https://doi.org/10.22364/iscflul.8.2.18

Manfred Dauster, *Dr. iur.*
Presiding Judge at the Supreme Court of Bavaria
Member of the Institute of Economic, European
and International Criminal Law of the Saarland
University in Saarbrücken, Germany

CRIMINAL PROCEEDINGS IN TIMES OF PANDEMIC

Keywords: distribution, legislation powers, Federal Republic of Germany, pandemic, impact of administrative containment measures, criminal proceedings, exhausting time lines, mandatory presence, hearings and protection of health, public hearings under containment conditions, detention, accelerated proceedings, aggravated conditions

Summary

COVID-19 caught humanity off guard at the turn of 2019/2020. Even when the Chinese government sealed off Wuhan, a city of millions, for weeks to contain the epidemic, no one in other parts of the world had any idea of what specifically was heading for the countries. The ignorant and belittling public statements and tweets of the former US president are still fresh in everyone's memory. Only when the Italian army carried the coffins with the COVID-19 victims in northern Italy, the gravesites spread in the Bergamo region, as well as the intensive care beds filled in the overcrowded hospitals, the countries of the European Union and other parts of the world realised how serious the situation threatened to become. Together with the World Health Organisation (WHO), the terms changed to pandemic. Much of the pandemic evoked reminiscences originating in the Black Death raging between 1346 and 1353 or in the Spanish flu after the First World War.

Meanwhile, life went on. The administration of justice in criminal cases could not and should not come to a standstill. Emergency measures, such as those that began to emerge in February 2020, are always the hour of the executive. In their efforts to stop the spread of the virus, in Germany, governments particularly reflected on criminal proceedings. Neither criminal procedural law nor the courts and court administrations applying this procedural law were adequately prepared for the challenges. Deadlines threatened to expire, access to court buildings and halls had to be restricted to reduce the risk of infection, public hearings represented a potential source of infection for both the parties to the proceedings and the public, virtual criminal hearings via conference calls had not yet been tested in civil proceedings, but were legally possible, but not so in criminal cases. The taking of evidence in criminal cases in Germany is governed by the rules of strict evidence and is largely not at the disposal of the parties to the proceedings. Especially in criminal cases, fundamental and human rights guarantees serve to protect the accused, but also

the victims and witnesses. Executive measures of pandemic containment might impact these guarantees.
Here, an attempt will be made to discuss at some neuralgic points how Germany has attempted to balance the resulting contradictory interests in the conflict between pandemic control and constitutional requirements for criminal court proceedings.

Introduction: How it came about

When news spread from the People's Republic of China at the end of 2019, and the beginning of 2020, that a new "flu virus" had appeared in the province of Wuhan[1], the ordinary citizen wondered at best whether this was another new type of bird flu. No one was seriously concerned at the turn of the year – neither the governments in Europe (and elsewhere) nor the individual citizens. Flu viruses have been part of winter seasons, and colds caused by them have (mostly) been under control. It was only when the Chinese government quarantined the megacity of Wuhan, as well as the surrounding province and curbed travel within the People's Republic of China that the first questions arose about what would happen if the viruses detected in Wuhan spread further, perhaps even appearing in Europe (or elsewhere on this globe). It should be recalled in this context that at the beginning of 2020 there was still no vaccine. At the same time, based on the experience gained in China, it had to be noted that the vaccines previously used for common flu infections were not effective[2]. Subsequently, when there was a widespread outbreak of COVID-19 in the Bergamo region of Lombardy, and news showed the Italian army using military vehicles to drive through the night transporting the coffins which contained the first COVID-19 victims there, the gravity of the situation in Europe was recognized. However, people were not really prepared for what the future held.

The COVID-19 pandemic has not only raised questions of medical law and ethics, such as how to select critically ill patients under shortage of the available intensive care beds and ventilators. COVID-19 has given rise to movements, not only in Germany, but also beyond, that have led to violent protests in denial of the pandemic. The coalescence of COVID-19 sceptics and conspiracy theorists is a consequence that raises questions for criminal law when this symbiosis joins forces with violent extremists. The undertaken containment measures have deeply interfered with our economic and social coexistence; of necessity, they have also restricted individual freedoms. Fundamental questions about parliamentary democracy in Western countries were raised when it became clear that all the employed measures created a gubernative power overhang that frequently

[1] Lutz H.-J. Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz – IfSG). Kommentar [Prevention and control of infectious diseases in humans (Infection Protection Act – IfSG). Commentary]. 2nd ed., München, 2020, Vorbemerkung margin 1.

[2] One head of state however was of different opinion. His initial press statements on COVID-19 made true internet history due to their surrealistic content.

left parliaments speechless. Financial aid to a pandemic-restricted or even stalled economy, in turn, has created opportunities for individual enrichment, implying criminal relevance. As is so often the case with urgent procurement of medical supplies, the shadow of corruption hangs over the actions of the public sector. Although the issues raised have criminal relevance, due to the scope of this article they cannot be discussed here, and must await scientific investigation in post-COVID-19 times. This article will focus on essential questions that concern dealing with the consequences of the pandemic in terms of criminal procedure. However, whether these can be applied to other countries or be relevant in other pandemics or natural disasters is a question that remains open.

1. Distribution of powers in disaster situations: Some German particularities

1.1. Managing the disaster by administrative measures

Germany is a federal state[3]. Legislative and governmental functions are divided between the central state of the Federal Republic and her *Länder* or Member States[4]. The Constitution does not provide for central government functions of federal bodies even in the event of national disasters, with the exception of the case of defense[5]. The management of disaster situations, which may include the COVID-19-pandemic at issue here, is primarily the responsibility of the 16 *Länder*[6]. However, under Art. 74 para. 1 No. 19 of the Basic Law, the central Federal Republic has (concurrent) legislative competence, *inter alia,* in respect of measures against dangerous or communicable diseases in humans and animals. The Federal Republic has made use of this legislative competence through the Act on the Prevention and Control of Infectious Diseases in Humans of 20 July 2000[7] (IfSG). Within the Federal Government, the Federal Ministry of Health (BMG) is the lead agency in the area of health policy and is thus responsible for drafting the relevant bills, ordinances and administrative regulations. As far as the Federal Government has not established its own federal health authorities[8], the *Länder* however are responsible for implementing the IfSG-regulations in accordance with

[3] Art. 20 para. 1 of the Basic Law of 23 May 1949 (BGBl. 1949 p. 1) last amended by Act of 29 September 2020 (BGBl. 2020 I, p. 2048).

[4] Arts 30, 70 and 83 of the Basic Law in particular.

[5] Arts 65a, 115a–115l of the Basic Law.

[6] Lutz H.-J., 2020, Vorbemerkung, margin 1.

[7] BGBl. 2000 I, p. 1045, in the latest version of Art. 98 der Jurisdiction Adjustment Ordinance of 19 June 2020 (BGBl. 2020 I, p. 1328) and Art. 5 of the COVID-19 Tax Aid Act of 19 June 2020 (BGBl. 2020 I, p. 1385).

[8] See section 4, para. 1, 1st sentence of IfSG as far as the Robert-Koch-Institute is declared leading coordination agency within Germany but also internationally (para. 3 of Art. 4). Section 5 of IfSG, amended by laws for the Protection of the Population in the Event of an Epidemic Situation of National

Section 54 of the IfSG. Additionally, they may issue their own *Länder* regulations in the field of public health, which must not contradict the IfSG. When it comes to COVID-19 containment measures, an interim summary conclusion is that the 16 State or *Länder* Governments are primarily responsible. They enact the necessary legislation and ensure that it is implemented by their subordinate state authorities. The role of the Federal Government, and in particular of the Federal Minister of Health and the Federal Chancellor, on the other hand, is a coordinating one; the Federal Government also performs the necessary tasks of coordination with the European Union[9] and with the other Member States of the Union in the case of the pandemic that crosses national borders[10]. The forum for national containment coordination is a conference held at regular intervals between the Federal Chancellor and the Heads of Government of the *Länder,* which ensures that measures taken or to be taken are uniform throughout Germany. The Chancellor, even if she wanted to, cannot "govern through" to the last city and its health departments. This observation seems important for an understanding by observers who are not familiar with the constitutional situation in Germany. Rather, the State Governments or the health ministries of the *Länder* implement the resolutions of the Conference of Prime Ministers (which the Federal Chancellor chairs) and the requirements of the Infection Protection Act through legal ordinances and other administrative degrees[11]. The parliaments of the *Länder* are informed about this, but have no expressive constitutionally secured powers of participation. For example, in spring 2021, the Twelfth Bavarian Infection Protection Measures Ordinance of 5 March 2021, has come into force in Bavaria on the basis of section 32 sentence 1 in conjunction with section 28 para. 1, section 28a of the Infection Protection Act (IfSG)[12], and should lead Bavaria[13] out of the second lockdown since COVID-19 had broken out.

