COVID-19 Governance in Germany

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1. Basic statistical information on COVID-19 in Germany[1]

Since the detection of the first COVID-19 case on January 28, 2020 until September 21 at total of 272,337 people have been positively tested on SARS-COV2[2] in Germany, 242,200 had recovered or finished quarantine and 9,386 died in relation with COVID-19.[3] After an initial period of significant growth from end of February to end of March when the rate of positively tested was highest (about 9% in week 14), a substantial decline was registered to a quota of about 1% by end of May. Since then the quota has remained more or less stable (see Appendix, Figure 1).

The testing capacity and policy have been changed significantly over time, in Germany. At the beginning of the pandemic, the testing frequency was limited to between 130,000 (March) and 300.000 (April) weekly tests (see above). These were predominantly concentrated on people with symptoms and those in contact with positively tested persons. The German testing policy was on the one hand adapted quantitatively by expanding the testing capacity to about half a million weekly tests by July and even more than a million by September (from 6,000 to 12,000 weekly tests per million inhabitants). The testing frequency was thus multiplied by the factor eight. On the other hand, the testing strategy was altered by increasingly including people without symptoms or contacts to positively tested (particularly travellers returning from holiday) and shifting to a mass testing strategy. The extended testing activity was accompanied by increasing absolute case numbers, yet also a quite stable quota of positively tested from July to September (See Appendix, Figure 2).

From an international comparative perspective, the German testing intensity is with about 200,000 tests per million inhabitants by 12th October 2020 quite high (higher quota have been registered inter alia for the US, Russia, Spain, Belgium UK and Israel). With its health system, largely based on outpatient care structures, in Germany, patients were mostly tested and cared for outside the hospitals which relieved the latter from a run and saved capacities for critical cases. It is assumed that outpatient care structures play a key role when it comes to explaining varying degrees of crisis affectedness and severity (see Beerheide 2020). Additionally, infections coming from outside potentially to become dangerous for patients inside

[1] Data, graphs and figures regarding section 1 can be found in the appendix figures 1-7.
[2] In the following, we use the term "cases" for people with a positive PCR laboratory test result on SARS-CoV-2 irrespective of clinical findings.
[3] According to RKI dashboard information of 22.9.2020.

could be minimized. Lastly, yet importantly, there has never been a decision (as, for instance, in Italy, UK, US) to send infectious COVID-19 patients to care homes.

Regarding hospitalized cases, the peak was reached in April with a total of 6,032 patients which corresponds to ~~a COVID-19 related hospitalization rate of~~ 20% of infected citizens under inpatient treatment (COVID-19 related hospitalization rate). Since then the number of hospitalized continuously shrank down to about 244 in beginning of July (11% hospitalization rate) to slightly increase again to 300-370 cases in August (5-12%). According to the reports of the German Interdisciplinary Association of Intensive and Emergency Care (Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin, DIVI), the peak utilization of the intensive care units in Germany was reached on April 18 with 2,922 cases (75% of which ventilated) based on a total capacity of about 30.077 places available in ICUs (22th April 2020). Thus, less than 10% of the intensive care capacities were used by patients positively tested on SARS-CoV-2.[4] Since then, the number of cases in ICUs constantly shrank to reach a level of about 200 by September (DIVI 2020a). The total amount of hospitalized and ICU cases thus remaining below 400 since June reveals that the increasing number of people positively tested on SARS-CoV-2 did not correspond to soaring numbers of seriously ill people. Against this background, the much-feared overburdening of the German health system did not become apparent at any time up to now.[5]

First cases of death in relation to COVID-19 were registered in Germany on March 9 to raise to 9,386 until September 21 (See appendix, Figure 3). While the peak of corona-related weekly deaths was highest from week 13 (601) to week 21 (266) with a peak in week 15 (1,736), which thus contributed to an excess mortality from March to May (see below), the number of deaths related to COVID-19 has decreased since then and has reached quite stable level of between 25 and 35 cases since week 28. The median death age is at 82 years.[6] About 60% of all COVID-19 related deaths in Germany happened in care homes or other in outpatient care.[7] Measured by 100.000 inhabitants, Germany ranks significantly lower than other countries (particularly the US, UH, Italy, Spain, but also Sweden) and quite similar to Denmark and Austria (See appendix, Figure 4). There was an excess mortality from March 23 to May 3 as compared to the 2016-2019 average (highest in week 15 in April with an excess of +14%)

[4] See DIVI 2020b, Tagesreport, 20.4.2020, Deutsches Netzwerk für Evidenzbasierte Medizin 2020: Stellungnahme, 8.9.2020 (https://www.ebm-netzwerk.de/de/veroeffentlichungen/pdf/stn-20200903-covid19-update.pdf, 15.10.2020).
[5] See also Deutsches Netzwerk für Evidenzbasierte Medizin 2020: 2.
[6] Statista 2020: Todesfälle mit Coronavirus (COVID-19) in Deutschland nach Alter und Geschlecht, 13.10.2020.
[7] See Rothgang, H. et. al. (2020): Pflege in Zeiten von Corona: Zentrale Ergebnisse einer deutschlandweiten Querschnittsbefragung vollstationärer Pflegeheime, in Pflege, 2020/33, S. 265-275, Ärztezeitung, 17.6.2020.

(See appendix, Figure 5). A share of this excess mortality was due to COVID-19 (in week 15 67%, whereas in week 33 0.9%). Taken weeks 1 to 33 together, there has been only a minor excess mortality in Germany of +0,5% (+4,079 cases in total) compared to the 2016-2019 average.[8]

2. Summary of the COVID-19 strategy

2.1 Phases and events[9]

In Germany, the COVID-19 pandemic crisis management during our investigation period was marked by a swinging pendulum. That is, it went from decentralism/localism towards intergovernmentalism and joint decision-making with rather centralizing and unifying impetus, back to decentralized patterns, looser coordination across levels and more local discretion.

From an intergovernmental point of view, three phases of pandemic mitigation can be distinguished in which a repeated re-balancing between localized and intergovernmental containment strategies within the German "unitary federalism" occurred[10] (See appendix, Figure 8).

- First Phase: From the detection of the first COVID-19 case on January 28, 2020 in Bavaria until March 17, when the infection risk level was rated "high" by the RKI, the logic of pandemic management was predominantly a local or at least decentral one. Besides cancelling mass events by the *Länder* governments, no country-wide measures of containment were considered necessary. During this phase the sub-national administrations (*Länder*, local governments) managed the pandemic on their own discretion according to the Federal Law on the Prevention of Infection (IfSG) (see section 2.2). Besides contact tracing and domestic quarantining, local health authorities enacted punctual containment regulations, such as school closures or shutdowns of facilities. The county of Heinsberg in North-Rhine Westphalia (NRW), for instance, with the first German COVID-19 hotspot, was the first local government to enact the closure of all schools and kindergartens, on February 26.

- Second Phase: After the RKI adjusted the infection risk level from "low/medium" to "high" on March 17 more intergovernmental coordination of containment measures and a uniform national strategy of containment was seen as appropriate including some central-

[8] See Destatis 2020. Sonderauswertung Zu Sterbefallzahlen des Jahres 2020, 25.9.2020.
[9] For a timeline of the containment measures see Appendix figure 8.
[10] Kuhlmann, S., 2020: Between Unity and Variety: Germany's Responses to the COVID-19 Pandemic. In: Joyce, Paul/Maron, Fabienne/Reddy, Purshottama Sivanarain (Hrsg.): The COVID-19 Pandemic: Early Lessons for Public Governance. IIAS Special Report. Brussels

izing attempts in federal legislation (see section 5). "Speaking with one voice" became the predominant narrative of an increasing and rapid tightening of the containment measures and a (temporal and partial) suspension of almost all fundamental rights and civil liberties, including the right to free assembly, the right to free movement, and the right to follow a profession. With the "joint guidelines to slow down the spread of the coronavirus" adopted on March 16, the federal and the *Länder* governments attempted a harmonized proceeding in pandemic containment across the entire country. Nationwide shutdowns were enacted by all *Länder* and, step by step, all schools and kindergartens were closed, nationwide contact-bans (limited lockdowns) imposed and subsequently extended. In general, this phase was a "race to the top" regarding the *Länder* responses to the pandemic:[11] after the lockdown was decided in Bavaria and the Saarland on March 21, all other *Länder* followed suit only a day later.

- Third phase: With the numbers of cases, hospitalizations and deaths decreasing and then remaining stable on a very low level over spring and summer, the pendulum swung back again, towards more sub-national discretion and variance. Debates and decisions regarding regulations on how to exit the lockdown and how to deal with new cases in the long term became more diverse and less coordinated. NRW and Bavaria represented two extremes here, with the former standing for a more permissive approach and the latter supporting a stricter one. Although the *Länder* prime ministers and the Chancellor decided on the April, 15 to extend most containment measures (apart from the re-opening of smaller shops and schools for higher classes in compliance with the Corona hygiene regulations), much discretion and leeway was granted to the *Länder*.

2.2 Key measures of the COVID-19 containment strategy

Legal Foundations

The German COVID-19 containment strategy was mainly based on an execution of the general clause (§ 28) of the Federal Law on the Prevention of Infection (*Infektionsschutzgesetz*, IfSG) by the Länder and local governments (for more details see section 5). With their executive orders on lockdowns, contact-bans, shutdowns and closures of public facilities, the Länder governments temporarily suspended a number of fundamental rights, such as the right to free assembly, free movement, free development of the individual, free exercise of religion and free exercise of profession. The magnitude and scale of this nation-wide and partly ongo-

[11] Eckhard, S./Lenz, A. 2020: Die öffentliche Wahrnehmung des Krisenmanagements in der Covid-19 Pandemie, Universität Konstanz, S. 7.

ing suspension of basic constitutional rights is unprecedented in Germany's post-war history. Some of the containment regulations, such as the lockdown of Bavaria, nation-wide school shutdowns, the extended restrictions for restaurants and mask obligations in class rooms were considered by lawyers as unconstitutional because the general clause of the IfSG does not provide a sufficient legal basis to enact such far-reaching measures and their proportionality was increasingly questioned.[12] In the meantime, the Federal Constitutional Court (*Bundesverfassungsgericht*) and a few *Länder* constitutional courts also repealed some of the executive orders and declared them as unconstitutional. This applied for instance to the general suspension of the free right to assembly which was considered unconstitutional by the Federal Constitutional Court claiming that each individual case must be examined and decided by the respective local "assembly authorities".[13] A similar court ruling was enacted regarding the general suspension of the right to free exercise of religion).[14] Furthermore, the constitutional court of the Saarland declared the contact tracing based on a statutory order of the Saarland as unconstitutional.[15] As a reaction the Länder parliaments in Saarland but also other Länder started to draft their own laws (see section 6) aimed at continuing the containment measures on a more solid legal basis.

The following measures have been key to the German COVID-19 strategy

Cancellation of mass events, limited lockdowns and contact-bans: The first measure of pandemic mitigation was the cancellation of mass events with more than 1.000 participants recommended to the Länder governments by the Federal Minister of Health on March 8, 2020. All Länder followed this advice with varying delays. In general, this ban was extended by end of 2020[16]. From mid-March until June a considerably tighter containment strategy was pursued based on an agreement of the Länder and the federal governments adopted on March 22. The most severe measures of this nation-wide containment approach were (limited) lockdowns (March to April), shutdowns, contact-bans and closures of public facilities, including schools and kindergardens (details see below in this section). Some cities (such as Freiburg in Baden-Württemberg and Munich in Bavaria) and some Länder (such as Bavaria and the Saar-

[12] See Frankfurter Allgemeine Zeitung, 30.9.2020.
[13] See BVerfG, 15.4.2020, 1 BvR 828/20.
[14] See BVerfG, 29.4.2020, 1 BvQ 44/20.
[15] Verfassungsgerichtshof des Saarlandes, Beschluss vom 28.08.2020, Lv 15/20.
[16] From September onwards, exceptions from the rule were allowed, e.g. in regions with no cases. Furthermore, under the condition that specific "hygiene concepts" were implemented to be elaborated by local organizers, even in regions with higher case numbers, mass events were permitted again. Elements of these "hygiene concepts" were physical distancing of 1.5 m, the traceability of contacts (by way of registering details of all participants), and the wearing of face masks (where 1.5 m distancing were not possible). Based on these restrictions, in October, first football events with up to 10,000 spectators took place again.

land) had taken the lead and imposed limited lockdowns (on March 20). Two days later, all 16 Länder Prime Ministers and the Chancellor agreed upon a fairly coherent and uniform containment strategy with a number of common key measures to enforce physical distancing nation-wide. All agreed upon a limited lockdown and contact-ban (instead of a strict lockdown, such as in France, Italy, Spain etc.) which provided that people were generally allowed to leave their homes but they had to keep a distance of 1.5 meters minimum and must not appear in groups of more than 2 persons (except for families or domestic partnerships). Groups of people partying or assembling in the public were forbidden and any contacts to persons outside one's own household were to be minimized. Playing grounds for children were closed. Indoor private events and family gatherings clashing with these rules were prohibited, too. The compliance to these rules was supervised by the local authorities for public safety and order and the police. Monetary fines were introduced by the Länder governments for punishing non-compliance. In some Länder more restrictive rules were introduced.

