

## „Law as Culture“ in Times of Corona

*Thomas Dreier*

"I sometimes don't leave the house in eight days  
and live very happily,  
a house arrest just as long on orders  
would throw me into a disease.  
Where freedom can be thought of,  
one moves in one's circle with ease,  
but where there's thought compulsion,  
even the legitimate ones come out with a shy mine."

*Georg Christoph Lichtenberg*

### **I. The limited view**

Hardly ever has so much – and so internationally – been written on a topic as is currently the case with the Corona virus. However, the chances of contributing something new with a further article are probably much lower than the risk of infection which is said to be 70 percent. Far greater, however, is the danger of contributing just another commentary, which will merely express opinions and feelings, rather than being based on established facts. Valid insights or even truths cannot be gained from the limited perspective of the home office. True, the view out of the window onto a largely depopulated near-world is complemented by the media kaleidoscope of the Internet and social media. But this technical dispositive was initially called "tele"vision, thus promising a view into the distance, merely throws us back to the closeness of or our own home environment in times in which direct, lived contact with reality is forbidden by law.

Anyway, the time lag is too short to be able to identify longer-term trends and changes. According to the paradox ascribed to Jaron Lanier, there is a general tendency to extrapolate current trends and thereby overestimate short-term effects and underestimate long-term effects. The reason simply is that a mere extrapolation of current data does not take into account the development of counterforces, feedback loops and changes in the conditions that determined the trend in the past.

In view of all this, the present article is not intended to present a major thesis spanning time and space. Rather, only some observations, assessments and individual perceptions will be made on the topic of "law as culture" in times of Corona. In the words of Werner Gephart, it is not a matter of "extracting a frivolous stimulus from the present situation", but "of addressing a neglected, namely normative, dimension of the pandemic event, which goes beyond the comparison of infection and death rates". It is worth noting, in this respect, that "law as culture" is not interested in the content of legal norms, but rather in the question of how the instrument of law is used as a cultural practice and performance in society and what are its effects in this respect.

## **II. Law as culture: Some Corona-induced functional transformations**

### **1. On the agenda of the law**

It could be argued that the law does not pursue an agenda of its own but is merely an instrument for implementing political objectives. Against such an assumption, however, it could be objected that at least fundamental rights as well as procedural rules of the rule of law seek to contain mere political decision making. In addition, as a subsystem of society, law claims to provide security and to stabilize legitimate expectations. It secures fundamental rights, strives to ensure that opportunities and resources are allocated and distributed fairly to those subject to the law, and it ensures fair procedures. Even if one is not prepared to ascribe an independent agent to law in this respect, according to the current understanding of the constitution, it is true that law has at least been used for the purposes mentioned, even if the democratic constitutional state may not – as stated by the well-known dictum of Ernst-Wolfgang Böckenförde – itself guarantee the conditions on which it depends.

This makes it seem reasonable to retrace the functional changes law may have undergone in view of the changed external circumstances of the Corona crisis. The question to be discussed here is aimed at the extent to which law continues to perform its traditional tasks in society as before the crisis, either in the same way or in a modified form. The issue is to find out and describe the shifts in the tectonics of the law, discussing whether the changes result in a strengthening or weakening of law as an instrument for structuring and solving problems of society.

### **2. Methodological considerations**

One methodological way of investigating changes in the function of law would certainly be to examine official and unofficial documents by means of text and data mining in search for the purely statistical occurrence of terms such as "law", "justice", "restriction of freedom" and the like, which speak for a strengthening of the law, as well as other terms which, like in particular that of "fear", may be interpreted as a sign for the weakening of the law as a stabilizing factor in society. Applied to text corpora before and after the beginning of the crisis, it would thus be

possible to empirically determine time lines which would indicate changes in the functions of the law.