As far as civil protection is concerned, the legislature of the States, such as of Bavaria, has enacted its own civil protection laws, which allows for increased coordination measures by the *Länder* authorities, but can also encroach on the legal sphere of third parties. In the context of the pandemic crisis, Bavaria has twice

Significance of 27 March 2020 (BGBl. 2020 I 587) and of 19 May 2020 (BGBl. 2020 I 1018) now allows the Federal Parliament to declare the National Emergency Infection Status. However, the federal authority is still limited and only comprises international border-crossing and travelling people across international borders as well as securing medical equipment and personnel nationally (Lutz H.-J., 2020, § 5 margins 1–2b).

9 See Arts 23 and 32 of the Basic Law.

10 As far as the financial and economic consequences from the combat against COVID-19 are concerned, the budgets of all public entities from central government to municipalities are affected. The main burden, however, also in relation to the European Union and the aid programs initiated by it, is borne by the federal budget, which also receives most of the public levies and taxes.

11 See section 54 of the IfSG.

12 The 12th Bavarian Infection Protection Measures Ordinance (BayIfSMV) (BayMBl, 2021, pp. 1–15).

13 The other State Governments have enacted similar ordinances.

declared a disaster situation[14] under Art. 4 para. 1 of the Civil Protection Act, on 16 March 2020, and 9 December 2020. In addition to the Disaster Protection Act, on 25 March 2020, the Bavarian State Parliament (Landtag) passed a Bavarian Infection Protection Act[15], which was limited in time until 31 December 2020[16]. This allowed the State Government to more easily access medical supplies such as respirators or protective suits during the COVID-19 crisis. The new law was also intended to make it easier for the State Government to access personnel such as doctors and nurses or firefighters, but not employees of the Bavarian Red Cross and other aid organizations. In an acute emergency situation, this should make it possible to meet additional personnel requirements. In addition, in an extreme emergency, the authorities could even "require any suitable person to provide services, materials or works". Before all these measures could be taken, the State Government had to declare a so-called "health emergency", which the State Parliament (Landtag) could demand be lifted at any time. The law has become obsolete; the status of "health emergency" never was declared[17].

1.2. Pandemic and court legislation

The situation with view on the constitutional distribution of legislative powers between central State of Germany and her *Länder* is not significantly different when it comes to other effects of the COVID-19 pandemic, in particular to courts. Under Art. 74 para. 1 No. 1 of the Basic Law, the German Central Government has legislative competence over matters of civil law, criminal law, the judiciary's organization, judicial procedure (excluding the law governing pre-trial detention), the legal profession, the notary's office and legal advice services. This (concurrent) legislative competence has a constitutional tradition in Germany and can be traced back to the Constitution of the German Empire

[14] Disaster is defined by article 1 para. 2 of the Civil Protection Act of 24 July 1996 (GVBl. 1996, p. 282) in the latest version of the Act of 10 April 2018 on amending the Civil Protection Act (GVBl. 2018, p. 194): A disaster within the meaning of this Act is an event in which the life or health of a large number of people or the natural basis of life or significant material assets are endangered or damaged to an unusual extent and the danger can only be averted or the disturbance can only be prevented and eliminated if, under the direction of the disaster control authority, the authorities, departments, organizations and the forces deployed cooperate in disaster control.

[15] GVBl. 2020, p. 174

[16] Other *Länder* did not follow the Bavarian example so that the Act remained unique.

[17] The constitutionality of this Bavarian state law to combat COVID-19 consequences was highly questionable. The federal legislature had made extensive use of its (concurrent) legislation through the IfSG. Under the regime of Art. 72 para.1, 1st sentence of the Basic Law, even supplementary *Länder* laws are not constitutionally permitted in such cases. Indeed, Art. 72 para. 1 of the Basic Law stipulates: "On matters within the concurrent legislative power, the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law." Due to the passage of time, the question of the constitutionality of the Bavarian law has been overcome.

of 16 April 1871[18]. It is explained by the need at the time to establish legal unity in the newly founded German nation state consisting out of 25 Federal States from the Kingdom of Prussia to the Free and Hanseatic City of Hamburg – all of them having different legislation on major issues of common national interest. The Reich legislature enacted a uniform Code of Civil Procedure (ZPO)[19], a uniform Code of Criminal Procedure (StPO)[20] and a uniform Court Constitution Act (GVG)[21] in the form of the then so-called Reich Justice Acts, which entered into force on 1 October 1879[22], the basic structures of which are still in force today. A uniform Criminal Code (StGB)[23] was already in force at the time under the North-German Federation and was then adopted as a Reich Act, the Commercial Code (HGB)[24] and the Civil Code (BGB)[25] followed the Reich Justice Acts; they too continue to shape legal life in Germany[26] up to now. In contrast to quoted legislation, the administration of justice remained and still is a matter for the courts of the Federal States, nowadays the *Länder*[27]. The central state has only those courts whose establishment is ordered or permitted by the Basic Law. These are the highest courts with ultimate jurisdiction. In the case of civil and criminal law, it is the Federal (Supreme) Court of Justice in Karlsruhe[28].

The laws of interest in the context of COVID-19 pandemic and criminal proceedings (in the first place, Code of Criminal Procedure [CPC] and secondly, the Court Constitution Act [CCA]) do not consider national (and international) emergency situations arising from pandemics. Only section 206 of the Civil Code (CC) recognizes a legally relevant circumstance as *force majeure* when a creditor is restricted and hindered in his legal litigation if and to the extent that this creditor has been prevented from any enforcement measures in the last six months. In this

[18] BGBl. des Norddeutschen Bundes 1871, No. 16, pp. 63–85. The broad scope of centralized legislation goes even back to the Constitution of the North-German Federation of 1 July 1867 (Stern K. Das Staatsrecht der Bundesrepublik Deutschland. Vol. V: Die geschichtlichen Grundlagen des deutschen Staatsrechts [The constitutional law of the Federal Republic of Germany. Vol. V: The historical foundations of German constitutional law]. München 2000, p. 305 et seq.).

[19] of 30 January 1877 (RGBl, p. 83).

[20] of 1 February 1877 (RGBl, p. 253).

[21] of 27 January 1877 (RGBl, p. 1077).

[22] Stern K. 2000, p. 417 et seq.

[23] of 15 May 1871 (RGBl, p. 127).

[24] of 10 May 1897 (RGBl, p. 219).

[25] of 8 April 1896 (RGBl, p. 195) (Stern K. 2000, p. 448 et seq.; Grüneberg C. In: Palandt, Bürgerliches Gesetzbuch mit Nebengesetzen [Civil Code with Ancillary Laws]. 79th ed., München, 2020, Einleitung margin 4 and 5).

[26] In contrast to other Federal States, cf. United States of America or Switzerland, the German *Länder* courts only apply national law, not rules that respective State Parliaments have enacted.

[27] Art. 92 of the Basic Law: The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the *Länder*.

[28] Art. 95 para. 1 of the Basic Law; sections 123 et seqq. of the Court Constitutional Act.

case, section 206 of the CC orders that limitation of claims is suspended[29]. This substantive regulation on the suspension of lapse of time rules is paralleled by section 245 of the Civil Procedure Code, which reads: "If, as a result of war or any other event, the activities of the court cease, the proceedings shall be suspended for the duration of that state of affairs."[30] However, litigation is different from criminal prosecution. It is therefore inadmissible to draw conclusions by analogy from the civil law regulations for the situation under criminal law. Executive COVID-19 containment measures, meanwhile, create multiple tensions with legal positions of others involved in the criminal process and even with judicial independence, as executive measures tend to disrespect the scope of sole judicial decision making when it comes to emergency measures. Executive measures find their end and limits where judicial responsibility has to be implemented, in particular in courtrooms when proceedings are formally carried out there. These tensions and their resolution shall now be examined in more details, after it has been discussed in general terms how the competences are distributed in the German constitutional structure.

