Band 12 / 2021

Corona Rules and Rule of Law – the Austrian Case

Alexander Balthasar

Schriftenreihe der
Landesverteidigungsakademie

Schriftenreihe der
Landesverteidigungsakademie

Alexander Balthasar*

Corona Rules and Rule of Law – the Austrian Case

* Priv.-Doz. Dr. iur., Director of the Institute of Law and Theory of the State with special regard to Military Law at the Austrian National Defence Academy, Vienna; Visiting Professor of Public Law at the Andrássy University Budapest

1/2022
Vienna, November 2021

Impressum:

Medieninhaber, Herausgeber, Hersteller:
Republik Österreich / Bundesministerium für Landesverteidigung
Rossauer Lände 1
1090 Wien

Redaktion:
Landesverteidigungsakademie
Institut für Staats- und Militärrecht
Stiftgasse 2a
1070 Wien

Schriftenreihe der Landesverteidigungsakademie

November 2021
ISBN 978-3-903359-38-3

Druck:
ReproZ W 21-4372
Stiftgasse 2a
1070 Wien

Table of Contents

Abstract

When invading Austria end of January 2020 the Corona virus found, as it was the case in other countries, too, Government as well as society not very well prepared to handle what turned out quite quickly to be a veritable crisis of unprecedented quality.

This case study – restricting itself for reasons of feasibility (given the still rapidly changing facts and norms) to the period of time from January 2020 to March 2021 – aims at assessing, from a lawyer's perspective, the performance of the Austrian Government when dealing with this crisis, not in order to belittle what was done but with a clear view to enhance future crisis management.

Acknowledgements

The author would like to thank

(i) Professor Dr. med. *Wolfgang Weninger* (Medical University Vienna) and Dipl.-Ing. Thomas Mohr (Science Consult) for inspiring discussions and background information

(ii) his former assistant at the Academy, Mag. *Bernhard Smutek*, and the Institute's secretary, Ms Brigitta Reiter, for valuable help in the establishing of facts

(iii) his current asistant, Dr. *Christoph Ebner*, for careful final reading of the text.

Preliminary Remarks

When the Corona crisis broke out in March 2020, nobody would have imagined that, one full year later[1], we were still held hostage by this virus, on the one hand fearing lethal consequences by the spreading of the virus, on the other hand suffering not only from severe limitations of our current daily life, but also from long term effects for our social and economic condition, public budgets included, by the measures taken in order to fight this virus.

Rarely there was a crisis which produced more **legislation, covering** all branches of the law and **all parts of life**, even wiping away most high ranking public principles (in particular that of budget discipline[2]), within shorter time.[3]

---

[1] This case study focussing on the *first* year of Austrian Corona Crisis management more recent legal and factual developments have not been taken into account *here* – there might be another opportunity.

[2] In March 2020 the European Commission decided (and confirmed in autumn 2020) not to instigate procedures under Article 126 TFEU (see Tagesschau [2020]; Fiskalrat [2020], 7, 36). This seems to be inevitable also with regard to Austria (see, for the estimated effects of the Corona crisis on the national budget Fiskalrat [2020], 6 et seq, 22 et seq: in sum, the federal budget will suffer from a **consolidated loss** of about **€ 60 x 10^9** in 2020 and 2021 – a sum amounting to **120 times of the annual deficit** in 2019 (about = 0, 5 x 10^9) or, for the next *two years*, to **more than 1/3 of the annual revenues** of this last year before the crisis (see BMF [2019], 1).

[3] For the full amount of the Austrian "Corona legislation" initiated in spring 2020 see (i) BGBl I 2020/12, (ii) BGBl I 2020/16, (iii) BGBl I 2020/23, (iv) BGBl I 2020/24, (v) BGBl I 2020/25, the "package" Acts (i) – (iv) each covering a wide range of legislation, while (v) providing the necessary horizontal budgetary amendments. Cf also *Resch* (2020) and *Klaushofer* et al (2020), 658 et seq and *Klaushofer* et al [2020], 629 et seq, respectively; for specific sectors (not in the least, however, aiming at completeness) see *Beck* (2020), *Kosterski* (2020), *Nicolussi* (2020), *Pramböck* (2020), *Trauner-Karner* (2020), *Zib* (2020).

Obviously, the overarching aim has always been a *most honourable* one: to **protect vital interests** of the (human) population:

(i) their **health**[4],

but in particular

(ii) the right to **life**[5] –

thus complying with the founding principle of Article 2 TEU, human dignity[6], as well as with the responsibility under Article (1 read in conjunction with Article) 2 first sentence ECHR to protect human rights in general, but in particular "everyone's right to life" in foro domestico[7], construed, even strengthened, also as duties under EU law via Articles 2, 3, 51 (1), 52 (3)

This legislation has been a *federal* one, based on Article 10 (1) (12) B-VG. Doubts whether this constitutional basis covers all provisions issued (cf Klaushofer et al [2021], 684 et seq) will be neglected here.

[4] Cf, for a comprehensive overview of the international sources of this - alleged - "fundamental human right" UN-WSC (2000). Nevertheless, *neither* the Austrian national fundamental rights code (StGG RGBl 1867/142) *nor* the ECHR *nor* the CFR (its most pertinent provisions being Article 3 [1]: "Everyone has the right to respect for his or her physical and mental *integrity*" and Art 35 first sentence: "Everyone has the *right of access to preventive health care* and the *right to benefit from medical treatment* under the *conditions established by national laws and practices*") provide a solid basis for the assumption that such a fundamental right forms actually part of the legal order applicable in Austria.

[5] Cf, paradigmatically, ECtHR (2019), point 218, *first* sentence ("The Court first reiterates that the right to life guaranteed under Article 2 of the Convention ranks as *one of the most fundamental provisions* in the Convention and also enshrines *one of the basic values of the democratic societies* making up the Council of Europe …").

[6] Cf also Article 1 CFR as well as the heading of the whole first Chapter of the CFR.

[7] Cf ECtHR (2019), point 218, *second* sentence ("the *obligation to protect the right to life* under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to ‚secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention' …").

CFR, read in conjunction with Article 168 TFEU as well as with Article 35 second sentence CFR aiming that "a *high level of human health protection* shall be ensured."[8]

Nevertheless the measures deemed necessary to fulfill this obligation[9] have, more often than not, turned out themselves to interfere with (the very same[10] as well as other[11]) fundamental rights of others as well as of the very same individuals benefiting, on the other hand, from these measures themselves. In addition, the measures also may interfere with the most important *public* interests (which, at a second glance, might also turn out to be just a simplifying code for *multiple rights* of many *individuals*[12]).

From a rational point of view unwelcome facts do not disappear when we

---

[8] See, however, for the actual amount of these fundamental rights obligations in more detail infra section II.

[9] At any rate, one consideration should not be overlooked: as far as can be seen, more often than not Corona infection had by far *not been the only cause of decease* (cf *Robert-Koch-Institut* [2020]: "Sowohl Menschen, die unmittelbar an der Erkrankung verstorben sind ("gestorben an"), als auch Personen mit Vorerkrankungen, die mit SARS-CoV-2 infiziert waren und bei denen sich nicht abschließend nachweisen lässt, was die Todesursache war ("gestorben mit") werden derzeit erfasst." ("human beings their death was caused directly by SARS-CoV as well as persons suffering from other illnesses the direct cause for their death could not be established have been counted"). *Exactly to the* extent that thus **the dimension of the disease** (i.e. the extent of the *complementary amount of causes* for the counted deceases) **has been exaggerated**, however, *we are not entitled to subsume the measures actually taken under the "obligation" mentioned in the main text.*

[10] Cf the possibility that the right to life (endangered by some other disease than COVID-19) is infringed by COVID-19 measures.

[11] In particular, but not restricted to: Article 7, 12, 14, 15, 16, 17, 24, 25, 33, 45 CFR (or the respective fundamental rights enshrined either in the ECHR or in the national Constitution. See in more detail infra subsection II/C.

[12] See *Balthasar* (2011), 22 et seq.

close our eyes.[13] This simple truth does also apply in public law; or, to put it differently:

even most noble *intention* of governmental action may not suffice for complying with the requirements of the rule of law.[14]

Against this very special background unprecedented for decades at least in Europe[15] it seems to be the right point in time for a first **assessment of the said measures**[16] – not so much with regard to their effectiveness as such[17],

---

[13] For the opposite view cf *Carroll* [1992] 103): "So she sat with closed eyes, and half believed herself in Wonderland, though she knew she had but to open them again, and all would change to dull reality."

[14] In Austria even best intention does not protect from the verdict of ACC that the measure at issue had been "arbitrary" – an assessment which might be considered as too stiff (cf *Balthasar* [2017], 578 et seq).

[15] Cf, however, already *Gartz* (2016) for deficiencies when dealing with the **migration crisis 2015** – both crises taken together seem indeed to indicate that **thorough reflexion on crisis management** should rank on the **very top of Austrian future agenda** as soon as ever possible (obviously, zeitgeist impediments have, up to now, delayed this vital undertaking already for far too long; see infra fn 119).

[16] The discussion has already started: As early as on 26 November 2020, the Austrian industrialist *Hansjörg Tengg* criticised the Austrian Government's anti-Corona-measures, arguing that in order to help 0,6 % of the population seriously affected by a Corona infection, causing the adverse impacts of the measures taken on economy, public budget and the education system were *out of proportion* (see Tengg [2020]).

[17] In this regard *much research work still needs to be done*; for a first recent overview, taking a global comparative perspective, cf *Brauner* et al (2021). For further analysis, an appropriate starting point could be to interprete the **correlation** between the *stringency of governmental measures* (cf https://ourworldindata.org/coronavirus/country/united-states?country=~USA#government-stringency-index) and the *rate of deaths* (cf https://covid19.who.int/table, 12. 3. 2021) *per population* (cf https://data.worldbank.org/indicator/SP.POP.TOTL).

but against the more complex[18] **yardstick** of the **rule of law** (one of the fundamental values enshrined, as a common European heritage, in Article 2 TEU and, thus, providing the binding framework for every political action in the European Union, crisis management included).

While restraining myself in this case study strictly to the *Austrian part and perspective* – which I feel best prepared to deal with – of handling this *global* crisis[19] I wonder, nevertheless, whether the items raised here are really *all* an Austrian peculiarity? At any rate, I would be glad if this case study were completed by comparable studies regarding the respective approaches of other European states (in particular EU Member States) – thus we finally could dispose of a solid, reliable basis for assessing the overall Corona approach of Europe in general (and of the EU in particular).[20]

That is also why I opted for this text to be published in *English* – only by reaching out beyond the limits of the area of the German language such further comparative as well as integrated studies will be possible. Nevertheless the official language of Austria being *German*, it is inevitable to

---

It is no surprise that Austria's measures **between April and October 2020** are assessed by the index just mentioned as rather **not stringent** (in this period, there are only *very few* States *worldwide* ranking still lower, like, e.g. Belarus or, quite astonishingly, Japan).

[18] Obviously assessing the effectiveness of measures interfering with interests protected by law is one component when applying the yardstick of the rule of law (see right infra text by fn 27).

[19] In particular I will disregard here any implication of Article 222 TFEU, although in particular with regard to **medical capacities** a vertical as well as a horizontal **cooperation** as provided in paragraphs (1) (b) and (2), military resources included, could have helped a lot. See for deficiencies in more detail *Hauser* (2021).
For the Early Warning and Response System (EWRS) see Ischgl-Report (2020), 46.

[20] Needless to say that the aim of pointing out deficiencies (compared against the yardstick which will just be explained infra in section I) is not to blame the current government for its endeavours, but rather to analyze shortcomings much deeper rooted in the structure of the Austrian political and legal system.

cite in this case study mainly sources of German language – a fact for which I ask the reader for understanding.[21]

[21] For reasons of authenticity there will be a couple of quotations in German – always, however, an English translation of mine was added.

I. Rule of Law

A. Proportionality

Justice is a matter of **right proportion.** This insight going back to *Aristotle* and *Plato*[22] implies a specific – **rational** – methodology of action (now in European Union Law[23] paradigmatically enshrined in, but not restricted to[24] Article 52 [1] EUCFR):

(i) First, a **legitimate goal**[25] needs to be chosen

---

[22] For a comprehensive overview of the sources cf *Kischel* (1999), 174 ff, 180 (fn 21) or *Lembcke* (2007), 4 ff.

[23] The reason why I am referring here, dealing with the performance of Austria in an area only slightly covered by EU law, nevertheless to EU sources for interpreting the term "rule of law" is that Article 2 TEU therefor provides a *common European legal basis* (see infra fn 28; cf also fn 25) which will be needed, if, as mentioned in the preliminary remarks, the discussion of the Austrian case shall have any impact on further discussions concerning the performance of other European states.

[24] Cf for its general application in EU law *Edward and Lane* (2013), point 2.32; *Trstenjak/Beysen* (2012); *Lenaerts/Van Nuffel* (2011), points 7-033 et seq; *Trimidas* (2006), 136 ff.

[25] Article 52 (1) CFR refers to

(i) "objectives of general interest recognised by the Union" and
(ii) "the need to protect the rights and freedoms of others".

Both categories (*bonum commune* and *iura* [fundamentalia] *subiective sumpta*) may in fact *overlap* as may be inferred from **Article 2 of the French Declaration** on Human and Citizens' Rights of 5 October 1789 (forming still part of the current French constitution) stipulating: "Le **but de toute association politique** est la **conservation des droits naturels et imprescriptibles de l'Homme**. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l' oppression."; cf also *Article 1 of the German Fundamental Law*, according to which human dignity has to be protected by the State (paragraph 1), human rights are fundamental

(ii) Second, **all** relevant "**stakeholders**" (i.e. the *entirety* of legitimate interests/rights concerned by the envisaged action) – not only the ones favoured by the legitimate goal pursued, but also and in particular all (different kinds of) **counterparties** – have to be *identified* and **balanced against each other**[26]

(iii) Third, the **optimal balance between effort and outcome** – with regard to **each** stakeholder – has to be **assessed**[27] (consequently, the option meeting best, from an *overall* perspective, the relevant criteria assessed has to be singled out).

---

to every human community as well as to peace and justice in the world (paragraph 2) and fundamental rights are binding to all branches of Government (paragraph 3).

For the requirements of a legitimate goal in general cf *Peers/Prechal* (2014), points 52.46 et seq, as well as, for the model of the ECHR, *Warbrick* (2009), 348 et seq (reference to the *second* edition of Harris et al, Law of the European Convention on Human Rights, instead to the most recent 4th edition [2018], is done *here deliberately* because the 4th edition does no longer contain *Warbrick's* chapter most topical in the context dealt with here).
In Austria,the ultimate yardstick for legitimacy is the so called "Sachlichkeitsgebot" (**test of reasonableness**), cf *Kucsko-Stadlmayer* (2014), point 105; for the genesis of this famous "Sachlichkeitsgebot" see *Balthasar* (2021b), 306 et seq.

[26] Cf *Peers/Prechal* (2014), points 52.50, 52.54 et seq (also demonstrating the difficulties when it comes to weight *different categories* of rights); in the framework of the ECHR see *Warbrick* (2009), 351 et seq, 354 et seq; for the perspective of Austrian constitutional law see *Eberhard* (2014), in particular points 42 et seq ("multipolares Grundrechtsverständnis" – "multipolar concept of fundamental rights").

