKI, Lothar Wieler, who is convinced "that there will be a second and third infection wave". ([welt.de](https://www.welt.de), 6.5.2020). With this forecast a leading scientist fuels fear without having reliable data to make a realistic risk assessment of the new fatalities to be expected. Up to now, the RKI only speaks of "7,723 deaths in connection with COVID-19 diseases" and not of deaths caused by Covid-19 ([RKI](https://www.rki.de), 14.5.2020: 1). Until this question is clarified, even such prognoses - in scientific terminology these are hypotheses - remain implausible.

In the search for sources of possible Covid-19 waves, a recent publication of the CIDRAP Center of the University of Minnesota is found ([CIDRAP](https://www.cidrap.umn.edu), 30.4.2020). However, this is not an epidemiological study on the novel corona virus, but a prognosis based on previously known data ("stand-point" paper, cf. [tagesspiegel](https://www.tagesspiegel.de), 5.5.2020). The authors use the method of analogy, i.e. a comparison with Spanish flu, which occurred in three waves between 1918 and 1920. However, there are not only arguments for such an analogy, there are also some reasons against it: The number of victims alone raises doubts: at that time between 25 and 39 million people died worldwide in two to three years ([Michels 2010](https://www.michels.org)), some even assume up to 50 million deaths. In contrast, about 267,000 people have died worldwide with Covid-19 ([worldometers.info](https://www.worldometers.info), 7.5.2020, Figure 18). Putting this figure in relation to the world population, the analogy is even more misleading. The Spanish flu, for example, claimed the lives of about 2.4 percent of all people, but this ratio is only 0.0034 percent for Covid-19 so far. Even if two more such pandemic waves are expected, the figure of 0.01 percent is hardly exceeded. The forecasts of the RKI are thus anything but alarming. One should rather fear media reports preparing a new shutdown.

Figure 18 also contains the fatalities of the influenza pandemic in 2017/18. It covers double the number of victims as that of Covid-19 and confirms all those experts in Germany who did not

switch to a new crisis mode in mid-March but warned against overreacting. Some recalled the experiences from the bird and swine flu 10 to 15 years ago: The WHO was not only wrong in classifying the two infectious diseases as pandemics. Their decision was made due to the significant influence of international pharmaceutical companies. Faced with this health threat, they sold vaccines, most of which had to be destroyed later. They caused a damage of 239 million euros for Germany only. ([spiegel.de](https://www.spiegel.de), 25.11.2011, Figure 19).

In a realistic assessment of the danger of the Covid 19 pandemic, therefore, not only the knowledge of epidemiologists is required. Even their classification as a pandemic was a purely political decision. It is important for the public to know whether the WHO is actually following the

Figure 19:

**Council of Europe:
The handling of the H1N1 pandemic
[= Swine flu]**

b) Possible influence of the pharmaceutical industry on public health decisions and conflicts of interest of scientific experts involved [...]

20. Another factor which nurtured suspicions about undue influence was the fact that the pharmaceutical companies had a strong vested interest in the declaration of a pandemic and subsequent vaccination campaigns. This interest arose from recent contractual arrangements regarding any new influenza pandemic (some were concluded between member states and pharmaceutical groups in the period 2006/2007 just after the avian flu scare). Various European countries signed so-called "sleeping" contracts with large pharmaceutical groups which were supposed to take effect on the declaration of a pandemic by WHO.

21. The commercial interests in the pandemic and vaccination campaigns can be illustrated by the high levels of benefit to pharmaceutical companies. According to estimations by the international investment bank JP Morgan, the sales of H1N1 vaccines in 2009 were expected to result in overall profits of between 7 and 10 billion dollars to pharmaceutical laboratories producing vaccines. According to figures presented by Sanofi-Aventis at the beginning of 2010, the group registered net profits of 7.8 billion Euros (+11%) due to a "record year" of anti-flu vaccines sales [...]

Source: Parliamentary Assembly, Council of Europe, Social, Health and Family Affairs Committee, Rapporteur: Mr Paul Flynn, The handling of the H1N1 pandemic: more transparency needed, [COE](https://www.coe.int), 23.3.2010; Initiator für den Untersuchungsausschuss des Europarats war Dr. Wolfgang Wodarg, [Blue highlighting: S.R.]

health interests of the citizens with its decision. Or has it perhaps given priority to the private interests of market-dominant companies, as it did with bird and swine flu? This question must be part of an honest political debate about health policy, on which democratic institutions decide.