2. Situations of tension

2.1. Justice has to be carried out – time lines

Justice has to be carried out. This demand is nothing less than a human right, its violation – a breach of international law. German criminal procedural law is also based on this principle, which is, however, not expressly laid down in German law. It follows from the general Principle of the Rule of Law contained in Art. 20 para. 3 of the Basic Law[31], that it is one of the most important duties of a state to grant legal protection to those seeking justice. This idea also underlies the guarantee

[29] Ellenberger J. In: Palandt, Bürgerliches Gesetzbuch mit Nebengesetzen [Civil code with subsidiary laws]. 79th ed., München, 2020, § 206 margin 4.

[30] That includes epidemics. The interruption sequence occurs automatically as soon as the organisation of a court is paralysed for a longer period of time. A formal decision is not required. The effects end as soon as the court is functional again (Greger R. In: Zöller R. Zivilprozessordnung. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. Code of Civil Procedure. Commentary]. 33rd ed., Köln 2020, § 245 margins 1 and 2, see also RGZ 128, 47; 167, 215).

[31] In conjunction with the fundamental rights of individuals as set forth by Art. 1 et seqq. of the Basic Law, in particular from Art. 2 para. 1 of the Basic Law (see BVerfGE 107, 395 [401]; Breuer M. In: Karpenstein U., Mayer F. C. (eds.). Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. 2nd ed., München, 2015, Art. 13, margin 3; Eser R. In: Löwe-Rosenberg, Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Judiciary. Extensive commentary]. Erb V., Eser R., Franke U., Graalmann-Scheerer K., Hilger H., Ignor A. (eds.). Vol. 11, 26th ed., Berlin/ Boston 2012, EMRK Art. 6, margin 13.

of Art. 19 para. 4 sentence 1 of the Basic Law, according to which legal recourse must be open to anyone whose rights have been violated by public authorities. Moreover, at the level of international law, the denial of judicial protection constitutes a violation of human rights[32], which German authorities including criminal courts are obliged to avoid under Art. 25, first and second sentences, of the Basic Law. For according to this, the general rules of international customary law are part of federal law, precede all laws of the land and generate immediate rights and obligations for all inhabitants of the federal territory[33]. An even clearer statement is contained by Art. 6 para. 1 sentence 1 of the European Convention of Human Rights of 4 November 1950 (ECHR) – that everybody under indictment has the right to trial within adequate time[34]. Additionally, Art. 13 of the Convention rules that everybody whose conventional rights have been violated shall have the right to seek effective legal protection by internal remedies of the States[35].

In theory, any pandemic leaves the court system untouched. Courts and judges are legally not permitted to cease, suspend or interrupt proceedings, unless the law expressively does make an exception. Since the entry into force in 1879, Germany, under the rule of the same CPC, experienced two wars. The First World War spared by direct impacts and battles did not affect any part of the German territory. However, the Second World War brought direct misery and horror to the German population and unprecedented physical damage to the country's infrastructure including the country's courts. Nevertheless, the court system kept on functioning – more or less, until the Allies intercepted the court structure on 8 May 1945[36]. The Reichsgericht, the former German Supreme Court in Leipzig,

---

[32] Doehring K. Völkerrecht. Ein Lehrbuch [International law. A textbook]. 2nd ed., Heidelberg 2004, p. 388, Verosta S. Denial of Justice. In: Bernhardt R. (ed.). The Max Planck Encyclopedia of Public International Law, Vol. 1, 1992, p. 1007 et seqq.; Paulsson J. Denial of Justice in International Law. American Journal of International Law, 2005, Cambridge University Press, p. 279 et seqq.; Eagleton C. Denial of Justice in International Law. American Journal of International Law, 1928, Cambridge University Press, p. 538 et seqq.; Berber F. Lehrbuch des Völkerrechts, Vol. 3: Streiterledigung, Kriegsverhütung, Integration [Textbook of International Law, Vol. 3: Settlement of Disputes, Prevention of War, Integration]. 2nd ed., München 1977, p. 12; Verdross A., Simma B. Universelles Völkerrecht. Theorie und Praxis [Universal international law. Theory and practice]. 3rd ed., Berlin, 1984, p. 857;

[33] Doehring K. 2004, p. 315; Sauer H. Staatsrecht III. Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht [Constitutional Law III. External threat, references of the Basic Law to international and European law]. 5th ed., München, 2018, p. 94, et seqq.; Geiger R. Staatsrecht III. Bezüge des Grundgesetzes zum Völker- und Europarecht [Constitutional Law III. References of the Basic Law to international and European law]. 7th ed., München, 2018, p. 147 et seqq.; Verdross A., Simma B. 1984, p. 542 et seqq.; Schorkopf F. Staatsrecht der internationalen Beziehungen [Constitutional law of international relations]. München, 2017, p. 147 et seqq.

[34] Eser R. 2012, EMRK Art. 6, margin 307 et seqq.

[35] The guarantees set down in Art. 6 para. 1 and Art. 13 of the ECHR are concurring (see Breuer M. 2015, Art. 13, margin 5.

[36] Proclamation No. 1, promulgated by the Allied Commander-in-Chief Dwight D. Eisenhower on 18 April 1944, closed the German courts.

ceased to exist on 19 April 1945[37]. However, few weeks after the surrender of German militaries, Military Governments in all four occupation zones including Berlin reopened courts, and they restarted their functions[38].

Despite the experience of war, the German legislature has so far seen no reason to make provisions in criminal procedure law for the event of an emergency situation affecting the entire country. COVID-19 has created a situation that Germany (and other countries) have never experienced in modern times[39]. A complete or temporary closure of the courts by the executive in its effort to contain the epidemic has however not been contemplated in Germany (or, recognizably, elsewhere in Europe). There is no legal basis for this in Germany. Moreover, in view of the constitutional and human rights guarantees on the access of individuals to judicial protection, such a statutory authorization of the government to close courts is hardly conceivable[40] or even unconstitutional.

The core of German criminal procedure are those regulations that deal with the main criminal proceedings in which the court has to establish the guilt of the defendant. For reasons of procedural concentration, but also to accelerate the process, which is stressful for all parties involved, especially the accused, section 229 of the CPC establishes a strict temporal regime. The court is not free to decide how long it can interrupt, postpone or adjourn a main hearing that has already begun. The law makes mandatory statutory provisions therefore. If these are not adhered to, the main hearing must begin anew. In individual cases, such restarted trial may contradict the requirements of Art. 6 para. 1 of the ECHR on the expedited treatment of charges before the courts, especially in matters

[37] Fischer D. Zur Geschichte der höchstrichterlichen Rechtsprechung in Deutschland [On the history of supreme court decisions in Germany]. JZ 2010, pp. 1077–1086. Attempts to re-establish the *Reichsgericht* in Leipzig immediately after the collapse of the Third Reich failed, among other things, because as a result of the Allied decisions of the Potsdam Conference, the US troops withdrew from Saxony and Central Germany came under Soviet military administration, which had no interest in re-establishing the *Reichsgericht*. Instead, the Soviets arrested those judges of the former *Reichsgericht* whom they could get hold of and took them to the Mühlberg concentration camp on the Elbe, where most of them died (Fischer D. 2010, pp. 1077–1086).

[38] Herbst G. Von der Wiedererrichtung bis zur Gegenwart [From restoration to the present]. In: Herbst G. (ed.). Das Bayerische Oberste Landesgericht. Geschichte und Gegenwart [The Bavarian Supreme Court. History and present]. München, 1993, p. 59; Biebl W., Helgerth R. Die Staatsanwaltschaft bei dem Bayerischen Obersten Landesgericht [The public prosecutor's office at the Bavarian Supreme Court]. 4th ed., München, 2004, p. 191.

[39] In the context of time limits under criminal procedure law, only section 26 (4) EGGVG takes extraordinary circumstances into account through the concept of *force majeure* (Böttcher R. In: Löwe-Rosenberg. Die Strafprozeßordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Court. Extensive commentary]. Erb V., Eser R., Franke U., Graalmann-Scheerer K., Hilger H., Ignor A. (eds.). Vol. X, 26th ed., Berlin/New York 2010, EGGVG § 26, margin 11; Kissel O. R., Mayer H. Gerichtsverfassungsgesetz. Kommentar [Jurisdiction Act. Commentary]. 7th ed., München 2013, § 26 EGGVG margin 18). However, the provision is not susceptible to analogy.