[27] Cf for the standard of the ECHR with regard to this proportionality test *Warbrick* (2009), 358 et seq (which, however, still lacks preciseness); for the different steps of this assessment according to Austrian doctrine see *Kucsko-Stadlmayer* (2014), points 99 et seq, for a comparison of the standard applied by the CJEU and German doctrine see *Rumler-Korinek/Vranes* (2019), points 15 et seq, stating a recent rapprochement of the Court to the mentioned doctrine.

Legitimate *choosing* as well as *balancing* as well as *assessing* (and *singling out*), however, in turn need a **yardstick** to be measured against. In a normative system based on the rule of law[28] the relevant yardstick is not the freely floating reason of a (single or a college of) "philosopher kings", but "**the law**"[29] ("the law is king", as already *Pindar*[30] put it).

B. The Complexity of our contemporaneous Law

In modern societies "the law" is complex. This **complexity of the law** stems mainly from several of its core elements:

---

[28] Cf **Article 2 TEU** (referred to already supra in fn 23), **binding all members** of the EU *also with regard to their domestic affairs* beyond the scope of normal Union law (arg "These values are *common to the Member States*"; cf *Hummer* [2015], 84). Most interestingly, neither *Lenaerts/Van Nuffel* (2011) nor *Edward and Lane* (2013) treat this topic – the interpretation of the term "rule of law" - at all (!); for the purpose mentioned in the text, however, it will suffice to refer to the ECJ's well-known Judgment of 23 April 1986, Case 294/83 (*Les Verts*), point 23, first sentence: "It must first be emphasized in this regard that the European Economic Community is a **Community based on the rule of law**, inasmuch as neither its Member States nor its institutions can avoid a **review** of the question **whether the measures adopted by them are in conformity with the basic constitutional charter**, the Treaty."

[29] Cf for the "'Provided for by Law' Requirement" enshrined in Article 52 (1) EUCFR (meaning that all limitations of fundamental rights have to be founded in the "law") *Peers/Prechal* (2014), points 52.36 et seq; cf also *Warbrick* (2009), 344 et seq.

[30] "Νόμος ὁ πάντων βασιλεὺς/θνατῶν τε καὶ ἀθανάτων/ἄγει δικαιῶν τὸ βιαιότατον/ὑπερτάτᾳ χειρί." (= first three and half lines of fragment 169 [number according to the fourth editio Bergkiana], see *Pindar* [1896], 268, 302).

1. Principle of equal treatment

The principle of **equal treatment** – insofar a reformulation of the requirements of proportionality just set out in lit A – secures that favourable effects of State activities as well as the complementary burdens therefor are *fairly shared* among all "stakeholders" or, to put it the other way, that **no excessive burden**[31] *is imposed to some members of the respective polity, according to its fundamental convictions (in turn laid down in legal documents*[32]). Complying with this principle presupposes a **solid establishment of the relevant factual situation**. **Increasing diversity** as well as **increasing interdependence** of our societies, however, renders this task more and more complex.

2. Principle of separation of powers

Distrust against abuse of power as well as the sheer need to avoid overloading too few public institutions are the main reasons why the principle of separation of powers has been developed in *several variants*:

(i) First, it is inherent in the concept of any **constitution** establishing a **vertical separation of power** (in particular between the Constitution and ordinary legislation, but, as a rule, also between Parliament and administrative and judicial authorities)[33]

---

[31] The prohibiton of an "excessive burden" is, upt to now, well-known only in the context of expropriation (Article 1 1. AP ECHR, cf *Harris* et al (2018), 881; ACC (2020c), points 96 et seq); in my opinion, however, there is no obstacle whatsoever to **generalize** this theorem.

[32] Even the Austrian "test of reasonableness" (see supra fn 25) is based on the entirety of legal provisions (in particular τέλοι enshrined in the Constitution), not on freely floating reason (see *Balthasar* [2021b], 312 et seq); cf also supra fn 29.

[33] By such a vertical separation, *a hierarchy of norms* is established (labelled by *Adolf Merkl* already a century ago "Stufenbau der Rechtsordnung", cf *Balthasar* [2010], 6 et seq, 230 et

(ii) Second, the (in essence **federal**) principle of **multi-level-government**, even applied in the framework of "ever closer" continental unification, the more so in explicitly federal states like Austria[34], triggers the need to coordinate inter-, supra-, national and subnational (= regional and local) law-making

(iii) the (**liberal**) principle of **limitation of the public sphere**, guaranteed in particular by fundamental rights, leaving room also to private (even corporate) law-making to be respected by public law[35]

(iv) the principle of "checks and balances", implying also a **horizontal separation of power** (in particular between Government and [different branches of the] Judiciary as well as additional controlling bodies as Ombudsman or Court of Auditors).

Obviously all these limitations tend, as an intrinsic corollary to its abovementioned purposes, to **fragment competences**, to enhance the need for plurilateral coordination and to increase the administrative burden for accountability, thus **reducing** (sometimes significantly) the **resources available for direct action**, not to speak of veritable **competence gaps** barring any comprehensive action, at least in time.

---

seq). Antagonist models are, as it is well-known, *Jean Bodin's* "princeps legibus solutus est" (cf Balthasar [2019]) as well as "Parliamentary supremacy" (cf *Bradley, Ewing & Knight* [2018], 49 et seq).

[34] Cf Article 2 of the Austrian Constitution (Bundes-Verfassungsgesetz – B-VG).

[35] Cf for Austria *Balthasar* (2006), 471 et seq.

3. Principle of democratic as well as of legal participation

In our current understanding of law-making – backed, however, by already the medieval (canon law) proposition "*quod omnes tangit, ab omnibus approbari debetur*"[36] – it does not suffice that proper norms, complying fully with the legal framework just set out in (1) and (2), are produced by some wise authorities. In contrast, the **principle of participation, in its two variants**[37], **means**

(i) in the **democratic context:** sometimes direct participation in person, mainly, **however, democratic representation of** all members (citizens) of the respective polity[38]

(ii) in (administrative and) **judicial procedures: involving** (at least offering the opportunity to be **heard**) all relevant "**stakeholders**" (bearers of legal – public as well as private – interests which are, in the latter case, understood as subjective rights).[39]

Obviously this **inclusion of the people concerned** by a decision in the decision-making procedure *may embetter* the quality of the decision – *certainly it will delay* the procedure, the more so, the more numerous and the more different the "stakeholders" are.

---

[36] See *Balthasar* (2014), 193, with further references in fn 90.

[37] See, however, for fundamental differences *Balthasar* (2010), 267 et seq; *Balthasar* (2014), 192.

[38] Cf Article 3 1. AP ECHR; Articles 10 and 11 TEU.

[39] Cf Article 41 (2) a CFR; Article 6 (1) ECHR, Article 47 (1) CFR (cf *Kröll* [2019], points 84 et seq).

C. Simplicity in Times of Crisis

In contrast (and maybe even as a specific reaction of the general public to this ever growing complexity of modern law) we find quite often the demand that "the law" – substantive as well as procedural – should be as easily understandable and as simple as ever possible.[40]

While it is quite easy to counter these demands in ordinary times by referring to the inevitable complexity of modern law (B), **it is apparent that we need indeed simple procedures in law-making** (legislation as well as in administration[41]) **in the moment of a serious crisis** – otherwise the necessary effectiveness (the product of *speed* and *output*) of the measures to be set in place could not be provided.

That is why we find in almost every country "simplified procedures" for law-making to be applied in times of crisis (of emergency), mainly of only *provisional* kind, and with only a *minimum of* (substantive as well as procedural) *safeguards*.

D. How can, if ever, proportionality (A) be maintained also in times of crisis where the complexity of modern law (B) has to cede to simplicity (C)?

If we need on the one hand simple procedures, but, nevertheless, on the other hand correct results, the only way to reconcile both demands seems to

---

[40] This demand has been a locus communis in European Enlightenment reflection on good legislation at least from *Francis Bacon* onwards, see *Mertens* (2004), 380 et seq.

[41] In addition preserving the rule of law would need specific procedures in the **judiciary** apt to provide effective remedies in times of crises, too, cf *Polzin* (2018), 664.

be to **do both subsequently, i.e. to build eventual simplicity on prior solid preparation, of reflexion as well as of exercise**[42]:

The more deliberation has been done (and passed rigorous tests) in advance, the less time-consuming elaboration is needed in times of crisis. Put it that way, the ability to apply, when needed, simple decision-making procedures without losing the quality of substance indicates that the respective institution has indeed done its homework in time – or, in again other words:

Simplicity can only be recommended as a **surface** phenomenon, dissimulating already achieved **perfection of the core.**

[42] With regard to the latter, the **military staff** is the traditional model of crisis management, also recommendable in civil parts of society (in the public sphere as well as in the sphere of private-owned enterprises; cf, for the latter part, e.g. *Fally* [2020]).

II. Obligation to protect Life – is there any (or no) alternative?

A. General Consideration

Although the need of balancing the legitimate goal pursued with counterparties' legitimate interests was emphasized supra in section I/A/(ii) as an intrinsic feature of the rule of law, we nevertheless hesitate to apply this approach also to the "the **right to life**" considered "internationally" to be "the **supreme value** in the hierarchy of human rights"[43], supremacy, however, seeming to *exclude balancing a limine*. Hence – apparently applying this paradigm of "supremacy" – the Austrian Government from the very beginning took the position **not to balance**[44] **the adversary effects** the measures imposed on the people in order to fight the Corona virus had in particular on the economy, rather to **compensate** them (if possible at all[45]) beyond any (reasonable) limit – the famous slogan being: "Koste es, was es wolle" ("Cost it what may").[46]

---

[43] Cit ECtHR (2001a), points 72, 94. Nevertheless it is held that even this right may be *waived* by an individual (see *Klaushofer* et al [2020], 682). This consideration will be neglected here.

[44] It is true that the chancellor of the time, *Sebastian Kurz*, claimed to have sought a "balance" between "a maximum of measures" and a "state still being able to act" (cf ORF (2020c). The context, however, shows that the latter consideration did only slightly mitigate the "cost it what may"-approach. What we may, however, also infer is that still mid of March 2020 the **Government hoped that two weeks of "lock down"** (cf, for the assessment of this measure, infra section IV/B/3) **would suffice to** "to starve the virus" ("Es geht darum, das Virus auszuhungern") and thus to **overcome the crisis (!)**.

[45] Whereas it is, at least in principle, possible to compensate financial losses of enterprises, appropriate compensation of adverse effects on education & research (due to closure of schools/universities) and on social & private life (due to the restrictions of assembly) is much more difficult.

[46] Cf Die Presse (2020a).

Obviously being allowed to act from such an absolute starting point would simplify a lot the procedures to make the appropriate choice of measures[47]; on the other hand: is it really true that we have here, with regard to the top of the "hierarchy of human rights", an **exemption of an intrinsic element of justice** (the rule of law) due to the fact that life is only "*an* inalienable attribute of human beings"[48] (among others)?

B. The two paradigmata

1. There is no Alternative (TINA)?

In contrast to what is required by the limitation clauses enshrined paradigmatically in the second paragraphs of Articles 8 – 11 ECHR (and, following this model, in Article 52 [1] EUCFR) the only limitation for the application of the first sentence of Article 2 ECHR seems to be Article 15 (**2**) explicitly stating that "*no derogation* from Article 2, *except in respect of deaths resulting from lawfull acts of war*… shall be made … under this provision." This would imply that **not even** the limitation clause enshrined in paragraph 1, allowing any of the "High Contracting Parties to "take measures derogating from its obligations under" the ECHR

- "*in times of* war or other *public emergency threatening the life of the nation*"[49],

---

[47] This is in particular true for the treatment of **legal persons**, which are in general also entitled to *fundamental* rights, although not to political rights exclusively linked to the status of "citizen" and of course *not to the "right to life"*, meaning that they have to share the burdens necessary to protect human life but are, by their very nature, unable to profit from these protective measures themselves; this fact, however, would in the balancing paradigm indeed quite easily suggest imposing an "excessive burden" on legal persons.

[48] Cit ECtHR (2001a), point 94. The indefinite article ("an") seems to open the door for *even more exceptions* from the principle of balancing, thus still more weakening the initial equation "justice = right proportion".

[49] Hence, in contrast to the exception provided by paragraph 2, paragraph 1 allows

although even then only

- "to the extent strictly required by the exigencies of the situation" and
- "provided that such measures are not inconsistent which its other obligations under international law"[50] and
- complying with the procedural requirements set out in paragraph 3,

would apply. Hence, there seems really to be "**no alternative**"[51], i.e. apparently States **have** – except in times of war with regard to "lawful acts of war"[52] – to **make** indeed **every possible effort** to secure the right to life of **every single human being** living under their "jurisdiction" within the meaning of Article 1 ECHR.[53]

---

derogation not only with regard to "lawful **acts of** war", but also with regard to

(i) other acts "**in time** of war"
(ii) any "**other public emergency** threatening the life of the nation".

[50] This clause resembles Article 53 ECHR.

[51] This slogan was, in 20th century, in particular used by *Margaret Thatcher*: "There is no alternative" (cf Investopedia [2020]).

[52] Obviously this provision intents to provide a legal basis for the committing of "lawful" – lethal – "acts of war" of a "High Contracting Party". Nevertheless, the usefulness of this provision remains doubtful in several respects:

(i) first it is by no means clear that the ECHR does at all apply to "acts of war" (see *Balthasar* [2009], 282 et seq, 293 et seq; *Harris* et al [2018], 205 et seq).
(ii) second, even if so, one had to argue that these "acts of war" fell still under the "jurisdiction" (Article 1 ECHR) of the acting State, although war acts differ from police acts insofar as the addressee of an act of war – the enemy and civilian population under *his* control – is, clearly enough, not under the jurisdiction of the acting State.

[53] This is also held in the *Ischgl Report* (2020), 125, and – if taken literally not even restricted

2. Or Not TINA?

Nevertheless, ECtHR still in its Judgement of 10 May 2001, ANo 25781/94, *Cyprus/Turkey*, held[54], at least at first sight quite astonishingly[55]:

"… the Court does **not consider it necessary** to examine in this case the **extent** to which Article 2 of the Convention **may** impose an obligation on a Contracting State to **make available** a **certain standard** of health care."[56],

nor did, up to now, subsequent case-law[57] or doctrine[58] unequivocally make obligatory the TINA paradigm. Right to the contrary, the Court (Grand Chamber) confirmed still in its Judgment of 19 December 2017, ANo *56080/13*, *Lopes de Sousa Fernandes/Portugal*, point 175, its Decision of 15 May

---

to the right to life (!): "Vorbeugender Gesundheitsschutz kann … **nicht mit wirtschaftlichen Vor- oder Nachteilen aufgewogen werden**." (Preventive protection of fundamental rights may not be balanced against economic advantages or disadvantages).

[54] Cf for the subsequently cited judgements *Harris* et al (2018), 215.

[55] Note that this Judgment (2001b) was delivered *two months after* the Judgment (2001a) referred to in subsection A. Cf also that the Court, in its more recent Judgment (2019), had *mitigated* its original formula to "[reiterating] that the right to life guaranteed under Article 2 of the Convention ranks as *one of the most fundamental provisions* in the Convention" (see supra fn 5).