Shutdowns: On March 20 almost all Länder imposed shutdowns of restaurants and shops. The intergovernmental agreement, adopted on March 22 provided for uniform rules. On this basis, large parts of the economy were shut down on a nation-wide scale for roughly one month (first lifting on April 15). The shutdown specifically affected the catering trade, shops, "body-related" services (hair dresser, beauty salons, tattoo studios etc.), cinemas, theatres, discotheques, bars, clubs, sport facilities. Furthermore museums, galleries, exhibitions, public memorials, zoos and botanic gardens were closed (first lifting on April 30). The assembly of people in churches, mosques and synagogues for worship was prohibited, too, including the Easter services in April (see above).

*Closing intra-federal borders and internal travel restriction*s: Besides closing external borders as decided by the federal government on March, 15 some Länder also closed their internal borders for non-residents coming from other Länder. In Mecklenburg-Vorpommern, for instance, non-residents, including those with a secondary holiday homes, were not allowed to enter *Land* anymore. Only on September 4, this Land opened up its borders again for external day tourists and citizens from other German Länder. The RKI is defining beside foreign countries also regions in Germany with more than 50 new cases on 100.000 inhabitants over a period of 7 days ("incidence rule") as corona "risk zones". In October 2020, most of the Länder enacted travel restrictions for inhabitants coming from "risk zones" inside Germany. Citizens having their permanent residence in "risk zones" were not allowed there to be hosted in hotels

or holiday apartments (so called "hosting ban"). This measure is highly controversial, the first courts have now repealed it, as first Länder governments stopped it.

Closure of schools and kindergardens: From mid-March, some local governments enacted directives for single schools in the event of detected cases[17]. This was followed by the Länder to debate school shutdowns for their entire jurisdiction and finally fairly homogeneous approaches of the Länder regarding country-wide school shutdowns and a general turn to home and remote. As schools are an exclusive competency of the Länder and kindergartens falling with the portfolio of local governments, joint federal-Länder guidelines did not include their shutdown. Despite some attempts at coordinating school policy during the pandemic across the Länder by the so-called "conference of the Länder ministers for education" (Kultusministerkonferenz, KMK), a uniform agreement on school closures could not be reached. The KMK only stipulated on March 13, that the decision on shutdown of schools and kinder gardens should be taken by the competent local health authority.[18] Although formally no harmonized solution was passed, after March, 16 step by step, all Länder closed schools and kindergartens accompanied by specific regulations on emergency childcare.

2.3 Lifting of containment and imposition of new restrictions

At April 15, the *Länder* and the Federal Government agreed upon an extension of most of the containment measures (limited lockdown, shutdown) until May 3. The *Länder* could decide autonomously about possible deviations from the general rule and to stipulate more relaxed or stricter rules for their respective territories. Thus, variation occurred in the concrete details of containment lifting in the different *Länder* and cities, with some of them enacting stricter and some looser rules. Voices in the public debate increasingly questioned why the ongoing suspension or the "re-granting" of basic constitutional rights was handled so differently from region to region. In general, it became increasingly difficult to reach uniform solutions across the Länder.

Localizing containment and introduction of the "incidence rule": There was a general trend at localizing containment policies, yet based on some country-wide standards which had been agreed by the federal and Länder governments on May, 6. The most important national standard rule regards the so called "incidence rule" monitored by the RKI based on which stricter

[17] The city of Kehl in Baden-Württemberg was the first German city stipulating a complete shutdown of schools on 12th of March 2020. The *Länder* government of the Saarland was the first Länder government to close all schools on 16th of March 2020.
[18] See KMK 2020: Zum Umgang mit dem Corona-Virus. Beschluss 369. Kultusministerkonferenz, 12.3.2020.

containment must be enacted regionally or locally under specific circumstances. According to this rule counties and county-free cities with more than 50 new cases per 100,000 inhabitants registered within seven days, must elaborate a severe containment concept including contact-bans and possible local lockdowns.

Mask obligations: The wearing of face masks in public transport, shops and other public spaces was made obligatory. Most Länder subsequently extended it to other public spaces, such as restaurants, cultural and sports facilities, public buildings, stations, platforms, hotels, office buildings etc. The wearing of face masks in public was initially (since April 15) only a joint non-binding recommendation by the *Länder* and the Federal Government based on the advice of the RKI. However, in the aftermath, Saxony, Mecklenburg-Vorpommern and Bavia were the first three *Länder* to stipulate a general mask obligation in public transport and shops. All other *Länder* followed suit and from April 27 onwards, so this became a nation-wide obligation. The City of Jena had been the first sub-national jurisdiction to introduce a mask obligation already on April 3. This, again, shows the predominant trend of a "race to the top" and the diffusion of containment measures across the country without centrally steering it.

Testing, tracking, tracing, quarantining: With the number of hospitalizations and deaths decreasing (over the summer months), testing was significantly extended from roughly 125,000 weekly tests in March to more than one million in September (see also section 1). For instance, Bavaria launched a comprehensive publicly financed mass testing strategy as part of its strict containment approach. The comprehensive track and trace system increasingly faced the local health authorities with capacity problems, because they had to scrutinize each individual case (irrespective of clinical findings or symptoms) with the aim of tracing and quarantining all possible direct contact persons or, in case of major clusters or untraceable "infection chains", closing the respective facilities. Because of the amended testing strategy (see section 1) more cases (also without clinical findings) were identified and thus the "infection chains" to be traced and tracked amounted to a magnitude only hardly manageable. As a result, many local health authorities reached their capacity limits. In regions with high case numbers or larger populations the federal army (*Bundeswehr*[19]) was called by some overburdened local health authorities to support them in tracing "infection chains" and supervising quarantining. The German "Corona Warning App" launched by the federal government in June 2020 was meant to support the pandemic containment and specifically to relieve local health authorities

[19] On April 15, the federal and Länder governments had agreed that the Bundeswehr could provide support to the local authorities in contact tracing.

from at least some burdens in tracing infections chains. The download was to be completely voluntary. Although, only about 23% of the population have downloaded the App so far and despite the fact that significantly less users have reported their positive test result to the health authorities via the App than would have been possible, this was interpreted as a success by the providers.

3. Health capacities and measures taken in relation to the hospitals and care homes[20]

3.1 Basic Structures of the German Health System

Germany has a social security based system with well-established decentralized structures of outpatient medical care which – besides the public health service and inpatient care (hospitals) – have played a key role in managing the pandemic (similar to Austria, Denmark, Finland and Norway). Outpatient medical care structures have proven to be particularly important for testing and caring of mild cases which largely relieved the hospitals from an uncontrolled influx of patients and from spreading infections within the hospitals (see also section 1)[21]. Outpatient care is provided by general practitioners and specialists in private practice, whereas inpatient care is lies with the hospitals, which are run to varying degrees by public (local, state), private and non-profit organisations.[22]

Relevant key indicators show that, in public health capacities, Germany ranks significantly higher than the European average (see Appendix, Figure 7). The German health service consists of three pillars: the public health service (*Öffentlicher Gesundheitsdients, ÖGD*), the outpatient medical care (*Ambulante medizinische Versorgung*) and the inpatient medical care (*Stationäre medizinsche Versorgung*). The system is highly decentralized, involving a multitude of subnational and local institutional actors, self-governing bodies and sub-state authorities. Whereas the federal level is basically limited to monitoring, surveillance, research and legislative functions, the lion's share of health-related tasks is assigned to the *Länder* and local governments, especially in health protection and aid, supervision of professions and health care facilities, based on specific *Länder* health service laws. These tasks are institutionally assigned to the *Länder* ministries of health, most of which have subordinated health authorities (mostly combined with other related tasks like social affairs), which also provide support

[20] Key indicators regarding health capacities can be found in the Appendix, figure 9; for COVID-19 related hospitalizations and ICU capacities see also figures 3 and 4.

[21] Beerheide 2020: Ambulante Versorgung: Systemvorteil in der Pandemie, in: Deutsches Ärzteblatt, 2020; 117(41): A-1903 / B-1621.

[22] See Schölkopf, M./Pressel, H. 2017: *Das Gesundheitswesen im internationalen Vergleich. Gesundheitssystemvergleich, Länderberichte und europäische Gesundheitspolitik*. 3rd edition. Berlin; Klenk, T./Reiter, R., 2012: Öffentliche Daseinsvorsorge, privat organisiert? Ein deutsch-französischer Vergleich der Bereitstellung der Krankenhausinfrastruktur. *Zeitschrift für Sozialreform (ZSR)* 58(4): 401-425.

and technical expertise to local authorities.[23] Around 84.4 % of total German health expenditure is financed by government programmes and compulsory insurance, including statutory and private health insurance, additionally private households contributing 12.9 %. Health care industry is one of the largest sectors of the German economy with 11.2 % of GDP. Around 85 % of the population is covered by statutory health insurance, the rest by private ones.[24]

Sub-national health administration in Germany is part of the Länder and local governments, whereas the federal government has no de-concentrated branches. The allocation of IfSG-related tasks to the local or Länder (state) health authorities differs across Länder[25]. Although there are health authorities which form part of the Länder (state) administration (Landesgesundheitsämter), the backbone of the German public health service is made up by the 375 local health authorities (*Kommunale Gesundheitsämter*) located in the counties and county free cities. Quickly beefed up with additional money and manpower during the pandemic, they have become "one of the central pillars of Germany's crisis response".[26] However, their most important task during the COVID-19 is to implement the IfSG on their own discretion and under the supervision of the *Länder* (see also sections 2 and 5).

In Germany, the management and financing of hospitals is assumed by the *Länder* and local governments. The *Länder* have to ensure the necessary investments and elaborate hospital plans for their territory, which determine the number, the location, and the medical specializations of hospitals in different part of the Land as well as the number of hospital beds. Local governments are responsible for the management of county- and city-level hospitals, where roughly 30 % of all clinic doctors are employed. Public health experts assess the capacity and resilience of the German hospital and care system as fairly high compared to other countries, specifically in Southern and Eastern Europe, but also the UK and the US).[27]

According to a report of the European Commission on the "State of Health in the EU"[28] the health expenditures in Germany (4,300 per capita) and the number of hospitals beds per 1.000 inhabitants (8) are the highest in Europe. In March 2020, the roughly 2,000 public, private, and non-profit hospitals provided about 500,000 beds, 28,000 of which with intensive care

[23] 11 of these *Länder* health authorities have their own departments for infection protection or epidemiology. They contribute to combating the pandemic, e. g. by provision of testing capacities and development of framework hygiene plans Corona for the child day care and special educational day care centres.
[24] Data for 2019 according to Verband der Ersatzkassen, 12.10.2020.
[25] See Kersten, J./Rixen, S. 2020: Der Verfassungsstaat in der Corona-Krise, C.H. BECK, pp. 115f.
[26] Financial Times, 4.6.2020.
[27] taz, 12.3.2020.
[28] See OECD/European Observatory on Health Systems and Policies 2019: Germany: Country Health Profile 2019, State of Health in the EU, OECD Publishing, Paris/European Observatory on Health Systems and Policies, Brussels.

equipment and 25,000 with respiratory devices. The occupancy quote in hospitals was, at that time, between 70 % and 80 % and the capacities were assessed to be easily adaptable to the urgencies caused by the corona pandemic, not at least because about 100,000 hospitals beds were vacant and another 50,000 beds could be gained.[29] These comfortable starting conditions notwithstanding, a severe problem lies with the staff situation in hospitals and nursing services, which has been seriously criticized by many experts and interest associations in the Germany. According to the German hospital association, about 17,000 positions are vacant in the nursing sector and about 3,500 for medical doctors and huge numbers of additional professionals are urgently needed in the health and care sectors. The situation has grown more and more acute over the years, because working conditions in the care sector have seriously worsened, employees have become overburdened and are badly paid. From a comparative perspective, Germany is one of the European countries with the lowest number of care personnel per capita. This so called "state of emergency in the care sector" (*Pflegenotstand*) has been increasingly acknowledged in the political debates, however, without effective solutions so far. In 2018, 37 % of German hospitals were in private ownership, 29 % publicly owned and 34 % managed by non-profit providers).[30] One consequence of this New Public Management-driven trend has been that efficiency and profitability concerns have become increasingly important in hospital management – partly at the expense of employees and patients, although, in total, the investment volume has increased as a result of more private investments. The privatization and commercialization of hospitals in Germany since the 1990s is intensively debated.[31]

3.2 Increasing health capacities during the pandemic

At all levels of government, efforts were taken to increase hospital capacities and anticipate a crises-related overburdening of public health institutions as experienced in Italy which was to be avoided in Germany. On the one hand, the federal government passed a legislative proposal aimed at financially supporting hospitals and medical practitioners and reducing red-tape for special-care homes. The new federal law on "COVID-19 hospital relief" adopted on March 25, 2020 granted inter alia financial support for hospitals facing problems due to the postponement of regular operations (€2.8 billion) and for the purchase of protective equipment (financial supplement of €50 per patient). Furthermore, measures were enacted to increase the liquidity of hospitals, to compensate medical practitioners for income losses result-

[29] taz, 12.3.2020.
[30] Statista 2020, Fachserie 12, Reihe 6.1.1, Gesundheit: Grunddaten der Krankenhäuser.
[31] See Klenk/Reiter 2012: 410.

ing from decreasing numbers of patients, and to temporarily abstain from strict quality assessments and site visits in special-care homes.