[40] Different opinion: Wagner M. Die Strafjustiz in Zeiten der Pandemie – Überlegungen zu § 10 EGStPO [Criminal justice in times of the pandemic - considerations on § 10 EGStPO]. Zeitschrift für Internationale Strafrechtsdogmatik, 2020, pp. 223, 231. Available: www.zis-online.com. [viewed 11.03.2021.].

of detention[41]. In any case, a new start of a main trial is anything but desirable, especially in large-scale proceedings with many defendants and many defense lawyers and an extensive taking of evidence that has already begun. These types of proceedings characterize everyday life in Germany before the white-collar criminal divisions of the regional courts, before the jury divisions of the regional courts and before the state protection senates of the higher regional courts, especially when these proceedings have already used up a large number of trial days. The effort of restarting the main hearing in such constellations is also always an expensive undertaking. According to section 229 of the CPC, a main hearing that has begun can be interrupted for up to three weeks. If more than 10 trial days have taken place, the interruption may last up to one month. Only in exceptional cases of illness of a party to the proceedings or of one of the recognizing judges can the interruption last longer. The legal idea behind this strict binding of the trial judge is that the trial events should be before his or her eyes before the deliberation and pronouncement of the judgement[42]. The longer the interruptions and adjournments last, the less this seems to be guaranteed[43]. The fact that this concentration of proceedings is accompanied by an acceleration of the process is a desirable side effect.

Justice has to be carried out, but not at any price. If court proceedings have to take place regardless of an emergency situation[44], simultaneously care must be taken to ensure that the health risk for all parties involved is kept as low as possible[45]. This is required by the constitutional protection of physical integrity according to Art. 2 para. 2 of the Basic Law and the protection of life through Art. 2 para. 1 ECHR[46]. When the first major wave of infections hit in the spring 2020, this conflict between granting justice and protecting health was put on the agenda of all courts, they were not prepared. Moreover, at that time it was not entirely clear from the point of view of epidemiology which concrete protective measures were at all capable of guaranteeing health protection in a courtroom. It quickly became apparent in March 2020 that the stringent deadlines of section 229 of the CPC could not be met and that major proceedings that had already begun were in danger of having to be suspended and to be then started anew.

[41] Eser R. In: Löwe-Rosenberg. Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Judiciary. Extensive commentary]. Erb V., Eser R., Franke U., Graalmann-Scheerer K., Hilger H., Ignor A. (eds.). Vol. 11, 26th ed., Berlin/Boston 2012, EMRK Art. 6 margin 313 et seqq.

[42] Wagner M. 2020, pp. 223, 226.

[43] The statement of the Federal Bar Association No. 71/2020 of November 2020.

[44] For various measures taken, see: Wagner M. 2020, pp. 223, 224 and 225.

[45] BVerfG, Einstweilige Anordnung of 1 April 2020 – file No. 2 BvR 571/20 = BeckRS 2020, 4898; VerfGH Sachsen, Beschluss of 20 March 2020 – file No. Vf. 39-IV-20 = BeckRS 2020, 4039; BVerfG, Einstweilige Anordnung of 16 November 2020 (file No: 2 BvQ 87/20); Usebach J. Angeklagter muss trotz Corona im Strafverfahren erscheinen [Despite Corona, the accused must appear in criminal proceedings]. Available: https://www.jura.cc/rechtstipps/angeklagter-muss-trotz-corona-im-strafverfahren-erscheinen/ [viewed 11.03.2021.].

[46] Eser R. 2012, EMRK Art. 2, margin 23 et seqq.; Satzger H. International and European Criminal Law, 2nd ed., München, 2018, p. 180 et seqq.

Switching to audiovisual hearings was not permissible under German criminal procedure law. Since other areas of law, such as insolvency law with the COVID-19 crisis, also faced unsolvable deadline problems, the federal government decided on a comprehensive solution, which with section 10 Introductory Act to the CPC (IACPC) (EGStPO)[47] also brought a solution for commenced main hearings in criminal cases. The time limit of two months and then days granted to the courts for interrupting or postponing a main hearing that had already begun enabled them to take the protective measures required for health protection in the hearing rooms in the meantime[48]. How many cases pending at trial in spring 2020 have been "saved" by the new regulation of section 10 IACPC is not known yet[49].

Section 10 IACPC was unavoidable[50]. The German Code of Criminal Procedure does not allow to switch (in crisis situations) to a virtual main hearing.

[47] Act to Mitigate the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedure Law of 27 March 2020 (BGBl. 2020 I p. 569), entered into force 28 March 2020. Section 10 IACPC was timely limited until 27 March 2021, and should then be repealed or become obsolete. Against the background that further containment measures might be necessary after 27 March 2021, because the lawmaker at the time expected the pandemic be over after one year. However, in our experience, it is not. With a view toward the 2021 general elections to the 20th Bundestag, the German national parliament, that will take place in fall 2021 it is already clear that the life of the current Parliament will then come to its end. Forming a new Government and a supporting majority within Parliament might take considerable time. Therefore, consideration have already started to extend the validity of section 10 IACPC for one year more until 27 March 2022. Critical of this with regard to the principle of acceleration and the concentration maxim is the statement of the Federal Bar Association No. 71/2020 of November 2020.

[48] Section 10 of IACPC has the following wording:
"Suspension of interruption periods due to infection control measures:
(1) Irrespective of the duration of the main hearing, the running of the periods of interruption referred to in section 229, paras 1 and 2, of the Code of Criminal Procedure shall be suspended for as long as the main hearing cannot be held due to protective measures to prevent the spread of infections with the SARS-CoV-2 virus (COVID-19 pandemic), but for no longer than two months; these periods shall end at the earliest ten days after the expiry of the suspension. The court shall determine the beginning and end of the suspension by an unappealable order.
(2) Subsection (1) shall apply mutatis mutandis to the time limit for pronouncing a judgment specified in section 268 paragraph 3 sentence 2 of the Code of Criminal Procedure" (see the official explanation to the draft law of 24 March 2020 [BT-Drs. 19/18110, p. 32 et seqq.]).

[49] At least the Case No. 7 St 1/16 pending in main trial at the Munich Higher Regional Court could be terminated by guilty verdict of 27 July 2020, due to section 10 IACPC. When COVID-19-pandemic hit this trial was on for almost three years and nine months. It started on 17 June 2016 when in total 10 defendant were charged of terrorism allegations. The trial included not only those 10 defendants but also their 20 defense counsels, 10 supporting interpreters and five court interpreters. In spring, the Higher Regional Court had already spent more than 200 court days, had closed the evidentiary proceeding and the final statements of the parties of the trial had already started. Millions of Euros had been spent already when the short time lines of Section 229 threatened to turn the trial in a restart from the beginning. – The unknown number of "saved" trials is another critical point of statement of the Federal Bar Association No. 71/2020 of November 2020.

[50] In this context with views on France and the efforts there, see Mechtcherine A. M. Pandemiebedingte Neuerungen im französischen Strafverfahrensrecht [Pandemic-related innovations in French criminal procedure law]. Available: https://jura.uni.koeln/efferuhd/user_upload/Homepage_ Aufsatz_Mechtcherine. pdf [viewed 10.03.2021.]; with view on Austria see Gölly S. Strafverfahren "in der Krise" [Criminal proceedings "in crisis"]. Universität Graz, We work for tomorrow – Interview

In contrast, this is possible before the civil courts[51], and the civil courts made good use of this possibility in the times of the current pandemic. Civil and criminal proceedings in Germany differ considerably in their legal structure[52], which makes it questionable whether virtual main hearings in criminal courts can be made possible at all in the future without deep intervention by the legislature in the structures of criminal proceedings. For future nationwide and long-lasting disasters, virtual main hearings are not a solution to be endorsed[53].

2.2. Containment measures and participation in the main trial

The CPC makes it crystal clear: the main trials can legally be held only in presence of the judges, including lay judges, the prosecutor, the court clerk and the defendant and his counsel[54]. It is a matter of course that the professional judges

of 19 May 2020; for critical views see Wagner M. 2020, p. 223/227 et seqq.; Fromm I. E. Strafprozess und Corona-Krise [Criminal proceedings and the Corona crisis]. Available: https://www.caspers-mock.de/publikationen/corona_strafprozess.htm [viewed 11.03.2021.]; Isfen O. Interview. Available: https://www.fernuni-hagen.de/universitaet/aktuelles/2020/04/am-corona-im-strafrecht.shtml [viewed 11.03.2021.];

[51] Section 128a of the Civil Procedure Code. The court may order an audio-visual hearing without any motion or consent of the parties (Greger R. 2020, § 128a margin. 3). Interrogation of witnesses, experts and parties is also permitted. Only taking evidence by documents is inadmissible (Greger R. 2020, § 128a margin. 7), as section 420 of the Civil Procedure Code requires the physical handover of the document to the court (Feskorn C. In: Zöller R. Zivilprozessordnung. Kommentar [Code of Civil Procedure. Comment]. 33rd ed., Köln 2020, § 420 margin 2).