However, in the absence of such studies the only remaining methodological option is to pursue a descriptive and analytical view. As a starting point it can be said that the characteristic feature of any emergency situation is that it makes binding decisions urgent which cannot be made quickly enough by routine procedures. What is needed are rapid solutions that do not provide the same level of detail and in which conflicting rights and interests cannot be weighed against each other with the usual care and differentiation. The question to be addressed here is how this simplification of decision-making affects the law as a means of enforcing the decisions made. This question has both a procedural and a substantive aspect, which will be dealt with in more detail below.

### **3. Fundamental observations**

Before doing so, however, two points should be noted.

Firstly, there has undoubtedly been a shift in emphasis from law to politics. More than ever before, it is becoming clear that it is the politicians who make the decisions, usually in cooperation with medical doctors (virologists) and – as in the case of the round table in the Chancellery and the Council of Experts in North Rhine-Westphalia – possibly together with sociologists, ethicists and lawyers. The government clearly has the reins of action in its hands, while the opposition has largely been pushed to the side-lines. Law, it might be concluded, is largely relegated to the role of a mere instrument for implementing political decisions. But this development may also give rise to another, contrary interpretation. After all, it may be said that law is being strengthened to the extent that territory is once again being reclaimed for regulation by state action, which was previously been left to the self-regulation of the market as well as to technology configured by private providers, which determines what users can do, regardless of what they are legally allowed to do.

Secondly, as long as a state of emergency has not been declared, which would largely suspend the law, the fundamental role of the law in structuring and procedurally determining the manner in which decisions are taken remains, as well as its claim to set a limiting framework for the contents of decisions transported by way of the law. For the time being, even in Russia, Hungary and Turkey, the politically desired changes have been implemented in accordance with the legal procedural rules in place, even if these changes – as in the case of the Hungarian Enabling Act – result in their abolition and hence a considerable restriction of the role of the law in securing freedoms.

#### **4. Procedural functional changes**

Turning to the details of functional changes of law in times of Corona, in the first place, procedural shifts come into view, i.e. changes regarding the activity of norm-setting.

Unless political action limits itself – as in the initial phase – and probably still in Sweden – to recommendations and appeals, the regulation (*Verordnung*) is the regulatory instrument of choice. It transfers decision-making powers to the executive, which in times of normality are reserved for Parliament. The instrument as such is already to be found in the police law on danger prevention and, as far as Corona is concerned, it is provided for by law in the German Infection Protection Act (*Infektionsschutzgesetz*). The constitutional framework for normative activity by way of regulations is provided in Germany by Article 80 of the Basic Law (*Grundgesetz*). According to this provision, the executive (the Federal Government, a Federal Minister or the governments of the *Länder*) to which the law-making power is delegated, may be empowered, provided that the content, purpose and scope of such empowerment are defined by law. In the case of laws that require the consent of the German Federal Council (*Bundesrat*) or that are implemented by the *Länder* on behalf of the Federal Government, or as a matter of their own, in addition the consent of the German Federal Council is required. The present considerable extension of the Federal Minister of Health's authority to adopt measures to combat Corona even without the consent of the German federal Council is reflected in the amendment to § 5 of the Infection Protection Act passed on 27 March 2020.

Insofar as the amended version of § 28 of the Infection Protection Act now also mentions freedom of movement (Article 11 (1) of the Basic Law) next to the fundamental rights of freedom of the person (Article 2 (2) sentence 2 of the Basic Law), of assembly (Article 8 of the Basic Law) and of the inviolability of the home (Article 13 (1) of the Basic Law), this is apparently intended to legitimise quarantine orders and curfews against non-troublemakers. However, this is no longer a question of procedural changes, but rather a question of the substantive content of the provisions. Furthermore, governance by means of an increasing number of regulations implies a double loss of confidence. On the one hand, a loss of confidence – justified by experience – in timely decision-making by means of parliamentary deliberations and, on the other hand, a loss of confidence that the norm addressees will behave appropriately in the absence of norm-setting by the state. Moreover, there is another connection between normative regulation and trust. Where a norm exists, there is no need for trust in the actions of others. Rather, only a residual amount of trust is required, namely that the others will adhere to legal norms, be it on their own volition, be it because the state threatens to enforce compliance by way of harsh fines and penalties.