On the other hand, the *Länder* took various measures to enhance their hospital capacities in preparation of an expected increase in case numbers. Their strategies were based on an agreement of the Federal and the *Länder* chancelleries passed on March 17 stipulating an emergency plan for the German hospitals. One major element of the plan was the doubling of the 28,000 places in intensive care units (25,000 of which with ventilation) and the conversion of rehabilitation facilities, hotels and bigger halls into care centres for mild corona cases. The Länder were responsible to elaborate local plans with their clinics regarding the creation of provisional care capacities for expected corona patients, if necessary, with the support of the German Red Cross (*Deutsches Rotes Kreuz*, DRK) or the Technical Aid Organization (*Technisches Hilfswerk*, THW). Furthermore, local governments developed concepts together with their health authorities and corona task forces directed at converting local real estates into hospital-like structures or re-activating vacant or old clinic estates or even construct completely new corona care centre. Last but not least, the hospitals started to re-organize their internal processes in order to be prepared organizationally for the inrush of corona patients.

A central capacity issue from the very start of the pandemic has been the availability of free intensive care units (ICU) for Covid-19 patients. Especially at the beginning of the pandemic, there was concern that – like in Italy and Spain - the capacity of ICUs could not be sufficient for the expected inrush of COVID-19 patients. However, at an early stage of the pandemic many experts declared that there was "no need to worry that a 'triage' of COVID-19 patients might become necessary in Germany"[32], provided that an exponential growth in COVID-10 patients would not happen. In addition, the federal government funded the construction of thousands of new intensive care beds with more than half a billion euros since the beginning of the pandemic. An emergency ordinance was adopted in April 2020, which provides for a daily notification of the occupancy of the intensive beds. This means that the federal ministry of health can react very quickly to impending bottlenecks. Figure 8 (See appendix) shows that the quote of ICUs occupied by COVID-19 patients in Germany has been rather low all over the pandemic. In April, when there was the peak of COVID-19 patients in ICUs, still only about 3,000 out of 30,000 ICUs were occupied by them. The respective numbers were continuously shrinking over the summer months (August: 223 ICUs with COVID-19 patients out of 30,500 ICUs in total) to slightly increase towards autumn (450 out of 3.500 in October). The

[32] Stang, A./Stang, M./Jöckel, K. 2020: Estimated Use of Intensive Care Beds Due to COVID-19 in Germany Over Time, in: Deutsches Ärzteblatt, April 2020, p. 117.

German health system has therefore been well equipped and prepared for an epidemic of national concern. So far, there has been no bottleneck regarding hospital beds and ICUs.

Additionally, more than 10,000 new beds have been n created since the beginning of the pandemic, there was a surplus in bed capacities for (expected) COVID-19 patients rather than a shortage (See appendix, Figure 9). Against this background, the federal policy which obliged the hospitals to keep considerable parts of their capacities clear for expected corona patients became increasingly criticized by experts. Paired with the generally shrinking non-COVID surgery in hospitals during the pandemic and the compulsory postponement of plannable operations (agreed by the federal and Länder governments) this policy led to a situation in which hospital capacities became increasingly under-utilized. By end of April 2020, about 50% of all plannable operations had been cancelled and there was an increasing concern about the accumulation of postponed operations[33]. By May, more than 908,000 plannable operations had been cancelled, including around 851,000 elective interventions and 52,000 cancer operations.[34] Hospitals receive financial compensation for operations that are postponed. Whereas over the summer months hospitals had re-started to conduct the postponed operations, since beginning of October, a further postponement of operations is being realized in order to keep intensive care beds clear for the expected (second) wave of COVID-10 patients.

3.3 Care Homes

About 40% of COVID-19-related deaths in Germany (3,736 residents and 41 employees) have happened in various types of care facilities[35] and roughly 60% in care homes for the elderly or other in outpatient care). Because of the median death age of COVID-19 patients of 82 years in Germany, the focused protection of care homes is key to pandemic management. However, the situation in German care homes was from the beginning much worse than that of hospitals. Whereas a general containment approach for the whole population was in the centre of pandemic management, the focused protection of vulnerable groups, specifically elderly people with pre-existing illnesses, was less emphatically pursued by policy makers. This is all the more puzzling as the dramatic problems regarding the staff situation in care homes, the chronic underpayment, overburdening und poor qualification of the employees have been well-known since many years. Furthermore, serious hygiene problems in some homes have also been discussed publicly since decades. Taking into account that the pandemic has turned out to be by far most dangerous for the 80+ aged with underlying health condi-

[33] Se statement by the president of the German Hospital Association, Gerald Gaß (see Gaß in BZ, 17.4.2020).
[34] Data according to Die Welt, 29.05.2020.

tions, care homes were conspicuously ill prepared. These shortcomings dramatically popped up during the pandemic. Yet, the political responses were criticized by many.

In contrast to the joint regulations quickly achieved for nation-wide general shutdowns and lockdowns, there was no intergovernmental agreement on a uniform handling of 12,000 care homes and no nation-wide protective standards were defined, for instance regarding staffing or stocking of protective equipment. This was repeatedly criticized by experts and interest groups, for instance, the German Foundation for Patients' Protection stating that "for the high-risk group virtually nothing happens". The foundation demanded to send nursing staff from the (under-utilized) hospitals to the care homes – a proposal which was not taken up however by the federal government. Although the federal and Länder agreement of 16 March and corresponding *Länder* regulations obliged care homes to restrict visits from outside, the concrete measures were largely left to local discretion. In view of the understaffed situation and the precarious shortage in protective equipment for the nursing staff, by March, all German municipalities issued a complete ban on visits to almost all care homes, in some cases even complete lockdowns for the residents[36]. The consequences for the latter were fatal because many of them came to be completely isolated and deprived of any contacts to their closest family members, which has also been labelled as the "by far most severe intervention into fundamental basic rights over the entire corona period"). According to a survey conducted by the German Care Association (BIVA-Pflegeschutzbund in May 2020, with more than 1,000 respondents (predominately relatives of residents), dramatic health consequences have resulted from the contact bans and lockdowns in care homes: about 70% report a general deterioration of the state of health, 65% a decrease in cognitive skills and 50% significant weight losses (). Although, since May 2020, the visit bans on care homes have been lifted stepwise, the situation remains strained and sound concepts of focused protection with respect of the dignity and basic rights of the elderly are still lacking. So far, the major emphasis of coping with the problems has been to enact new regulations regarding visits and contact limits, e.g. limiting the number of visitors, registration before and screening after entering, recording in a visitor list, prohibiting visits in private rooms, permanent wearing of face masks etc. In addition, according to a draft bill from 15 October onwards a national mass testing strategy will be implemented in care homes. However, 70% of the respondents who participated in the above-mentioned survey claimed that the lifting of the ban achieved in May has not brought about noticeable improvements so far.

4. Economic Rescue and Stimulus Measures[37]

In the first half of 2020, the German economy found itself in the deepest recession in its post-war history. Following a decline of 2.0 % in the first quarter of 2020, the German GDP shrank by 9.7 % in the second quarter, which represents a historical quarterly decline never seen before. Three in four German companies were negatively affected by the COVID-19 pandemic (see KANTAR 2020a: 2020b).[38] The economic sectors that have been hit mostly are hospitals, healthcare, social services, vehicles and machinery, and food production. Companies were most frequently affected by a loss in demand and cash-flow problems. Approximately half of all German private companies had to shut down their operations temporarily, either partly or fully. The last forecasts for GDP development in 2020 by leading German economic research institutes are currently (September 2020) between -5.2 % (IMK and ifo Institute), -6 % (DIW) and -6.25 % (IW; see also appendix).[39] The decline in GDP is expected to be somewhat less than in the global financial crisis 2009, when German economy collapsed by 5.7 %.

Because of the intensive use of an extended short-term allowance, the unemployment rate rose from 5.1 % in March to 6.2 % in September 2020.[40] Approximately 25 % of this increase is corona-related, mostly because unemployed people under the pandemic conditions have more difficulties to find a new job).[41] Unemployment in Germany fell in September 2020. Since July 2020, there has been "no corona-related increase in unemployment on the labour market"[42] and since May 2020, all labour market indicators have continued to recover.

Several instruments, some of which already known from previous crisis periods (e.g. financial crisis 2008/09), have been applied to remedy the economic impacts of pandemic containment.

Short-time allowance (Kurzarbeitergeld) which is in Germany a "classical" instrument of economic crisis mitigation in Germany played also a decisive role in the current crisis in order to temporarily saving jobs and securing the existence of companies, similar to the financial

[37] For key indicators regarding the economic impacts of the crisis see Appendix, figures 10-12.

[38] KANTAR 2020a: *Betroffenheit deutscher Unternehmen durch die Corona-Pandemie, Mai 2020*, KANTAR 2020b: *Betroffenheit deutscher Unternehmen durch die Corona-Pandemie, zweite Erhebungswelle, Juli 2020* (Studien im Auftrag des Bundesministeriums für Wirtschaft und Energie).

[39] See DIW 2020: *German Economy: On the Long, Slow Road to Normality*, DIW Weekly Report, No. 10, 11.9.2020, ifo Institute 2020a: *ifo Business Climate Index Rises*, September 2020, ifo Institute 2020b: *Economic forecast Autumn 2020*: German Economy still on force for recovery, 22.9.2020, IMK 2020: *Prognose der wirtschaftlichen Entwicklung 2020/2021*, IMK-Report 161, September 2020, IW 2020: Weite Wege der Erholung. IW-Konjunkturprognose Herbst 2020 (IW-Forschungsgruppe Gesamtwirtschaftliche Analysen und Konjunktur) (IW-Report 46/2020.

[40] Bundesagentur für Arbeit (2020): Monatsbericht zum Arbeits- und Ausbildungsmarkt September 2020.

[41] See Frankfurter Allgemeine Zeitung, 1.10.2020.

[42] Bundesministerium für Wirtschaft und Energie 2020: Die wirtschaftliche Lage in Deutschland im September 2020, Pressemitteilung, 14.9.2020.

crisis of 2008. In the course of the pandemic, temporary regulations were introduced, on 1 March 2020 until the end of the year, to simplify and increase the receipt of short-time allowance, which have been extended until the end of 2021. Employees whose wages are reduced by at least half receive up to 70 % of the lost net wage from the fourth month of receipt (77 % for employees with at least one child) and from the seventh month on 80 % (87 % for employees with at least one child). The maximum duration of short-time allowance, paid by the Federal Employment Agency (*Bundesagentur für Arbeit*), is 24 months. The number of short-time allowances peaked in April 2020 with 5.95 million recipients. This tool has proved to be quite effective because it relieves employers of the salary costs for their employees, which helps to avoid immediate dismissals and facilitates to keep employees in the companies.