[56] Cit (ECtHR 2001b), point 219, last sentence.

[57] See *Harris* et al (2018), 215.

[58] Cf, with regard to Article 2 CFR (related to Article 2 ECHR via Article 52 [3] CFR), *Borowsky* (2019), point 38; *Wicks* (2014), point 02.21; cf also, with regard to Article 35 CFR, *Damjanović* (2019), points 21 et seq, 28; *Hervey/McHale* (2014), point 35.21, here referring to the position of the EU Fundamental Rights Agency (see, however, also point 35.20 where the authors consider that "immunization against the major infectious diseases" forms part already of the "minimum core" approach; "immunization", however, just being a synonym for "vaccination", also this opinion does by no means back the position here labelled "TINA").

2012, ANo 42290/08, *Wiater/Poland*, point 39, that

"The *allocation of public funds* in the area of health care, which is a fervently debated issue in a number of European States, is *not a matter on which the Court should take a stand*. **It is for the competent authorities of the Member States to consider and decide how their limited resources should be allocated** (…). Those authorities are after all better placed than the Court to evaluate the relevant demands in view of the scarce resources and to take responsibility for the difficult choices which have to be made between worthy needs (…)."[59]

This pragmatic finding appears to be *quite reasonable* – also with regard to the consideration that the Corona virus is **by far not the only threat** to the right to life, **not even the most dominant one**[60] so that even under the TINA paradigm it would be necessary to apply the *same severe yardstick* in an *equal – likewise rigid* – manner to **all** threats (which would, evidently, be **impossible**[61]). Nevertheless, this finding obviously is not easy to reconcile with Article 15 (**2**) ECHR:

So far to see, the most convincing way seems to be restricting the scope of this paragraph to the obligations enshrined in Article 2's *second* sentence.[62]

---

[59] Cit ECtHR (2012), point 39.

[60] In 2020 Austria, Corona-induced deaths amounted – according to Statistik Austria (2020) - in total to 6.477 (out of 90.517), among them only 393 were under 65 of age. The latter figure corresponds roughly to the annual death rate in all sorts of traffic accidents (369), but even the prior figure amounts only to *less than a half* of deaths caused by chronical heart diseases (15.582).

[61] The overarching, quite trivial reason for the fact that in this world the fight against death can never be won completely is that **human beings are mortal beings** – can it be that a secular world is challenging (repressing) this fundamental element of human existence?

[62] While the first sentence of Article 2 (1) ECHR protects the "right to life" in general, the second sentence prohibits **only intentional deprivation** of one's life. This formula is **not a hendiadys** – rather it contains *two separate obligations*, with *different standards* (cf *Harris* et al [2018], 206 et seq, 223 et seq respectively).

With regard to the *complementary* part of Article 2, however, it could help to take into account when interpreting *this specific part* of the Convention the subsequent development in European human/fundamental rights legislation:

Article 35 EUCFR – the EUCFR's corollary to the specific obligation here at issue (derived from Article 2 EHCR) "to **make available** a **certain standard** of health care" – being categorized *not as a proper "right", but as a mere "principle"* within the meaning of Article 52 (5) ch cit already by the official Explanations to this Article[63], we could, in this specific case[64], *accept* this *guidance provided by the CFR* also for the interpretation of Article 2 *first* sentence of the ECHR.[65]

C. Conclusion

While the "Cost as it may" approach of the Austrian Government with regard to fight the Corona virus is, at *first* sight, mandatory under Article 2 ECHR, a *more thorough analysis* of the ECtHR's *case-law* as well as of the *specific*

---

[63] Cf "The principles set out in this Article …"; on the basis of Article 6 (1) (3) TEU already the attempt of doctrine (cf *Giesecke* [2019] point 9 f; *Damjanović* [2019], point 20; *Hervey/McHale* [2014], point 35.37) to interpret the *first* sentence as granting an "individually enforceable right" is doubtful. At any rate, there is more consensus that at least *second* sentence (which bears much more relevance in the here given context) is only a "principle" (cf *Giesecke*, ib, point 36; *Damjanović*, ib, point 28).

[64] Usually, as it is enshrined in Article 52 (3) CFR, the relationship works the other way round.

[65] In fact, characterizing exactly this sentence as "[ranking] as one of the *most fundamental provisions* in the Convention and also [enshrining] one of the **basic values** of the democratic societies making up the Council of Europe" which "enjoins the State not only to refrain from the ‚intentional' taking of life, but also **to take appropriate steps** to safeguard the lives of those within its jurisdiction" (cit ECtHR [2012], point 33; emphasis added) does quite well fit to this category of "principle".

characteristics of this crucial Article provides that there are at least solid arguments that, right to the contrary,

- protecting human lives *cannot* be restricted, in an unproportional manner, *only* to the fight against the Corona virus, but, even *much more important*,
- also the **right to life** – at least with regard to the "obligation on a Contracting State to *make available a certain standard of health care*"[66] – is **not supreme** in the sense that it should not be **balanced against other fundamental rights**, among those also
    - the right to property[67],
    - to conduct a business[68],
    - to education[69],
    - to religious[70] and

---

[66] Also with regard to direct interference, however, balancing can be necessary (cf *Balthasar* [2006], 658 et seq, in particular fns 3236, 3239 - 3243; *Depenheuer* [2007], 87 et seq].

[67] Article 5 StGG; 1 1. AP ECHR, Article 17 (1) CFR. ACC (2020c) did not generally deny this need to balancing, but contented itself with the finding that the legislator had indeed provided acceptable compensation. An in depth analysis whether the Corona pandemia really justifies several *general* and long-lasting lock-downs, and the profound interferences with economic activities (and the consequences for private property) inevitably following from these was not yet done by ACC. Cf also, rather critically assessing the current compensation rules, *Sander* (2020).

[68] Article 6 StGG; Article 16 CFR. See previous fn; cf also *Klaushofer* et al (2020), 703 et seq; *Klaushofer* et al (2021), 711 et seq.

[69] Article 14 CFR. Cf, for the sector of universities, the Act BGBl. I /2020/23, for the sector of schools the ordinances of the minister for education of 13 May 2020 (applying retroactively since 16 March 2020), BGBl II Nr 208, and of 3 September 2020, BGBl II Nr 384 (accepted by ACC [2021], see infra fn 129). Cf also *Klaushofer* et al (2021), 710 et seq.

[70] Article 15 StGG; Article 9 ECHR; Article 10(1) CFR. For the inclusion of religious services in the Corona measures (first legally, only since a later point in time formally excluded,

- to private[71] life,
- to assembly[72] and to association[73],

not to speak of the right

- to free movement[74] and the freedom to provide[75] and take advantage of services.[76]

---

but de facto still included) see in more detail *Balthasar* (2021a). Cf also *Klaushofer* et al (2020), 711 et seq; *Klaushofer* et al (2021), 724 et seq.

[71] Article 8 ECHR; Article 7 CFR. Cf in particular paragraph 1 (1) (3) (a), in conjunction with subparapgraph 3, of Ordinance BGBl II 2020/479 as amended by BGBl II 2020/528, **restricting even meetings among closest relatives** (= parents, children and brothers/sisters) to **visits of single** persons (!!) – a provision again set into force for the eastern regions (Vienna, Lower Austria and Burgenland) 2021 for the Easter week (cf paragraph 2 [3] of Ordinance BGBl II 2021/58, read in conjunction with Article 25 (1) of this Ordinance, as amended by BGBl II 2021/139). Cf also *Klaushofer* et al (2020), 715 et seq; *Klaushofer* et al (2021), 719 et seq.

[72] Article 12 StGG; Article 11 ECHR; Article 12 CFR. Cf the recent judgment of ACV (2021), assessing a prohibition of assembly by the Viennese Police as illegal. Cf also *Klaushofer* et al (2020), 708; *Klaushofer* et al [2021], 709 et seq.

[73] Article 12 StGG; Article 11 ECHR; Article 12 CFR.

[74] Article 4 (1) StGG, Article 4 (2) B-VG, Article 2 (1) 4. AP ECHR (within the federal territory); Article 4 (2) StGG, Article 2 (2) 4. AP ECHR (freedom to emigration); Article 45 CFR (within the Union territory). See for the Austrian policy in this respect infra fn 153. Cf also *Klaushofer* et al (2020), 662 et seq, 695 et seq, 749; *Klaushofer* et al [2021], 635 et seq, 654 et seq, 708 et seq, 733..

[75] This part of the EU fundamental freedom of services (cf Articles 56 et seq TFEU) corresponds to the fundamental right to conduct a business.

[76] Closing down of enterprises, in particular restaurants, hotels, but also hair-dressers, theatres, museums, libraries, book-shops, etc infringes not only the economic rights of the operator, but also of the customer.

If this finding is true, already the **starting point of Austrian Government's Corona policy has been wrong.**

III. Emergency Law-Making – Institutional Deficiencies

As stated supra (subsection I/C), **making of law has** – despite of its intrinsic complexity – **to be simple in times of crisis**. This postulate, however, presupposes *previous solid substantive preparation* (see supra subsection I/D) if the necessary concession to speedy reaction shall not amount to a serious loss of quality and thus in the end counteract effectiveness.

A. Lack of Preparation despite Warning still in Time

1. Shaping legislation only after the beginning of the crisis

When end of January the Corona virus crossed for the first time Austrian borders[77], the only law applicable to fight it was the Federal Act on Epidemias, Official Law Gazette (BGBl) 1950/186, a modified version still of the Cisleithanian Act of 14 April 1913 on the prevention of and fight against communicable diseases, Imperial Law Gazette (RGBl) No 67[78], providing authorities only with measures[79] at that point in time **apparently**

---

[77]See in more detail *Ischgl-Report* (2020), 13 et seq.

[78] Applicable in the whole "Austrian" part of the former Austrian-Hungarian monarchy, i.e., apart from what is now the Republic of Austria, also in Cz, Sl, as well as in parts of Poland, Ukraine, Romania, Italy and Croatia. Against this common legal background it could be interesting to *compare the subsequent developments in these respective countries*, in particular, however, in Cz where the Cisleithanian Act, most probably, was likewise transferred into the new republican legal order (of then Czechoslovakia).

[79] Seclusion of infected persons (§ 7), Disinfection of items and rooms(§ 8), exclusion of infected persons from educational institutions (§9), prohibition of use of public water installation as well as of natural water resources (§ 10), prohibition of selling food from infected area (§ 11), prohibition of entering infected area (§ 12), specific caution with regard

considered unfit to meet the current danger.[80] That is why, obviously **without much time for deliberation**, **special legislation** had to be adopted in Parliament, above all[81] the Federal Act on provisional measures preventing diffusion of COVID-19 (subsequently: CO-M-A)[82], adopted and published (!) on **15 March 2020**[83], in force since **16 March 2020**, but since then already **several times amended**.[84]

---

to corpses of infected human beings (§ 13), destruction of infected animals (§ 14), prohibition of mass events (§ 15).

[80] This was not only the assessment of the legislator in March 2020, see infra fn 19, but later-on also of the Ischgl-Report (2020), 41, 106 et seq, in particular with regard to the lack of competence to prohibit the departure of infected tourists.
When looking closer, however, the main difference is only that the Act on Epidemias does (still) **not provide a legal basis for "locking down"** the whole country (which, in turn, has been the **main** - in fact for (far too) long a time the **sole** - instrument used to fight Corona and will be assessed quite critically infra in section IV/B/3.
So the assessment of the legislator in March 2020 might indeed be contested (!). That, however, exactly *a general "lock-down"* was favoured quite early and *solely* by the Government may in turn be understood better against the background of the *rather weak performance* of Tyrol's health care authorities, on the basis of the Act on Epidemias, in early March in Ischgl (Tyrol), *as later on established* (cf Ischgl-Report [2020], 32 et seq, 40 et seq, 52 et seq, 81 et seq, 88 et seq, 105 et seq, 120 et seq, 125 et seq; *Reinfeldt* [2020]): because at least in March thouroughly amending *legislation* indicated to the general public that it was *not negligence of administration* (for which responsibility lay already by the new federal Government in office since January 2020) but only the insufficient legal basis (for which previous governments were to be held responsible) which had caused the disastrous effects of Ischgl.

[81] For the bulk of other **Corona-triggered legislation** see supra fn 3.

[82] Bundesgesetz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19 (COVID-19-Maßnahmengesetz), BGBl I 12/2020 (since BGBl I 2020/104 the official abbreviation is: "COVID-19-MG"). To be more precise, CO-M-A (Corona-Measures-Act) did only form part, as Article 8, of a bundle of legislative measures all published in a single Bill.

[83] Not only the speed is amazing, also the weekday, the 15 March having been a **Sunday**.

[84] BGBl I 2020, Nos 16, 23, 104, 138; BGBl I 2021, Nos 23, 33). In addition, the Act on

In the motivation of the Draft Bill of **14 March 2020**[85] (here, due to time pressure, not done by the Government but by members of Parliament themselves[86]) we read:

"Das **Epi**demiegesetz 1950, BGB Nr. 186/1950, das im Wesentlichen auf dem Gesetz betreffend die Verhütung und Bekämpfung übertragbarer Krankheiten, RGB\. Nr. 67/1913, beruht, sieht verschiedene Maßnahmen vor, die auch zur Bewältigung der sog. "Corona-Krise" herangezogen wurden. *Mit dem Fortschreiten der* **Pan***demie hat sich jedoch herausgestellt, dass die* **Maßnahmen des Epidemiegesetzes 1950 nicht ausreichend bzw. zu kleinteilig sind, um die weitere Verbreitung von COVID-19 zu verhindern.** Es sollen daher in einem ersten Schritt jene Maßnahmen ermöglicht werden, die unbedingt erforderlich sind, um die weitere Verbreitung zu verhindern. Vor diesem Hintergrund kann es auch der Fall sein, dass es sich dabei allenfalls um vorläufige Maßnahmen handelt."[87]

This reasoning seems to indicate that it was *only* the "*proceeding*" of the *current* "Corona crisis" which revealed to Austrian Government (for the *first* time) the difference between the kind of diseases for which the Act on **Epi**demias had been made and a really global **pan**demia, so that prior to the outbreak of this crisis there had been no chance to frame apt legislative measures in

---

epidemias was, since then up to March 2021 (cf fn 1), *even more times* amended (BGBl I 2020, Nos 16, 23, 43, 62, 103, 104, 136; BGBl I 2021, Nos 23, 33).

[85] IA 396/A Blg NR XXVII. GP, 10.

[86] So-called "Inititativantrag" (cf paragraph 26 of the Paliamentary Rules of Procedures' Code, BGBl 1975/410).

[87] "The Act on *epi*demias ex 1950, mainly building on the Act on the prevention of and fight against communicable diseases ex 1913 provides several measures also applied to overcome the so-called ‚Corona-Crisis'. It was only in the course of spread of this *pan*demia that these measures turned out to be insufficient or to be shaped on too small scales to bar effectively further spread of COVID-19. Hence, as a first step by the legislation here proposed shall be provided the legal basis for effective measures for the said purpose. These measures may be of only pro-visional kind, too." Cf also, in this regard, the judgement of the Austrian CC of 14 July 2020, V 408/2020, point 120.

order to *prevent*, but also, if need be, at least to *fight* effectively the spread of the latter disease.[88]

Now it is true that *originally* the Act ex 1913, with very few exceptions[89], had focused only on infections caused by **bacteria**[90], not taking in special account[91] infections caused by **virus**.[92]

But already since decades subsequent amendments[93] have, more and more

---

[88] This difference might, however, have been exaggerated (se right supra fn 80). So the following parts of the text have to be read under the premiss that **even if** the Government's assessment were fully true …

[89] Mainly small pox (variola) – a disease where effective vaccination had made other measures de facto obsolete –, yellow fever (orchopyra) and rabies/lyssa, although also viral forms of cerebrospinal meningitis were included.

