

## ›Exploiting COVID-19‹ – Legal Issues and Lawyers' Living Conditions

(answers to the questionnaire)

May 12, 2020

**Preliminary note:** Germany is a federal state. Therefore, the respective states (*Bundesländer*) are allowed to deploy their own laws for several legal areas in their respective jurisdiction; where applicable, we give details in the following sections.

### Overview

1. The Right of Assembly under COVID-19
2. The Situation in Prisons under COVID-19
3. Asylum and Migration Law under COVID-19
4. Labor Law under COVID-19
5. Housing Law under COVID-19
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### 1. The Right of Assembly under COVID-19

As part of the measures taken against Corona, the federal states issued statutory orders encompassing large numbers of massive restrictions of fundamental rights. These include general bans on assemblies; in some federal states, one may apply for exceptions, which are subject to approval.

De facto, the basic right to freedom of assembly (Article 8 of the Basic Law) was abolished. According to the constitution, assemblies can be held in Germany without registration (they only have to be reported beforehand). In practice, almost no assemblies were approved in the first weeks of the measures.

Most Courts have ruled that any assembly (rallies, demonstrations) constitutes an infection risk and, therefore, cannot be authorized. In response, some colleagues went to the Federal Constitutional Court (*Bundesverfassungsgericht*). In response, the Court left open the question of whether the prohibition of assemblies by ordinances (*Verordnungen*) is constitutional, but stated that the importance and scope of freedom of assembly must be taken into account in any decision.

Since then, the authorities have at least allowed rallies with few participants (in general, no more than 20 persons).

Various colleagues are in the process of expanding the scope for assemblies in (legally and politically) challenging the state authorities and the Courts. In addition, RAV formed a group of colleagues in order to develop a strategy on how to have the actions of state institutions – in particular, the general ban on assemblies – declared unconstitutional by the Courts, retroactively.

## 2. Situation in Prisons under COVID-19

The most pressing problem for prisoners: Almost everywhere, visiting bans are in operation (often also a ban on receiving parcels). Some prison authorities try to ›compensate‹ the bans with extended telephone capabilities (duration and frequency of calls), but in fact this leads to an extensive isolation. In addition, health risks in the case of an infection are much higher due to the significantly inferior medical care in the prisons in general.

Situation since mid-March 2020 in mainly all prisons:

- Detainees can no longer welcome relatives and friends in jail.
- Any suspected COVID-19 case in the prison/in the same house/on the same station leads to confinement and isolation of the respective facility mentioned above; COVID-19 suspects are isolated and allowed for yard walks only once a day for one hour (23h confinement).
- Visits by lawyers are usually only possible in cells equipped with a glass partition (*Trennscheibe*) and sometimes only with a special permission; in Bavaria: suspension of day passes (*Ausgang*) and parole options (*Hafturlaub*).<sup>1</sup>
- Imprisonments for failure to pay a fine are suspended with different regulations on the *Länder* level:
  - Lower Saxony, North Rhine Westphalia: Convicted persons sentenced up to 12 months imprisonment currently do not receive summons to commence imprisonment, unless there are compelling reasons to the contrary in the individual case.<sup>2</sup>
  - Bavaria: Persons who have to serve a juvenile detention (leisure detention, short detention, or a maximum of four weeks' permanent detention) or a custodial sentence of up to six months are generally only summoned to a later start of detention.
  - Berlin: Enforcement of legally binding sentences of less than three years imprisonment is postponed until July 15, 2020, and the execution of juvenile detention (§§ 13 (2) no. 3, 86f. JGG) in the Berlin-Brandenburg juvenile detention center is temporarily suspended. According to the authorities, the release of all persons still in youth detention should have taken place by March 22, 2020.<sup>3</sup>
  - Bremen, North Rhine Westphalia: Early release of prisoners serving substitute prison sentences and of those inmates whose remaining prison sentences are short-term only is possible.<sup>4</sup>

## 3. Migration and Asylum Law under COVID-19

### 3.1. Asylum/Refugees

Border closures again have reduced the number of new arrivals of refugees to Germany. Procedures pending with the Federal Office for Migration were more or less suspended from March 23 to April 20. Only by now (May 11) hearings are to restart again. The same is more or less the fact with cases pending at Courts.