Economic rescue packages with multiple corona emergency funding schemes: The economic rescue package (Rettungspaket) enacted by the federal government in March 2020 represents the most comprehensive state aid provided to the economy in German history so far. The package included a rescue fund of about €600 billion for medium-sized and larger companies, which consisted of loan guarantees amounting to €400 billion, €100 billion for state holdings in companies and €100 billion to finance easier access for bridging loans from the state-owned German reconstruction bank (*Kreditanstalt für Wiederaufbau*, KfW). Furthermore, aids for small businesses and solo entrepreneurs worth around €50 billion were enacted. The measures embraced a total value of around 750 billion euros[43] and were voted in the *Bundestag* on 25 March with the rare unanimity of all its parliamentary groups; the Bundesrat agreed on 27 March. In addition, VAT was reduced from 1 July to 31 December 2020. The regular tax rate drops from 19 percent to 16 percent, the reduced tax rate from 7 percent to 5 percent.

These additional expenditures encompass inter alia a global corona-budget for any possible crisis-related contingencies (€60 billion), support for the public health system to fight the corona virus (€3.1 billion) and social protection measures for job seekers (€3 billion). In this context, the government has also reshaped the bank-rescue fond created during the bank crises of 2008/09 into a new economy stabilization and rescue fond which allows for granting additional money to firms. All in all, the federal budget is expected to increase from € 343 billion Euro to €508 billion and the indebtedness to €231 billion, which is unprecedented in the history of this country. Lacking reliable data, the supplementary budget passed on March 24 basically draws on the experiences made during the bank crisis of 2008/09.

[43] Bundesministerium für Finanzen/Bundesministerium für Wirtschaft und Energie 2020.

The Ministry of Economic Affairs and Energy enacted a rescue package for businesses, small and medium sized enterprises and freelancers directed at granting immediate financial help to small enterprises (up to €50 billion), also including subsidies for small and medium-sized enterprises and solo-freelancers not to be paid back. Furthermore, liquidity assistance, the possibility of tax deferrals and a more flexible handling of short-time allowance are provided as well as state guarantees for up to €600 billion as part of the new economy stabilization and rescue fond. €100 billion are made available for the state to nationalize (at least partially) strategically important big enterprises, such as Lufthansa, which were seriously affected by the crisis, in order to avoid the selling of these companies to foreign investors during the crisis (their re-privatization is intended however after the crisis). Again, it falls to the administrative portfolio of the Länder to manage the subsidies granted by the federal government and to handle the local application procedures. Currently, the federal government offers 10 different corona funding schemes (see appendix, Figure 11).

Whereas the measures initially received much support in the public debate, more recently they become increasingly criticized because of being socially imbalanced, granting not enough support to socially vulnerable people, neglecting the cultural sector and for being overly focused on the demand side. In addition to the federal government's rescue package, many German *Länder* have enacted own measures to support their economies, amounting to €141 billion in direct support and €63 billion in state-level loan guarantees).[44]

Social protection: On March 23, the federal Ministries of Labor and Social Affairs and Health put forward a whole package of social protection measures directed at absorbing situations of social hardship and existence threatening circumstances caused by the pandemic. For one, the access to basic security benefits for job seekers (so called Hartz IV) was simplified, in order to offer quick support to the employees which may lose their jobs during and in the aftermath of the crises, many of whom coming from small businesses, freelancers or so called "solo-entrepreneurs". These groups belong to the most seriously hit economic actors because in many cases the shutdown entailed a complete cancellation of all orders and a breakdown of all business activities. In addition, owners and employees of small businesses and solo-entrepreneurs usually have no access to unemployment benefits or other social security measures and do not have noteworthy financial reserves at their disposal to bridge income losses over longer periods of time. Furthermore, a moratorium for rents was enacted from

[44] See IMF (2020): *Policy Responses to Covid-19*, Country Policy tracker Germany, 24.9.2020.

April to September 2020 in aid of those tenants who were not in the position anymore to pay their rents as a result of income losses caused by crisis-related shutdowns and lockdowns.

Paradigm shift in financial policy and new debts: The pandemic has profound financial consequences for Germany).[45] To finance the economic crisis mitigation programmes, the federal government decided to run up new debts of 156.3 billion Euro which represents the biggest new indebtedness ever seen in this country. With the economic rescue package, the federal budget in 2020 will exceed the permitted credit limit of 99.755 billion euros. This clashes with the constitutionally enshrined debt brake (with upper limit for structural net borrowing at 0.35 % GDP) and represents a fundamental paradigm shift in German financial policy. For the first time, the constitutional option was used of temporarily suspending the debt brake. This is possible in the event of natural disasters or exceptional emergency situations which are beyond the control of the state and have a significant negative impact on the state's financial position. To make the suspension of the debt brake legally possible, the Bundestag decided, in an urgent procedure on March 25[46], that the exceptional emergency situation according Article 115 Basic Law applied and that on this basis the constitutional debt brake was to be lifted for the 2020 budget year. So far there has been a second supplementary budget for 2020 and the first parliamentary debate on the budget for 2021 (see appendix, Figure 12).

5. Emergency Organization and Procedures

5.1 Managing Emergencies in the Federal System

Predominance of subnational actors

Coordination in the federal system is based on the highly decentralized and fragmented structure of the German politico-administrative system. One salient feature of the Corona crisis management is the lacking power of the federal level to impose pandemic emergency measures (such as shutdowns, lockdowns) to the whole country. As the German government

[45] See Bundesministerium der Finanzen 2020a: Entwicklung des Bundeshaushalts bis einschließlich August 2020. Monatsbericht September, Bundesministerium der Finanzen 2020b: Bundeshaushalt 2021 und Finanzplan bis 2024 – parlamentarische Beratungen beginnen, 2.20.2020, DIW 2020: *German Economy: On the Long, Slow Road to Normality*, DIW Weekly Report, No. 10, 11.9.2020, ifo Institute 2020a: *ifo Business Climate Index Rises*, September 2020, ifo Institute 2020b: *Economic forecast Autumn 2020*: German Economy still on force for recovery, 22.9.2020, IMK 2020: *Prognose der wirtschaftlichen Entwicklung 2020/2021*, IMK-Report 161, September 2020, IW 2020: Weite Wege der Erholung. IW-Konjunkturprognose Herbst 2020 (IW-Forschungsgruppe Gesamtwirtschaftliche Analysen und Konjunktur) (IW-Report 46/2020), Gebhardt, H. & Siemers, L.-H. (2020). Wirkung der Corona-Krise auf die Staatsfinanzen, in: Wirtschaftsdienst 2020/7, pp. 468-470.

[46] Altogether 469 votes (3 against, 55 abstentions, all AfD). Such a decision requires the so-called "Chancellor Majority", i. e. the majority of the members of the Bundestag, which currently has 355 votes.

did not make use of the constitutionally possible regulations on an internal emergency (Art. 91 Art 35 Basic law), but applied the general clause (§ 28) of the Federal Law on the Prevention of Infection (*Infektionsschutzgesetz*, IfSG), the intervention powers of the federal government in governing a pandemic crisis remained rather limited from the very beginning.

Within the German administrative federalism, the IfSG is executed by the *Länder* and local governments. Based on its general clause (paragraph 28), the *Länder* authorities have the right to impose restrictions to their populations in case of specific risk situations, such as the one caused by the SARS-CoV-2 virus. The Federal Government can give recommendations to the *Länder* and push for coordinated measures, but it is not in a position to impose these.

To achieve nationwide emergency solutions and uniform standards, both the horizontal self-coordination of the 16 German *Länder* and the vertical involvement of the federal level is necessary. Initially, the *Länder* differed widely in their approach, in particular regarding lock-downs, shutdowns, and school closures. After several meetings of the *Länder* Prime Ministers and the Chancellor the regulatory landscape looked quite homogeneous in the different regions, with some stricter handling in Bavaria and a more relaxed approach, at least to some respect, in North Rhine-Westphalia and Brandenburg. Convergence was also a result of court decisions. The Länder variance grew again with the lifting of the measures (see section 2).

The local health authorities which are part of the local governments (in cities and counties; see institutional description above) can draw on longstanding experiences in managing health threats, such as SARS in 2003, bird flu in 2006 or swine flu in 2009, but also in containing local outbreaks of measles and other infectious diseases. These tasks belong to their traditional portfolio of functions. They have proven to be institutionally resilient and viable in coping with them. Over the course of previous epidemics, German local health authorities (*Gesundheitsämter*) became more and more experienced in tracking infection chains, tracing contacts and containing virus spread, which proved to be particularly useful in the COVID-19 pandemic. This institutional legacy might be an important difference to unitary centralized countries (such as the UK) where subnational and local expertise and know-how in pandemic mitigation are less valued and trusted by central governments.

Preparedness: Pandemic Plans and Risk Analyses

In Germany, the first national pandemic plan was published by the RKI as the federal authority for disease surveillance and prevention in 2005. This plan was revised and updated several

times, most recently on 4 March 2020).[47] It forms the general procedural framework for prospective pandemic preparation and containment measures. Furthermore, all German *Länder* and many local authorities have established pandemic plans for their territory which are based on the national plan. For instance, the Land Brandenburg adopted one in 2007; amendment in March 2020).

In the corona crisis, these plans served as salient sources for national and sub-national policymakers as well as for local professionals and managers to take concrete actions, establish necessary governance structures (e.g. crisis task forces), and to decide upon appropriate measures of crisis management during the various phases of the pandemic (containment, protection, mitigation, recovery). However, crisis management practice has shown, that the various pandemic plans are not always compatible, but sometimes rather conflicting which has made the coordination of containment measures across jurisdictions difficult.

Risk analyses: In Germany, risk analyses have become important instruments to prepare public organizations to disasters, specifically in the context of emergencies caused by floods[48]. They have been implemented at all levels of government, however to varying degrees and with different impacts regarding the current COVID-19 crisis. According to § 18 of the Federal Law on Civil Protection and Emergency Aid (*Zivilschutz und Katastrophenhilfegesetz des Bundes, ZSKG*), the federal government is obliged to conduct risk analyses in the field of civil protection. On this basis, in 2012 a comprehensive risk analysis was conducted by the Federal Agency for Civil Protection and Disaster Assistance (*Bundesamt für Bevölkerungsschutz und Katastrophenhilfe, BBK*) and other pertinent federal offices which was approved by the German Bundestag in 2013).[49] In this analysis, various scenarios of possible disasters were modelled (for meltwater floods and pandemics) based on previous experiences with comparable emergencies (such as the Elbe flood of 2002 and the swine flu pandemic of 2009). The pandemic risk analysis was elaborated by a consortium of specialists headed by the RKI and circulated to all federal and Länder authorities.

Although this analysis included a scenario of a pandemic caused by virus SARS, the predicted damage for Germany (e.g. millions of deaths, similar affectedness of all age groups by the

[47] See RKI 2017: Nationaler Pandemieplan Teil I Strukturen und Maßnahmen, RKI 2016: Wissenschaftlicher Teil des Nationalen Influenza-Pandemieplans (Teil II), RKI 2020: Ergänzung zum Nationalen Pandemieplan. COVID-19, 4.3.2020.

[48] Floods are among the most dangerous natural disasters in Germany and have become increasingly serious over the last decades.

[49] Deutscher Bundestag, Unterrichtung durch die Bundesregierung, Bericht zur Risikoanalyse im Bevölkerungsschutz 2012, Drucksache 17/12051, 3.1.2013.

virus) does not correspond to the current COVID-19 pandemic. It turned out to be much milder in its health-related effects than the modelled one, but some of the envisaged protective measures and the modelled collateral damages (e.g. economic and societal impacts) partly do reflect the current situation. Interestingly, however, this risk analysis and the prognosis of a SARS virus pandemic has not explicitly been taken into account by decision-makers, specifically to meet preparatory measures, such as recruiting and upgrading medical and nursing staff, purchasing or self-producing protective devices and material and establishing appropriate governance arrangements in preparation of the predicted event. Critics have even labelled this non-decision making as an indicator of "state failure".[50] Though such an assessment might be overdone, the ignorance of existing risk analyses reflects the government's insufficient preparation for major health crises.