[52] Civil proceedings are conducted to a greater extent in writing, they can even be performed in writing without any oral hearing at all (section 128 para. 2 CPC). Criminal proceedings, on the other hand, are strictly oral (with a significant exception in the case of evidence by documents, which the criminal court may refer to the so-called self-reading procedure under section 249 para. 2 CPC, whose introduction met with considerable resistance from the bar associations and other legal professionals at the time, because they feared that it would result in a considerable loss of their opportunities to attack the formation of convictions by the judge in open court and that the criminal process would be faced with secret proceedings without public scrutiny). In civil proceedings, the parties also have a much stronger influence on the scope of an evidentiary hearing. What is not disputed is deemed admitted and does not require proof. In criminal proceedings, on the other hand, these procedural concessions do not exist. Whatever appears to the criminal court to be in need of proof requires proof. Such evidence is to be taken *ex officio*. The scope of the criminal court's taking of evidence is simply inconceivable in German civil proceedings, and may not even be feasible. Only evidence that has been formally collected before the criminal court according to the rules of criminal procedure can be used by the criminal judge in his judgement. This is not the case in civil proceedings in this strictness. It is hardly conceivable that the criminal proceedings would be written down to a greater extent without interfering with the right of the accused and his defence lawyers to request evidence. The legal profession will not allow itself to be deprived of this main means of struggle without resistance in future reforms of criminal procedure law. A virtualisation of criminal proceedings would also require far greater discipline on the part of those involved in the proceedings, which can hardly be reconciled with the procedural drama of the request for evidence.

[53] On the legal review of an inhibition according to section 10 of the Code of Criminal Procedure (EGStPO) by the Federal Supreme Court of Justice see BGH decision of 11 November 2021 – file No. 4 StR 431/20 – StraFo 2021, p. 77 et seq.

[54] If a verdict is rendered in the absence of a person whose presence at the main hearing is required by law, this constitutes an absolute ground for appeal under section 338 No. 5 of the CPC, which, without further statutory circumstances, leads to the nullification of the verdict by the appellate court.

are obliged to participate in the hearings on the days determined by the presiding judge[55]. This applies in the same way to the representatives of the public prosecutor's office. The law provides[56] for the participation of lay judges in criminal proceedings – with the exception of the single judge at the district court and the criminal senates of the higher regional courts with jurisdiction at first instance. The lay judges are obliged to serve and must appear at the hearings, in which they have to participate according to the general list of lay judges established by the court administration[57] after the election of lay judges[58]. If they fail to comply with this duty, they may be charged with the costs of the proceedings caused by their absence[59].

The presence of the defendant at main trial is mandatory[60]. Under exceptional circumstances, exclusively as defined by law, the defendant may take leave from his obligation to show up in court and to be present during the main trial[61]. The (abstract) risk of infection by COVID-19 virus does not match such exemptions. If the accused fails to appear at the main hearing despite being duly summoned, he or she must expect to be forcibly brought before court by police on the next day of the hearing or to be taken into trial custody. Such a trial custody arrest warrant does not require any further grounds for arrest[62]. In the case of defense counsels, their attendance is a professional duty, which, however, cannot be enforced. In addition, the absence of an appointed defense counsel will regularly cause the criminal court to assign a mandatory defender to the accused, who is subject to the same professional duties as the appointed defense counsel[63]. Witnesses, as well as expert witnesses are also obliged to appear in court when duly summoned[64].The background to these duties is the principle of personal interrogation in the main hearing contained in section 250 of the CPC. Failure to appear despite being summoned can lead to witnesses and experts being ordered to pay a fine, or alternatively to serve a detention order, and to

[55] The issue might be seen differently when it comes to work at home and not in the court office room. This is a common recommendation across Europe. Nevertheless, it should not be overlooked that this requires a secure infrastructure and optimal IT equipment, which is not guaranteed at all courts in Germany (Wagner M. 2020, p. 223).

[56] Sections 28 and 29 of the CCA for the District Courts (1 professional judge and two lay judges); section 76 para. 1 of the CCA for the Regional Courts (1 professional judge and two lay judges in the "small" criminal chamber (appeals only) and three professional judges and two lay judges in the "grand" first instance chambers).

[57] Section 44 of the CCA.

[58] Sections 36–45 of the CCA

[59] Section 56 of the CCA.

[60] Sections 230 and 231 of the CPC.

[61] Sections 231a; 231c and 233 of the CPC.

[62] Section 230 para. 2 of the CPC.

[63] In the event of the absence of the duly summoned mandatory defence counsel or in the event of his refusal to defend, this conduct may result in his being ordered to pay the costs caused by the suspension if the court is thereby compelled to suspend the proceedings and start anew (section 145 para. 4 of the CPC).

[64] Section 48 para. 1 of the CPC (witnesses); Section 72 of the CPC (experts).

pay the costs of the proceedings incurred by their absence[65]. The court may also order witnesses (although not the experts) to be coercively brought to the next scheduled hearing (by the police)[66]. Neither witnesses nor experts may use the general risk of infection by COVID-19 as sufficient excuse to stay away from a hearing they are summoned to.

All these listed duties are subject to the constitutional reservation of proportionality. In the case of witnesses, experts and lay judges, the Code of Procedure and the Courts Constitution Act leave their non-appearance without consequences if their absence is sufficiently excused[67]. In the context of COVID-19, this can only ever be for medical reasons, which the witness, expert or lay judge must give evidence for. The court's assessment of submitted medical certificates – as is so often the case – is a question that the court can only answer after expert advice from epidemiologists or virologists. The measures that the court itself has taken to protect the health of persons in the hearing room have to be included in such assessments. Indeed, these measures are a part of the considerations that courts must make under the proportionality test before they may impose negative measures on individuals. These measures will be commented on in the following discussion.

In the case of witnesses and experts, the question always arises within the framework of proportionality whether procedural law provides possibilities to avoid their direct hearing in the courtroom and to replace them with other means of taking evidence. First and foremost, audiovisual examination of witnesses is to be considered, which is admissible if direct examination in the courtroom causes the risk of serious detriment to the witness[68]. Infection risks might represent such risks. Under such circumstances, the court may order the audio-visual hearing. The consent thereto by the parties is not needed, and the respective witness may even be interviewed in his home – from pandemic perspective, a safe place. Again, without consent of the parties, the court may order the hearing of an expert. A risk of detriment, as it is pre-required by section 247a para. 1 CPC when it comes to hearing witnesses is not required in this constellation of hearing experts[69].

Section 256 para. 1 of the CPC allows the reading of expert opinions, medical certificates and investigation reports of police witnesses. Orders under section 256 para. 1 CPC to read out these items of evidence do not require the consent of the parties to the proceedings. Under narrow conditions, according to section 251 para. 1, para. 2 of the CPC, the court may also order the reading of earlier records of interrogation of witnesses, experts and former co-defendants, for example, if the interrogated persons have died in the meantime or are otherwise unreachable,

[65] Section 51 of the CPC (witnesses); section 77 of the CPC (experts).

[66] Section 51 para. 1, 3rd sentence of the CPC.

[67] Section 51 para. 2 CPC (witnesses); section 72 CPC (experts); section 56 para. 1 of the CCA.

[68] Section 247 para. 1 CPC. On those methods see Mechtcherine A. M.

[69] Section 247 para. 2, 1st sentence CPC.

but especially if the prosecutor, the accused and the defense agree to such a reading. Forensic experience teaches that consents under section 251 para. 1 of the CPC are granted if such protocols only marginally concern the events of the crime and of guilt. If they are of significance regarding guilt, the parties to the proceedings do not waive the personal hearing of the persons giving evidence, because only in this way do they have the possibility of direct confrontation.