[90] In the order of paragraph 1 of the Act (original version) the following diseases were covered (inofficial translation into English and medical terms added by A.B.): scarlet fever (scarlatina), diphteria (diphteritis), typhold fever (typhus abdominalis), shigellosis (dysenteria), cerebrospinal meningitis (meningitis cerebro-spinalis epidemica), childbed fever (febris puerperalis), louse-borne **typhus** (Typhus exanthemicus), cholera asiatica, plague (pestis), relapsing fever (febris recurrens), leprosy (lepra), trachoma (conjunctivitis granulosa trachomatosa), yellow fever (ochropyra), anthrax, glanders (malleus).
By Amendment of 3 December 1925, BGBl No 449, "paratyphus" was added to the list, by amendment of 18 June 1947, BGBl No 151, also tuberculosis (since BGBl 1968/127 governed by a separate Act).

[91] Obviously this omission was caused by the fact that the species of virus had not yet been detected before 1935.

[92] From a practical point of view, the decisive difference between bacteria and virus is that only the former may be fight effectively by *general* **antibiotics**, whereas with regard to the latter we have to wait until a *specific* **vaccination** serum is available. In addition, also **transmission via the air** seems to be easier.

[93] Federal Act on Epidemias (BGBl 1950/186; republication); BGBl 1961/185; BGBl I 2006/114; BGBl I 2008/76; BGBl I 2012/43.

(but mainly only in 2006), also[94] listed infections triggered not by bacteria[95], but by virus. [96]

And a glance to Wikipedia[97] suffices to see that the dangers emanating from the phenomenon of a *pan*demia – and, in particular, also of **virus-triggered pandemias** like *influenca*[98] – were already well-known (as such) **globally** at least *during the last two decades*, discussed, inter alia, within the format of the WHO[99] as well as within the German Government[100], but also in Austria –

---

[94] The following diseases triggered by *bacteria* were added to the list: Since 1950 (BGBl No 186): Polio (poliomyelitis); food poisoning, triggered by bacteria; psittacosis; Bang's disease (morbus Bang, brucellosis); whooping cough (pertussis); leptospirosis.

[95] Triggered neither by bacteria nor by virus, also malaria and trichinosis were added to the list since 1950/186, echinococcus granulosus and multiocularis (since BGBl I 2008/76).

[96] Polyomyelitis (since BGBl 1950/186); hepatitis epidemica (since BGBl 1961/185); hemorrhagic fever, bird flu, viral food poisoning, SARS, meningoencephalitis, legionnaires' disease, rubella (since BGBl I 2006/114).

[97] See Wikipedia, "Pandemie".

[98] While being perfectly true that Corona is by no means the first virus-triggered pandemia (cf, apart from the three diseases mentioned already supra in fn 89, the "Spanish influenca" right after World War I and, in more recent times, HIV, Ebola and SARS 1), it seems nevertheless that Corona is, in our times, in fact the *first really global virus-triggered pandemia entailing (at least potentially) serious consequences for literally everybody in every part of the world.*

[99] Cf already WHO (2009), in particular 25 et seq; nevertheless, still in January and February 2020 the director general of WHO played down the danger oft he new disease (cf *Hauser* 2000b, 10 et seq).

[100] Cf in particular *Robert Koch Institut* (2014).

here, however, mainly[101], on *regional* level.[102] Apparently **Government**[103] **(= legislation and**, as a necessary precondition therefor, **administration**[104]**), but also medical science**[105] **and pharmaceutical industry**[106]**, had failed**

---

[101] Cf, however, that already under the responsibility of minister *Maria Rauch-Kallat* not only a national plan on the pandemia of influenza had been adopted (*BMGF* [2005]) but that it had also been she who had ordered, under the impression of the "Bird flu", end of 2006 *nine millions of protective masks* – an action which, however, until the beginning of the current Corona crisis, had *not at all been appreciated by the public* (cf *Der Standard* [2020a]).
Contrary to what had been promised in that plan (see page 13, point 1.4.8), however, until the outbreak of the Corona crisis *no single amendment of the plan had been accomplished* (see Ischgl-Report [2020], 40 et seq).

[102] Cf in particular the regional "Influenza-Pandemieplanung" of the City of Vienna (Rathauskorrespondenz 2006).

[103] However: Austria being a federal State disposing not of only one but of ten "Governments" it seems that also **mutual denial of competence** happened, e.g. with regard to the region of Tyrol: so we read in the Ischgl-Report (40 et seq) that the (head of) government of Tyrol had *refrained from issuing a regional plan* implementing the National Plan on Pandemieas (see previous fn) on ground of the federal competence, although this national plan was not at all considered to be effective (cf for the lack of availability of informed staff) by the regional authorities of Tyrol (see *Ischgl-Report* [2020], 96); cf also *Klaushofer* (2021), 683 et seq.

[104] This finding implies also a political dimension insofar as it had been no other than the current president of the Austrian Social Democrats, *Pamela Rendi-Wagner*, a medical researcher *habilitated in epidemology* (!) who had been *responsible for exactly these issues in the Austrian Ministry for Health Care from 2011 to 2017*, first as director general, from March to December 2017, however, even as minister. Cf also *Ischgl-Report* (2020), 41: "Die Notwendigkeit einer Novellierung des Epidemiegesetzes 1950 war den Verantwortlichen des Gesundheitsministeriums bekannt."

[105] Most strikingly we read in the NZZ (*Kusma* [2020]) on the basis of information provided by the virologist prof. *Gerd Sutter* (LM University Munich): "… das Mers-Virus, das wie 2019 nCoV zu den Betacoronaviren zählt … infiziert seit 2012 immer wieder Menschen; bis anhin sind fast **2500 Infektionen** bestätigt und knapp **860 Personen gestorben**. … die Todesfallrate … dürfte jedoch immer noch **deutlich über derjenigen liegen, die man bis anhin für Covid-19 … annimmt** …" – so apparently still in February 2020 **even top**

to reassess in lock-step with this information **the further suitability of measures** provided by the Act[107]; otherwise the surprised reaction of the legislator in March 2020 mentioned right supra – whether justified or not[108] – would not have occurred.

2. The Warning of the Federal Minister for Defence already in September 2019 – not properly taken into account by the Minister for Health Care

In contrast, in a report on the future of the Austrian Armed Forces[109],

---

experts did not in the least expect the quantitative and qualitative dimension of Covid-19 (up to now, we count more than 2,7 x 10^6 deaths caused by Corona world-wide [see infra fn 174!). Against that background *administrations cannot be blamed of having underestimated* severely the dangerousness of *Corona*.

[106] Cf Branchengespräch (2020): "*Covid-19 hat die Welt unvorbereitet getroffen*, *obwohl* die Experten wussten, dass die ‚Krankheit X' irgendwann auftauchen wird. *Keiner hat damit gerechnet*, mit welcher Härte die größte Pandemie seit der Spanischen Grippe zuschlagen würde." ("Covid-19 hit the world *unprepared*, *although* experts knew that the 'disease X' would become a reality some day in the future. *Nobody expected* how strong the strikes of the major pandemia since the Spanish influenca would be"; emphasis added)).

[107] Of course, already long before (even long before the species of "virus" itself was detected in 1935) examples of virus-triggered pandemias were well known: smallpox (vaccination available since the late 18th century) and the Spanish influenza. Apparently, however, these diseases – both overcome already since many decades – did *no longer motivate neither medical nor public management research*.

[108] See for the assessment infra section IV/B.

[109] See BMLVS (2019a).

published on **17 September 2019**[110] by the Minister for Defence[111] during the *interregnum*[112], we read on p 22:

"Pandemie

Eine Pandemie ist die unkontrollierte Ausbreitung einer hochansteckenden Infektionskrankheit, beispiel[s]weise mit Grippe**viren**, die nicht eingedämmt werden kann. Im Falle einer Pandemie bei Menschen könnte es dazu kommen, dass in einer ersten Phase von bis zu sechs Monaten **kein Impfstoff bzw. keine Medikation** zur Verfügung stünde. In einer zweiten Phase wäre zwar ein Impfschutz entwickelt, die **Produktionskapazitäten** würden für den großen Bedarf jedoch **nicht ausreichen**. Aufgrund einer Vielzahl an Toten und massenhaft Erkrankten hätte dies **massive Auswirkungen auf das Funktionieren von Staat, Gesellschaft und Wirtschaft. Im Extremfall dürften die Menschen ihre Häuser nicht verlassen, es käme zu massiven Versorgungsengpässen, die Krankenhäuser, Sanitätszentren und mobilen medizinischen Dienste wären überfordert**."[113]

---

[110] See BMLVS (2019b). Warnings by the ministry for defence against pandemias, however, date at least back to 2015, see *Hauser* (2020b), 7, although mainly focused on "limited pandemias" ("high lethality, but short term") like Ebola.

[111] Major-General *Thomas Starlinger*, before and again currently adjutant of the Federal President.

[112] As it is well-known, between the resignation of the Government *Kurz/Löge*r as a consequence of the successful vote of no confidence of national Parliament on 27 May 2019 and the appointment of the still current government *Kurz/Kogler* on 7 January 2020 a transitory government (*Bierlein/Jabloner*) had been appointed, formally vested with all characteristics of a full government, in practice, however, consisting mainly of high-ranking civil servants and reduced to **mere care-taking**.
On the other hand, during this period also considerations with regard to specific political parties had less weight for some ministers.

[113] "A pandemia is the uncontrolled diffusion of a highly contagious infectious disease, e.g. by influenza virus, which cannot be contained. In such a case affecting human beings it could happen that during the first six months neither vaccination nor other medical treatment were available. In a second step vaccination were in principle available, but

So *from mid of September 2019 at the very latest* the Austrian Federal Government, the Austrian Minister for Health Care included, **should have** been aware that instruments might be necessary to fight *pan*demia *not yet provided* by the Act on *Epi*demias[114] and, hence, have **started the preparation of the necessary legal amendments**.

B. Procedures of Law-Making in the Corona Crisis

1. Inconsistency with the requirements of the specific crisis

CO-M-A was, as said, adopted by the **plenary** of the House, *although its shere size* (**183** members) combined with the impossibility to secure minimal distance did **not meet the necessary requirements** already then ordered by the Minister to be respected by "ordinary" civil society.[115]

---

facilities were to scarce for the high demand. Mass deaths and illnesses would have severe effects on the functioning of State, society and economy. In extremis people were not allowed to leave their homes, supply were severely reduced, hospitals, medical care center and mobile medical services were overcharged.".
It was the Federal President himself who cited this quotation in his speech on 26 October 2020 on the occasion of swearing in lieutenants of the Armed Forces at the Military Academy in Wiener Neustadt.

[114] It is a pity that the Report cited in the main text does not reveal its sources, in particular with regard to the "lock down-scenario" pointed out there – the more so because not even the Plan issued by the Robert Koch Institute (2014) had mentioned such a scenario.

[115] Already by instruction of 10 March 2020, based on paragraph 15 of the Act on Epidemias, the **prohibition of indoor assemblies of more than 100 persons**, had been ordered by the Minister (BMSGPK 2020a) with, it is true, some exceptions, among those Parliamentary assemblies, but – quite telling (cf text right infra by fn 127) – *without any attempt of reasonably motivating this exception.*

2. Irrational Burden of History

According to the President of Parliament that was done deliberately in order to show that Parliament could function also in times of crisis.[116] President *Sobotka* thought it even necessary to refer, in this context, to the events of 4 March 1933 when Parliament's further action had been blocked by the resignation of all its three presidents[117] – a reference illustrating how sensitive the issue of replacing the plenary is still today among Austrian politicians even in times of emergency.

While it is perfectly true that we should all learn from history it is, however, important to draw the *correct* conclusions – otherwise we are again going astray. Given that there are only quite superficial similarities between the two crises[118] the specific reminiscence of 4 March 1933[119] should not have impeded applying the proper emergency tools provided by the Constitution.[120]

---

[116] See, itself quite critical, Addendum (2020a).

[117] Apparently President *Sobotka* aimed to avoid any reproach that he, too, had given away lightly the functionality of the plenary.

[118] While Parliament in March 1933 was deeply divided and, furthermore, Government was interested to keep Parliament blocked in order to facilitate its double fight against Austrian National-Socialists and the German Reich backing them (see in more detail *Balthasar* [2021b], 243 et seq), not only Parliament stood together in March 2020 when adopting *unanimously* C-OM-A, but there are no indications for any internal or external threat comparable to 1933 either.

[119] It is, however, also true that at least before the Corona crisis occurred it had *not only in Austria, but rather in the whole western hemisphere* not been very welcome to discuss emergency scenarios at all – the predominant reaction being the suspicion that an abuse of powers, combined with an infringement of fundamental rights, was to be prepared (cf, with, parte pro toto, reference to *Michel Foucault* and *Giorgio Agamben*, *Slavoj* Žižek [2020] who, however, himself does not share this opinion).

[120] See infra point 4.

3. The Devastating Assessment of the Austrian Constitutional Court (ACC)

The original version of CO-M-A, adopted, as said supra, on 15 March 2020 by the plenary of the Nationalrat **enabled** the Minister for Health Care, but also regional and local authorities **to issue ordinances** by which entering specific establishments, but also of parts of the public sphere could be prohibited and infringements be sanctioned by administrative penalties. Subsequent amendments of this Act[121] still widened the scope of these enablement. While the addressees, in their vast majority, cooperated quite willingly, **judicial control** – on the stage of administrative courts of first instance as well as, in particular, by the Constitutional Court – revealed that

- although one specific part of CO-M-A itself complied with constitutional limits (in particular with that set by the protection of property)[122],
- not only the **wording** of the health care minister's first Ordinances[123]

---

[121] See supra fn 84.

[122] Cf ACC (2020c).

[123] See (i) BGBl II 2020/96, amended by BGBl II 2020/110, BGBl II 2020/112, BGBl II 2020/130, BGBl II 2020/151, BGBl II 2020/162,
(ii) BGBl II 2020/98, amended by BGBl II 2020/107, BGBl II 2020/108, BGBl II 2020/148, BGBl II 2020/162,
(iii) BGBl II 2020/197, replacing the ordinances (i) and (ii), amdended by BGBl II 2020/207, BGBl II 2020/231, BGBl II 2020/239, BGBl II 2020/246, BGBl II 2020/266, BGBl II 2020/287, BGBl II 2020/299, BGBl II 2020/332, BGBl II 2020/342, BGBl II 2020/398, BGBl II 2020/407, BGBl II 2020/412, BGBl II 2020/446, BGBl II 2020/455, BGBl II 2020/456
(iv) BGBl II 2020/463, replacing temporarily the ordinance (iii), amended by BGBl II 2020/472, BGBl II 2020/476).

as such was highly **misleading**[124], but that

- the Minister had, in these ordinances,
    - **excessed** the legal enablement[125] as well as
    - **infringed** the principle of equal treatment[126] as well as
    - **not complied with** the procedural requirement of properly establishing, assessing and documenting the facts.[127]

In the end,

- not only these *Ordinances*[128] having been, to the largest extent[129], **annulled**[130]

---

[124] Cf, commenting, parte pro toto, on the judgement of ACLA (2020), covering also the judgement of ACV (2020), *Kopetzki* (2020).