Regarding the local level of government, a survey conducted by the German Joint Agency for Local Government Management (*Kommunale Gemeinsschaftsstelle für Verwaltungsmanagement, KGSt*) revealed that less than 10 % of the German local governments have implemented a comprehensive risk management system for their entire territory whereas about one third declares to have a risk management for parts of the jurisdiction.[51] The same applies to emergency plans which have come into operation only in a minority of German local governments during the Corona crisis).[52] Specifically, smaller municipalities with less than 5,000 inhabitants (making up 73 % of all German municipalities) do not have activatable emergency procedures or strategies for their territories. Furthermore, existing emergency plans have often proved to be useless because they have been tailored to different kinds of disasters than pandemics (e.g. floods) or are outdated.[53] Another (non-representative) survey found out that only one third of public risk management systems explicitly include pandemics as a possible risk.[54] Thus, risk management worked rather poorly as a tool for crisis preparation in the current COVID-19 pandemic.

The poor functioning of risk analysis as a tool of emergency management does not only apply to the ex-ante and ongoing assessment of first-round crisis effects, that is the immediate health-related damages to be measured by numbers of infected, hospitalized and deaths. It even more applies to the so called "risk-risk trade-offs" or "second-round effects" of crisis

[50] Jessica Hamed in Frankfurter Rundschau, 25.3.2020.
[51] See KGSt 2019: Umsetzungsstand des kommunalen Risikomanagements. Ergebnisse einer Umfrage: Schlussfolgerungen und Handlungsempfehlungen, 1/2019, Köln.
[52] See Public Governance 2020, Zeitschrift für Öffentliches Management, Sommer 2020, Berlin, p. 8.
[53] See Erhardt, C. 2020: Virus traf Deutschlands Kommunen unvorbereitet (https://kommunal.de/corona-umfrage-buergermeister, 29.3.2020)
[54] See Public Governance 2020: 8.

management to be calculated in a comprehensive multi-dimensional risk assessment.[55] This analysis is meant to explore the expected collateral damages of the crisis mitigation measures themselves (so called "second-round effects") which are related to any type of coping strategy and which can be economic, social, political, mental, environmental but also health-related on the longer run. Such an assessment which, by including un-intended side-effects of pandemic containment measures, would lead to a more balanced multi-dimensional risk-analysis and correspond to the constitutionally required proportionality principle of crisis mitigation policies (especially when accompanied by the suspension of fundamental rights).[56] However, multi-dimensional risk-assessments according to the proportionality principle, as, for instance, claimed by the German National Academy of Sciences Leopoldina, have been applied during the crisis only rudimentary and delayed by the Länder executives, if at all.[57]

5.2 Deviations from normal procedures and institutional blueprints

Cross-departmental emergency task forces

Although in times of peace hazard control and danger prevention are essentially subnational tasks assumed by the German *Länder* (see Art. 30 Basic Law), in risk situations of national concern the federal government can grant support to the Länder (information, advice, provision of resources). Additionally, it has to make sure that a coordination between the Länder and the federal level is guaranteed regarding risk assessments and protective measures. In the case of national emergencies, the establishment of inter-ministerial emergency task forces at the federal level of government is provided as a pertinent tool of coordination across departments. This type of cross-departmental organization represents an exception to the normal departmental principle (Ressortprinzip) which is constitutionally enshrined and otherwise predominant in German governmental coordination at the federal level. The cross-departmental composition of the emergency task forces is meant to bundle various departmental interests and to guarantee for horizontal coordination and a joint approach of central-level emergency management in cases of large-scale risk situations, such as a pandemic.

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[55] See also Collins, A./Florin, M.-V./Renn, O. 2020: COVID-19 risk governance: drivers, responses and lessons to be learned, in: Journal of Risk Research, online.

[56] In Germany, the principle of proportionality (or prohibition of excess) is a general public law principle derived from the rule of law, which all state interventions in the rights of the individual must comply with. It is composed of the requirements of the suitability of any government measure, its necessity and proportionality. The principle of proportionality means that any state interventions must be proportionate to the desired achievable goal. Authorities should not take any harder action than is absolutely necessary. The proportionality of any state decisions can be checked in court in the event of complaints by those affected.

[57] See Leopoldina 2020: Dritte Ad-hoc-Stellungnahme: Coronavirus-Pandemie – Die Krise nachhaltig überwinden, 13.4.2020, p. 11.

During the COVID-19 pandemic, this task was assumed, from 27 February onwards, jointly by the federal ministries of health and of interior as lead ministries of the task force which met twice a week. Furthermore, representatives of the ministries of economy, finance and social affairs and other departments were included taking into account the high risk of collateral damages for the economy and society. Furthermore, two (a small and a large one) federal-level "Corona Cabinets" were established, which met twice a week during the shutdown.[58]

For the coordination between the federal and the *Länder* governments, in national risk situations with a high demand of intergovernmental consultancy, a specific inter-ministerial coordination group is formed (*Interministerielle Koordinierungsgruppe des Bundes und der Länder, IntMinKoGr*) to guarantee for coordinated action across federal departments and across Länder based on professional expertise regarding risk assessments, forecasts, jointly agreed recommendations and communication strategies. The IntMinKoGr group is operationally supported by the Federal Agency for Civil Protection (Bundesamt für Bevölkerungsschutz und Katastrophenhilfe, BBK) which assumes general management office functions for this group. During the COVID-19 pandemic, the advice given to the *Länder* in this group was mainly based on the risk analyses of the federal ministries of health and interior focusing in particular on health-related risk assessments.

By mid-March, all Länder governments also set up emergency task forces to cope with the pandemic crisis in their territories. These emergency task forces worked in close collaboration with inter-ministerial coordination groups to ensure an intergovernmental (with the federal and local levels) and inter-departmental coordination of mitigation measures. In the Land Brandenburg, for instance, such a team was established on the 14 March, led by the Secretary of Health. In the up to now peak of the pandemic, this inter-ministerial coordination group met around the clock in the Brandenburg Ministry of the Interior in its coordination centre for crisis management. Its major task was to bundle the manifold and rapidly changing information coming from the federal government and other German *Länder* in order to constantly reassess the regional pandemic situation on this basis, adopt the necessary measures and take the coordinative efforts with the federal level and, if applicable, with other *Länder* governments. The group published a daily report "Corona".

[58] The so-called small Corona Cabinet, headed by the Federal Chancellor, included the federal ministers of defense, finance, the interior, foreign affairs, health and the head of the Federal Chancellery. The so-called large Corona Cabinet additionally included all specialist federal ministers who are responsible for the topics on the agenda. If, for example, the matter of organizing enough harvest workers was on the table, the federal Minister of Agriculture was included (see federal government, press release, April 9, 2020).

Whereas local governments played only a minor role in the crisis-related decision-making bodies of the *Länder* and were often confronted with "accomplished facts" (as the Schleswig-Holstein Prime Minister Günther admitted later[59]), they assumed a number of key functions regarding local pandemic containment and health protection.[60] Within their broad multi-purpose task portfolio, local governments were not only responsible for health-related issues but, more generally, for pandemic crisis management in the territory, the horizontal coordination of various crisis-related administrative units at the local level as well as for the vertical coordination between the respective *Länder* authorities and the federal level (specifically the RKI). They took major decisions on crisis mitigation and pandemic containment and were also in charge of organizing the related administrative processes and the communication activities with the local public.

On the local level of government, too, cross-sectoral coordination of emergency management was ensured by specific emergency task forces which had been formed in all counties and county-free cities since mid-February 2020. They were aimed at supporting the local executives in all crisis-related issues, internally coordinating mitigation measures and guaranteeing for coherence of crisis management across administrative units and with other local jurisdictions. The composition of these Corona emergency task forces varied across jurisdictions, yet in general they reflected the multi-functionality and the cross-cutting horizontal coordination capacities of local governments in Germany. This should be explained using the example of the crisis team in the Rhine county Neuss (North-Rhine-Westphalia), which met since the 26 February. The team is headed by the head of the county administration.The heads of the following departments have been participating: local health authority, local board for public safety and public order office (*Ordnungsamt*)[61], school and youth offices, social welfare board, personnel office, municipal supervisory authority (*Kommunalaufsicht*), county press office, county fire brigade control centre (*Kreisleitstelle der Feuerwehr*) and county liaison command of the *Bundeswehr* (*Kreisverbindungskommando*) as well as the medical director of

[59] Der Tagesspiegel, 7.6.2020.

[60] Franzke, J. 2020: German Municipalities in the COVID-19 Pandemic Crisis. Challenges and Adjustments. A preliminary analysis, Online-Report for International Geographical Union.

[61] In this specific case, the regulatory office of the county administration is meant, which is responsible to averting threats to public safety or order in the territory and includes a uniformed enforcement service. But there are also such offices in the larger cities. In some German Länder, even Länder authorities also have regulatory competencies.

the rescue service and the county fire brigade chief.[62] Depending on local circumstances, additional external experts were involved, e.g. from the police or from municipal hospitals.

Depending on the local infection situation, since the 20 April, many counties began to withdraw staff from their emergency task forces or finish their activities. Since August 2020, crisis teams have been reactivated in a number of jurisdictions where the numbers of positively tested increased.

Push towards centralization and challenged checks and balances

The pandemic was also used by political actors as a "window of opportunity" to achieve changes in the institutional setting.[63] As explained earlier, the decentralized setting of the German pandemic management essentially allocates operational decision-making and executive competencies to sub-national actors (Länder, local governments) and thus legally limits federal government's intervention possibilities. Although not being the result of systematic regulatory analyses or evidence-based assessments, the Federal Minister of Health succeeded in strengthening his institutional position by shifting powers in the institutional system of check and balances and gaining additional competencies regarding sub-national pandemic management.

Initially, the Federal Government planned to be authorized to declare (and stop) an epidemic emergency of national concern without involving the Bundestag (Details below in this section). However, these ideas were rejected by a majority in the *Bundestag*. On 24 March 2020, the FDP, Linke and Bündnis 90/Die Grünen (three of four opposition parliamentary parties in the *Bundestag)* achieved that the decision-making power on the declaration and lifting of an epidemic emergency of national concern was allocated to the parliament. Thus, the new law on "the protection of the population in the event of an epidemic emergency of national concern", could be passed based on a broad cross-party consensus in parliament. Only the AfD and the Linke abstained. Drawing on this new legal construction, the *Bundestag* can now declare (and stop) an "epidemic emergency of national concern". By securing the right for the legislature to decide about a national emergency and advocating the preservation of the par-

[62] See Rhein-Kreis Neuss, Pressemitteilung, 20.3.2020.
[63] See Kuhlmann, S./Hellström, M./Ramberg, U./Reiter, R., 2020. Tracing divergence in crisis governance: Responses to the COVID-19 pandemic in France, Germany and Sweden compared. In: IRAS 2021 (forthcoming).

liamentary reservation even during the pandemic, the separation of powers between the executive and legislative branches remained secured in this respect.[64]

According to the amended § 5 IfSG, within the emergency of national concern, declared on the 27th of March, the Minister of Health gains considerable additional powers and discretion to decide measures unilaterally and to issue orders in the (otherwise decentralized) pandemic management system as long as this emergency situation persists. The Ministry of Health is then authorized to enact exceptions from IfSG by way of simple statutory ordinances without parliamentary approval and without consulting the Länder and their parliamentary chamber (*Bundesrat*), which some lawyers consider as unconstitutional[65] or at least constitutionally questionable.[66] The problem here is that the extent and magnitude of these possible exceptions from the law have not been specified which entails the danger that large parts of the federal law could be derogated by one single ministry. The new intervention powers of the Minister of Health under this pandemic emergency rule include inter alia the right to order physical examinations for travellers, travel bans for specific countries, and to secure the purchase of medicaments and cures, medical products, and materials for disinfection and laboratory prognostics. This authorization is limited in time, but must be withdrawn on 31 March 2021 or 31 March 2022 (Section 5 (4) IfSG, new version) or when epidemic emergency does not persist anymore.

According to a report of the Scientific Service of the German Bundestag, the new § 5 IfSG addresses important incisions into constitutionally enshrined basic rights, even the right to life and physical integrity, for instance when it comes to possibly bring insufficiently tested medicaments and cures on the market.[67] Regarding these parts of the law, the Bundestag and the Länder have no means to intervene or to prevent the enacted changes which obviously challenges checks and balances during the "emergency rule".