The national Bar Council as well as different lawyer individuals asked not to deliver any negative decisions concerning asylum seekers, as those would neither find legal consultation nor would they be able to make any appeal by themselves. By and large, state authorities respected this demand.

At the same time, we recognized and criticized unclear and unlawful quarantine decisions (in some cases, for whole camps) with a total lack of communication and information to the inhabitants. Legal procedures are engaged in order to obtain the right for people to leave the camps, where they have no possibilities to distance and protect themselves against the COVID-19 pandemic.

**Dublin transfers:** The Federal Office of Migration declared the interruption of deportation procedures in all Dublin Cases; further, they declared to restart them, once the Corona crisis is over. In their legal argumentation they suggest an extension of the timeframe of up to six months in order to be able to deport people to other European Countries – even though the current legal timeframe suggests otherwise. This will be challenged legally in every single case.

**Social welfare:** Asylum seekers did not appear in the national ›Social Welfare Solidarity Pact‹. Cases are pending in order to challenge the limitation of social welfare access and to ask for equal treatment compared to German nationals, EU-citizens, or third member state citizens holding a residence permit.

### 3.2. Migration

Quite a lot of people are blocked in foreign countries without the possibility to enter. We saw a lack of political willingness, to act in a pragmatic way. This is especially painful as for family unification cases; few cases are pending challenging this situation.

Concerning residence permits and working permits we had mainly a quite pragmatic acting from the foreign offices in charge. Prolongation was done via Internet or by sending papers by the postal service without strict inquiries.

Problems will appear for those who lost their jobs as this will be a juridical challenge, because in general the laws are very strict concerning the need of sufficient income. As we know, a lot of migrants are particularly concerned about precarious working conditions as well as by anticipated dismissals due to the Corona crisis.

**Border closures:** Since March 16, border crossings are only possible having »significant reasons«. Police are not allowing people to enter Germany via airports and other border checkpoints; prohibitions are known in a lot of cases, racial profiling is an ongoing practice. According to our knowledge, no cases challenging cases of racial profiling are pending, due to lack of having effectively access to a lawyers and Courts. The *Wissenschaftliche Dienste* (a federal parliament-run, judicial expert service) stated on April 30, 2020 that the general interdiction to leave the country (in operation since March 16) is unlawful.<sup>5</sup>

**Public discourse:** Migration and asylum are not important issues; by and large they are neglected. The situation on the Greek Islands is more or less present in the media, rescue operations in the Mediterranean Sea are also covered from time to time, but: The main discourse does not take into account that migrants are one particular group – among others –, extremely endangered by COVID-

19. At the same time, transfer of seasonal migrant workers from abroad to Germany is possible and even featured by state authorities.

Lawyers and activists are collaborating more intensively, political leftwing-groups try to find new coalitions – but everything remains very difficult.

#### 4. Labor Law under COVID-19

The central instrument on the labor market is short-time work (*Kurzarbeit*). Requirements to apply for short-time work benefits have been eased: A smaller proportion of the workforce – 10 percent instead of one third – must now be affected by a loss of working hours. In addition, short-time work compensation can also be applied for by temporary workers, and the social security contributions to be borne by the employer are fully covered by the Federal Employment Agency (*Agentur für Arbeit*). The short-time working allowance – so far 60 percent of the lost net remuneration or 67 percent for employees with children – is to be increased; so far, Germany is in the bottom ranks compared to other European countries: From the fourth month onwards, the short-time working allowance is to be increased to 70/77 percent and from the seventh month onwards, it will rise to 80/87 percent of the lost net remuneration. In addition, it was decided that until October 31, 2020 any additional income earned in so-called ›systemically relevant‹ (*›systemrelevant‹*) areas will not be credited against the short-time working allowance.

