

QUESTIONNAIRE ON THE IMPACT OF COVID-19 ON RULE OF LAW AND JUDICIAL ACTIVITY

The following answers are provided by the German Judges Association (Deutscher Richterbund, DRB). The DRB is the largest association of judges and prosecutors in Germany. It currently represents about 17.000 judges and prosecutors all over Germany. The answers given describe the current state of affairs as of 31 May 2020.

Preface:

The COVID-19 pandemic has been and still is an unprecedented challenge for all state powers including the judiciary. All state powers were thus prompted to act within their constitutional competencies to provide swift solutions to the challenges posed by the pandemic.

However, in the context of the questions hereinafter it must be differed clearly between

- *legal reforms, i. e. legislative acts by Parliament that are bound by the limits of the German constitution,*
- *executive orders which may only be issued as far as there is legislative ground for those, and*
- *judicial decisions on how to proceed with the administration of justice, which are made by each and every judge individually and independently on the basis of the law.*

The different state powers may only act within their respective competence. According to the German Constitution, the legislative shall be bound by the constitutional order, the executive and the judiciary shall be bound by law and justice. The situation of the COVID-19 pandemic did not affect this principle.

Very generally speaking, the legal reforms undertaken so far in response to the COVID-19 pandemic rather solved than posed problems of the judiciary that arose or were likely to arise from the pandemic. However, there are controversies (also among judges) on the question of which decisions of the executive (e. g. regarding court organisation or physical access to courts) may be in conflict with the independence of judges to handle their cases in accordance with the law as they see fit.

Therefore, the subsequent questions may be answered as follows:

1. What are the main problems the Judiciary experienced at a general level in your country as a consequence of the legal reforms approved in order to cope with the COVID-19 pandemic?

DRB: The German judiciary did not yet experience any significant problems as a consequence of legal reforms that were approved in order to cope with the COVID-19 pandemic, but rather of the pandemic itself which caused many courts to limit their work to the most urgent cases. In fact, the legal reforms in question were designed to solve specific problems of the administration of justice that had arisen or were expected to arise as a consequence of the pandemic. Such problems notably included the extension of certain fixed deadlines set by law that were no longer feasible in times of a pandemic, and rules for the use of video technique for the implementation of certain court hearings. As it is usual within the legislative procedure in Germany, the judiciary was able to participate in that procedure by giving specific recommendations on which problems ought to be addressed urgently by way of legal reform. The DRB actively made specific suggestions for legal reform in this context. So far, the recommendations of the judiciary were generally well received and implemented at a good pace.

2. Did the legal reforms approved in your country in order to cope with the COVID-19 pandemic affect Rule of Law and Human Rights principles? If any, pls. enumerate them.

DRB: As of today, none of the legal reforms approved of in Germany in order to cope with the COVID-19 pandemic seem to affect the principles of the rule of law or international human rights. This very rough assessment is of course without prejudice to the possibility of constitutional review of any law. It might be worth mentioning in this context that those changes of statutory law that were made in response to the pandemic are only temporary and will cease, unless prolonged for good reason, automatically after a certain period of time.

3. As to the judicial organisation of your country, what impact had the legal reforms approved in order to cope with the COVID-19 pandemic? More specifically, what were their effects on the powers of the Minister of Justice, Council for Judiciary, Heads of Courts, Heads of Prosecution Services, Judges, Prosecutors, Court Administrators, Court Managers?

DRB: None of the legal reforms in order to cope with the COVID-19 pandemic concerned the organisation of the judiciary as such. The powers of all authorities within the hierarchy of court organisation remain unchanged as hitherto.

4. As far as Court activity, Court proceedings and trials are concerned, what was the impact of legal measures adopted? Pls. provide relevant information distinguishing between civil, criminal and administrative cases.

DRB: Distinguishing between impact of legislative measures on the one hand, and measures ordered in the course of court management, the key issues were as follows:

a) Impact of pandemic-related changes of (statutory) law

- Civil law

The Civil Procedure Code was not changed due to the pandemic.

Since March/April, the legislative powers have been discussing a proposal for legislative change that would foresee the temporary introduction of the possibility to conduct trials at courts for labour and social law via video conference instead of a personal hearing. The law of civil procedures that applies to general civil law cases had already foreseen this possibility before (albeit it had hardly been used in practice). The DRB gave its opinion on the draft law and made suggestions for changes, as did the German Lawyers Association that criticised parts of the draft law (see below question 12). The law has not been passed until now.

Most significant legal changes due to the pandemic regarded the substantive law regulating certain matters (i. e. tenancy, condominium, corporate and insolvency law). Those changes did not affect the procedural law or court activities.

- Criminal law

In accordance with the German Code of Criminal Procedure, a criminal trial must be started all over again if it is interrupted for a longer period than three weeks. At the end of March, the German Parliament (Bundestag) enacted a new temporary statute law that enables criminal courts to interrupt a trial for up to 3 months and 10 days if it cannot be held as a consequence of measures that were adopted to contain the coronavirus pandemic. The DRB had specifically recommended to enact such a temporary law.

b) Impact of court management orders

Ministries and court presidents all over Germany acted differently with regard to the organisation of court activities. It might be noted that court presidents in Germany are judges, but they do exercise executive power within their administrative duties. Therefore, they are able to give orders how service staff have to carry out their work, but regarding judges the powers of the court presidents are strictly limited by the principle of judicial independence.