One thing, however, has not changed. As a rule, the norm addressees still do not consult the legal text of any regulation itself but rather rely on the media for the communication of its content. Press releases, news magazines, daily newspapers and – not to be underestimated – social media act as communicators in this respect. In the results of Google searches, the links to the original texts usually appear further down in the search result lists. The exact wording of amendments to laws and new regulations, however, remains a matter for lawyers. This leads to contradictions and consequently to uncertainties. For example, when Baden-Württemberg's

Prime Minister Kretschmann announced that it is only allowed to meet outside in pairs, this information contradicted the wording of his own decree. The rule decreed is not about "inside" or "outside", but about "public" and "non-public", i.e. the public versus the private space. The limitation to two persons applies only to the public sphere, whereas in all other respects a maximum of five persons is permitted.

Finally, it should only briefly be pointed out that the discussion of the crisis and the respective legal restrictions has, for the time being, pushed other legal issues into the background, in particular those concerning consumer protection, which were normally dealt with in the media on a large scale.

## **5. Substantive functional changes**

The fact that the threat of Corona in countries like Germany affects all inhabitants in roughly the same way may be conducive to solidarity. But this is probably different in countries with greater income disparities, where only a minority of rich people has access to medical facilities and where large parts of the population are exposed to the virus with only little, if any protection. In economic terms, not everyone is equally affected by Corona. Even if only a few may be benefitting from the crisis, those who may keep their businesses open are still doing comparatively well. Also, civil servants have less to worry about their salaries than employees who might lose their jobs. Moreover, in many countries, such as the USA, the lack of a Corona-compatible infrastructure over long stretches is taking its toll due to the profit-optimising health care system, the widespread lack of health insurance coverage and the failure to cushion the risk of losing one's job, for example through short-time work compensation schemes.

Furthermore, each regulation in turn creates new inequalities. Since justice considerations are no longer negotiated in a democratic body in a lengthy discourse but are – if at all – determined by the executive alone, there is a shift in material terms towards "rough justice". At present it is not about transforming subtle ramifications of an increasingly differentiated justice into law, but about regulating a reduced set of facts as clearly as possible. How "rough" and woodcut-like or more finely chiselled justice turns out to be depends not only on the time-pressure of necessity, but to a considerable extent on the cultural characteristics of the individual national societies or the groups entrusted with decision-making.

In Germany, there is a general social tendency to reach a consensus and a practice of balancing conflicting interests and rights. This has to do with a rather far-reaching identification with the state and state action, which may be seen as a remnant of the subservient spirit (*Untertanengeist*) and the resulting self-discipline. This is symbolically expressed by the German Chancellor when she only addresses her fellow citizens at longer intervals during which the director of the Robert Koch Institute, an institutionalized physician, is presented as making "official" announcements. Already in neighbouring France, where appeals to reason initially remained largely ineffective in view of the widespread critical distance to government measures, there was apparently a need not only for far more frequent appearances of President Macron in the media, but also for a restriction of fundamental freedoms to a much greater extent and in a far

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more finely granulated way than in Germany. However, it should also be noted that the practical effect of these restrictions is somewhat mitigated by the fact that the pass required by law for leaving one's home can be issued "sur l'honneur", i.e. by the person concerned himself. Whereas in Germany a prohibition is regularly regarded as a prohibition, it appears to be generally accepted in France that a principle which obviously cannot be fully complied with need not be fully complied with either.