Likewise, the courts are well advised not to turn to the possibilities of a substitution without further ado. If, for example, the credibility of a witness is questionable or the scientific performance of an expert is of importance, it would be unwise to "only" read out earlier hearing transcripts or the written expert opinion. Pursuant to section 261 of the CPC, the court must draw its conviction to be recorded in the judgement from the entirety of the main hearing and, in doing so, pursuant to section 244 para. 2 of the CPC, extend its findings ex officio to all facts and evidence that are of importance for establishing the truth. In the case of critical evidence, a hasty evasion of a substitute taking of evidence may run counter to these duties and render the subsequent judgement erroneous[70]. Furthermore, documentary evidence that depends on the authenticity of the document or that involves circumstances that require a visual inspection can only be taken in a main hearing. This is another reason why audiovisual criminal hearing are ruled out, because the parties to the proceedings must be given the opportunity to participate in the judicial inspection in person and directly.

In order to cope with COVID-19-related consequences, the German Code of Criminal Procedure does open up possibilities to a limited extent to reduce human encounters in courtrooms in accordance with epidemic advice. The main hearings, which sometimes involve many people in a confined space, are nevertheless to be accepted under the given legal conditions.

At the height of the first pandemic wave in spring 2020, the obligation to appear in court was often hard up against the limit of its enforceability. At the beginning of the pandemic, when its dimensions gradually became apparent and even nowadays, judges and court administrations had to develop abilities beyond the legal demands, which they never thought to be forced into in order to cope with constitutional requirements to protect health and bodily integrity of persons who have to appear before court and in courtrooms. A few examples may give evidence for the management skills that had to be developed at that time.

The participants in the proceedings who were not in custody[71] but also did not live at the court location and did not have their own motor vehicle, were confronted with the situation that long-distance and local public transport was suspended for weeks. Planes were grounded, trains at the station, long-distance buses no longer ran. In order to continue with important main hearings, especially those that had already begun, the courts resorted to costly means of transport

[70] Raising that topic, see Mechtcherine A. M.

[71] The issue of custody in pandemics as a different aspect to be discussed here later.

at the expense of public budgets. The judiciary could not help but pay for taxi fares and hotel accommodation when hotels were still open and running their business[72]. In extreme cases, the only option was for the police upon official requests of the courts to provide transport. The logistical effort to overcome the distance between the place of residence/office and the place of the court was enormous in individual constellations. Reliable figures so far are not available, yet. At the very end of the road, in a certain number of cases, main hearings had to be adjourned. Again, reliable figures of such cases are not yet available. However, the problems did not stop with people to be transported. Another problem in the first wave was the provision of food for the participants in the proceedings, when restaurants, cafés and canteens had to close. Not every court location with longer trial durations had and still has "food to go" facilities. In the end, catering might have been the only remaining option, again at the expense of public funds. After all, the protection of life and physical integrity also covers the obligation to provide food options when an entire infrastructure has been eliminated due to official disease containment measures.

This obligation to appear in court if duly summoned correlates with the court's obligation to install and secure a safe environment in courtrooms, their surroundings, in the court house and the immediate areas surrounding the courthouse. The obligation to protect health by the adjudicating courts can be traced back to the fundamental right guarantee of the protection of health and physical integrity under Art. 2 para. 2 of the Basic Law. As far as the hearing room and its immediate surroundings are concerned, section 176 para. 1 of the CCA declares the presiding judge of the adjudicating court responsible[73]. He implements his authority through so-called session security orders, which are issued prior to the hearing's beginning (and then altered if needed) and then enforced during the proceedings by the court administration, the police or court guards who are present.

These security orders of the presiding judge cover the seating arrangement in the courtroom, the distances between the individual parties to the proceedings, the erection of dividing screens between them, their disinfection, the equipment of the individual seats with microphones and their regular disinfection, the frequency of interruption of a main hearing on the day of the hearing for its ventilation with fresh air. In addition, the security orders may also limit the number of spectator seats in the auditorium. The presiding judge may, of course, order the wearing of certain facial masks, which is also recommended or obligatory outside the court,

[72] In the first weeks of the pandemic, completely unorthodox types of cooperation between courts and the private sector could occur. Defence lawyers complained that it was impossible to find open hotels in Munich when they travelled from their law firm or residence to the court in Munich for several days. In this situation, the Hotel and Restaurant Association offered its help and even set up a hot-line for such defence counsels.

[73] Mechtcherine A. M.

for the court and participants in the proceedings[74]. However, it should also be noted in this context that the implementation of some of these measures cannot be enforced. It makes little sense to put masks on defendants by direct coercion. Against the defense lawyers, such measures fail completely. Direct coercion against them is inadmissible. If the parties to the proceedings do not cooperate, the criminal court only has the option of adjourning the main hearing and ordering the defense lawyers who are unwilling to cooperate to pay the costs incurred on the day of the hearing in question if the law provides for. The imposition of costs proves to be a rather blunt sword in the concrete conflict-like trial situation between a court carrying out its legal duties and unwilling lawyers[75].

The court building and its immediate surroundings are not accessible to such security orders issued by the presiding judge of the trial. This is where the respective court president comes into play as the representative of the building owner and as the holder of domiciliary rights. While respecting the right of the public and the media to participate in court hearings (section 169 para. 1, 1st sentence of the CCA) and giving priority to individual security decisions of the presiding judges in specific proceedings, all court presidents in Germany have regulated access to and stay in court buildings by so-called in-house-rules. This includes, for example, security checks at the entrances of the courts, bans on dangerous objects and the exclusion of drunk persons from entering court buildings. After COVID-19, these rules had to be adapted and continuously altered, for example, with regard to distance requirements, masking, disinfection and the obligation to self-disclose any infections. Certain areas of the buildings that were accessible to everyone before COVID-19 were now closed in order reduce the risk of infection. Basically, it has been and still remains the duty of the Police and the Court Guards to enforce those rules. However, it should be noticed that those rules are a matter of private law; enforcing private regulations by Police and Court Guards is legally complicated. In case of visitors not complying with those rules the conflict between administration (including Police) and obstructing individuals might end

[74] The obligation to wear a mask during an ongoing trial is not unproblematic. Against a completely different background (in particular the veiling of [female] defendants and witnesses by face veils), the legislature introduced section 176 para. 2 of the CCA on 13 December 2019 (Act of 10 December 2019 [BGBl, 2019 I, p. 2121]), according to which persons participating in the hearing may not veil their faces, either in whole or in part. The presiding judge may allow exceptions to this rule if and to the extent that making the face visible is not necessary to establish identity or to assess evidence. If, in order to reduce the risk of infection, the presiding judge compulsorily orders the wearing of masks, the extent to which this may affect the assessment of evidence of individual witnesses must be weighed up in accordance with section 176 para. 2, 2nd sentence oft he CCA (see Heuser M., Bockemühl J. "Der Rechtsstaat braucht den freien Blick ins Gesicht" – Maskerade in der Hauptverhandlung ["The rule of law needs a clear look in the face" – masquerade in the main hearing?]. KriPoZ, 2020, p. 342 et seqq.; Wagner M. 2020, pp. 223, 224).

[75] Lack or refusal of cooperation by defence lawyers can constitute a violation of their professional duties, which may be prosecuted in the (state) lawyers' courts. However, this sword is also a rather blunt one; the sanctioning of professional duties by the lawyers' courts does not help in the conflict situation. It does not follow the refusal to cooperate on its heels, but hits the lawyer unwilling to cooperate only after a period of investigation and indictment – if at all. Obstructive lawyers are aware of this situation and might make an illegitimate benefit out of it.

by the court president banning them from the court house. Ignoring such bans is a criminal offence pursuant to section 123 of the German CC (trespass) and may therefore provoke the Police to act and to remove the person concerned or to arrest him/her. Is that person however a participant to a trial, defendant, defense counsel, witness or expert such removal or arrest proves contra-productive. With view on enforcing the president's house rules on persons who claim to have the right to be in court or to have access to the court the house rules require the enforcement officers to inform the presiding judges of respective trials before imposing further measures so that the presiding judge being responsible for the main trial may take a decision in terms of safeguarding his/her trial and letting the house rules being enforced – often an exercise between Scylla and Charybdis.

2.3. Public hearings under containment measures

The hearing before the adjudicating court, including the pronouncement of judgments and orders, shall be public (section 169 para. 1, 1st sentence of the CCA). This principle, whose roots in Germany can be traced to the Napoleonic reforms at the beginning of the 19th century, put an end to the inquisition proceedings, which had been held in secret and which had been the rule for centuries all over Europe. Even then with the implementation of the Napoleonic reforms, public hearings meant the duty of the third power to show transparency. With the democratic upheavals in the 19th and especially in the 20th century, another element of the principle of publicity was added, namely the control of the courts by the public, especially the media. This means democracy within courts and court proceedings. Media and courts are therefore a very sensitive issue. Their interests are often not congruent, for example when courts protect the personal rights of those involved in proceedings, but in whom the media have a heightened interest. In the context of the pandemic, however, it is not primarily a question of this highly interesting and highly controversial area of conflict, but simply of the obligation of the courts to organize the access and stay of persons in court buildings and courtrooms in such a way that no (increased) risk of infection emanates from them.