While most state ministries and court presidents in March only very carefully "recommended" that judges would limit their presence at

court to deal only with urgent cases, and generally stressed that it was (“of course”) up to each judge to decide these issues within their judicial independence on a case-by-case basis, some very few court presidents in Germany decided to temporarily close their courts to the public, which prevented some judges from holding a trial although they had wanted to. Within the German judiciary it is now discussed when, and under which circumstances, such orders could interfere unduly with the principle with judicial independence, and there is at least one case in which a court of appeal came to such a conclusion.

Many court presidents, however, ordered court service staff to work limited hours in March and April to prevent staff from working together in one room. This caused delays in the administration of cases. On the other hand, however, court work was not stopped “completely” in Germany at any time.

5. Did “urgent” cases receive a different treatment and in this framework was a special legal definition or specification of “urgency” introduced for Court proceedings and trials?

DRB: Courts were not generally closed in Germany, but remained open in order to have “urgent” cases dealt with. Whether or not a case is urgent or not, must be decided by each judge individually and is a matter of her or his judicial independence. However, as judges are bound by the law, any legal provisions that require a judge’s decision within a certain timeframe had to be fulfilled by judges regardless of the pandemic. For example: It is prescribed by German law that, if a person was detained, a judge must decide within one day whether or not that person may be kept in detention (e. g. pre-trial detention); otherwise that person must be released. Such decisions still had to be made during the pandemic simply because the law required it. The legal provisions in each field of law thus determine to a certain extent whether or not a case is urgent.

6. Did the amount of money and, more generally, the value at stake in the case play a role in the treatment of it?

DRB: As it is within each judge’s independence to prioritize individual cases based on the very circumstances of each case, this question cannot be answered. Generally speaking, the value at stake is one out of many possible criteria in prioritizing a civil law case.

7. As far as criminal cases are concerned, did cases concerning arrested defendants receive a different treatment?

DRB: Yes, as all these cases are sensitive in light of the presumption of innocence, they usually were.

Partly this was already described at question 5 (as prescribed by the German law of criminal procedure, it must be decided by a judge within one day after an arrest if the arrested person may be kept in detention).

If charges are brought against a defendant who is in pre-trial detention, it is required by the law of criminal procedure that the case must be dealt with by the courts in as short time as possible, taking into account all the circumstances of the case. Within regular intervals during pre-trial detention, higher instance courts must assess if it still is proportional to keep the defendant in pre-trial detention, taking into account e. g. criteria such as the length of proceedings, the complexity of the case and the severity of the charges in question.

These basic legal requirements have not been altered in light of the pandemic. Therefore, cases in which the defendant was arrested had to be treated as urgent by the courts, which led many criminal courts to hold the trial despite the pandemic if they considered that sufficient measures of hygienic security could be taken. In some cases which were postponed because of the pandemic, arrested defendants were set free on bail or other conditions if the courts found that it was not proportional to continue pre-trial detention until the belated date of the trial.

8. What was the impact of such legal reforms on legal deadlines and procedural timeframes?

See above question 4. a), regarding criminal law.

9. What is the role played in your country by IT, e-filing, smart and remote working in the management of cases as an effect of legal measures approved in order to cope with the COVID-19 pandemic? To what extent these measures are applicable also to the activity of Public Prosecutors?

DRB: The quality of IT differs quite significantly between the different German states which are responsible for the equipment of the judiciary.

Where judges (and prosecutors) were able to access their work via e-file, they could work from at home and were sometimes even encouraged to do so in order to minimize the risks of contamination in court buildings.

However, e-filing is not yet a general standard within the German judiciary, but so far is only being tested in pilot projects, so this did not concern too many colleagues.

Nevertheless, many judges were still able to work from at home with paper files if their courts were equipped with laptops that allow the judges to access databases via secure connection from at home. Whether or not this possibility was used, was up to each judge and depended also on the type and amount of cases that were to be dealt with. The same could be said of public prosecutors to whom, due to

the nature of their work, the possibility of working at home is less practical than for judges who generally have fewer cases to deal with.

The pandemic showed that laptops can be a very useful tool for many judges, even if electronic filing is not yet introduced; however, not all German states have already equipped their courts with laptops so far.

10. What is the role played by your Association in the drafting of such legal reforms? Was your Association consulted by the Government before adoption of the aforesaid measures?

DRB: Yes, see question 1 (The DRB was consulted and actively made specific suggestions for legal reform in this context). It must be noted, however, that in some cases the deadlines for giving a formal statement on a draft law was extremely short (one working day or even shorter).

11. Did the Government consult the High Council for the Judiciary and/or other judicial institutional instances or representatives before adoption of the aforesaid measures?

DRB: There is no High Council for the Judiciary in Germany.

12. What is the attitude of Bar Associations and Lawyers vis-à-vis such legal reforms?

DRB: The German Lawyers Association noted with concern that neither parties to a lawsuit nor lawyers should be deprived of the possibility to demand a personal hearing. Courts should only be able to conduct a hearing via electronic means if all parties and lawyers expressly agree to that procedure. The Lawyers Association stated that in their view article 6 of the ECHR foresees that no individual is deprived of the right to a personal hearing at any time, regardless of the pandemic.