If one looks at the Corona-induced substantive changes of the law, the focus of interest is primarily on the restrictions of fundamental rights as a consequence of the goal of securing the right to life and health. The debate about their admissibility and justification is still – at least in Germany – entirely within the framework of the dogmatic construction of fundamental rights as developed and applied before by the Federal Constitutional Court (Bundesverfassungsgericht). Described in a somewhat simplified and slightly abridged way, state measures restricting fundamental freedoms not only require a valid justification, but they also must comply with the principle of proportionality. It is only within the confines of the proportionality between the restrictions adopted to serve a justified purpose that the legislature has a certain margin of discretion, which it is authorised to fill out with a politically motivated decision. Of course, in situations of uncertainty this margin of discretion is far greater than usually. In the words of the former constitutional judge Udo di Fabio, situations of uncertainty allow the democratically legitimised bodies "considerable room for manoeuvre in assessing the extent of the risks and in shaping the measures they take to combat infection".

In each individual case of a decision affecting fundamental rights the decisive question is in which respect it is, beyond moral appeals and recommendations, precisely the legal normative order that is needed to achieve the intended effect. This guarantees an appropriate balance between the state's obligation to provide for health care, on the one hand, and individual restrictions of freedom on the other hand. A balance also has to be struck between the rights to freedom of different individual persons, if the freedom of one person can only be achieved at the expense of restricting the freedom of the another. At the same time, restrictions of fundamental rights must be formulated in a sufficiently clear and unambiguous manner. It is above all this point that ignites the current criticism of the latest amendment to the German Infection Protection Act. The criticism is directed at both the lack of certainty regarding the formulation of the prerequisites for the norm to apply and of the legal consequences foreseen in cases of non-compliance, which are said not to meet the constitutional requirements of certainty for freedom-restricting measures.

However, the involvement of technology is likely to have far more far-reaching and long-term consequences. The app technology used in China and other Asian countries to track the locations of citizens may still encounter data protection concerns in Germany. However, to the extent that it proves to be successful, the technology available will not only arouse desire, but will also play an important role when it comes to balancing conflicting fundamental rights. At any rate, the ground for acceptance is already prepared by the fitness apps that many people use not only voluntarily but even enthusiastically. Whereas resistance against the use of tracking apps for reasons of collective health protection still seems to predominate, it might be noted that according to rumors, a draft law which would have allowed the use of tracking apps was

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already formulated by the Ministry of Health. However, there exists an unmistakable trend away from normative regulations which define how people *should* behave towards a technology that defines in which way people *can* behave and that self-executes the normative command.

And then there is the question, which is taboo in German legal discourse, of how many lives can be accepted as potential collateral damage in order to avoid overly far-reaching restrictions on the freedom of others, and to prevent excessively negative effects on the functioning of the economy. This question is taboo in Germany, because in the light of the guarantee of human dignity the Federal Constitutional Court declared it inadmissible to offset human lives against each other. True, the case in which this rule was reaffirmed concerned a law that would have allowed the shooting down under certain circumstances of a passenger plane hijacked by terrorists. The law that was struck down contained the authorisation of a specific act which would certainly lead to the death of a specific number of people, whereas regarding Corona, at the time of making any decision affecting the lives of people, it is not known whether people will die as a consequence of that particular decision and, if so, how many. Nor is there a direct link between a future relaxation of the contact ban and those people who may subsequently be infected and eventually die. Similarly to road deaths – which in the 1960s and 1970s were on the scale of a whole small town a year (!) in Germany alone, and which are still accepted today in order to keep the economy going and to maintain freedom of movement at a socially acceptable and accepted level – we will ultimately respond to the Corona crisis with measures based on decisions taken under conditions of uncertainty, accepting the death of some people with the aim of safeguarding the health, rights and interests of the far greater number of others. Such a decision is facilitated by the fact that it is left to chance who as an individual will have to bear the negative consequences and who does not. Again, Udo di Fabio pointed out that constitutional law is only poorly prepared for dealing with the necessity to make a selection of life chances, be it statistically abstract or individual and concrete. At least, however, it can be said that a "not unjustifiably high" inevitable mortality rate may constitutionally justify measures to achieve herd immunity.