Here, the recent reform of the German government's Infection Protection Act gives cause for concern. Because some of the innovations revolve around the question of future vaccinations, i.e. the group of people affected and the relevant decision-making bodies. In article 20 (6) it says: "The Federal Ministry of Health is empowered to order by legislative decree, with the consent of the Bundesrat, that threatened parts of the population must participate in protective vaccinations or other measures of specific prevention, [...]". (*IfSG*, 27.3.2020) The Robert Koch Institute (RKI) has already been instructed to set up a "permanent vaccination commission" (cf. article 20 (1)). In that way, an important decision-making competence that was until now in the hands of physicians will be transferred to a bureaucratic and politically controllable institution. This is not only lacking in confidence, but also contradicts medical knowledge. The public discussion about the newly introduced obligation to vaccinate against measles has already shown that vaccinations are not a panacea, but must be individually adapted to each patient (*DAZ* 15.11.2029).

3.3 Scenario 3: Political Governance through Social Intermediaries

The recent reforms of the German Infection Protection Act indicate a third possible scenario for an outcome of the corona crisis. The powers of the central state were not only expanded, but in some cases passed on to intermediaries, i.e. to "agents" between citizens and the elected government. This continues the trend that the public sector is commissioning more and more private service providers to develop solutions to complex topics of our modern society. If democratic control works, different interests are taken into account and the common good is not forgotten, there would be little to object to. In exceptional situations such as the Corona crisis, however, the institutional control mechanisms were weakened or completely removed, so that in the end a system change is also conceivable. A political system could be established in which the government steers through decisions that no longer result from a democratic decision-making process, but through intermediaries or mediators. Experts from institutions, media or NGOs would give the Executive the necessary legitimacy for its actions.

The term intermediary stands for agent (cf. lat. "lie inbetween") and has become common in recent years in contexts of state regulation of the Internet. For this specific area, it refers to (online) services "which perform a mediating function between digital content and users. They usually do not offer their own content, but draw the user's attention by aggregation, selection and presentation to content created by third parties (and possibly their own)" (*Intermediäre*, 2018). Typical examples of such "information intermediaries" are search engines on the Internet, app platforms, news services and sales platforms.

The term is equally suitable for describing current socio-political developments. This could consolidate the increasingly dominant role of social intermediaries such as non-governmental organisations (NGOs), foundations, associations and the media and change the political and economic system for the long term (Figure 20). The difference would be based on the fact, that intermediaries not only accompany future decision-making processes, but also decisively influence them. Their expertise makes it easier to present policies that are detrimental to citizens as constraints. Because the role of the well-informed mediators gives the impression that they are neutral observers who look at the problems objectively and always strive for the best solution for the benefit of all. In this way, not only oppositional opinions and alternative approaches are faded out, but also the sovereign, who in democracies has the choice between different policy offers, is made superfluous.

Behind the scenes there is a tough battle for influence on relevant legislative processes, especially among intermediaries. Lobbying in health policy in particular shows how large the diverging interests really are, even if they remain hidden from the public. An analysis of the activities of all parliamentary committees in the 2009-2013 legislative period has shown that the Health Committee is a "showcase for the associations". There "a whole army of experts - and lobbyists - appeared: 528 external experts submitted 1274 statements. (*aerztezeitung.de*, 11.2015). This revealed a particularly large imbalance between the large central associations and smaller, less active organisations (*Dhungel, Linhart 2015: 759*). The current list of all associations registered in the Bundestag contains on 886 pages exactly 2317 organisations (*Öffentliche Liste*, 30.4.2020).

