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Fundamental rights & proportionality: criticism and desiderata

>> The corona pandemic was also an enormous stress test for the law, especially fundamental rights. Some of the measures enacted by the state to combat the pandemic represented serious restrictions on freedom and social life that were unprecedented in the history of the Basic Law. The ban on paying a last visit to dying relatives in hospital or a nursing home, for example, directly affected the dignity of the people involved. Contact and exit restrictions, school closures and the almost complete shutdown of social life massively encroached on people's fundamental rights. The Federal Constitutional Court's confirmation of compulsory vaccination for employees in healthcare professions represented a serious encroachment on the right to physical self-determination. Has the state gone too far? The answer to this question must be nuanced.

Three aspects are undisputed:

Firstly, the state is fundamentally entitled to impose restrictions on freedom in order to combat a pandemic infectious disease with a severe course of disease in order to protect life and health, particularly of vulnerable people, and to prevent the healthcare system from being overburdened.

Secondly, the executive, i.e. the health administration, may not order restrictions on freedom on its own initiative. Instead, it requires a sufficiently specific basis in parliamentary law. This was provided by the Infection Protection Act (the former Federal Epidemics Act) with increasingly detailed and fundamental rights-intensive powers of intervention over the course of the pandemic, which are, however, difficult to understand for the constitutional layperson (think of the catalogue of measures in Section 28a IfSG).

Thirdly, even in a pandemic situation of national scope, in what is sometimes politically referred to as a health emergency, the civil liberties guaranteed in the Basic Law and in the state constitutions are not suspended. There is no reservation of fundamental rights in a state of emergency that would allow the legislature and executive to interfere with fundamental rights without further ado. Not even in a pandemic. Rather, every state intervention in freedom must be specifically justified. In particular, the proportionality of each individual measure must also be ensured in each individual case.

Looking at the case law of the constitutional and administrative courts on the coronavirus measures, it is noticeable that the principle of proportionality was regularly used as a standard of review, but was often applied superficially. Sometimes one could not help but get the impression that health protection always prevails. In view of the high constitutional weight of life and health and the state's duty to protect them, any intervention, no matter how harsh, seemed to be justifiable and, in particular, proportionate. 'Health always wins' seemed to be the unspoken paradigm of abstract consideration. Of course, such a paradigm would be tantamount to a reservation of emergency under fundamental law, which the Basic Law does not recognise. Above all, (1) two open flanks of the principle of proportionality have become visible:

Firstly, it has not infrequently been neglected to go beyond the abstract into a concrete assessment and ask whether a measure can make a significant contribution to containing the spread of infection at all. For example, the ban on walking at night alone would have had to be categorised as disproportionate from this perspective. Of course, from an abstract point of view, life and health are more important than an evening stroll. But a merely abstract view falls short of the mark. It must be supplemented by a concrete consideration: Does a measure bring so much in concrete terms that its depth of intervention is proportionate in this respect. The night-time curfew mentioned above may well be appropriate because it was able to prevent some contacts and therefore also infections. However, the rather small concrete contribution to the realisation of the purpose is disproportionate to the considerable depth of intervention of the curfew. A desideratum can therefore be formulated: The abstract balancing of interests must be supplemented by a concrete, actual consideration of the realisation of the purpose. A measure is disproportionate if its concrete contribution to the realisation of the purpose is so marginal that its depth of intervention is inappropriate in comparison

Secondly, the current dogmatics of the proportionality test is not sufficiently capable of dealing with the negative consequences of restrictions on freedom. In this respect, it has a blind spot. The social and societal consequences of encroachments on fundamental rights are not adequately mapped, at least not in a separate assessment point. This is rightly referred to as the 'legally invisible social dimension of encroachments on fundamental rights', as a 'fundamental rights vacuum' (2). Social, psychological, societal or economic 'collateral damage' - for example from school or business closures or from contact or curfew restrictions - is not adequately covered. In this respect, too, a desideratum needs to be formulated: The proportionality test must be explicitly extended beyond the traditional bipolar purpose-intervention relationship to include consequential, collateral and third-party disadvantages. The (legitimate) purpose pursued by a measure must be placed in a multipolar relationship to the expected 'collateral damage'. <<

Literature:
1: Zu weiteren Aspekten s. J. F. Lindner, Thesen zur Weiterentwicklung des Verhältnismäßigkeitsgrundsatzes, NJW 2024, S. 564.
2: O. Lepsius, Ausnahme als Rechtsform der Krise, DVBl. 2023, S. 701/703.