However, the principle of public court hearings must not be misunderstood. The principle of public court hearings does not give rise to an individual right (not even of the media representatives) to come to the court and to the proceedings pending there under all conceivable circumstances. Other events can prevent this in individual cases. It does not play a decisive role whether the obstacles are those with natural causes or those caused by people. Snowstorms in winter, floods in spring and fall can easily prevent the journey to the court and the proceedings just as much as strikes or terrorist attacks elsewhere. Such constraints do not affect the publicity of a court hearing. As long as a court does not hinder the access through its own decisions, publicity of court hearings appear to be guaranteed.

In spring and early winter 2020, *Länder* governments agreed on reducing social contacts. They limited social contacts to a few people of not more than two households. With these containment restrictions personal movement was reduced.

Only those, who had valid reasons were permitted to leave their homes temporarily. Those who went to work had such valid reason and were permitted to leave their homes so that respective administrative restrictions did not cause problems to representatives of media. It took however a while and routine in practice to make enforcement authorities to understand that those who justified their absence from home with their wish to attend a court hearing as an observer had either valid reason to be on the move. In this context, publicity of court hearings was not affected.

The same applies insofar as the house rules of the court presidents, in implementation of the government rules to reduce social contacts, entailed restriction measures to protect visitor circulation and court personnel, such as the mask requirement in the buildings, the distance rules (also in the immediate area in front of the buildings) and the disinfection requirement. Although this made the work of the media representatives on reporting from hearings more difficult, it did not make it impossible and was reasonable from a proportionality point of view, because general as well as individual health protection could claim priority. In this context, no legal disputes have become known that would have prompted media houses. Nothing else applies to general visitor traffic.

However, based on section 176 para. 1 of CCA, presiding judges were also obliged to take restriction measures within a courtroom and in the immediate area in front of it. Their orders limited the number of seats available to spectators in order to implement the administrative spacing rules. In doing so, consideration was and is given to the special interests of the media[76]. Nevertheless, measures taken by the presiding judge's security orders also lead to a reduction in the number of seats available to members of the press in a session room. At the first glance, such restrictions seem to entail limitations on the publicity of court hearings. The principle of public hearing does not apply without limitation, however. Family matters and non-contentious matters, as well as matters of mandatory placement in medical or psychiatric treatment are not heard in public pursuant to sections 170 and 171a of CCA. Whenever the interests of third parties (including victims) or of the state require it, the court may exclude the public entirely or for certain parts of the proceedings[77]. Persons who appear in a manner contrary to the dignity of the court may also be denied admission to hearings[78]. A further point for consideration in this context is the simple observation that, when it comes to criminal proceedings that attract media and public attention, no courtroom can meet the demands placed on the presiding judge. Only in exceptional cases may a court resort to temporarily renting suitable hearing rooms in this kind of

[76] Section 169 of the CCA opens the possibility that under the legally given conditions public hearings may be transmitted from the courtroom to a different media room. Under pandemic conditions this legal option could not be implemented factually. Firstly, too many proceedings are concerned. Secondly, courts in Germany are not equipped with media rooms, as section 169 – new CCA was enacted in 2017 and the time was too short to let all courts realize the requirements and to install necessary equipment.

[77] Sections 171b; 172 of the CCA.

[78] Section 175 para. 1 of the CCA.

"sensational trials". Such facilities are not designed for the special (security) needs of criminal proceedings and require elaborate preparation, which often cannot be done in the short time until the trial begins. In addition, frequently it cannot be forecasted that a particular trial will arouse exceptional media and public interest. These findings are particularly true for public hearings under pandemic conditions, where even ordinary criminal proceedings encounter a shortage of space resources. At the end of all considerations regarding the publicity of court hearings, the admissibility of restriction measures depends on a judicial weighing of proportionality: How much publicity in a courtroom is still conducive to the protection of health vis-à-vis judges and all other participants in the proceedings? In a case pending at the Munich Higher Regional Court with an average of 60 people present in a 250 m^2 courtroom, the court sought virological and forensic medical advice. The experts developed a courtroom and trial concept, which the presiding judge then implemented by issuing orders according to section 176 para. 1 of the CCA – much against the initial resistance of the defense counsels who preferred the proceeding be interrupted and be restarted anew. This was the only way to bring the proceedings, which had lasted four years, to a conclusion by way of a verdict. None of the persons present at trial contracted infection.

2.4. Acceleration requirement in detention cases under aggravated pandemic conditions

Finally, one last momentum of tension should be addressed, namely, pre-trial detention under COVID-19 conditions. Since pre-trial detention and execution of criminal sanctions in a pandemic such as COVID-19 have much broader references, which therefore cannot be discussed in the context of this description, the presentation focuses on the tension between pre-trial detention and delayed or slowed down criminal proceedings.

Art. 6 para. 1, 1st sentence of the ECHR requires speedy treatment of detention cases[79]. Section 121 of the German CPC transposes this international obligation into national law. Section 121 of the CPC rules by its first paragraph that pretrial detention may not last longer than six months. Pre-trial detention may only be maintained beyond six months if the particular difficulty or the particular scope of the investigation or another important reason prevents the proceedings from being concluded by judgment. In such cases, the Higher Regional Court decides every three months whether these conditions are still met and the custody might then be extended.

---

[79] Meyer F. In: Karpenstein U., Mayer F. C. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. 2nd ed., München, 2015, Art. 6 margin 72 et seqq.; Satzger H. 2018, p. 195 et seqq.

The wording of Art. 6 para. 1 of the ECHR and section 121 of the CPC suggests that a schematic consideration of the circumstances that lead to a long pre-trial detention does not have to take place in the assessment[80]. A pandemic has not yet been the subject of such considerations. It has always been circumstances such as lengthy investigations abroad, difficult questions of fact that can only be answered by experts, or simply the multitude of offences and the victims harmed by them who must be heard before the start of a main hearing. As long as and to the extent that the public prosecutor's office and the courts cannot be reproached for delaying the handling of the proceedings, but rather have done everything in their power to promote the proceedings towards a verdict, the competent higher court, if the proportionality of the detention is still maintained, is in a position to pronounce the three-month extension of custody. Only circumstances that lie within the sphere of the public prosecutor's office and the court can justify the release of a pre-trial detainee from detention. First and foremost, the overloading of the courts, especially with other detention cases, should be mentioned in this context[81], which in the past has led higher courts to cancel arrest warrants. Although their focus is primarily on the adjudicating body, a higher court also takes the situation of a court as a whole into consideration when making the necessary overall assessment. If the competent body of the court, in Germany the presidium of the court, which is entrusted with self-administrative tasks and is staffed with democratically elected judges, fails to provide necessary relief for a criminal division that is overloaded with detention cases, this omission falls back on the judiciary. The pandemic-related obstacles cannot be compared to all this.

The outbreak of the COVID-19 pandemic is a circumstance for which neither the courts nor the public prosecutors are responsible. This applies equally to the containment measures ordered by governments, over which the courts have no control and which they cannot disregard if they are not to be accused of disregarding health protection.

COVID-19 would be clearly misunderstood if courts did not start trials or interrupted trials with this in mind. The extended interruption periods granted by section 10 of the IACPC are therefore to be understood as obligations to act. A court concerned must do everything within the interruption period – if necessary, in cooperation with the court administration – to ensure that the interrupted main hearing can be resumed as soon as possible under the conditions of guaranteed health protection for all parties to the proceedings and can then be continued. If this goal has been achieved and, if necessary, confirmed by an expert, there is no reason to wait until the end of the legally granted interruption period. *Mutatis mutandis*, this also applies to those proceedings that have yet to begin and to which section 10 IACPC does not apply. With a view to the review of the promotion acts by the higher courts, it is urgently advisable for the recognizing courts to document

---

[80] See for the criteria that the European Court of Human Rights as applied by Meyer F. 2015, Art. 6 margins 79–82; Eser R. 2012, EMRK Art. 6 margin 313 et seqq.