Thus, parliamentary democracy in Germany has developed already in the direction of a democracy of associations (*HHU*, 10.5.2020) and created the structural bases for a possibly new system, in which in future powerful intermediaries

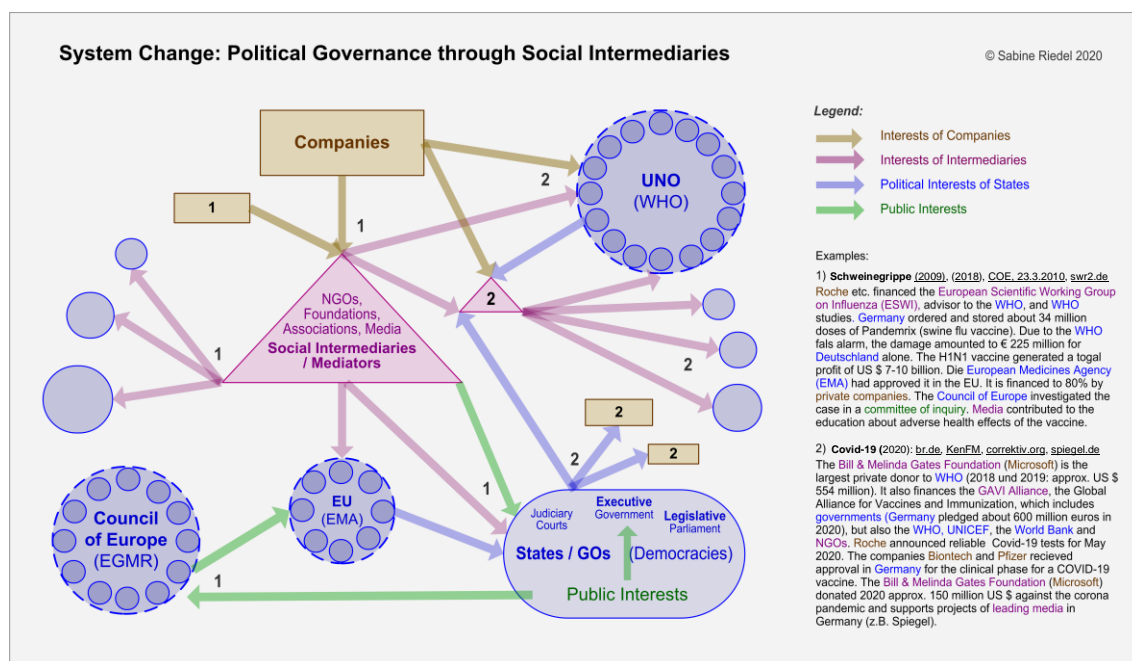
initiate laws without the sovereign being able to check or correct them. With the removal of legislative and judicial control mechanisms, which have so far been guaranteed by parliaments and courts, executive and economic power would move closer together. Through their respective "intermediaries", they could in future control both states and entire economies. Such a system would thus not only contradict democratic principles, but above all the market economy model. Even if it has been weakened for years, it would end normatively after such a system change. The middle class as the backbone of market-based democracies would disappear and leave the field entirely to market-dominant companies (Atlas-In-itiative, 23.4.2020). The counterpart at the political level would be a centrally controlled economic policy that intervenes directly in economic life according to need or balance of power.

At first view, 30 years after the end of the Cold War, such a new form of central government economy is simply inconceivable. Many people, especially in Eastern Europe, made sacrifices during the period of transition in order to gain a foothold in the new free-market systems. Quite a few have lost their jobs or suffered the consequences of social decline. For this very reason, this third scenario can only be implemented against the will of a large part of the population. It will once again divide Europe, and Germany in particular, because the memory of the socialist systems is still

present in the states of Central Eastern and South Eastern Europe. These authoritarian regimes, despite their differences, were all centrally administered economies in which politics and economics were controlled by a party elite.

However, a possible new intermediary-driven system will not simply return to the old socialist model, even if the planned state holdings in large companies as a result of the Corona crisis would suggest it (dw.com, 19.3.2020). It will only use those instruments of socialist planned economy that serve to keep the new ruling elites in power. The question of where the journey will then take us can only be answered if the relationship between the political and economic actors outlined in Figure 19 and the role of the social intermediaries are analysed more carefully. It is useful to examine the transformation research of the past three decades. However, it is not enough to refer only to common doctrines (Merkel 2010). In fact, there are further attempts to explain the system transformation in Eastern Europe, which has been more or less successful. The approach of the convergence theory is meant here, according to which opposing social systems, over a certain period of time, mutually align and develop similar structural elements. Based on this approach, it can be shown that no clear "winners" emerged from the block confrontation in 1990. (Riedel 2015: 245f.) On fact, in the past 30 years, the democratic and free-market systems have changed

Figure 20:



Quelle: Eigene Zusammenstellung

significantly and created something new for which science does not yet offer any suitable terms.