But let's get back to the mechanical internal workings of law. At a level below constitutional law, legal instruments are likely to be reactivated which in times of normal operation tended to have a shadowy existence. For example, in civil law, which is largely concerned with the allocation of risks, the corrective instrument available to react to the fact that the basis of a contractual transaction has ceased to exist (Wegfall der Geschäftsgrundlage) could be reactivated, which already served well in times of high inflation in 1923 as a corrective to shifts in the risk unforeseen by both parties.

This instrument was initially developed by the courts and in 2002 found its way into the German Civil Code (Bürgerliches Gesetzbuch, BGB). Section 313 now states that "[i]f circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration." Also, if an adaptation of the contract is

not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may either revoke or terminate the contract. In this way, unjustified risk distributions resulting from the application of the law in place can be corrected, albeit always retrospectively and usually only by way of litigation. For instance, an answer will have to be found to the question whether, and if so, how much and when rent will have to be paid in cases in which due to Corona and the ensuing regulations the rented property cannot be used as originally assumed by both parties. In a similar way, Corona-related default risks could be distributed retrospectively in a fairer way than if the contractually agreed risk-distribution was applied mechanically. The only question remaining is which solution is to be considered as “fair”. If someone has rented a holiday apartment for a year which he cannot use due to Corona-induced travel restrictions, does he have to pay rent also for this period, or should the landlord bear the risk and the resulting financial loss? Of course, such *ex post* adjustments cannot only be made by the courts in individual cases but may likewise be effectuated by the legislature in a general way for certain types of fact scenarios. It should be noted, however, that because any such state intervention is affecting constitutionally protected property interests, once again a careful balancing of fundamental rights will be necessary. These issues will have to be examined in greater detail once a “re-entry” of the law has occurred.

## **6. Re-entry of the law**

Since, as stated above, the characteristic feature of any emergency is that it calls for decisions which cannot be made quickly enough through the routine procedure, it will take a certain amount of time after the beginning of the emergency for the right to review the legality of the restrictions and temporary suspension of rights, i.e. until there will be a “re-entry” of the law. After all, the action for review of the law against the North Rhine-Westphalian contact ban before by the administrative court of appeal in Münster can be seen as a first such step towards a judicial review of the limits of the functional change of law and towards a return to normality. Of course, how long it will take before such a re-entry will be completed depends on the legal instruments available before the beginning of the crisis – means of preliminary legal protection, possibility of an abstract procedure for judicial review of statutory norms or even popular actions – by means of which the measures in question can be reviewed regarding their legality.

However, every re-entry is confronted with difficulties, if the necessary normative basis for such re-entry has itself been removed by means of the emergency measures. In any case, the re-entry of law presupposes that the constitutional order, including the possibility of a constitutional review of fundamental rights and procedural guarantees – and ultimately of all state measures with an impact on civil liberties – has remained intact. This will be discussed in more detail below after having a closer look at the normative use of metaphors and symbols in connection with the Corona crisis.



### **III. On the symbolism in connection with functional changes**

Law does not only operate in a functional, but also in a symbolic way. This raises the question of the use of metaphors associated with functional changes of law. A distinction can be made between metaphors that are used to legitimize the entire legal reaction to the spread of the virus and metaphors that are used to justify the contents of an individual legal regulation. This can only be illustrated by a few particularly striking examples.

#### **1. „Figures“**

Of course, symbols and metaphors are less frequently to be found the more arguments on Corona are made based on facts and figures. Nevertheless, it is not overlooked that already the mere use of figures as such has a symbolic value just as much as the individual figures themselves. However, the symbolic message emanating from the figures appears to be rather ambivalent.

On the one hand, insofar as the figures – e.g., those communicated by the John Hopkins University or the ones on the website [coronazaehler.de](http://coronazaehler.de) – are not rounded, but ostensibly take into account each individual of the "new cases", of the "deceased" and the "active cases", they give the prima facie erroneous, albeit reassuring impression that the events could, if not really controlled, at least be recorded down to every individual and thus in their entirety. This is reminiscent of the famous Washington Memorial erected to commemorate the Vietnam War, which seeks to banish the monstrosity and chaos of the war by meticulously enumerating all the names of GIs who died far away from their homes.