[125] Cf ACC (2020a). In the meantime, Parliament has provided the necessary legal basis (see paragraph 4 of CO-M-A as amended by BGBl I 2020/104).

[126] Cf ACC (2020b), points 91 et seq.

[127] Cf ACC (2020b), points 90 et prec); ACC (Judgements of 1 October listed right infra in fn 129 (ii), ACC (2020k) and ACC (2021b). Dissenting *Klaushofer* et al (2021), 666.

[128] Due to the necessary time needed for legal proceedings even the most recent judgement of the Austrian Constitutional Court (of 1 October 2020) do not yet cover the Ordinances more recently issued (not those mentioned infra in fn 138, but not even BGBl II 2020/544), nor the immediate predecessor, BGBl II 2020/463, as amended by BGBl II 2020/472 and 476).

[129] As far as can be seen the up to now only exception is an Ordinance of the minister for education which was just ("gerade noch") accepted by ACC (2021a).

[130] See ACC (2020i), part I. This seems, however, to be the very only example, due to the rapid speed of amendment, because "annulment" in the strict sense of the term meaning abolishing a provision which has, at the point in time of the court's decision, still been in force is no longer possible when the provision at issue had already been cancelled by its author. In this case, only a ex post facto declaration is possible (and even there **CC had to**

or **declared of having been void**[131] by ACC[132],

- but likewise, to a *large* extent, *individual fines* [133] imposed by the authorities annulled (or at least lowered) by administrative[134] courts[135],

---

alter its case-law for being in a position to admit the complaints, see its Judgements 2020a, points 20 et seq, and 2020b, points 32 et seq).

[131] See ACC, Judgements of

(i) 14 July 2020 (2020a and 2020b);
(ii) 1 October 2020 (2020j, 2020i [part II], 2020h, 2020g, 2020f, 2020e.

[132] In Austria it is the Constitutional Court which is competent to assess and, if necessary, annul ordinances.

[133] Out of all 45 cases decided by administrative courts (see next fn but one) only three cases did not concern imposing a fine, but other administrative acts (one claim for compensation for loss of earnings [dismissed], one complaint against arrest [successful] and one complaint against business closure [successful]).

[134] The establishment of administrative courts of first instance by Federal Constitutional Act BGBl I 2012/51 (operational since 1 January 2014) did not confer to them a monopoly of control of all administrative acts; right to the contrary, legislation has been enabled to confer this task in *some* matters also to courts of the ordinary judiciary (Article 94 [2] B-VG). Based on this provision administrative decisions to isolate infected people in quarantine have to be contested before courts of the ordinary judiciary (!) Within the period of time here assessed no single judgement of an ordinary court of first instance in this type of cases was listed in the official case-law information system.

[135] Apart from the leading cases already mentioned right supra in fn 124, a search in the Austrian Legal Information System (RIS) revealed that out of **45 cases** *decided* by the administrative courts of first instance until end of October 2020 (a **very low number**, indicating that already the administrative authorities had, when intervening at all, in the vast majority of cases restrained themselves to admonishing, instead of imposing fines or taking other kind of ac-tion [see previous fn but one]; *otherwise the number of complaints would have been much higher, the more so be-cause for the lodging of complaints before the administrative courts no lawyer is needed*) administrative decisions were only **confirmed in 7 cases**, whereas **19 annulments** and **16 lowerings** were delivered; in addition, **13 cases** were *referred* to CC for annulment of

a discussion arose whether *all* fines (i.e. also those not contested by their addressees) should be paid back ex officio[136] – already this effect[137] a **very severe embarrassment**, even weakening, **of the rule of law** (at least of the confidence of the population in it and in its representatives: the authorities).

When analyzing these shortcomings, two main sources of flaws can be identified:

(i) On the one hand, the **duplication of legislation** – having *first* to adopt a formal *Act of Parliament* where the *legal basis* for the *subsequent ordinances* to be issued, in a separate, *second* step, by the Minister – seems to be quite cumbersome, in particular when a speedy and flexible reaction to rapidly changing circumstances or rapidly growing insight into the facts is required[138];

---

the legal basis of the administrative decisions, meaning that, almost automatically, after that annulment, the annulment of the decisions in these cases will follow, too.

[136] Cf Der Kurier (2020b); Vienna online (2020a); Die Presse (2020b).

[137] CC refrained, up to now, from assessing the concrete measures imposed by the minister's ordinances in substance, i.e. against the yardstick of sufficient compliance with fundamental rights or institutional provisions of the Constitution. How difficult such an assessment is, more often than not, may be illustrated, parte pro toto, by *Gamper* (2020) or *Gstöttner/Lachmayer* (2020).

[138] How "**motorized**" (© *Carl Schmitt*) the issuing of ordinances still had been during the whole period of time here at issue may be inferred from the fact that the list of ordinances presented in fn 123 is by far no more accurate; since then have in addition been issued:

(i) BGBl II 2020/479, definitely replacing BGBl II 2020/197, amended by BGBl II 2020/528
(ii) BGBl II 2020/544
(iii) BGBl II 2020/566, replacing BGBl II 2020/544, amended by BGBl II 2020/598 (Article 1)
(iv) BGBl II 2020/598 (Article 2), replacing BGBl II 2020/566, amended by BGBl II 2021/2, BGBl II 2021/17
(v) BGBl II 2021/27

apparently[139] it was exactly this dilemma which caused the excision of enablement reprimanded by the CC.

(ii) On the other hand, the **legislative task** to **formulate**, under high time pressure, highly sensitive ordinances regulating the daily life of the population (interfering in particular with fundamental rights) in an unprecedented way **should not be conferred solely to a single minister**, the less so, if, as it has always been the case with the ministry for health care, this ministry is more linked with the *medical* part of academia than with *lawyers*.

4. The Emergency Ordinance Clause provided in the Constitution – not used despite its Advantages in Times of Crisis

a) The Advantages

Already since 1929 Article 18 (3) – (5) of the Austrian Constitution (Bundes–Verfassungsgesetz; B-VG) calls the Federal President, when

- the Nationalrat is not assembled/not able to assemble in time/is barred from proper functioning by force majeure[140], but

(vi) BGBl II 2021/49

(vii) BGBl II 2021/58, amended by BGBl II 2021/76, BGBl II 2021/94, BGBl II 2021/105, BGBl II 2021/111, BGBl II 2021/120, BGBl II 2021/139.

[139] There is, however, also a less favourable interpretation: that Government *did not dare to communicate the full amount of interferences deemed to be necessary to Parliament's plenary*.

[140] Exactly this latter precondition: force majeure (the Corona disease), barring the plenary from assembling, was, obviously, fulfilled from 10 March 2020 onwards (see supra fn 115).

- action needing the consent of the Nationalrat is necessary in order to prevent serious damage

to issuing provisional "Emergency ordinances", on the *joint proposal* of the Federal *Government* and a Subcommittee of the House of Deputies of the Austrian Federal *Parliament* (Nationalrat).[141] These ordinances may neither amend the Constitution nor cause permanent financial burden (neither for individuals nor for the State) nor interfere with some specific parts of legislation. In particular with regard to the crisis here at issue this regime would have provided several **advantages**:

(i) First, the *need*[142] for **cumbersome duplication**[143] would have been **avoided**; right to the contrary, the concrete measures could have been imposed *directly* – and, thus, *much more speedily*, thus avoiding the trap of divergence between the enabling clauses and the concrete measures thought to be appropriate.

(ii) Second, the **whole Government** being needed to propose the Ordinance to the Federal President, not only the *formal legal quality* of the text could have been enhanced[144], but also *conflicting interests*

---

[141] Pursuant to Article 55 (3) B-VG all parties have to be represented in this committee in proportion to their size in the plenary – hence, from the political perspective of majority, it should not matter whether it is the plenary or the subcommittee which is called to decide.

[142] Also an Emergency Ordinance issued by the Federal President *could* be further precessed by subordinate ordinances issued by the minister or regional/local authorities. In contrast to the regime actually chosen, however, already the Emergency Ordinance *could* also have contained all the measures imposed only by the minister's ordinance, on the *level of formal legislation*, being thus *by far the more flexible* – and, with regard to the requirements of the constitutional principle of legality, the *much more secure* – tool (cf in this regard also *Klaushofer* et al [2020], 758 et seq; *Klaushofer* et al [2021], 666).

[143] See right supra text before fn 139.

[144] Much more legal expertise is to be found in the Legal Service of the Federal Chancellery and in the Ministry of Justice.

represented by other ministries[145] could have been heard and balanced beforehand[146].

(iii) Third, also Parliamentary opposition[147] as well as the Federal President could have been integrated in the shaping of the concrete measures, thus providing **additional legitimacy** (compared with that of the minister) needed in times of crisis.

(iv) Fourth, making use of emergency tools would have **underlined the seriousness** of the crisis as well as the **provisionality** of the measures imposed.

(v) Fifth, Article 18 (5) B-VG explicitly barring the imposing of "permanent financial burden", more awareness with regard to this specific topic could have been raised, too.[148]

In sum, **not shrinking back** from using, in times of crisis, the specific tools provided exactly for such a situation by the Constitution[149] would not only

---

[145] On highest administrative level the federal Government (ministers) could in this case have been supported effectively by the *conference of General Secretaries*. Also on subordinate level this complex representation is provided by socalled "**crisis units**" (mainly building on the military model, see supra fn 4); for the evaluation of these crisis units on regional and local level in Tyrol at the beginning of the Corona crisis see *Ischgl-Report* (2020), 141.

[146] See, for one important interest, right infra (fifth consideration) and, generally, in more detail infra section IV.

[147] Eventually, consent of a Parliamentary committee for the issuing of minister's ordinances (an option provided by Article 55 [4] B-VG) was required by amendment of CO-M-A (see its paragraph 11 as amended by BGBl I 2020/104).

[148] See for the financial dimension of this crisis supra fn 2.

[149] Also with regard to Switzerland Felix *Uhlmann* (NZZ 2020) has been of the opinion that using the emergency powers provided by the Swiss constitution would be justified. In contrast the judgement of the ACC (2020d), whereby an administrative decision imposing the prolongation of the duration of community service – motivated with emergency caused by COVID – was annulled, shows how cumbersome the use of tools provided in ordinary

have shown formal **respect for the rule of law** as such, but would have provided the required *speediness* in times of crisis as well as better *quality* and, therefore, substantive *effectiveness*.

b) The Implicit Democratic Precondition not met in the Corona Crisis as Reason for Not Using the Emergency Clause

The emergency competence conferred by Article 18 (3) – (5) B-VG to the Federal President jointly with the Government and the Parliamentary Subcommittee is, obviously, *not meant to allow* the President to set in place *rules objected by the plenary* of the Nationalrat (otherwise, the consent of the subcommittee would not have been required), but only *to overcome technical obstacles* barring the plenary from performing its legislative tasks.

From that point of view, however, making use of the Federal President's emergency powers is the more harmless, the clearer the legal opinion of the plenary is already well-known; or, the other way round:

The fact that President *Sobotka* insisted on an action of the plenary could also be interpreted in a way that the need was felt to **provide the necessary political legitimacy for the unprecedented measures by Parliament** exactly because, up to that point in time, *the House had not yet uttered any political guidelines* how to deal with such a situation.[150]

---

legislation to meet a crisis really is (to fulfil the demands of the Court would, most probably, take so much time that the crisis would be over before the State could make use of the additional term of community service).

[150] This interpretation would go fully in line with the deficiency pointed out supra subsection III/A.

IV. Emergency Law-Making – Substantive Deficiencies

Even **if** an alleged "supremacy" of the right to life dispensed from the need of balancing conflicting rights (as it generally forms part of the rule of law as pointed out supra in lit A/I/[**ii**]) [151], this supremacy would nevertheless **not dispense** from the requirement to choose the **most lenient measure** still sufficing to achieve the goal (= the principle mentioned supra in lit I/A/[**iii**]).

A. Available Measures

As a necessary precondition for assessing the measures actually taken (see infra lit B) against this yardstick, we have to know which measures are available at all; in this regard, we may, in a very general manner, discern the following kinds of measures:

1. Prevention measures against the spread of an infection

a) Seclusion

Obviously the most targeted means of fighting the *spread* of an infection is the **seclusion** ("*quarantine*") of persons already actually (or at least reasonably suspected of having been) infected – as it has always been provided by the Act on Epidemias.[152]

---

[151] See supra subsection II/B/1.

[152] See supra fn 79.

As a necessary precondition therefor, constant and reiterated medical examination of the whole sample of people ("**testing**") might be necessary, completed by other instruments (e.g. "contact tracing").

In addition also a preventive seclusion of persons bearing a specific risk of being infected ("vulnerable groups") might be appropriate.[153]

b) Disinfection

Depending of the kind of spread, also (constantly reiterated) **disinfection** of the **surroundings** of people, in particular the **air** (in- and outdoor), of **clothes** and **bodies**, might be appropriate.

c) Vaccination

The most specific measure is, evidently, **vaccination** (although, within the period of time reflected here, not always sufficiently available).

d) Other specific measures

Eventually, also preventive measures of a less targeted kind:

- keeping more **distance** as usual in physical communication, this implying in particular

[153] In this case, however, the first step of seclusion has to be followed by a second step, meaning that constant surveillance has to guarantee that among the vulnerable, but still sound group **infected people will be detected and separated immediately**.

- avoiding mass events (assemblies, theatre presentations & festivals, sport events) and, in particular, *as long as sufficient vaccination is lacking*,
- wearing protective clothes (*among* them: the famous mask protecting mouth and nose) where keeping sufficient distance in daily life cannot be reliably ensured (in particular in mass transport traffic, in super markets, schools)

➢ **control** the admission to the country's territory[154]

could be necessary.

e) General "lock-down"

Obviously, however, the by far **most intensive** and, at the same time, **least targeted** measure is a general "lock-down". Hence, this measure should only be applied with caution, rather as an "**ultima ratio**" than as a regular means. Or, to put it differently:

This instrument is, when applied frequently, and without scrupulous prior assessment of its necessity, *most likely to be considered as excessive.*[155]

[154] "Controlling", however, having the purpose of making sure that no infection risk is imported does **not imply** imposing **absolute entry bans** (which have indeed been inflicted, although mitigated by several exceptions, cf oesterreich.gv.at [2021]).

[155] This finding would also apply if the final necessity of a "lock-down" were only the consequence of prior deficiencies, i.e. could have been avoided by better prior management.

2. Measures to cure the infection

While the concrete answer evidently depends of the concrete disease, in a general manner one can say that the less available curing measures are the more the focus has to be laid on preventive measures.[156]

Nevertheless, **enlarging the capacity** of medical treatment in hospitals, in particular **of high quality (intensive care units)** should be a quite natural and self-evident – **instantaneous** – reaction to the emergence of a crisis, as far (and as speedy) as ever possible.