To answer the question of how a new authoritarian and centrally controlled economic model could look like, it is worth looking at China. It is striking that this country was completely excluded from the transformation research of the 1990s. This is because the People's Republic refused to transform its system. This has surprisingly hardly affected his relations with the western industrialized countries (europarl.europa.eu, 16.12.2015). In contrast, the reform states of the former Eastern Bloc were under the observation of ranking agencies and transformation researchers for many years in order to review the reform programs, most of which were prescribed from outside (bpb.de, 2004, Höhmnn, 2004).

However, the Chinese Communist Party (CP) also started reforms in 1992 and introduced a "socialist market economy" without touching on its single-party rule. It has only extended property rights and allowed private companies to operate. Whether this led to a market economy with functioning social security systems is disputed among experts. Critics consider the term "state capitalism", coined by Max Weber, to be more suitable, in which state and private enterprises coexist (Krätke 2012: 17). However, in this Chinese economic and social model, human and civil rights are disregarded, and "democracy" is considered a foreign word. Nevertheless, current German textbooks on political education already regard it as an "alternative model for governance in the 21st century". According to this report, not China, but "the market-based democracies that have dominated the economy and technology up to now would probably have to face systemic competition". (bpb.de 2018: 29). This view loses its credibility in the Corona crisis, because authoritarian governments appear to be inflexible and unable to learn, even as they seem to have everything under control (tagesschau.de, 21.4.2020).

3.4 Outlook: The Future is not Fixed – Democracy is the Right Answer

As reported by the NGO Reporters Without Borders (ROG), the Corona crisis is being used by authoritarian regimes not only in China but worldwide to discredit opposition movements and journalists. It provides the pretext for arrests due to the spread of alleged false reports about the dangers of Covid-19: "Far too many governments are reacting to the Corona crisis with authoritarian reflexes of censorship, surveillance, repression and disinformation." (ROG, 11.5.2020) By restricting freedom of expression, they play a decisive role

in withholding important information, adopting questionable sources uncritically and preventing open discussions on pandemic measures. They conclude: "Those who now restrict independent reporting not only increase insecurity, but also expose people to very real dangers."

This statement contains the decisive argument for open and democratically constituted societies. Only they provide the framework for a broad exchange of information and expertise that is needed for sustainable problem solving. An interest-driven elite will never outweigh the intelligent answers that people from different professions, social classes and age groups can come up with. That is why the governments of Western democracies today must be asked why they are reacting to the Corona crisis with the same measures as, say, authoritarian-led China? Apparently they have lost confidence in the efficiency of democratic systems and underestimated their own people in dealing responsibly with their fellow human beings. This mistrust is becoming more visible every day as emergency measures continue without real threat. Inner-party critics, especially within the opposition, are threatened with expulsion proceedings (tagesspiegel.de, 9.5.2020, mdr.de, 11.5.2020). This reaction was last seen in the former GDR towards civil rights activists (SED, Parteistrafen).

German leading media, which see themselves as the "fourth power", that is, as a social corrective, are currently fanning this mistrust of the population: "Corona conspiracy theories. In the social media and meanwhile also on the streets, an alliance of bullshit is forming in the matter of Corona. In parts violent." (spiegel.de, 10.5.2020) With such statements, journalists not only violate their own terms of use to create an "open, friendly and respectful climate of discussion" (spiegel.de, 22.5.2018). The word "conspiracy theory" is used to discredit more and more contributions that are essential for a pluralistic discourse of opinion. However, it is precisely the task of scientists to investigate even apparently absurd allegations. Even if some of the arguments may sound contradictory, they can inspire efforts and help to overcome the corona crisis. Those who do not critically inquire and examine will not gain new insights.