On the other hand, the total number of names listed in the Vietnam Memorial as well as the figures communicated daily with regard to Corona, likewise send the opposite message: Big numbers frighten. Of course, what is understood by the recipients as a "large" number depends on the mind frame of the respective viewer. Most likely, for those who focus on the individual, a number beyond the size of a group of people that can be precisely grasped at a glance appears to be large, and for those who earn €30,000 a year, 50,000 cases are a lot. However, for those who, as state leaders, put this number in relation to the total population of their country, this number may seem relatively small.

At the same time, the symbolic use of figures conceals the respective point of reference. Thus, absolute numbers of infected persons etc. do not indicate the percentage they represent of the total population. At present, the number of fatal cases in Germany is less than one tenth of a per thousand of the general population. However, the figure of fatal cases could also be put in relation to the total number of deaths in Germany in 2017 (932,272), of which the statistics show 344,500 deaths from cardiovascular diseases and 227,600 from cancer alone.

Moreover, the mere figure conceals the circumstances of its determination. The number of those infected had increased, it was said. But this finding may have been the result of more people having been tested than during the days before. If the figures indicate that the number of deaths

has also risen, it is not always made clear whether this is an absolute number or whether only those who died the day before are counted. Likewise, did those who were included in the statistics of fatalities die "because of" or "with" the virus? And would not a particularly large number be a positive rather than a negative sign regarding the desired herd immunity? Clearly, the way in which such numbers are being perceived by the audience is due to the reference values chosen but not disclosed. Such is the case when, e.g., the number of infected and fatal cases in the USA is compared with those in Germany or even in smaller European member states, without mentioning that the population of the USA roughly corresponds to that of Europe as a whole. Whether or not such distortions are ideologically intended or not is, of course, difficult to ascertain.

## **2. "Epidemic" and "pandemic" versus „war“**

Attention should first be paid to the metaphors used to describe the threat and the means used to combat it. Here, a striking difference becomes apparent between the rather factual-rational designation as an epi- or pandemic on the one hand and the rhetoric of war metaphors on the other hand, which French President Macron uses and with which he links up – beyond all cultural and political differences between France and the US of the past – to the numerous metaphorical "wars" to which U.S. presidents had previously called („*war on poverty*“/Johnson; „*war on drugs*“/Nixon; „*star wars*“/Reagan; „*war on terror*“/Bush; and, lastly, of course, Trump who simultaneously declared “war” on COVID-19, terrorists and drug cartels).

Whereas “epidemic” and “pandemic” emphasize the impersonality of the virus and focus on the degree of its spread determined by objective facts, the “war” metaphor personalises the counterpart and, in a certain way, gives the enemy a face. Above all, “epidemic” and “pandemic” do pre-determine the means with which the threat is to be countered and the instruments that appear suitable for combating it. The metaphor of “war”, however, evokes a state of emergency right from the outset, i.e. the suspension of certain rights and legal regulations as well as the use of military force.

It should be noted, however, that the “war” metaphor most likely evokes different associations in individual countries. Thus, in Germany, "war" is consistently perceived as a threat due to the tremendous destructions resulting from World War II, which Germany itself had started. In contrast, in France, "la guerre", of which the French President Macron never tires of speaking, is rather likely to evoke above all the collective narrative of the “resistance” and with it the possibility of a successful individual as well as collective fighting back. Hence what is called up is the hope that such type of warfare with limited means might once again succeed the country to liberate itself from the hated occupiers. Needless to point out that in the US the “war” metaphor has a totally different meaning, where it evokes the overpowering military machinery, which defeats and annihilates the enemy by the use of superior weapon systems. On the one hand, such an understanding manifests the binary scheme of good and evil which is deeply rooted in US culture, as can be seen in almost every US movie production which invariably ends with a man-to-man fist fight between the representative of the good and the representative

of the bad. On the other hand, “war” is part of the powerful narrative of the collective US self-image as a world power that – despite the trauma of Vietnam and the less than successful experiences of military engagement in Afghanistan, Iraq and most recently Syria – still considers itself invincible.