For employees with children requiring care, the Infection Protection Act (*Infektionsschutzgesetz*) has been extended to include a right to compensation: Employed custodial persons (*Sorgeberechtigte*), who suffer a loss of earnings due to closed down child care facilities by official order – and with no other reasonable possibility of child care provision – receive compensation. The amount of the compensation is 67 percent of the net loss of earnings and is paid for a maximum of six weeks. The regulation applies until December 31, 2020.

Since April 10, 2020 (and, for the moment being, until June 30, 2020), exceptions to the provisions of the Working Hours Act (*Arbeitszeitgesetz*) are possible for certain activities (COVID-19-ArbZV). This basic authorization (*Ermächtigungsgrundlage*) allows for far-reaching exemptions for activities that are deemed necessary to maintain public safety and order, health care and nursing, services of general interest or to supply the population with certain existential goods (goods of daily use, medicines, etc.). Namely, the regulation applies to maximum working hours, minimum rest periods and the general ban on employment on Sundays and public holidays.

Further legal measures have been taken to reduce personal contacts: For example, sick leave (*Krankschreibungen*, to be issued by medics) for minor diseases of the upper respiratory tract and for suspected COVID-19 infections are possible via phone until June 23, 2020. In the area of collective labor law, video and telephone conferences are permitted to hold works and staff council meetings.

Finally, a Federal government draft bill (*Referentenentwurf*) is under way: If adopted, the bill will allow for video conferences instead of presence in court rooms; the Federal Labor Court (*Bundesarbeitsgericht*), as the third instance, may also order the written procedure without the consent of the parties; the Courts would also have the possibility to exclude the public for reasons of health protection.

## 5. Housing Law under COVID-19

The lockdown measures affect tenants disproportionately. Economic losses, short-time work or unemployment lead to liquidity squeezes, people will no longer be able to pay their rents, and the existence of tenancies is at risk.

Politicians reacted relatively quickly to this problem. If people are unable to pay rent in the period from April 1 to June 30, 2020 due to Corona-related restrictions, they may not be dismissed. This regulation applies to both residential and commercial properties, regardless of size and economic power.

However, the rent is only deferred for a period of two years, i.e. until June 30, 2022. By then at the latest, the arrears must be settled, otherwise the tenant is threatened with termination of lease.

This is exactly where our criticism comes in. Nobody knows how the crisis will develop. But we will all be poorer afterwards and whether the rent arrears can be paid is more than uncertain.

We demand:

- In times of crisis, but also afterwards, the settlement of rent debts must avert any cancellation of renters' contracts.
- If tenants cannot afford paying rents, the state must step in.
- Furthermore, landlords should also participate in overcoming the crisis, either by a legally decreed rent reduction or by a partial tax increase on rented out property.

## 6. Risks to the Exercise of One's Profession under COVID-19

According to an April 2020 survey by the *German Federal Bar Association* (BRAK)<sup>6</sup> among 14,500 lawyers (i.e. 9% of all German lawyers), two-thirds of all lawyers have considerably fewer mandates and thus might have to cope with a considerable drop in turnover.

Only around 19 percent of those surveyed stated that they had generated roughly the same number of mandates since the beginning of the COVID-19 crisis. 9.37 percent of respondents had around 30 percent fewer mandates than in the previous six months, 17.36 percent (minus 50%), 16.96 percent (minus 75 %), and 7.97 percent of the participants have not even had a single new mandate since the beginning of COVID-19 crisis. The Federal government has handed out a lump sum payment of 9,000 Euro to support self-employed persons with up to five employees (15,000 EUR for those with up to 10 employees) – until now, details on the cash provision to lawyers are unknown.

Another topic is the ›system relevance‹ of lawyers: If the respective state (*Bundesland*) decides the lawyers are to be perceived as a ›system relevant‹ group of workers (such as medics, nurses, police etc.), monies would be deployed by the state for childcare. According to the BRAK survey mentioned above, more than 33 percent of lawyers have childcare needs. 15.7 percent are exposed to the situation that partners are only partially able to guarantee childcare. For 6.1 percent childcare is not guaranteed by partners at all; 1.9 percent are single parents and need assistance with childcare.