In the Corona crisis, the public broadcasters have joined in the fomentation of mistrust (mdr.de, 11.5.2020) In doing so, they react to changes in the media landscape caused by the Internet. Already in the 1980s, private broadcasters were able to break their former monopoly position. (ard.de, 12.5.2020). But the Internet has

removed the business basis from the dual broadcasting system. The social networks use new forms of production, reprocessing and exchange of information. It is true that the Federal Government and the Länder have strengthened the presence of public broadcasting on the Internet with a state treaty (2018) and reorganised it legally. (Dörr, 14.6.2019). But they hardly fulfil their public mandate to support diversity of opinion on the Internet if they support private monopoly providers such as YouTube, Facebook or Google in censoring the content of social networks (mdr.de, 10.5.2020), or if they themselves become involved (swr3.de, 12.5.2020). In an open competitive society, they will not succeed with this, they can only convince with quality.

Social science research refers to social networks on the Internet as "digital civil society" (bpb.de, 13.5.2020). Strengthening civil society actors is a key objective of the German Federal Ministry for Economic Cooperation and Development abroad. It says: "In addition, a pluralistic and free civil society contributes to social dialogue, political participation and constructive state-civil relations, thereby reducing the risk of violent conflict." (bmz.de, 11.5.2020). German civil society should not only be heard, but also be involved in political decision-making processes, even more if their expertise is in demand, as is now the case. But the reality is different: Employees currently have to fear for their jobs if they trust experts whose questions and advices are not politically desired (spiegel.de, 10.5.2020, cf. the statement of experts in Figure 21).

But this example also shows that civil society in Germany, despite its limitations, is increasingly rethinking its strengths. It has succeeded in warning part of the MPs against the negative consequences of an immunity card. Under the leadership of Health Minister Jens Spahn, the Federal Government has proposed a change to the Infection Protection Act, which had been revised only one month earlier, namely on 27.3.2020, and which had given the shutdown a legal framework (see Figure 15). The aim of the proposal was to insert a fifth paragraph in Article 22, which would have made the vaccination certificate a document which proves immunity against a communicable disease (IfSG-Entwurf, 29.4.2020: 20).

Apart from the fact that such proof is questionable from a medical point of view, in the long term this could significantly restrict the freedoms of citizens: "And the app developer, who already has the necessary digital ID in his program, is already advertising with the tempting prospect of then being able to travel again without any problems or

go to a concert." (tagesspiegel.de, 4.5.2020) The Bundestag rejected this supplementary proposal in the first reading of the law (IfSG-Entwurf, 5.5.2020). He should now go further and ensure clear legal relationships: either by abolishing the sometimes arbitrary emergency measures or by a clear, nationwide legal basis

Figure 21:

Joint press release of the external experts of the Corona Paper from the Federal Ministry of the Interior, 11.5.2020

"Conclusion:

All in all, at the request of a courageous employee of the BMI, we have shown the manifold and serious adverse effects of corona protection measures in the medical field, and these are serious. For us, the whole process gives the impression that, after a certainly difficult initial period of the epidemic, the risks have now not been considered to the necessary extent, and particularly not in a comprehensive risk assessment. With regard to reporting on this process, we are asking you to focus on the substantive value of our analysis and to report on us, in office and in person, in a manner which is appropriate to the serious situation. The disease Covid-19, caused by the coronavirus SARS-CoV-2, is serious for many people in the known risk groups. As with any serious infectious disease, it is important to find the best treatment for patients and to stop infection routes. But therapeutic and preventive measures must never be more harmful than the disease itself. The aim must be to protect the risk groups without jeopardising medical care and the health of the population as a whole, as is unfortunately happening right now. We in science and practice as well as very many colleagues daily experience the consequential damage of corona protection measures on our patients. **We therefore ask the Federal Ministry of the Interior to comment on our press release and hope for a pertinent discussion that will lead to the best possible solution for the entire population in terms of the measures.** [...]

From the Annex:

"In March and April, 90% of all necessary operations were postponed or not carried out. [...] Thus 2.5 million patients were not operated on in March and April 2020, although this would have been necessary. [...] Experts estimate that there are between 5,000 and up to 125,000 patients who will die because of the postponed operations."

Source: Presseerklärung, 11.5.2020, nine experts (general practitioner, microbiologist, pharmacologist, psychologist, pathologist, dermatologist, social scientist; highlighting bold in original, blue: S.R.)

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