### **3. „Boundary“ and „frontier“**

The metaphors of "boundary" (Grenze) and "limitation" (Begrenzung), by which the law defines the scope of permissible exercise of freedom, also deserve attention. Law itself lives from the drawing of boundaries like hardly any other social subsystem. In times of Corona, the drawing of boundaries restricting the rights to freedom returns in the form of "containment" (Eingrenzung) of the spread of the virus as well as "limitation" (Beschränkung) of the exponential growth of case numbers and, last but not least, in the reference to the "capacity limit" of hospitals, which is not to be exceeded.

If these borders remain more in the realm of the symbolic, the normatively ordered closure of national borders is about the containment of very real physical spaces of movement. The renewed lowering of the barriers and the suspension of the freedom to travel within the Schengen area – which its inhabitants had long since accepted as an irreversible *acquis* – with the aim of restricting the spread of the virus may be rationally understandable and presumably justified. Nevertheless, the metaphor of the "border" recalls old subliminal associations. Borders exclude and they include. The closing of borders to protect the confined population understands the threat as an external one, a rhetoric that was already underlying and justifying the Iron Curtain which – at least in the official reading of the GDR – was erected to defend eastern socialism against the presumed attacks by the capitalist west. Signs in border regions that currently indicate that it is not possible to leave one's own country also promote the idea that beyond the barrier there lurks the dangerous, the dark, the unpredictable and ultimately evil.

### **4. „Herd immunity“**

The metaphor of "herd immunity" proves to be particularly ambivalent. On the one hand, "immunity" sounds positive at first, since it removes medical vulnerability and with it the concrete fear of the abstract danger of infection. The term "herd" refers to the multitude of masses in which the individual is absorbed and finds protection. The immunisation of the many limits the spread of the virus and is intended to ensure the survival of the community. On the other hand, the comparison with a herd of animals, which resonates in the metaphor of "herd immunity", at the same time evokes the idea that the herd gives up some of its members – according to a Darwinian description its “weakest” – in order to ensure the survival of the group. It is not without reason that "risk group" is a related term used in public discussion which, contrary to the idea of a "herd immunity", tries to protect the particularly vulnerable members of the community not only in medical but also in symbolic terms, i.e. by trying to isolate them from the rest of the population.

## **5. „Necessity“**

Finally, a brief comment shall be made on the concept of "necessity", which has been talked about so much lately. Just like Angela Merkel's famous "without alternative" (alternativlos), "necessary" seeks to exclude every other possibility and every other procedure right from the outset. What remains unmentioned is the purpose to which the statement that something is necessary refers. In one of the Do-it-yourself stores, which are currently still open in parts of Germany not only to craftsmen but to the general public, an announcement was made that one should not only keep the required distance to fellow customers, but also limit the duration of one's stay in the store to the extent "necessary". However, the question is: Necessary for what? Until the addressed customer has found what he is looking for? But who then decides what the customer may search? Or does "necessary" mean only those items which are absolutely needed, and if so, according to what criteria are these items to be determined? Are those determinations to be made according to objective or subjective criteria, by typified groups of demanders or by individual circumstances?

Regarding the law, two things may be concluded from these observations. Firstly, the fading out of the frame of reference by way of metaphorical "short cuts" in thinking leads to considerable uncertainty about what is and what exactly is not permitted. Secondly, such questions, with which the courts in the pre-Corona era had to deal with on a daily basis, remain unanswered for the time being, i.e. at least as long as the re-entry of the law described above does not occur.