The amendment of the IfSG pushed towards more centralization and a strengthening of the federal level (ministry of health and RKI) in times of a pandemic threat. The result is a weakening of the *Bundestag* and the *Länder* once an epidemic emergency has been declared, thus a clear upgrading of the central-state executive, specifically the Minister of Health. Against this background, since beginning of May, two opposition fractions in the Bundestag (AfD, FDP)

[64] See Kropp, S. 2020: *Zerreißprobe für den Flickenteppich? in:* Verfassungsblog.de, 26.5.2020.
[65] Thielbörger, P./Behlert, T. 2020: in: COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze; in: Verfassungsblog.de, 26.9.2020.
[66] See Wissenschaftliche Dienste Deutscher Bundestag 2020: Staatsorganisation und § 5 Infektionsschutzgesetz (Ausarbeitung), 2.4.2020, S. 6.
[67] Ibid, S. 7.

have demanded the annulment of the exceptional legal situation of a "epidemic emergency of national concern", also pointing to decreasing COVID-19-related infection, hospitalization, and death rates in Germany, in order to re-establish the normal situation of checks and balances in the federal system. In a legal expertise of the FDP fraction it was criticized that maintaining the epidemic emergency (lasting for more than 7 months at time of writing) constitutes a constitutionally alarming exemption regime because one single ministry is empowered to enact exceptions and deviations from parliamentary laws not been precisely specified and defined. On 6 May 2020, the AfD proposal –to revoke the national epidemic situation[68] was rejected by all other parliamentary groups. Another attempt of the FDP on September, 17 was also rejected[69]. Further proposals with similar intentions submitted by the AfD have not been decided yet at time of writing.[70]

Drawing on the new "emergency rule", the ministry of health made extensive use of its upgraded regulatory competencies. A range of new ordonnances were enacted which in a "non-emergency situation" would not fall to the regulatory competence of the Minister of Health, for instance new ordonnances regarding stock increases of medicaments for intensive care, licensing regulations for doctors, dentists and pharmacists, securing training in the health professions, compensating financial burdens of dentists, drug providers and maternal health care facilities, procurement of medical products and personal protective equipment, ensuring the supply of the population with medical products as well as on the international travel.

The "carte blanche" authorization of the Ministry of Health concerns substantial parts of federal regulations which are actually or potentially affected[71]. Though during the "emergency regime" the executive is undoubtedly (and intendedly) strengthened, while the parliamentary opposition finds itself weakened regarding pandemic regulations, it must be reminded that the opposition fractions had finally not opposed against the "emergency law", but voted in favour of it (FDP, Bündnis90/Die Grünen) or at least abstained (AfD, Linke). However, the critique

[68] See Deutscher Bundestag, Drucksache 19/18999, 6.5.2020.
[69] Deutscher Bundestag, Drucksache, 19/20046, 16.6.2020.
[70] See Anträge der AfD-Fraktion, Drucksache 19/22551(neu), 17.09.2020, und Drucksache 19/22547, 16.9.2020.
[71] Data regarding the number of regulations concerned by the Minister's "carte blanche" vary. According to the official information of the federal Ministry of Health about 11 ordonnances are currently concerned (https://www.bundesgesundheitsministerium.de/service/gesetze-und-verordnungen.html).The legal expertise of the FDP fraction identified however more than 1,000 regulations potentially affected by this authorization (Kingreen 2020a: Stellungnahme als geladener Einzelsachverständiger zu den BT-Drucks. 19/20042, 19/20046 und 19/20565, Deutscher Bundestag, Ausschuss für Gesundheit, Ausschussdrucksache 19(14)197(2) zur öffentlichen Anhörung am 9.9.2020, p. 7~~; experts' hearing of the German Bundestag, committee for health, 9.9.2020~~).

of Prof. Thorsten Kingreen (raised in the legal expertise of the FDP fraction)[72] also concerns the fact that the public increasingly gets the fatal impression of a continued state of emergency within which the usual constitutional procedures and instruments do not work anymore, which however does not correspond to reality.[73] Given the fact that the epidemic will presumably become a part of "normalcy" at least until March 2021 (when all emergency orders are meant to expire), some assume that the constitutionally questionable state of emergency legislation could be made permanent beyond the next national elections in autumn 2021.[74] Besides the upgrading of the operative powers of the Federal Ministry of Health regarding the pandemic management and the national regulation of pandemic emergency issues, further centralizing steps were taken by upgrading the institutional position of the RKI to a "national authority for disease monitoring and prevention" discharged with new intervention powers and capacities to coordinate mitigation strategies between the *Länder* and the federal level.

~~Although there can be no doubt that the balance between the legislative and the executive branches has clearly shifted, during the pandemic, towards the to the latter and that the legal and political consequences of this shift are still being discussed controversially in the public and academic debate[75], a complete „disempowerment of the parliament in favour of an almost limitless executive"[76] does not correspond to reality.~~

At the latest since the federal law on an epidemic emergency of national concern was passed on March 27, 2020, the executive branch has clearly gained powers and dominated the German decision-making process in the pandemic. Though, the Bundestag passed some important laws and two supplementary budgets, it was in the backseat in discussing the overall strategy of pandemic management and reluctant to create a sound legal basis (by way of legislation) for mitigation measures. This also applies to most of the Länder parliaments. Since some months, the legal and political consequences of the limited role of the legislative branch have been discussed controversially in the German public and academic debate[77]. However, a com-

[72] Kingreen, Th. 2020b. Die Feststellung der epidemischen Lage von nationaler Tragweite durch den Deutschen Bundestag. Rechtsgutachten für die FDP-Fraktion im Deutschen Bundestag, 11. Juni 2020.

[73] Kingreen 2020a: 7.

[74] Ibid: 8.

~~[75] Siehe Zeh W., Zum ausnahmslosen Primat des Parlaments in: ZParl Zeitschrift für Parlamentsfragen, Jahrgang 51 (2020), Heft 2, S. 469-473.~~

~~[76] Siehe Kingreen, T. 2020: Whatever it takes? Der demokratische Rechtsstaat in Zeiten von Corona, in: Verfassungsblog vom 20.3.2020.~~

[77] Siehe Zeh W., Zum ausnahmslosen Primat des Parlaments, in: ZParl Zeitschrift für Parlamentsfragen, Jahrgang 51 (2020), Heft 2, S. 469-473.

plete „disempowerment of the parliament in favour of an almost limitless executive“[78] – like Kingreen assumed (see above), did not correspond to reality and seems overdone.

Nationwide suspension of fundamental rights by executive orders

Another deviation of the COVID-19 management from normal emergency procedures regards the decision procedure on the nationwide shutdown and (limited) lockdown. As outlined further above, these decisions were not taken by parliaments but rested with the discretion of 16 Länder governments and their subordinated authorities who enacted the respective executive orders. Waiving to draw on the constitutionally provided emergency regulations (see above) and instead applying § 28 of the IfSG, the German federal government created some important constitutional tensions. The major problem concerns the fact that the IfSG does not provide for a shutdown and lockdown of national scope, as it had to be imposed in Germany in mid-March 2020. According to §§ 28 and 32 of the IfSG the Länder governments are authorized to enact executive orders for epidemic danger defense. However, these interventions must be limited temporally and regionally. Massive and longer-term restrictions of the entire social life and individual freedoms on a national scale are, by contrast, not regulated by the IfSG.[79]

Quick consensual nation-wide decisions: federalism beyond the joint decision-making trap?

The decisions jointly agreed upon by all 16 Länder and the federal government were not only taken in a very short time based on a broad consensus across parties and levels, which conspicuously deviates from normal non-crisis decision-making in the German federal system (e.g. in the context of digitalization or fiscal relations). These decisions were also far-reaching and comprehensive in radically (although temporarily) altering the status-quo ex ante by suspending almost all constitutional basic rights on a nation-wide scale. Thus, the COVID-19 pandemic fuelled an unusual fast process of joint decision making across Länder and levels who agreed with the federal government on the tightening up of restrictions resulted in fairly homogeneous containment regulations for the entire German population. This has also been lauded as an “extraordinary political achievement”[80]. In the course of the crisis, repeated

[78] Siehe Kingreen, T. 2020: Whatever it takes? Der demokratische Rechtsstaat in Zeiten von Corona, in: Verfassungsblog vom 20.3.2020.

[79] See Papier, H.-J. 2020: Umgang mit der CORONA-Pandemie: Verfassungsrechtliche Perspektiven, in: *Aus Politik und Zeitgeschichte*, Vol. 70, 35–37/2020, 24.8.2020, S. 7. Papier was President of the Federal Constitutional Court from 2002 to 2010.

[80] Thielbörger, P./Behlert, T. 2020: COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze; in: Verfassungsblog.de, 26.9.2020.

shifts occurred between unitarization, also labelled as a "race to the top" of *Länder* responses to the pandemic[81] and decentralized decisions showing more variation between sub-national entities. But, the speed and magnitude of decisions consensually agreed across jurisdictions appear to be rather untypical for the German federal system. The procedures for enacting these measures, in many respects, deviated – time- and content-wise - from the usual joint decision-making in the federal system, which is marked by sometimes overly lengthy negotiations between veto-players, tough deliberation of contrasting opinions, give and take, but also careful balancing of interests, putting things in proportion, thorough consensus-building, and long-term sustainability of solutions.

Institutional trust and acceptance of pandemic containment measures

Despite the severe restrictions government decisions imposed on citizens, available opinion polls show a clear increase in institutional trust in all state institutions from the federal president to the local governments. The *Bundestag*, too, benefited from this positive trend (See also appendix, Figure 13)[82]. The acceptance of containment measures is an important indicator and precondition for implementation success and compliance with these rules. Regarding various types of measures (prohibition of mass events with more than 100 participants, closure of public facilities, closure of borders, general lockdown, cancellation of public transport, locating mobile phones without consent), a longitudinal study of the University of Mannheim revealed however in a representative survey[83] that the degree of acceptance to these measures has clearly declined over time since the beginning of the pandemic until July. Whereas the acceptance rate regarding the prohibition of mass events, the closure of public facilities and the closure of borders was at almost 100% in March the support shrank to between 30% (borders) and 20% (public facilities) by July. Only the prohibition of mass events was still accepted by a clear majority of the German population (64%) as an appropriate containment measure to fight the pandemic.

Other containment measures, too, which from the beginning did not receive extremely high acceptance rates in the population, were increasingly rejected by the population. Thus, the acceptance of a general lockdown decreased from more than 50% to around 10%, the cancellation of public transport from about 25% to roughly 10%. The rather low acceptance of locat-

[81] Eckhard, S./Lenz, A. 2020: Die öffentliche Wahrnehmung des Krisenmanagements in der Covid-19 Pandemie, Universität Konstanz, p. 7.
[82] Frankfurter Allgemeine Zeitung, 16.5.2020.
[83] See Juhl, S./Lehrer, R./Blom, A./Wenz, A./Rettig, T./Reifenscheid, M./Naumann, E./Möhring, K./Krieger, U./Friedel, S./Fikel, M./Cornesse, C. 2020: Die Mannheimer Corona-Stuide: Demokratiesche Kontrolle in der Corona-Krise, p. 6 et seq.

ing mobile phones without consent remained fairly stable at around 25%. At the same time the proportion of people who do not accept any of these measures increased from almost zero in March to roughly one quarter of the German population in July.

5.3 Policy-Advice and Openness of the Scientific and Political Debate

Governments at all levels (federal, Länder local) based their decisions largely on the recommendations of experts. During the corona crisis, the RKI has become the most important player in institutionalized policy expertise not only on the part of the federal government[84] but also regarding containment strategies developed by the Länder and local governments. As a higher federal authority (*Bundesoberbehörde*) it is directly subordinated to the federal ministry of health. Thus, it enjoys less autonomy and discretion than, for instance, the Swedish National Public Health Agency.[85] In the corona crisis, the advisory function of the RKI basically referred to three major fields: (1) Pre-crisis risk prognosis, including the elaboration of a national pandemic plan (see above); (2) Monitoring and publication of infection cases (positively tested by a PCR test), number of hospitalized cases, recoveries, and deaths; (3) Epidemic risk assessment based on which measures of containment, protection, mitigation, and recovery were recommended to politics and communicated to the public.

Besides internal policy advice provided by the RKI, decision-makers at all levels have largely relied on the external assessments and recommendations of the chief virologist of the Berlin Charité, Prof. Dr. Christian Drosten[86], who has served as a direct advisor to the federal government from the beginning of the pandemic. Regarding policy advice, the federal level (RKI) could only give recommendations to the Länder and local governments, and not impose any decisions to them. However, the RKI's recommendations were followed thoroughly by the *Länder* and local governments, who transformed them into binding legal decisions.