## 7. Professional Practice under COVID-19

Business is starting again slowly and colleagues have to face a situation where especially the right of clients to always have the possibility of confidential consultation at every step of the legal procedure are at stake. Courts do not provide the respective infrastructure; instead, they are building little walls, lawyers and clients will have to keep distance; it is hardly possible to have confidential talks. In our offices, we still have to get used to this situation; some colleagues are wearing masks while others don't, or only when meeting with clients. Some offices are fully closed.

A special situation hits colleagues with children; in some states, they are allowed to send their children to school or kindergarten as lawyers are seen as relevant for the system. In others, this is not the case and colleagues have to take care of their children the whole week, which is of course a special problem for single parents. The BRAK (and the respective Bar Associations on the *Länder*-level) demand ›system relevance‹ for lawyers.<sup>7</sup> As of April 23, 2020, Saxony, Rhineland-Palatinate, Mecklenburg-Western Pomerania and Berlin, North Rhine-Westphalia, Saxony-Anhalt, Brandenburg, Berlin, Bavaria grant ›system relevance‹ status;<sup>8</sup> on May 5, Saarland followed as did Hesse on May 11.

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<sup>1</sup> See [https://www.justiz.bayern.de/service/corona/Umgang\\_Justiz.php](https://www.justiz.bayern.de/service/corona/Umgang_Justiz.php)

<sup>2</sup> See [https://www.mj.niedersachsen.de/startseite/aktuelles/corona\\_virus/fragen\\_und\\_antworten/informationen-zum-umgang-mit-dem-corona-virus-in-der-justiz-186310.html](https://www.mj.niedersachsen.de/startseite/aktuelles/corona_virus/fragen_und_antworten/informationen-zum-umgang-mit-dem-corona-virus-in-der-justiz-186310.html) and <https://www.justiz.nrw/JM/ministerium/corona/justizvollzug/index.php>

<sup>3</sup> See <https://www.berlin.de/sen/justva/presse/pressemitteilungen/2020/pressemitteilung.908021.php>

<sup>4</sup> See [https://www.weser-kurier.de/bremen/bremen-stadt\\_artikel,-bremen-laesst-haeftlinge-vorzeitig-frei- arid,1905002.html](https://www.weser-kurier.de/bremen/bremen-stadt_artikel,-bremen-laesst-haeftlinge-vorzeitig-frei- arid,1905002.html)

<sup>5</sup> Wissenschaftliche Dienste, Ausreiseuntersagungen nach § 10 Abs. 1 S. 1 in Verbindung mit § 7 Abs. 1 Nr. 1 3. Alt. Passgesetz zur Eindämmung der Infektionen mit SARS-CoV-2 (WD 3-3000 -108/20),

<https://www.bundestag.de/resource/blob/694066/f301a7087795f12ddc0b9d5b6dc3cf5e/WD-3-108-20-pdf-data.pdf>

<sup>6</sup> See <https://brak.de/die-brak/coronavirus/corona-umfrage/> (summary) and

[https://brak.de/w/files/00\\_startseite/covid19/2020\\_04\\_20\\_gesamtergebnis\\_umfrage\\_coronakrise\\_brak.pdf](https://brak.de/w/files/00_startseite/covid19/2020_04_20_gesamtergebnis_umfrage_coronakrise_brak.pdf) (full report).

<sup>7</sup> See <https://brak.de/die-brak/coronavirus/corona-umfrage/> (summary) and [https://brak.de/w/See\\_files/00\\_startseite/covid19/2020\\_04\\_20\\_gesamtergebnis\\_umfrage\\_coronakrise\\_brak.pdf](https://brak.de/w/See_files/00_startseite/covid19/2020_04_20_gesamtergebnis_umfrage_coronakrise_brak.pdf) (full report).

<sup>8</sup> <https://jura-online.de/blog/2020/04/23/anwalte-und-notare-gelten-nun-auch-als-systemrelevant/>