## **IV. Unwanted functional changes**

To what extent the re-entry of the law will succeed cannot be predicted with certainty. Experience to date with restrictions on fundamental rights introduced in Germany at the time of terrorist threats demonstrates that there will be no complete return to the *status quo ante* once the threat is over. Invariably, there will be a desire to extend the simplified procedure of issuing regulations made possibly in view of the Corona crisis to other areas. Most important, however, the more determined the political will is to prevent the re-entry of the law, the less successful it will be. In Russia, for example, Putin brought the constitutional amendment abolishing the time limit on his presidency through the Duma at a time when the Western media had already largely focused their attention on the incipient Corona crisis. After all, he too is now forced by the pandemic to postpone the associated plebiscite.

In Hungary, President Orbán has, in the shadow of – and with reference to – Corona, eliminated the principles of the rule of law and, by means of a parliamentary enabling act, secured for himself dictatorial powers which in Europe go beyond the Polish measures and which have hitherto been known only from Turkey. However, the explanation for this dramatic development is less to be found in the change of the rule of law, but rather by asking what changes occurred in Hungarian society in recent years. After all, Hungary was the most liberal country within the former Eastern bloc which – in spite of the suppression of the 1956 uprising – had furthest escaped Stalinist influence and had helped democratic freedoms to break through

in 1989 by opening its borders with Austria. Likewise, Trump undertakes electoral diversionary tactics when he combines the fight against Corona – as mentioned above – with a simultaneous fight against terrorism and drugs, and to this end threatens the government of Venezuela with real military means.

Finally, it can be described as normative collateral damage of the Corona crisis if different normative standards are applied when it comes to distinguish domestic from foreign measures. To cite just one example: Whereas the admission of postal voting is considered to be in line with democratic traditions in the case of the Bavarian run-off vote of the local elections, the Polish PiS-party has been accused of election manipulation with regard to a comparable measure for their presidential elections on the sole ground that unlike Germany Polish law did not previously provide for a universally applicable postal voting and therefore had to introduce it by law before it could be applied.

## **V. Return to normality (*status quo ante*)?**

The question of the extent to which there will be a lasting change in the functionalities of law and legal instruments is, of course, only part of the more general question which of the currently suspended behaviours will be resumed once the crisis is over. What will remain, what will be cut back? And what will an exit strategy look like?

There can hardly be any doubt that life will pick up again once the Corona crisis is over. For the time being, the longing for faraway places is likely to be merely postponed. Once the travel restrictions have been lifted, the longing will be lived out more intensely, at least to the extent that the virus does not survive and wait at the envisaged travel destinations. However, it seems not entirely unlikely that the upgrading of digital communication tools will make some of the former business trips and project meetings superfluous. Likewise, the digital offer of educational and cultural institutions will certainly not be reduced again once the closure of schools and museums is lifted. In this respect it can already be said that the crisis has initiated and promoted beneficial effects. Whether the normative expectation of not shaking hands as a sign of personal greeting and beyond that to kiss the cheek – i.e. whether there will be a definitive end to the kissing society – seems uncertain. After all, the close relative of the cheek kiss, the socialist brother kiss, did not survive the fall of the Iron Curtain. A more central question will, of course, be to what extent the discourse on saving the world climate can benefit from the current forced reduction in polluting emissions.

To end on a positive note: Perhaps the most important message of the changes in the functionality of the law is that it is not the economy that is the measure of all things, but the well-being of people. Of course, it cannot be denied that human well-being is at least also dependent on the functioning of the economy, just as, conversely, a prioritization of the economy based on utilitarianism, which has reached a climax in neo-liberal ideas, can at least serve the well-being of the people. However, even though both approaches look at two sides of the same coin, it makes a decisive difference from which side one looks at the problem. From an economic point of view, the guiding principle is primarily one of maximising profits,

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whereas from a point of view which takes human beings as its starting point, the issue is primarily one of their physical and psychological well-being. Perhaps at the end of the day, ordo-liberal ideas of a social market economy will regain the upper hand. Then the Corona crisis would have re-opened the chance not only to solve the problem of production, but also the so far inadequately addressed problem of distribution.

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