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[84] The RKI has a long history as research and prevention institute (founded already in 1891 as "Royal-Prussian Institute for Infection Diseases") and used to be affiliated to the Federal Health Authority until 2001. When the first infection protection law (IfSG) was passed and the Federal Health Authority abolished in 2001, the RKI became a subordinate authority of the Federal Ministry of Health. Its major tasks are biomedical research and epidemiological analyses on communicable and non-communicable diseases based on which the RKI provides advice to the federal government, public health authorities and the general public regarding prevention and containment measures. Furthermore, the RKI is responsible for the surveillance of public health and the detection of health risks for the population.

[85] See Kuhlmann et al. 2020.

[86] Prof. Dr. Christian Drosten is a German virologist heading the Institute of Virology at the Berlin university hospital Charité. He became known internationally when he was the first to decode the genome of the SARS virus from the group of corona viruses, which in early 2003 triggered several epidemics of atypical pneumonia, especially in Asia. Her also became nationally famous during the Swine Flu pandemic of 2009 and reached considerable prominence during the COVID-19 pandemic as the "Corona educator of the nation" (Süddeutsche Zeitung 13.3.2020). As an external advisor he is formally not affiliated to the federal government.

Unlike other policy discourses in the German federal system,[87] the scientific discourse about pandemic risk assessment and COVID-19 mitigation measures did not unfold in a vertically decentralized and fragmented manner which, in Germany, usually gears to slow and incremental change, but was clearly dominated by very few central-level advisors favouring a quite incisive and radical containment approach. Although besides the RKI and Christian Drosten, further specialists (virologists, pathologists, epidemiologists) were also present in the public from time to time, their (partly deviating) assessments and recommendations could hardly gain political and executive attention. Drastic measures were considered inevitable to slow down the spread of the virus, "flatten the curve" and thereby avoid a crash down of the health system, as experienced in Italy, Spain and the US. More moderate or sceptical opinions questioning the necessity (and maintenance) of drastic measures, such as country-wide contact-bans, shutdowns, school closures and comprehensive mask obligations could not gain notable influence up to now.

An interdisciplinary group of leading academics affiliated to the Leopoldina National Academy of Science, in their 3rd ad hoc statement submitted to the federal government on 13 April 2020,[88] claimed that the protection of legal interests other than the protection of health and life must also be taken into account by policy-makers in order to ensure the proportionality of measures. According to the Leopoldina group, multiple perspectives of different disciplinary angles must be included in a comprehensive assessment of main and side effects of crisis management to ensure a well-balanced choice of measures respecting different groups of stakeholders and societal spheres. Another interdisciplinary expert's group, based in the universities of Berlin, Bremen and Cologne, also criticized the overly narrowed public and scientific discourse[89] pointing to the necessity of a more balanced, rational, and enlightened deliberation when it comes to determine appropriate and proportional measures. Furthermore, they criticized the politicization of the pandemic and the instrumentalization of science for political aims

[87] See Kuhlmann, S./Wollmann, H. 2019: Introduction to Comparative Public Administration: Administrative Systems and Reforms in Europe. 2nd ed. Cheltenham/Northampton: Edward Elgar, p.139 et seq.
[88] See Leopoldina 2020: Dritte Ad-hoc-Stellungnahme: Coronavirus-Pandemie. Die Krise nachhaltig überwinden, 13.4.2020.
[89] See Autorengruppe 2020: Thesenpapier 4.0 Die Pandemie durch SARS-CoV-2/Covid-19 - der Übergang zur chronischen Phase, Köln, Berlin, Bremen, Hamburg, 30.8.2020, S. 7. The group was composed by renowned German scientists, inter alia the president of the Experts' Council for Health (Prof. Dr. Schrappe, University of Cologne), lawyers specialized in public health (e.g. Prof. Dr. Hart, University of Bremen), public health experts (e.g. Prof. Dr. Glaeske, University of Bremen), a specialist in forensic medicine (Prof. Dr. Püschel, University Clinic Bremen) and a political scientist (Prof. Dr. Manow, University of Bremen).

Hence, whereas at the beginning of the pandemic, predominantly virologists and epidemiologists dominated the discourse, at a later stage of the crisis, increasingly representatives from other disciplines (economists, psychologists, pedagogues, social scientists etc.) took the floor aiming to address the far-reaching non-medical impacts of the crisis on the economy, the social life, and the mental health of people. Furthermore, some lawyer pointed to the legal aspects of the enacted regulations as a violation of fundamental constitutional rights, partly questioning their lawfulness.

This partial shift in political consciousness is also mirrored by a recent proposal of the fraction Bündnis 90/Die Grünen submitted to the German Bundestag in June 2020 requesting the establishment of an independent interdisciplinary pandemic council to advise the federal government in pandemic mitigation issues based on broad scientific expertise. The council is meant to identify the multifaceted health-related, social, economic, constitutional etc. impacts of pandemic containment policies, to formulate recommendations on well-balanced containment measures and to consider results of comprehensive impact assessments.[90] The proposal, however, was rejected with the votes of the coalition fractions and the AfD on September 17.

6. The Role of German Parliaments in COVID-19 Related Decision-Making

The federal parliamentary decision-making competencies were conspicuously constrained from the very beginning of the crisis and in fact limited to the declaration of a national emergency of national concern, economic rescue and stimulus legislation, financial policies, especially adjustments of the federal budget, health-/hospital related regulations and policies to mitigate the negative social and economic impacts (un-intended second-round effects) of pandemic containment (lockdown, shutdown). The relevant laws were passed through parliament in extraordinary fast, simplified and formally reduced procedures based on an untypical broad cross-party consensus temporarily lacking any political controversy (see below). There were, for instance, three readings of major legislative acts in one day accompanied by the opposition parties waiving of their right to consultation and deadlines. Direct decisions on crisis management, pandemic containment and the suspension of fundamental constitutional rights were, by contrast, legally excluded from the *Bundestag's* mandate and rested with the Länder and local governments (see above).

[90] See Antrag der Fraktion BÜNDNIS 90/DIE GRÜNEN Pandemierat jetzt gründen. Mit breiterer wissenschaftlicher Perspektive besser durch die Corona-Krise, Deutscher Bundestag, Drucksache 19/20565, 30.6.2020.

The *Bundestag* began its parliamentary debate on the COVID-19 pandemic[91] on February 12 when the German prevention strategy against the coronavirus was discussed on request of the two coalition fractions (CDU-CSU and SPD). The debate was focused on rather specific and less strategic questions. At that time, the opposition parties began to use the various parliamentary instruments to present their ideas how to fight the pandemic. On March 4 the German government issued its first governmental declaration (*Regierungserklärung*) on the fight against the coronavirus, presented by the Federal Minister of Health[92]. However, the opposition failed in presenting real alternatives during this debate.[93] On March 6, the Federal Government informed the *Bundestag* for the first time about its intended measures in the COVID-19 pandemic.[94] When, on March 17, the RKI classified the level of risk as "high" (see above), this marked the beginning of a phase of intensive involvement of the German parliament in the pandemic-related debates regarding the above-mentioned areas of decision-making which the Bundestag has a mandate for. Chancellor Merkel gave her first governmental declaration on the strategy to fight the COVID-19 pandemic in Germany and Europe on April 23 in the Bundestag emphasizing that the pandemic emergency situation will definitely be a "democratic imposition".[95]

6.1 Securing the operational functioning of parliamentary work during the pandemic

The pandemic situation, especially the safety and hygiene precautions, the containment measures and quarantine rules, confronted the German parliament with many new challenges regarding its operational functioning. A central problem was the legal "necessity of a physical presence of the members and other participants at meetings and in sessions of the *Bundestag*" provided by in the Basic Law).[96] Therefore, in March 2020 concerns grew about the parliament's ability to work in the pandemic. Initially, the Federal Government strived for a rapid amendment of the Basic Law in order to be able to establish a small emergency parliament instead of the *Bundestag* in the event of a pandemic – similar to the Joint Committee of the *Bundestag* and *Bundesrat*, which can be set up in defence situations (*Verteidigungsfall*). The President of the *Bundestag*, Wolfgang Schäuble, too, proposed to amend the Basic Law to

[91] A dossier with all Parliamentary materials regarding the pandemic (by 3.9.2020) can be found here: https://www.bundestag.de/dokumente/parlamentsarchiv/dossier-689782.
[92] Chancellor Merkel herself was at this time in quarantine.
[93] Bundestag, 19. Wahlperiode, Protokoll der 148. Sitzung, 4.3.2020, S. 18438ff.
[94] Deutscher Bundestag 2020: *Unterrichtung durch die Bundesregierung zur Haushaltsführung 2020*. Drucksache 19/17664, 6.3.2020.
[95] Deutscher Bundestag, Protokoll 156. Sitzung, 23.4.2020, S.19296ff.
[96] Wissenschaftliche Dienste Deutscher Bundestag (2020a): *Virtuelles Parlament. Verfassungsrechtliche Bewertung und mögliche Grundgesetzänderung*, WD 3 - 3000 - 084/2, S. 3.

allow for virtual parliamentary meetings. Apparently, a parliamentary emergency operation based on the French model was also considered.[97]

However, plans for rapid constitutional change or emergency operation were rejected by a majority in parliament. Especially the opposition parties did not want to rush to change the constitution in such a sensitive area. Instead, it was agreed to amend the Rules of Procedure (*Geschäftsordnung*) for a limited period of time. Therefore, on March 25 the Bundestag decided almost unanimously to amend its Rules of Procedure until the end of September 2020 [98]. In this period, it will be sufficient for a quorum if more than a quarter of its members are present. This new rule also applies to the parliamentary committees, which can now also use electronic means of communication for voting and decision-making. Public committee deliberations and hearings can now also be conducted even exclusively by electronic means. Meetings have been shortened, and decision-making rules and voting techniques have been temporarily changed. Furthermore, the legal possibility was approved to order containment measures (e.g. quarantine rules) based on the IfSG against members of the *Bundestag*. Internally, the parliamentary groups in the *Bundestag* switched to virtual parliamentary group meetings, thus ensuring the operational functioning of the parliament during the pandemic, especially in times of lockdown and mass quarantine, though in a restricted and limited manner.

Since the end of the shutdown and lockdown, the pandemic-related adjustments to parliamentary processes have been gradually reversed, but the hygiene restrictions and containment rules (e.g. 1.5 m distance rules, quarantine regulations etc.) remain. To be better prepared for similar crises in the future, it was proposed therefore to introduce an experimental clause in the *Bundestag*'s Rules of Procedure to examine, for example, whether the possibility of allowing digital meeting formats could be made a permanent rule.[99]

6.2 Role of the opposition fractions in the German Bundestag: a phase of "truce"?

A striking feature of parliamentary decision-making during the early phase of the COVID-19 crisis was the extraordinary broad cross-party consensus and the virtual lack of party-political

[97] The President of the Assemblée nationale decided on 17 March 2020, in a telephone conference with the Bureau, to introduce parliamentary operations in a limited format ("dans un format restreint") (See Wissenschaftliche Dienste des Bundestages 2020b).
[98] Deutscher Bundestag 2020a: *Beschlussempfehlung und Bericht des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung (1. Ausschuss) "Änderung der Geschäftsordnung des Deutschen Bundestages*", Drucksache 19/18126. An extension of this deadline to 31 December 2020 is currently being discussed in the Bundestag.
[99] See Decker, F./Ruhose, F. 2020: Verliert der Bundestag in der Krise an Bedeutung? In: *Demokratie im Ausnahmezustand. Wie verändert die Coronakrise Recht, Politik und Gesellschaft?* S. 2.

competition regarding major COVID-19 related decisions of the German *Bundestag*, in particular the key legislation on an "epidemic emergency of national concern" (see above) and the first economic rescue package, both enacted end of March. Hence, "speaking with one voice" was at that time not only a guiding principle in the coordination between levels but also regarding parliamentary decision-making. Thus, the demonstrative non-partisan consensus appeared as untypical for German parliamentary reality as the mutual consent between majority and opposition thanking each other for their collaboration. This specific situation must also be understood in light of the necessity that for temporarily suspending the constitutionally enshrined "debt brake" (*Schuldenbremse*), which was an essential element of the legislative proposal on economic rescue, a so called „chancellor majority" (355 votes) was needed, thus requiring parts of the opposition's votes. There were expedited procedures and all opposition parties, even mostly the AfD, voted for the COVId-19 rescue legislation and facilitated fast decisions by abstaining from their rights on consultation and legally granted deadlines. On this basis, the government's COVID-19 economic rescue measures could be ratified by the parliament and incorporated into eight laws in an extremely speedy procedure (see section 4). Besides the two coalition factions (CDU-CSU and SPD), the parliamentary fraction of Bündnis 90/Die Grünen and the FDP voted in favour of these laws, while the AfD and the Linke approved two laws each and abstained on the others. In general, this reflects an extraordinary non-partisan consensus in the *Bundestag* triggered by the pandemic situation, also labelled as a situation of "truce" in party-political debates[100] rarely experienced in this country.