B. Appropriateness of measures?

1. General Overview

When looking at the measures actually taken in more detail, we see that these "measures" varied – in fact **predominantly** – the instrument assessed supra as the **least targeted one**: the general "lock-down"[157], while more specific preventive measures, as

- seclusion of infected persons
- specific protection of vulnerable groups

apparently **were not given the same weight**:

---

[156] That is why some oft he more recent Corona Ordinances mentioned right in the beginning the aim to prevent overwhelming of hospitals' capacities (BGBl II 2020/479, BGBl II 2020/598 [Article 2], BGBl II 2021/27, BGBl II 2021/49).

[157] See supra fns 67, 80 and infra point 3.

While it took until December 2020 (!)[158] that, following the example of Slovakia and Southern Tyrol, mass **tests** were started[159], the then[160] most vulnerable group: aged people residing in special nursing homes – were, it is true, temporarily barred from visits of their relatives[161]; but *infection from inside was not barred* as effectively (!).[162] So it is no surprise that a **considerable part**

---

158 In fact, reiterated mass tests *had been planned* in early April, but eventually not performed (cf *Hauser* 2020a, 10 et seq), apparently due to the **lack of correctness** (while "antibody tests" had a tendency to indicate also incorrectly "positive" results, it was exactly the opposite with PCR-tests), combined with (then) a **fairly low rate of infected people** (0,33% of the population). When looking deeper, however, one gets the impression that after Easter 2020 the hope prevailed that the harsh lock-down measures *had sufficed* (cf *Hauser*,ib, 12 et seq; Addendum (2020c).

159 How necessary mass tests – even reiterated – are, is shown by the findings of *Heinz Burgmann*, virologist of the Medical University Vienna that, at least in November 2020, out of all infected people only a minority (45 %) had been detected by the authorities (cf SN 2020a), meaning that there was *no safeguard against spreading of the virus by the majority of the population* (!).Against that background even expert sceptcism (cf not only previous fn, but also Addendum (2020c, and still Der Standard (2020b) is not convincing.
In March 2021, also the minister for health care emphasized the number of tests (in sum 355.000) unconceivable before (see Der Kurier 2021b).

160 Apparently in the meantime situation has changed considerably mutations of the virus being more aggressive also with regard to younger people (cf Die Presse [2021a]). Nevertheless: if targeted measures had been taken in time against the original version of the virus also the spreading of the mutations would have been brought down.

161 Already the Ordinance BGBl II 2020/98 aimed at barring people from entering the public space altogether, without explicitly stating family visits as a justification. While this restriction was cancelled by Ordinance BGBl II 2020197, it was reestablished to a large extent by Ordinance BGBl II 2020/479 (see right infra fn 177).

162 On the one hand, systematic and reiterated testing of the inhabitants may have been *planned* in April (*Hauser* 2020a, 10), but, most probably, was not done (cf BMSGPK 2020b, an official report specifically dedicated to the situation in these institutions does by no means boast with such a measure; right to the contrary, it is not only admitted that "some" nurseries did not perform tests at all (p 48], but also the information that "inhabitants" as well as

of the mortality rate of Corona – far above their share of population! – then consisted of these inhabitants of nursery homes, in early summer 2020[163], but even to a far higher extent in autumn 2020.[164]

Nor did we see efforts to enlarge considerably medical capacities, in particular **not** with regard to raising the **number of intensive care units**[165], **nor disinfection measures of the public space**.[166] Compared with these deficiencies, much more emphasis was laid, apart from the quite simple but perfectly reasonable measure of keeping distance, to the wearing of "masks", likewise by far not useless, but, nevertheless, also and in particular, a measure of *symbolic* value.[167]

"staff" is tested "systematically" is reported not as already done, but, obviously, only as a project [p 14]).

[163] Until 22 June 2020 *36, 8 %* of all deaths (52, 1 % female, 24, 5% male) accepted as caused by Corona happened in old age nurseries (see BMSGPK 2020b, 5).

[164] Since October 2020 the share had increased to 53 % (see ORF 2020a). This finding is the more surprising because exactly the same experience – very well noticed and criticized internationally – had already been made in Sweden in early summer 2020.

[165] While the *total* number of these care units in *2019* had been 2567 (cf BMSGPK 2020c, where, however, this number covers also "anesthesiology"), there is **no indication whatsoever that this number had been increased in 2020**; right to the contrary, still in November only this number is available on the official website of the ministry (cf also *Huber* [2020]), whereas *Klaus Markstaller*, president of the Austrian association for anesthesiology, reanimation and intensive medical treatment, still on 14 November 2020 speaks only of "about 2.000" intensive care units (see Vienna online (2020b).
Follows that also information that *more* intensive care units had been made *available for Corona* patients (cf AGES 2020b; quite interestingly, however, exactly the information "*zusätzlich* [verfügbar]" appears only in the German version, not in the English one [see AGES 2020c]) can only mean that *less capacities are now available for patients suffering from other illnesses*.

[166] If it is true that natural UV light needed to kill Corona virus (cf *Schmalwieser* et al [2020]) is lacking in Austria during at least half of the year. So it could have paid to set, exactly during these months, also disinfection measures in place.

[167] Obviously only one element is needed: mask **or** distance, the far more effective measure

2. Prospect of vaccination?

In December 2020 there was information that we would dispose of effective vaccination **as soon as January 2021**.[168] And apparently there was also indication that *Austrian* enterprises contributed *from the beginning* considerably in making available a serum.[169]

If this option had materialized, the quite harsh assessment of in particular the second "lock-down" (see infra point 3) could perhaps have be mitigated: rather, we could have presumed that the *Government had, based on this specific information, already envisaged this end* of the current Corona crisis *in summer 2020* at the latest and *hence* not thought it necessary to focus more on other preventive measures. Even then this explanation would have comprised an **aleatory element** better to be avoided next time.[170]

---

being keeping distance (cf Addendum 2020c). And in fact chancellor *Kurz* himself frankly admitted on 31 July 2020 that the mask was mainly needed to keep the population in a status of constant awareness ("Die Maske habe auch einen **symbolischen Effekt**. Je mehr sie aus dem Alltag verschwinde, desto größer werde die Sorglosigkeit, so Kurz.", cit ORF 2020b; emphasis added). Cf also *Hauser* (2020a), 24, speaking of an "awareness raising measure" (equated with a "Placebo -Effect").

[168] See Vienna online (2020c), but also (providing a general overview on the state of play of eleven sera) SN (2020b).

[169] Cf in particular Open Science (2020 [of *30 June* 2020]), with regard to the roles of

(i) Apeptico Forschung und Entwicklung GmbH (see for this enterprise already Addendum [2020b], of *22 March* 2020)
(ii) Apeiron Biologics
(iii) Takeda Pharmaceutical Company Limited
(iv) unspecified production facilities of *Pfizer* in Austria (these facilities belong to the Austrian enterprise Polymun, see TREND (2020).

[170] While being perfectly true that the availability of effective sera *could have lasted much longer* (in the Branchengespräch [2020] the following answers were given to the question, why, this time, the time interval was so extraordinarily short:

But, most astonishingly, in March 2021 we had to realize that exactly this very same Austrian Government having pretended to follow the TINA paradigm when fighting the Corona virus showed rather its **parsimonious side** when it came to procuring *as much* of vaccination doses *as ever possible* (which was *not* done).[171]

Could it be that the Government has not been fully interested in speedy and complete vaccination of the whole population[172] at all, be it due to *lack of*

- The basic research and the technology already developed in 2003 with regard to SARS 1
- extraordinary amount of cooperation among industry and university, facilitated by
- extraordinary amount of public financial aid
- extraordinary speed of regulatory agencies' procedures),

nevertheless exactly because sera were speedily available, *not all tests* excluding adverse side effects *can have been made*.

[171] Austria seems to have missed about 700.000 doses of Pfizer (see Der Kurier 2021a) and about 1,4 million doses of Johnson & Johnson (see Der Kurier 2021b). This shortage could be the result of (may be only technical) restrictions imposed by the federal ministry for finance limiting the budget for vaccination doses procurement to € 200 millions (see Wiener Zeitung [2021]).

[172] Obviously, questions of **prioritizing** would be avoided a limine exactly to the extent that sufficient vaccination doses were available *at the same point* in time *for all people*. **In the current situation, however, where** such prioritizing is indeed necessary, it seems that the **criteria** (cf for the current version of the national vaccination plan BMSGPK [2021]) were *not applied in the same accuracy all over Austria*: otherwise it would not be understandable that the member of the regional Government responsible for health care, *Christian Stöckl*, refers to prioritizing the inhabitants of special nursing homes as the main reason for the better Salzburg performance (cf Die Presse [2021b]), although exactly this group has been classified in the first priority category in the national vaccination plan, too.

In addition, it could *have* pay to **prioritize also in other regards**:

(i) as a local antibody test ordered by the mayor of Krimml (Salzburg) showed **more than 25%** of the inhabitants were already immunized without vaccination (cf Mein Bezirk 2021). This finding would suggest **to**

confidence in the effectiveness of vaccination (with regard to the protection of others[173]) at all, be it due to *fear of societal tensions* between the persons already vaccinated and those still on the waiting list?[174]

3. Assessment of the four "Lock-Downs"

While there had been, in March 2020, at least quite good reasons for locking down the whole country:

- lack of information with regard to the dangerousness of the virus[175]
- need to gain time for setting more specific and effective measures

---

prioritize vaccination of people not yet immunized – and, thus, *to relax the still current vaccination doses shortage* considerably.

(ii) moreover, it sounds perfectly reasonable to **prioritize people living** quite closely together **in metropolitan areas** (as suggested by a citizen living outside such a metropolitan area, cf *Matl* (2021).

[173] Cf Der Standard [2021], reporting that experts are of the opinion that vaccinated people might still operate as spreaders.

[174] One indication in that direction may be the reluctance to cancel Corona restrictions for vaccinated people (cf Der Standard [2021]), labelling (rather denouncing) cancellation as granting a "vaccination privilege".

[175] It may be presumed that the dangerousness had been in fact overestimated, seeing the pictures of Lombardia where dozens of corpses could not be buried any more (see SZ 2020); cf in this regard the famous statement of Austrian federal chancellor *Kurz* that everyone would know someone killed by the virus (Kleine Zeitung 2020). In contrast, another chancellor's statement (of some 100 000 deaths caused by the virus) was meant for the *global* level (cf Bundeskanzleramt 2020) and, in this respect, not exaggerated, given that currently (on 30 March 2021) the number of deaths worldwide caused by COVID-19 amounts to more than 2,7 x 10^6 (cf statista 2020).

(mass testing, seclusion of infected people, protection of vulnerable people, but also enlarging intensive care units) in place[176],

the second lock down imposed in autumn 2020[177] as well as the third one right before Christmas 2020[178] (and the most recent one, imposed only on the eastern regions right before Easter 2021[179] reveiled that the *interval in summer 2020* – where, mostly due to higher temperatures, the spread of the virus had diminished – had *not been used effectively*.[180]

So it is fairly safe to assess that all the difficulties arising from the **second** and **third** general "lock-down" with regard to

(i) the economy as well as to the public budget as well as to the education system (and all the *complicated measures* related to these phenomena)

(ii) the intensity of interference with private and family life

not to speak of the third (or even fourth) lock-down – **could have been avoided** if Government had made better use of (done its homework during) the summer interval 2020.[181]

---

[176] From the very beginning the overarching benchmark had been to "flatten the curve" (see *Neuwirth* [2020], under the subheading "Flatten the curve": "Ziel aller Maßnahmen war es, die Zahl der Erkrankten und der Hospitalisierten (und damit auch der Intensivfälle) niedrig zu halten"); cf also Der Kurier (2020a).

[177] BGBl II 2020/479.

[178] BGBl II 2020/598.

[179] BGBl II 2021/139.

[180] In addition, one could – in particular with regard to the **high share vulnerable groups** had contributed to the mortality rate – that the second "lock down" affecting adversely *generally all parts of the population* **lacked effectiveness at all** (cf *Walterskirchen* [2020]).

[181] Cf supra fn 17 where it was already mentioned that this veritable nadir is clearly shown by the stringency index.

V. Conclusion

The Austrian *reactions* to meet the Corona crisis *after* its onset – *unexpected* as it was, *although* there had in fact been opportunities to prevent the crisis by proactive measures – has shown, *despite all sincere endeavors*, serious methodological flaws which may be summarized to the overall finding that

(i) on the one hand the core element of the rule of law: **the proportionality principle**

(ii) on the other hand **the necessary caution** (before the outbreak of the crisis, but also during summer 2020)

have both been **neglected**. To this double finding[182] one observation might be added:

Lack of preparation how to overcome most effectively a crisis **will**, most probably, **not be caught up any more during a crisis**. Rather, having found *one* instrument (in casu concreto: the general lock-down), *Government will stick to it* "cost it what may" instead of constantly applying, among a variety of measures, the instrument best qualified for the specific moment.

This persistent "more" (or less) "of the same" will, however, more often than not bring less results that could have been expected by solid preparation.

---

[182] Up to now it is true that this finding is not yet backed by jurisprudence, the ACC – to the largest extent – having contented itself to annulling ordinances on grounds of infringement of standards of procedure (see supra fn 127), *not so much yet on substantive grounds* (see, however, for two annulments supra fns 125 et seq, for one confirmation supra fn 129). So the *general assessment of ACC* with regard to the constitutionality of C-OM-A as well as of the manifold restrictions imposed by the implementing ordinances *is still* to be expected.

