

Luxemburger Juristische Studien –  
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Stefan Braum (Ed.)

# Experimental Law

The Rule of Law and the Regulation  
of the Corona Pandemic in Europe



**Nomos**

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## Experimental Law

### Rule of Law in the pandemic – Vertical and horizontal perspectives

Is it possible to combat a pandemic with the means of the liberal rule of law? And if so, how? What are the implications of combating the pandemic for basic principles of the rule of law and for the various system levels of the law? Are there such things as best practices in pandemic control? Finally, can models of legal regulation of a pandemic be derived from the geopolitical context?

These were the research questions at the beginning of the project “*Protection against infection through (European) regulatory law*”, funded by Luxembourg’s Research Fund (Fonds national de la Recherche – FNR). In all these questions, the project was able to gain **both vertical and horizontal insights** into the legal handling of the pandemic that had not previously existed, without this process of gaining knowledge already having come to a comprehensive end. On the contrary, during the project it became apparent how dynamically and comprehensively European and international legislators reacted to the Corona crisis in constitutional, repressive and preventive terms. How lasting the influence on the legal system will be cannot yet be fully assessed.

From a vertical perspective, the following contributions contain – with a comparative legal intention – divergent national models of pandemic regulation. The following contributions refer to the states that were relatively severely affected by the pandemic and that have had – in part dramatic – experiences with the excessive demands and the failure of the respective national health system. On the one hand, legal-cultural differences in the prevention and repression of the pandemic become visible, but on the other hand, a hard core of legal control can be distilled from the comparative legal perspective. Conclusions and recommendations may be derived from this, which could be applied to the respective national legislation. As a normative consequence of these experiences, the question will arise to what extent the European legal framework must be strengthened, even harmonised. At the same time, a look at a regulatory model that is in part strongly divergent in terms of legal culture, such as in Singapore, may raise awareness of the geopolitical significance of pandemic regulation and thus also question the ability of the liberal constitutional state to effectively counter existential crises while at the same time protecting freedom.

## **Synthesis – Influences of Covid legislation in a nutshell**

Synthesising both the vertical and horizontal research contributions, clear trends can be discerned as to how the regulation of the pandemic has influenced the legal system and its paradigms at the levels mentioned. There are **shifts and deformations due to emergency legislation**, a **shift of focus to executive law** can be observed, a **transformation of the principle of proportionality** and, last but not least, a **paradigm shift with regard to the digitalisation of preventive social control**.

**Emergency legislation:** At the beginning of the pandemic in February and March 2020, states such as Spain or France relied on constitutionally secured emergency articles. In spring 2020, the French legislature created a simple-law emergency rule in the "Code sanitaire" that was specifically geared to the pandemic situation. Other countries, such as Germany or the United Kingdom, were able to base their measures to contain the pandemic on simple legal emergency articles from the outset. They were provided for in the respective infection control or pandemic laws and which were supplemented in the course of the pandemic, in Germany, for example, by the concept of an "epidemic emergency of national significance". In the course of the pandemic, changes in the constitutional requirements for emergency legislation became apparent: despite virological polyphony, the continued maintenance of the Covid rules, which still date back to the state of emergency, was and is a problem that must be negotiated publicly, according to normative criteria. While at the beginning of the crisis both empirical ignorance and the risk of systemic failure led to a normatively justifiable narrowing to virologically advised and systemically explicable radical containment, in the course of the pandemic means-purpose relations increasingly came into view that require political – above all normative – justification. A **transformation of the principle of proportionality** can be observed, from an intervention barrier that must be based on empirically substantiated facts to a principle that justifies fundamental rights interventions based on risk models. **The law adapts like plasticine to the respective empirically recognisable pandemic situation.**

**Executive law:** In all countries involved, our studies show a shift in the focus of legislation to the executive, which decisively determines the content of covid laws even if they are – formally – passed by parliaments. This primarily affects the criminal justice system. Executive law is strongly accessory, i.e. its content follows from a complex technique of legal references to administrative law. Moreover, it has a tendency to criminalize minor misdemeanours in the context of crisis legislation. This creates

problems for the legal principles of criminal legality as well as criminal liability.

**Digitalisation and prevention:** The project was able to draw inspiration from the **example of Singapore** in its research into instruments of pandemic regulation that have a preventive effect. Long before the introduction of digital certificates and effective covid apps, which are were just beginning to unfold effectively in Europe after the end of the so-called third Corona wave, the use of digitally supported prevention instruments was part of a strategy in Singapore from the very beginning. Singapore understood digitisation as part of a **strategy of trust in "good governance"** and at the same time an **empowerment of the population** itself to act. For Europe, however, this model is associated with the fear of the expansion of social control through digital technologies.

**Experimental Law:** beyond these core elements of pandemic regulation, a pattern of legislation is emerging that has the potential to have a lasting impact on the law even after the pandemic has ended: We see in "experimental law" the style of pandemic regulation law. What becomes visible is that this style counters the normative requirements of general legislation with a regulatory model that largely deviates from it. Little in it is permanent, much follows empirical knowledge and the technical or medical possibilities of pandemic control that are available at a particular time, in a particular place. Rules are not binding, their legal force only lasts for the moment. Nothing is universally valid, but follows selective medical imperatives. Experimental law is a right of resubmission, it refers to rules that always apply only until further notice. Just until medical expertise tries out new things and the law merely reproduces the empirically founded knowledge.

This may be a long-term problem in fighting crises under the rule of law. It is possible that a problem of legitimacy will arise for the democratic constitutional state in general, because its justification narratives will be transformed, namely from the idea of the citizen who makes self-determined use of his or her rights of freedom to a point of reference for (bio-) political optimisation.

These "findings" and "diagnoses" are reflected in the contributions to this volume and are confirmed in different ways.

Together they all have a moving target. They analyse, compare and criticise pandemic regulation in their respective moments. Therefore, the picture that emerges is in a sense the compilation of snapshots, drawn at a particular time in a particular place. That is part of the nature of things: nothing can be determined conclusively and with ultimate certainty. Nevertheless, common features crystallise, namely a new style of law: the

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experimental use of rules to manage systemic risks. In the system of law, only its recurring crisis mode seems to last. This would then also mean saying goodbye to normative bindingness, which should be constitutive for legislation that conforms to the rule of law. This volume is perhaps a kind of packaging supplement that points out the risks and side effects of this legal style for the democratic rule of law state.

*Luxembourg, in August 2022*

*Stefan Braum*



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