When the pandemic containment measures were started to be lifted in mid-April, two opposition fractions, FDP and AfD, explicitly proclaimed to withdraw from the "anti-Corona-consensus" in the *Bundestag* achieved in March. The other two fractions, Linke and Bündnis 90/Die Grünen, also increasingly criticized the federal government but were not so clear on their position to withdraw from the consensus (Deutscher Bundestag 2020d: 19311). However, the non-partisan consensus held firm - at least partially - in the decisions on six crisis-related laws, until the end of May 2020.[101] Voting in this period followed the coalition-opposition dichotomy in only two cases[102]. For all other laws, there was a partial consensus

[100] DIE ZEIT online, 23.4.2020.
[101] At least in one case even longer. On 17 September 2020, the left-wing parliamentary group and Bündnis 90/Die Grünen approved a bill by the CDU/CSU and SPD to amend the COVID-19 Insolvency Suspension Act (Drs. 19/22593), while AfD and FDP voted against.
[102] The "Second Law for the Protection of the Population in an Epidemic Situation of National Significance" and "Law on Mitigating the Consequences of the COVID-19 Pandemic in Events Law".

between the government coalition and individual opposition factions[103]. At the beginning of May, parliamentary activities, such as motions and minor questions, increasingly addressed long-term aspects, societal and ecological impacts of the crisis.

In general, legislative proposals were, as this is usually the case, prepared by the federal government in a particularly close collaboration with the two coalition factions of the *Bundestag* supporting the government, CDU-CSU[104] (246 MPs) and SPD[105] (152 MPs). Thus, on April 22, the Coalition Committee (*Koalitionsausschuss*)[106] of CDU-CSU and SPD decided on concrete measures to mitigate the social and economic consequences of pandemic containment. However, the key legislation on the "epidemic emergency of national concern" was also negotiated with three of the four oppositional fractions in the parliament (FDP, Grüne, Linke) to ensure a broad cross-party support of this issue and enhance the legitimacy of the law. Thus, one day before the decisive meeting in the Bundestag, the Federal Health Minister, at the request of the Chancellor, talked to the heads of these three fractions[107] who obviously wrested the consent from him that the Bundestag, and not the federal government, would be competent to declare and cancel an "epidemic emergency of nation concern" (see above). This compromise was the precondition for the opposition to support or at least not vote against the law. As a result, the much criticized "self-empowerment" of the federal executive in times of an epidemic "emergency rule" was off the table.

6.3 The Role of Länder Parliaments

Basic components of the national containment strategy were negotiated and agreed upon between the federal and *Länder* governments, thus rather marginalizing the *Länder* parliaments,

[103] The "Law on Mitigating the Consequences of the COVID-19 19 Pandemic in Competition Law and for the Self-Governing Organizations of the Commercial Sector" was passed unanimously, as was the "Law on parental allowance measures in the wake of the COVID-19 pandemic" (with FDP abstaining) and the "Law on support for science and students" (with AfD and Left Party abstaining). All opposition factions abstained on the "Social Protection Package II". The "Planning Guarantee Act" received the approval of the FDP (with Bündnis 90/Die Grünen abstaining, AfD and Left Party rejecting). The FDP also approved the "Corona Tax Assistance Act" (rejected by AfD, abstention by Left Party and Bündnis 90/Die Grünen).

[104] The CSU is part of the Bavarian *Land* government; the CDU is currently involved in government in ten *Länder*.

[105] The SPD is currently involved in eleven *Länder* governments.

[106] The coalition committee is since 1961 an informal body of the German federal government coalition made up of party-political and executive leaders from the federal and, in some cases, the Länder level. In principle, coalition committees have the task of coordinating the cooperation between coalition partners in the federal government, in the Bundestag and, if possible, in the Bundesrat. The current coalition committee includes: Federal Chancellor Merkel (CDU) and Vice Chancellor Scholz (SPD), the party leaders Kramp-Karrenbauer (CDU), Esken/Walter-Borjans (SPD), Söder (CSU) as well as the parliamentary group leaders Brinkhaus (CDU/CSU), Mützenich (SPD) and Dobrint (CSU regional group). See CDU 202): Ergebnis Koalitionsausschuss, 22.4.2020.

[107] The FDP (80 MPs) and the Left Party (69 MPs) were more closely involved into the legislative preparatory work by the Federal Government than the right-wing AfD (the largest opposition party in the *Bundestag* with 89 MPs, but politically isolated).

who are formally not needed for pandemic emergency actions. This situation was initially accepted by large majority in the *Länder* parliaments, especially during the shutdown in March/April 2020.

Over the course of the crisis, they increasingly and partly successfully searched to upgrade their role in several respects. For one, especially the opposition parties became more critical about the *Länder* governments passing COVID-19 regulations without involving the parliaments. Second, the Federal Constitutional Court (*Bundesverfassungsgericht*) and some *Länder* constitutional courts increasingly began to repeal executive containment orders from April onwards and declared some of them as unconstitutional (see section 2.2), which put the *Länder* parliaments under pressure to act themselves. Furthermore, when in May/June the unitary handling of the pandemic decision-making was skipped and intergovernmental coordination lifted, the actual discretion of the *Länder* to individually determine their own COVID-19 strategy increased which prompted some *Länder* parliaments to upgrade their role in crisis-related deliberations. Finally, there is also a party-political reason: The year of 2021 will be a "super election year" in Germany, in which, the *Bundestag* (in September) and the *Länder* parliaments of Baden-Wuerttemberg and Rhineland-Palatinate (March), Saxony-Anhalt (June), Berlin and Mecklenburg-Western Pomerania (autumn) will be elected. Anyone who wants to position him or herself politically in preparation for these elections must start now. Against this background, the complaints about and end of the "hour of the executive" in favour of an urgently needed "hour of parliaments" increased[108]. The Länder have therefore been forced to choose the legislative path for COVID-19 regulations more often than at the beginning of the crisis, which increases the formal legitimacy of these rules and leaves more space for debating alternative approaches. This, of course, also applies for economic rescue legislations, which have not only been enacted by the Bundestag, but also, in addition, by the *Länder* parliaments for mitigating the negative impacts of containment policies in their respective territories.

So far, the state parliaments have passed only a few laws during the pandemic. Thus, many *Länder* parliaments adopted supplementary budgets for 2020, such as Baden-Wuerttemberg, Bavaria, Mecklenburg-Western Pomerania and Saxony. The respective Länder governments have often been granted credit authorizations by the parliaments: in Baden-Württemberg (€ 5 billion), North Rhine-Westphalia (€ 25 billion), and Saxony (€ 6 billion)[109]. A peculiarity was

[108] See Frankfurter Allgemeine Zeitung, 10.6.2020, 21.9.2020.
[109] Siehe Gesetz zur Feststellung einer Naturkatastrophe, der Höhe der Ausnahmekomponente und zur Festlegung eines Tilgungsplans nach § 18 Absatz 6 der Landeshaushaltsordnung für Baden-Württemberg vom

the declaration of a state of emergency (*Katastrophenfall*) by two German *Länder* parliaments. Legally, this can be done by the (*Länder* or local) executives alone without involving the parliaments. However, in Bavaria and Baden-Württemberg it was decided to grant this power to the Länder parliaments[110] in order to ensure a broader political legitimacy of the exceptional legal status which equips the government with additional interventions powers and discretion. Another special case was the adoption of an own *Länder* Law on the Prevention of Infection by the parliaments of Bavaria and North Rhine-Westphalia, which expanded the state government's options for action in the event of a disaster even beyond the federal IfSG. On March 16, the Bavarian state government had declared a disaster situation for Bavaria. In addition, the Bavarian Landtag adopted on March 25, the Bavarian Infection Protection Act (BayIfSG). This determines the existence of a "health emergency" by the state government in the course of the pandemic and defines certain conditions for this. In the corona crisis, the law expands the scope of action of the state agencies and gives Bavaria's authorities extensive powers even beyond the federal IfSG.

The debate about the executive dominance in the fight against the pandemic is also growing in the *Länder* parliaments. The basic positions of the opposition and the government factions in the Länder can be well described using the example of the Bavarian state parliament. The parliamentary groups FDP and SPD have introduced, on 28 May 2020[111] and 8 June 2020[112], two drafts of an "Infection Protection Parliamentary Participation Law" to the Bavarian state parliament to increase its involvement of in the enactment of statutory ordinances under the IfSG. The parliamentary procedure on the draft laws is ongoing. In the meantime, in some

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19.3.2020, Gesetzblatt für Baden-Württemberg, Nr. 6/2020, S. 125, Gesetz über die Feststellung eines Nachtrags zum Haushaltsplan des Landes Nordrhein-Westfalen für das Haushaltsjahr 2020 (Nachtragshaushaltsgesetz 2020 – NHHG 2020) vom 24. März 2020, Gesetz- und Verordnungsblatt (GV. NRW.), Nr. 8/2020, S. 185 bis 196.Sächsisches Coronabewältigungsfondsgesetz vom 9. April 2020 (SächsGVBl. Nr. 9/2020, S. 166).

[110] The Baden-Württemberg state parliament determined on 19 March 2020 that the corona pandemic is a natural disaster within the meaning of the state budget law. This authorizes the federal state to take out loans of up to 5 billion euros, which are to be repaid within 10 years. On 16 March 2020, the Bavarian state Parliament determined the disaster in accordance with the Bavarian Disaster Protection Act (BayKSG), which was repealed on 16 June 2020. During the event of a disaster, all authorities, agencies and organizations deployed worked together under the direction of the disaster control authority.

[111] The draft law stipulates that the Bavarian state government must submit in the next twelve months all draft ordinances with restrictive effects for citizens to parliament for approval. As a rule, this should be done before publication. If this is not possible, the regulation would have to be discussed in the state parliament no later than seven days after it came into force. Otherwise it would automatically become ineffective. A debate about the ordinances issued by the state government according to the opposition "not only creates more legitimacy and transparency, it also ensures qualitatively better legislation". Siehe Gesetzentwurf zur Beteiligung des Bayerischen Landtags beim Erlass von Rechtsverordnungen nach § 32 Infektionsschutzgesetz (Bayerisches Infektionsschutz-Parlamentsbeteiligungsgesetz, BayIfSPBG) Drs. 18/7973.

[112] Gesetzentwurf zur Verbesserung der Ausübung der Befugnis des Freistaates Bayern von Gesetzen im Sinn des Art. 80 Abs. 4 Grundgesetz und zur Sicherstellung des Grundrechtsschutzes bei bayerischen Rechtsverordnungen zur Bekämpfung übertragbarer Krankheiten nach § 32 Satz 1 Infektionsschutzgesetz (Bayerisches Infektionsschutzmaßnahmen-Parlamentsbeteiligungsverbesserungsgesetz, BayIfSMPBVerbessG).

German *Länder* an ex-post evaluation of the Länder governments' COVID-19 crisis management has been started. The parliament of Rhineland-Palatinate was the first to set up a specific committee of enquiry (*Enquete Kommission*), in May 2020, to examine the precautionary and control measures against the spread of the coronavirus adopted in Rhineland-Palatinate and to work out consequences for the further pandemic policies[113]. The committee started its work on July 3, planning to present its results to the parliament and make recommendations by December 2020. In Brandenburg, too, the parliament set up on request of the AfD parliamentary group a committee of enquiry (*Untersuchungsausschuss*), on September 23, to investigate the state government's crisis policy in the COVID-19 pandemic (Landtag Brandenburg 2020).

The pandemic is not over yet, so any estimates made in this analysis can only be preliminary. The future will reveal whether and with which short- and long-term impacts Germany will manage this crisis and how this compares to other countries.

[113] The motion was accepted with the votes of the governing parliamentary groups SPD, FDP and BÜNDNIS 90 / DIE GRÜNEN and the largest opposition party, the CDU. The AfD voted against it.