VI. References:

A. Literature & Other Sources except Courts' Judgements

(Addendum 2020a), Addendum, 16 March 2020 Coronavirus: Risikogruppe Politiker?
https://www.addendum.org/coronavirus/risikogruppe-politiker/

(Addendum 2020b), Addendum, 22 March 2020, Ein Medikament aus Wien, das Leben retten könnte,
https://www.addendum.org/coronavirus/medikament-covid-19/

(Addendum 2020c), Addendum, 21 July 2020, Warum die Rückkehr zur Maskenpflicht übertrieben ist,
https://www.addendum.org/coronavirus/rueckkehr-zur-maskenpflicht/

(AGES 2020a), https://covid19-dashboard.ages.at/dashboard.html

(AGES 2020b), https://covid19-dashboard.ages.at/dashboard_Hosp.html?l=de

(AGES 2020c), https://covid19-dashboard.ages.at/dashboard_Hosp.html?l=en

(Balthasar 2021a), Balthasar, Alexander, Corona, Gott und wir. Eine Betrachtung eines Juristen, in: Gregor Schwimbersky (Hrsg), Corona eine chronische Krise? Multiperspektivische Streiflichter gesellschaftlicher Ereignisse (2021)

(Balthasar 2021b), Balthasar, Alexander, 100 Jahre B-VG – eine komplexe Bilanz, in: Alexander Balthasar/ Attila Vincze (eds), Hundert Jahre österreichisches Bundes-Verfassungsgesetz – die Perspektive von außen (Sramek 2021), 239 - 317

(Balthasar 2019), Balthasar, Alexander, Was heißt "Princeps legibus solutus est" bei Bodin und bei uns?, in: Andreas Raffeiner (ed), Auf der Klaviatur

der Rechtsgeschichte. Festgabe für Kurt Ebert zum 75. Geburtstag (Verlag Dr. Kovač 2019), 45 - 56

(Balthasar 2017), Zu kurz gegriffen. Besprechung VfGH 29. 06. 2017, E 875/2017, E 886/2017, ZÖR 2017, 577 - 588

(Balthasar 2014), Balthasar, Alexander, Demokratie im europäischen Mehrebenensystem: ein Plädoyer für das Machbare, in: Alexander Balthasar/Peter Bußjäger/Klaus Poier (eds), Herausforderung Demokratie. Themenfelder: direkte Demokratie, e-Democracy und übergeordnetes Recht (Sramek 2014), 163 - 205

(Balthasar 2011), Balthasar, Alexander, Die Gewährleistung rechtlicher Beteiligung im Verwaltungsverfahren – eine zunehmende Herausforderung, in: Manfred Matzka (ed), E-Partizipation im Verwaltungsverfahren. Die Nutzung der Informationstechnologie im Großverfahren nach AVG (facultas 2011), 15 - 46

(Balthasar 2010), Balthasar, Alexander, Die Beteiligung im Verwaltungsverfahren (Springer 2010)

(Balthasar 2009), Balthasar, Alexander, "Inter pacem et bellum nihil medium"? Eine Untersuchung zum Grundrechtsschutz diesseits und jenseits der Grenze zwischen Krieg und Frieden, in: id, Grenzen und Gefahren des Schutzes der Grundrechte (Sramek 2009), 269 - 309

(Balthasar 2006), Balthasar, Alexander, Die österreichische bundesverfassungsrechtliche Grundordnung unter besonderer Berücksichtigung des demokratischen Prinzips. Versuch einer Interpretation (Springer 2006)

(Beck 2020), Beck, Susanne, Das Recht auf Eltern-Kind-Kontakte in der Corona-Krise. Ein Versuch, Verordnungen der Bundesregierung (sic!) und Grundrechte der Eltern-Kind-Beziehung auseinanderzuhalten und dadurch in Einklang zu bringen, iFamZ 2020, 75 - 79

(Mein Bezirk 2021), Bezirksblätter Pinzgau, 22 March 2021, Über ein Viertel der getesteten Krimmler haben Corona-Antikörper
https://www.meinbezirk.at/pinzgau/c-gesundheit/ueber-ein-viertel-der-getesteten-krimmler-haben-corona-antikoerper_a4541819

(BMF 2019), Bundesministerium für Finanzen (Austrian Federal Ministry for Finance), Bundesfinanzgesetz (BFG) Bundesfinanzgesetz 2019
https://service.bmf.gv.at/BUDGET/Budgets/2018_2019/bfg2019/Bundesfinanzgesetz_2019.pdf

(BMGF 2005), Bundesministerium für Gesundheit und Frauen (former Austrian Federal Ministry for Health Care and Women 2005), Influenza Pandemieplan. Strategie für Österreich. Manual 2005),
https://docplayer.org/74915129-Influenza-pandemieplan-strategie-fuer-oesterreich.html

(BMLVS 2019a), Bundesministerium für Landesverteidigung und Sport (former Austrian Federal Ministry for Defence and Sport, Unser Heer 2030. Die Antwort auf künftige Bedrohungen (2019),
https://www.bundesheer.at/archiv/a2019/unserheer2030/pdf/zustandsbericht_unserheer2030.pdf

(BMLVS 2019b), Bundesministerium für Landesverteidigung und Sport (former Austrian Federal Ministry for Defence and Sport), Presseaussendung, 17 September 2019
https://www.ots.at/presseaussendung/OTS_20190917_OTS0177/bundesheer-verteidigungsminister-thomas-starlinger-praesentiert-zustandsbericht-unser-heer-2030

(BMSGPK) 2021, Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (current Austrian Federal Ministry for Social Affairs, Health Care, Nursing and Consumer Protection), COVID-19-Impfplan (version of 12 March 2021)

(BMSGPK 2020a), Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (current Austrian Federal Ministry for Social Affairs, Health Care, Nursing and Consumer Protection), Instruction of 10 March 2020, No 2020-0.172.682 ("Maßnahmen gegen das Zusammenströmen größerer Menschenmengen nach § 15 Epidemiegesetz")
file:///C:/Users/alexa/Downloads/Erlass_BMSGPK_Ma%C3%9Fnahmen%20gegen%20Zusammenstr%C3%B6men%20gr%C3%B6%C3%9Ferer%20Menschenmengen_15....pdf

(BMSGPK 2020b), Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (current Austrian Federal Ministry for Social Affairs, Health Care, Nursing and Consumer Protection), COVID-19 in Alten- und Pflegeheimen, 2020. Endbericht Stand: Juli 2020
https://www.google.com/search?q=COVID-19+in+alten-+und+Pflegeheimen%2C+2020.+Endbericht+Stand%3A+Juli+2020&oq=COVID19+in+alten+und+Pflegeheimen%2C+2020.+Endbericht+Stand%3A+Juli+2020&aqs=chrome..69i57.337j0j15&sourceid=chrome&ie=UTF-8

(BMSGPK 2020c), Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (current Austrian Federal Ministry for Social Affairs, Health Care, Nursing and Consumer Protection), BETTEN nach Fachrichtungen 2019, in: Jahresmeldung Krankenanstaltenstatistik/
Erstellt im Oktober 2020
http://www.kaz.bmgf.gv.at/ressourcen-inanspruchnahme/betten.html

(Borowsky 2019), Borowsky, Martin, Commentary to Article 2 CFR, in: Jürgen Meyer/Sven Hölscheidt (eds), Charta der Grundrechte der Europäischen Union[5] (Nomos 2019), 147 - 172

(Bradley, Ewing & Knight 2018), Bradley, Anthony/Ewing, Keith/Christopher, Constitutional and Administrative Law[17] (2018)

(Branchengespräch 2020), hosted by Pharmig, the association of Austrian pharmaceutical industry in cooperation with Die Presse, Die Presse, 26 November 2020

(Brauner et al 2021), Jan Brauner/Sören Mindermann/Mrinank Sharma/David Johnston/John Salvatier/Tomaš Gavenčiak/Anna Stephenson/Gavin Leech/George Altman/Vladimir Mikulik/Alexander Norman/Joshua Monrad/Tamay Besiroglu/Hong Ge/Meghan Hartwick/Yee Whye Teh/Leonid Chindelevitch/Yarin Gal/Jan Kulveit, Inferring the effectiveness of government interventions against COVID-19, Science (19 February 2021), 371 (6531), available online: https://science.sciencemag.org/content/371/6531/eabd9338)

(Bundeskanzleramt 2020), Brief des Bundeskanzlers Sebastian Kurz zu Ostern 2020
http://download.krone.at/pdf/Kurz_Kanzlerbrief_Coronakrise.pdf

(Carroll 1992), Carroll, Lewis, Alice in Wonderland (Wordsworth Classics 1992)

(Damjanović 2019), Damjanović, Dragana, Commentary on Article 35 CFR, in: Michael Holoubek/Georg Lienbacher (eds), Charta der Grundrechte der Europäischen Union. GRC Kommentar[2] (MANZ 2019), 635 - 645

(Depenheuer 2007), Depenheuer, Otto, Selbstbehauptung des Rechtsstaates[2] (2007)

(Der Kurier 2021a), Der Kurier, 16 March 2021, Wieviel mehr Impfstoff-Dosen Österreich hätte bestellen können
https://kurier.at/politik/inland/zu-wenig-bestellt-wie-viel-impfstoff-dosen-fehlen-in-oesterreich/401220033

(Der Kurier 2021b), Der Kurier, 16 March 2021, Anschober: 200.000 zusätzliche Pfizer-Dosen für Österreich in zweitem Quartal
https://kurier.at/politik/inland/gen-veraenderung-und-mikrochips-anschober-will-mit-corona-mythen-aufraeumen/401219802

(Der Kurier 2020a), Der Kurier, 17 March 2020, Wann der Höhepunkt der Coronawelle erreicht ist, entscheiden wir,
https://kurier.at/wissen/wissenschaft/wann-der-hoehepunkt-der-coronawelle-erreicht-ist-entscheiden-wir/400783142

(Der Kurier 2020b), Der Kurier, 22 July 2020, Wie geht's mit den Corona-Strafen weiter? Regierung zur Amnestie abwartend. Nachdem der VfGH die Corona-Ausgehregeln für verfassungswidrig erklärt hat, fordert die Opposition eine Generalamnestie
https://kurier.at/politik/inland/wie-gehts-mit-den-corona-strafen-weiter-regierung-zur-amnestie-abwartend/400978673

(Der Standard 2021), Der Standard, 24 February 2021, Anschober vertagt Debatte über Erleichterungen für Geimpfte auf April
https://www.derstandard.at/story/2000124432371/regierung-vertagt-die-debatte-um-erleichterungen-fuer-geimpfte-auf-april

(Der Standard 2020a), Der Standard, 5 May 2020
https://www.derstandard.at/story/2000117273199/ex-gesundheitsministerin-rauch-kallat-ueber-masken-vogelgrippe-und-angst

(Der Standard 2020b), Der Standard, 24 November 2020
https://www.derstandard.at/story/2000121950069/taskforce-im-gesundheitsministerium-gegen-massentestung-wie-in-der-slowakei

(Die Presse 2021a), Die Presse, 26 March 2021, Was die britische Variante ansteckender und tödlicher macht,
https://www.diepresse.com/5956924/was-die-britische-variante-ansteckender-und-todlicher-macht

(Die Presse 2021b), Die Presse, 26 March 2021, Warum Salzburg trotz Infektionsrekords noch genug Intensivbetten hat
https://www.diepresse.com/5957032/warum-salzburg-trotz-infektionsrekords-noch-genug-covid-intensivbetten-hat

(Die Presse 2020a), Die Presse, 18 March 2020, Koste es was es wolle. Regierung stemmt sich gegen Coronakrise, https://www.diepresse.com/5787203/koste-es-was-es-wolle-regierung-stemmt-sich-gegen-coronakrise

(Die Presse 2020b), Die Presse, 3 August 2020, Kogler für Rückzahlung der Strafen https://www.diepresse.com/5847785/kogler-fur-ruckzahlung-der-strafen

(Eberhard 2014), Eberhard, Harald, Grundrechtskonkurrenzen und Grundrechtskollisionen, in: Detlev Merten/Hans-Jürgen Papier/Gabriele Kucsko-Stadlmayer (Hrsg), Handbuch der Grundrechte in Deutschland und Europa. Band VII/1: Grundreche in Österreich[2] (2014), 275 - 318

(Edward and Lane 2013), Edward, David/Lane, Robert, European Union Law (Edward Elgar Publishing 2013)

(Fally 2020), Fally Markus, CORONA – verändert COVID-19 das (Krisen)Management und die ganze Welt?, GRC aktuell 2020, 2/2020, 56 - 59

(Fiskalrat 2020), Fiskalrat (Austrian Fiscal Advisory Council), Bericht über die öffentlichen Finanzen 2019 bis 2021, 2 December 2020 https://www.fiskalrat.at/publikationen/berichte/bericht-ueber-die-oeffentlichen-finanzen-uebersicht.html

(Gamper 2020), Gamper, Anna, Verpflichtende Corona-Trac(k)ing-Apps: von der "demokratischen Zumutung" zum "Rand der Demokratie", NLMR 2020, 3/2020, 155 - 162

(Gartz 2016), Gartz, Wolfgang, Das Management der Flüchtlingskrise. Never let a good crisis go to waste (nwv 2016)

(Giesecke 2019), Giesecke, Bettina, Commentary on Article 35 CFR, in: Jürgen Meyer/Sven Hölscheidt (eds), Charta der Grundrechte der Europäischen Union[5] (Nomos 2019), 694 - 710

(Gstöttner/Lachmayer 2020), Gstöttner, Susanne / Lachmayer, Konrad, Versammlungsrecht in Zeiten der Pandemie. Eine verfassungsrechtliche Analyse der neuen epidemierechtlichen Bestimmungen, NetV 2020, 3/2020, 124 - 130

(Harris et al 2018), Harris, Davis/O'Boyle, Michael/Bates, Ed/Buckley, Carla/Harvey, Paul/Kamber, Krešimir/Lafferty, Michelle/Cumber/Peter/Green, Heather (eds), Harris/O'Boyle/ Warbrick. Law of the European Convention on Human Rights[4] (OUP 2018)

(Hauser 2021), Hauser, Gunther, Geteilte Zuständigkeiten – Resilienzdefizite. Die EU in der Coronakrise als strategiehistorisches Fallbeispiel, in: Landesverteidigungsakademie des österreichischen Bundesheeres (ed), "Resilienz im Spannungsfeld zwischen Interdependenz und Autarkie" – unter besonderer Berücksichtigung der Beitragsleistung des Militärs zur rechtsstaatlichen Resilienz (to be published soon)

(Hauser 2020a), Hauser, Gunther, Österreich und die Coronakrise. Reaktionen, Massnahmen, Ausblick, ISS Aktuell 3/2020, 4 et seq

(Hauser 2020b), Hauser, Gunther, Die Coronakrise 2020. Unterschiedliche Strategien zu deren Eindämmung im Vergleich (Verlag Barbara Budrich 2020)

(Hervey/McHale 2014), Hervey, Tamara/McHale, Jean, Commentary on Article 35 CFR, in: Steve Peers/Tamara Hervey/Jeff Kenner/Angela Ward (eds), The EU Charter of Fundamental Rights. A Commentary (Hart Publishing, 2014), 951 - 968

(Huber 2020), Huber, Johannes, Intensivbetten: Auslastung und Auslastung, dieSubstanz.at. Analysen und Hintergründe zu Politik, https://diesubstanz.at/gesellschaft/intensivbetten-auslastung-und-auslastung/

(Hummer 2015), Hummer, Waldemar, Die gemeinsame Wertebasis der EU. Vertikales und horizontales "Kongruenz- und Homogenitätsgebot", in: Johannes Pichler (Hrsg), Rechtswertestiftung und Rechtswertebewahrung in Europa (2015), 65 - 91

(Investopedia 2020), TINA: There is no alternative (last update: 20 November 2020)
https://www.investopedia.com/terms/t/tina-there-no-alternative.asp

(Ischgl-Report 2020), Unabhängige Expertenkommission, Management COVID-19-Pandemie Tirol, Bericht vom 12 October 2020 (https://www.tirol.gv.at/fileadmin/presse/downloads/Presse/Bericht_der_Unabhaengigen_Expertenkommission.pdf

(Kischel 1999), Kischel, Uwe, Systembindung des Gesetzgebers und Gleichheitssatz, AöR 1999, 174 - 211

(Kleine Zeitung 2020), Kleine Zeitung, 30 March 2020, Bundeskanzler Sebastian Kurz. "Bald wird jeder von uns jemanden kennen, der an Corona gestorben ist."
https://www.kleinezeitung.at/politik/innenpolitik/5793215/Bundeskanzler-Sebastian-Kurz_Bald-wird-jeder-von-uns-jemanden

(Klaushofer et al 2021), Klaushofer, Reinhard/Kneihs, Benjamin/Palmstorfer, Rainer/Winner, Hannes, Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus (II), ZÖR 2021, 613 ff

(Klaushofer et al 2020), Klaushofer, Reinhard/Kneihs, Benjamin/Palmstorfer, Rainer/Winner, Hannes, Ausgewählte unions- und verfassungsrechtliche Fragen der österreichischen Maßnahmen zur Eindämmung der Ausbreitung des Covid-19-Virus, ZÖR 2020, 649 ff