[81] Also see Meyer F. 2015, Art. 6 margin 82.

their efforts, if necessary, their failure and the reasons for this[82]. However, the focus must always remain on the proportionality of detention, which must be examined independently of all other circumstances at every stage of the proceedings and without regard to the time limits granted[83]. Proportionality has an objective element of assessment, which the courts cannot influence, even though their own best efforts. If at a certain point in time the expected sentence is disproportionate to the imprisonment served so far, or if further execution is no longer reasonable for other reasons, the only option is release. This, however, is independent of any pandemics and their effects.

Pandemic and acceleration requirement are admittedly a new process constellation that has not occurred before. However, they are being managed under conditions that were already tested before COVID-19.

Conclusion

The current article attempted to give an insight into some, by no means all, aspects of criminal proceedings under pandemic conditions in Germany. The discussion may suggest that German criminal procedure law does not always have adequate solutions at hand, however, in my opinion, they are necessary. The legislator has so far been hesitant and procrastinating in coming up with temporary solutions only. However, it does not take Cassandra to say that with today's globalization and the international mobility that comes with it, the next pandemic is looming around the corner. Should the wheel that was half-invented at COVID-19 then becompleted? Under the impression of the existing pandemic, there would be an opportunity to take precautions when nature again shows its face in all its harshness, for example, whether it is conceivable or even desirable to facilitate the taking of evidence in the main trial under pandemic conditions[84]. Germany was not alone in being affected; COVID-19 hit other countries much harder. The European Union recognises the goal of a harmonized Union-wide criminal procedure law. Here, indeed, would be a real project[85]. If this presentation has provided food for thought on this, it has already halfway achieved its goal.

[82] So expressively, OLG Karlsruhe, Decision of 30 March 2020 (file No. HEs 1 Ws 84/20).

[83] OLG Naumburg, Decision of 30 March 2020 (file no: 1 Ws HE 4/20); OLG Karlsruhe, Decision of 30 March 2020 (file No. HEs 1 Ws 84/20); OLG Braunschweig, Decision of 25 March 2020 (file No. 1 Ws 47/20).

[84] See also: Wagner M.2020, pp. 223, 232.

[85] Art. 82 para. 2 sub-para. 2 lit. d of the Treaty on the Functioning of the European Union (Eser R. 2012, EMRK Einf., margin 152 et seqq.; Satzger H. 2018, p. 84 et seqq.).

BIBLIOGRAPHY

Literature

1. Berber F. Lehrbuch des Völkerrechts, 3rd vol.: Streiterledigung, Kriegsverhütung, Integration [Textbook of International Law, 3rd vol.: Settlement of Disputes, Prevention of War, Integration]. 2nd ed., München, 1977.
2. Biebl W., Helgerth R. Die Staatsanwaltschaft bei dem Bayerischen Obersten Landesgericht [The public prosecutor's office at the Bavarian Supreme Court]. 4th ed., München, 2004.
3. Doehring K. Völkerrecht. Ein Lehrbuch [International law. A textbook]. 2nd ed., Heidelberg, 2004.
4. Eagleton C. Denial of Justice in International Law. American Journal of International Law, 1928, Cambridge University Press, p. 538 et seqq.
5. Fischer D. Zur Geschichte der höchstrichterlichen Rechtsprechung in Deutschland [On the history of supreme court decisions in Germany]. JZ 2010, p. 1077 et seqq.
6. Fromm I. E. Strafprozess und Corona-Krise [Criminal proceedings and the Corona crisis]. Available: from https://www.caspers-mock.de/publikationen/corona_strafprozess.htm [viewed 11.03.2021].
7. Geiger R. Staatsrecht III. Bezüge des Grundgesetzes zum Völker- und Europarecht [Constitutional Law III. References of the Basic Law to international and European law]. 7th ed., München, 2018.
8. Herbst G. Von der Wiedererrichtung bis zur Gegenwart [From restoration to the present]. In: Herbst G. (ed.). Das Bayerische Oberste Landesgericht. Geschichte und Gegenwart [The Bavarian Supreme Court. History and present], München, 1993, p. 59 et seqq.
9. Heuser H., Bockemühl J. "Der Rechtsstaat braucht den freien Blick ins Gesicht" Maskerade in der Hauptverhandlung ["The rule of law needs a clear look in the face" – masquerade in the main hearing?]. KriPoZ, 2020, p. 342 et seqq.
10. Isfen O. Interview. Available: https://www.fernuni-hagen.de/universitaet/aktuelles/2020/04/am-corona-im-strafrecht.shtml [viewed 11.03.2021.].
11. Karpenstein U., Mayer F. C. Konvention zum Schutz der Menschenrechte und Grundfreiheiten. Kommentar [Convention for the Protection of Human Rights and Fundamental Freedoms. Commentary]. 2nd ed., München, 2015.
12. Kissel O. R., Mayer H. Gerichtsverfassungsgesetz. Kommentar [Jurisdiction Act. Commentary]. 7th ed., München, 2013.
13. Löwe-Rosenberg. Die Strafprozessordnung und das Gerichtsverfassungsgesetz. Großkommentar [The Code of Criminal Procedure and the Law on the Constitution of the Judiciary. Extensive commentary]. Erb V., Eser R., Franke U., Graalmann-Scheerer K., Hilger H., Ignor A. (eds.). 11th vol., 26th ed., Berlin/Boston, 2012.
14. Löwe-Rosenberg. Die Strafprozeßordnung und das Gerichtsverfassungsgesetz. Großkommentar [Code of Criminal Procedure and the Law on the Constitution of the Judiciary. Extensive commentary]. Erb V., Eser R., Franke U., Graalmann-Scheerer K., Hilger H., Ignor A. (eds.). Xth vol., 26th ed., Berlin/New York, 2010.
15. Lutz H.-J. Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen (Infektionsschutzgesetz – IfSG). Kommentar [Law on the Prevention and Control of Infectious Diseases in Humans (Infection Protection Act – IfSG). Commentary]. 2nd ed., München, 2020.
16. Mechtcherine A. M. Pandemiebedingte Neuerungen im französischen Strafverfahrensrecht [Pandemic-related innovations in French criminal procedure law]. Available: https://jura.uni.koeln/efferuhd/user_upload/Homepage_Aufsatz_Mechtcherine.pdf [viewed 10.03.2021.].

17. Palandt. Bürgerliches Gesetzbuch mit Nebengesetzen [Civil code with subsidiary laws]. 79th ed., München, 2020.
18. Paulsson J. Denial of Justice in International Law. American Journal of International Law, 2005, Cambridge University Press, p. 279 et seqq.
19. Satzger H. International and European Criminal Law. 2nd ed., München, 2018.
20. Sauer H. Staatsrecht III. Auswärtige Gewalt, Bezüge des Grundgesetzes zu Völker- und Europarecht [External threat, references of the Basic Law to international and European law]. 5th ed., München, 2018.
21. Schorkopf F. Staatsrecht der internationalen Beziehungen [Constitutional law of international relations]. München, 2017.
22. Stern K. Das Staatsrecht der Bundesrepublik Deutschland. Vol. V: Die geschichtlichen Grundlagen des deutschen Staatsrechts [The constitutional law of the Federal Republic of Germany. Vol. V: The historical foundations of German constitutional law]. München, 2000.
23. Usebach J. Angeklagter muss trotz Corona im Strafverfahren erscheinen [Despite Corona, the accused must appear in criminal proceedings]. Available: https://www.jura.cc/rechtstipps/angeklagter-muss-trotz-corona-im-strafverfahren-erscheinen/ [viewed 11.03.2021.].
24. Verdross A., Simma B. Universelles Völkerrecht. Theorie und Praxis [Universal international law. Theory and practice]. 3rd ed., Berlin, 1984.
25. Verosta S. Denial of Justice. In: Bernhardt R. (ed.), The Max Planck Encyclopedia of Public International Law, vol. 1, Oxford, 1992, p. 1007 et seqq.
26. Wagner M. Die Strafjustiz in Zeiten der Pandemie – Überlegungen zu § 10 EGStPO [Criminal justice in times of the pandemic – considerations on § 10 EGStPO]. Zeitschrift für Internationale Strafrechtsdogmatik, 2020, p. 223 et seqq. Available: www.zis-online.com [viewed 11.03.2021.].
27. Zöller R. Zivilprozessordnung. Kommentar [Code of Civil Procedure. Commentary]. 33rd ed., Köln, 2020.