(Kopetzki 2020), Kopetzki Christian, Corona-Ausgangsbeschränkungen – "Freunde besuchen"?, RdM 2020, 4/2020, 161 - 164

(Kosterski 2020), Kosterski, Susanne, Homeoffice als Zukunftsmodell: Chance oder Fluch?, ögswissen 2020, 28 - 29

(Kröll 2019), Kröll, Thomas, Commentary on Article 47 CFR, in: Michael Holoubek/Georg Lienbacher (eds), Charta der Grundrechte der Europäischen Union. GRC-Kommentar[2] (2019), 789 - 845

(Kucsko-Stadlmayer 2014), Kucsko-Stadlmayer, Gabriele, Die allgemeinen Strukturen der Grundrechte, in: Detlev Merten/Hans-Jürgen Papier/Gabriele Kucsko-Stadlmayer (Hrsg), Handbuch der Grundrechte in Deutschland und Europa. Band VII/1: Grundreche in Österreich[2] (2014), 77 - 136

(Kusma 2020), Kusma Stephanie, Ein Impfstoff fällt nicht vom Himmel. Die Suche nach einem Impfstoff gegen das neue Coronavirus läuft. Erfahrungen mit früheren Epidemien helfen dabei, NZZ 19. 2. 2020, 35

(Lenaerts/Van Nuffel 2011), Lenaerts, Koen/Van Nuffel, Piet, European Union Law[3] (Sweet&Maxwell 2011)

(Lembke 2007), Oliver Lembcke, Hüter der Verfassung. Eine institutionentheoretische Studie zur Autorität des Bundesverfassungsgerichts (Mohr Siebeck 2007)

(Matl 2021), Matl, Karl-Heinz, Ein Umdenken in der Impfstrategie (Letter to the editor of Salzburger Nachrichten), SN 26 March 2021

(Mertens 2004), Mertens, Bernd, Gesetzgebungskunst im Zeitalter der Kodifikationen (Mohr Siebeck 2004)

(Neuwirth 2020), Erich Neuwirths COVID-19-Analysen, COVID-19 Österreich - aktuelle Daten, 3 November 2020, https://just-the-covid-facts.neuwirth.priv.at/2020/11/03/covid-19-oesterreich-aktuelle-daten/

(Nicolussi 2020), Nicolussi, Julia, Anlass- und Krisengesetzgebung im Recht der Hauptversammlung. Ein Rechtsvergleich und Diskussionsbeitrag, GesRZ 2020, 306 - 317

(NZZ 2020), Neue Zürcher Zeitung, 14 March 2020, 30 et seq, Interview: "Die öffentliche Ordnung ist schwer gestört." Die Ausrufung von Notrecht durch den Bundesrat wäre gerechtfertigt, sagt der Staatsrechtler Felix Uhlmann

(oesterreich.gv.at 2021), oesterreich.gv.at, Reisebeschränkungen durch das Coronavirus
https://www.oesterreich.gv.at/themen/freizeit_und_strassenverkehr/reisen_und_ferien/Reisebeschr%C3%A4nkungen-durch-das-Coronavirus.html

(Open Science 2020), SARS-CoV-2: Forschung und Entwicklung in Österreich, Open Science, 30 June 2020

(ORF 2020a), Österreichischer Rundfunk, 19 November 2020, Anteil der Toten in Pflege- und Altersheimen hoch,
https://www.orf.at//stories/3190406/

(ORF 2020b), ORF Landesstudio Tirol, 21 July 2020,
https://tirol.orf.at/stories/3058852/

(ORF 2020c), Österreichischer Rundfunk, 15 March 2020
https://orf.at/stories/3157892/

(Peeers/Prechal 2014), Peers, Steve/Prechal, Sacha, Commentary on Article 52 EUCFR, in: Steve Peers/Tamara Hervey/Jeff Kenner/Angela Ward (eds), The EU Charter of Fundamental Rights. A Commentary (Hart Publishing, 2014), 1455 - 1521

(Pindar 1896), Pindari Carmina cum deperditorum fragmentis selectis (ed Wilhelm v. Christ, Teubner^2 1896)

(Polzin 2018), Polzin, Monika, Art. 15 EMRK und die Rolle des Europäischen Gerichtshofs für Menschenrechte", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV) 2018, 635 - 669

(Pramböck 2020), Pramböck, Conrad, Generation Z: Die betrogene Generation, NetV 2020, 146 - 149

(Rathauskorrespondenz 2006), Rathauskorrespondenz = Presse-Service der Stadt Wien of 6 April 2006, Wien ist vorbereitet: Influenza-Pandemieplanung für Wien erstellt (https://www.wien.gv.at/presse/2006/04/06/wien-ist-vorbereitet-influenza-pandemieplanung-fuer-wien-erstellt)

(Reinfeldt 2020), Reinfeldt, Sebastian (2020), Alles richtig gemacht?

(Robert Koch Institut 2020), Robert-Koch-Institut, Antworten auf häufig gestellte Fragen zum Coronavirus SARS-CoV-2 / Krankheit COVID-19 Gesamtstand: 11.12.2020; wie werden Todesfälle erfasst) Stand 02. 12. 2020

https://www.rki.de/SharedDocs/FAQ/NCOV2019/gesamt.html

(Robert Koch Institut 2014), Robert Koch Institut, Wissenschaftliche Grundlagen. Nationaler Pandemieplan II
https://www.rki.de/DE/Content/InfAZ/I/Influenza/Pandemieplanung/Downloads/Pandemieplan_Teil_II_gesamt.pdf?__blob=publicationFile

(Resch 2020), Resch, Reinhard (ed), Das Corona-Handbuch. Österreichs Rechtspraxis zur aktuel-len Lage (MANZ 2020)

(Rumler-Korinek/Vranes 2019), Rumler-Korinek, Elisabeth/Vranes, Erich, Commentary on Article 52 CFR, in: Michael Holoubek/Georg Lienbacher (eds), Charta der Grundrechte der Europäischen Union. GRC-Kommentar^2 (2019), 932 - 961

(Sander 2020), Sander, Peter, Entschädigungen: Zickzack mit offenem Ende. Gastkommentar, Die Presse – Rechtspanorama, 16. 11. 2020, 17

https://www.diepresse.com/5897957/entschadigungen-zickzack-mit-offenem-ende

(Schmalwieser et al 2020), Carvalho, Fernanda/Henriques, Diamantino/Correia, Osvaldo/
Schmalwieser, Alois (corresponding author), Potential of Solar UV Radiation for Inactivation of Coronaviridae Family Estimated from Satellite Data, Photochemistry and Photobiology (accepted 15 October 2020, online publication https://onlinelibrary.wiley.com/doi/10.1111/php.13345

(SN 2020a), Salzburger Nachrichten, 27 November 2020, 3, Virus verbreitete sich unbemerkt

(SN 2020b), Salzburger Nachrichten, 15 December 2020, 4, Immunität bleibt lange stabil

(Statista 2020), Statista Weltweite Zahl der Todesfälle in Zusammenhang mit dem Corona-Virus (COVID-19) seit Januar 2020 8Stand: 30 March 2021) https://de.statista.com/statistik/daten/studie/1103240/umfrage/entwicklung-der-weltweiten-todesfaelle-aufgrund-des-coronavirus/

(Statistik Austria 2020), Todesursachen/ Sterbefälle nach den häufigsten Todesursachengruppen, Alter und Geschlecht 2020 http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/gesundheit/todesursachen/index.html

(SZ 2020), Süddeutsche Zeitung, 19 March 2020, "Entschuldigung, aber ich muss weinen"
https://www.sueddeutsche.de/panorama/coronavirus-italien-bergamo-1.4851056

(Tagesschau 2020), Tagesschau, 20 March 2020, EU setzt Defizit-Regeln aus https://www.tagesschau.de/ausland/corona-eu-defizitregeln-101.html

(Tengg 2020), Tengg, Hansjörg, Gastkommentar: Wie lange wird sich der zwar ethisch wertvolle, aber gesellschaftlich letale Lockdown-Kurs fortsetzen lassen? An den Lockdowns leiden alle!, Die Presse 26. 11. 2020, S 27

(Trauner-Karner 2020), Trauner-Karner, Johanna, Der Corona-Effekt. Auswirkungen der COVID-19-Pandemie auf die Lebensbereiche Verkehr&Mobilität, Sport&Haushalt sowie Eigentumsschutz, ZVR 2020, 356 - 359

(TREND 2020), Trend, 45/2020, 2 December 2020, Corona: Die große Impfstoff-Hoffnung aus Österreich
https://www.trend.at/branchen/gesundheit-medizin-pharma/corona-impfstoff-hoffnung-oesterreich-11739894

(Trimidas 2006), Trimidas, Takis, The General Principles of EU Law[2] (Oxford University Press 2006)

(Trstenjak/Beysen 2012), Trstenjak, Verica/Beysen, Erwin, Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung, EuR 2012, 265 - 284

United Nations – Economic and Social Council (Committee on Economic, Social and Cultural Rights), Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights , 11 August 2000, E/C.12/2000/4
https://undocs.org/E/C.12/2000/4

(Vienna online 2020a), Corona-Strafen: Darum ist eine Generalamnestie nicht möglich, 23 July 2020 (Akt. 13.28)
https://www.vienna.at/corona-strafen-darum-ist-eine-generalamnestie-nicht-moeglich/6685879

(Vienna online 2020b), Österreichs Gesundheitssystem "jetzt vollkommen ausgelastet", 14 November 2020 (Akt. 17.35)
https://www.vienna.at/oesterreichs-gesundheitssystem-jetzt-vollkommen-ausgelastet/6808552

(Vienna online 2020c), Corona-Impfungen starten im Jänner 2021 in Österreich, 24 November 2020 (Akt. 14.16)
https://www.vienna.at/corona-impfungen-starten-im-jaenner-2021-in-oesterreich/6818557

(Walterskirchen 2020), Walterskirchen, Gundula, Pflegeheime werden nicht durch geschlossene Schulen geschützt, 22 November 2020
https://www.diepresse.com/5901364/pflegeheime-werden-nicht-durch-geschlossene-schulen-geschutzt

(Warbrick 2009), Chapter 8 ("Articles 8 – 11: General Considerations), in: Harris, Davis/O'Boyle, Michael/Bates, Ed/Buckley, Carla/Harvey, Paul/Kamber, Krešimir/Lafferty, Michelle/Cumber/Peter/Green, Heather (eds), Harris/O'Boyle/Warbrick. Law of the European Convention on Human Rights[2] (OUP 2009), 341 - 360

(Wicks 2020), Wicks, Elisabeth, Commentary on Article 2 CFR, in: Steve Peers/Tamara Hervey/
Jeff Kenner/Angela Ward (eds), The EU Charter of Fundamental Rights. A Commentary (Hart Publishing, 2014), 25 - 38

(Wiener Zeitung 2021), Wiener Zeitung, 25 March 2021, Impfstoff. Die 200-Millionen-Euro-Frage. Gab es tatsächlich beim Corona-Impfstoff einen Kostendeckel? Eine Spurensuche
https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2097960-Die-200-Millionen-Euro-Frage.html

Wikipedia, "Pandemie",
https://de.wikipedia.org/wiki/Pandemie#:~:text=Pandemie%20(von%20altgriechisch%20%CF%80%CE%B1%CE%BD%20pan,i.d.R.%20auch%20mit%20schweren%20Krankheitsverl%C3%A4ufen

(WHO 2009), World Health Organization, Report of the Review Committee on the Functioning of the International Health Regulations (2005) and on the Pandemic Influenza (H1N1) 2009,

https://apps.who.int/iris/bitstream/handle/10665/75235/9789241564335_eng.pdf;jsessionid=2A1A33BB27D849FA74FC4AD7E42B141A?sequence=1

(Zib 2020), Zib, Christian, Elektronische Beurkundung nach Corona, NZ 2020, 361 - 364

(Žižek 2020), Žižek, Slavoj, Der Mensch wird nicht mehr derselbe sein. Die eigentliche Revolution, die das Coronavirus bringt, wird unsere Selbstwahrnehmung betroffen haben, NZZ 14. 3. 2020, 25

B. Judgments

B.1. European Court of Human Rights (ECtHR)

(ECtHR 2019), ECtHR, Judgment (Grand Chamber) of 29 January 2019, ANo 36925/07, *Güzelyurtlu and Others v.* Cyprus and Turkey

(ECtHR 2017), ECtHR, Judgment (Grand Chamber) of 19 December 2017, ANo *56080/13*, *Lopes de Sousa Fernandes/Portugal*

(ECtHR 2012), ECtHR, Decision of 15 May 2012, ANo 42290/08, *Wiater/Poland*

(ECtHR 2001b), ECtHR, Judgment of 10 May 2001, ANo 25781/94, *Cyprus/Turkey*

(ECtHR 2001a), ECtHR, Judgment of 22 March 2001, ANo 34044/96 et al, *Streletz et al/Germany*

B.2. Court of Justice of the European Communities (ECJ)

(ECJ 1986), ECJ, Judgment of 23 April 1986, Case 294/83, *Les Verts*

B.3. Austrian Constitutional Court (ACC)

(ACC 2021b), ACC, Judgment of 9 March 2021, V 530/2020

(ACC 2021b), ACC, Judgment of 9 March 2021, V 530/2020

(ACC 2020k), ACC, Judgment of 10 December 2020, V 436/2020

(ACC 2020j), ACC, Judgment of 1 October 2020, G 271/2020 and V 463-467/2020,

(ACC 2020i), ACC, Judgment of 1 October 2020, G 272/2020,

(ACC 2020h), ACC, Judgment of 1 October 2020, V 392/2020,

(ACC 2020g), ACC, Judgment of 1 October 2020, V 405/2020,

(ACC 2020f), ACC, Judgment of 1 October 2020, V 428/2020,

(ACC 2020e), ACC Judgment of 1 October 2020, V 429/2020,

(ACC 2020d), ACC, Judgment of 28 September 2020, E 1262/2020

(ACC 2020c), ACC, Judgment of 14 July 2020, G 202/2020, V 408/2020

(ACC 2020b), ACC, Judgment of 14 July 2020, V 411/2020

(ACC 2020a), ACC, Judgment of 14 July 2020, V 363/2020.

B.4. Austrian Administrative Courts of first Instance

B.4.1. Administrative Court of Vienna (ACV)
(ACV 2021), ACV Judgment of 24 March 2021, VGW-103/048/3227/2021

(ACV 2020), ACV Judgment of 5 June 2020, VGW-031/047/5718/2020

B.4.2. Administrative Court of Lower Austria (ACLA)
(ACLA 2020), ACLA, Judgment 12 May 2020, LVwG-S-891/0001-2020

When invading Austria end of January 2020 the Corona virus found, as it was the case in other countries, too, Government as well as society not very well prepared to handle what turned out quite quickly to be a veritable crisis of unprecedented quality.

This case study – restricting itself for reasons of feasibility (given the still rapidly changing facts and norms) to the period of time from January 2020 to March 2021 – aims at assessing, from a lawyer's perspective, the performance of the Austrian Government when dealing with this crisis, not in order to belittle what was done but with a clear view to enhance future crisis management.

ISBN: 978-3-903359-38-3