InDi Institut für Internationale und Digitale Kommunikation
Institute for International and Digital Communication

Interdisziplinär. Angewandt. Innovativ. | Interdisciplinary. Applied. Innovative.

ZEITSCHRIFT FÜR INTERNATIONALE UND DIGITALE KOMMUNIKATION: NACHHALTIGKEITSPERSPEKTIVEN – JOURNAL OF INTERNATIONAL AND DIGITAL COMMUNICATION: SUSTAINABILITY PERSPECTIVES

Special issue: INTERNATIONAL VIRTUAL EXCHANGE COVID-19 - ETHICAL DILEMMAS AND HUMAN RIGHTS – EXPLORING INTERNATIONAL DIMENSIONS

Heft 1 (2022)

Herausgeber*innen der Special Issue:

Prof. Dr. Milena Valeva
Prof. Dr. Kathrin Nitschmann

Editors of the special issue:

Prof. Dr. Milena Valeva
Prof. Dr. Kathrin Nitschmann

Umwelt-Campus Birkenfeld | HOCHSCHULE TRIER

InDi Institut für Internationale & Digitale Kommunikation

IMPRESSUM
Hochschule Trier, Umwelt-Campus Birkenfeld
Fachbereich Umweltwirtschaft/Umweltrecht
InDi - Institut für Internationale und Digitale Kommunikation
Campusallee
Gebäude 9916
55768 Hoppstädten-Weiersbach
Deutschland
Telefon: +49 6782 17-1819
E-Mail: info@umwelt-campus.de
Web: https://www.umwelt-campus.de
Kontakt /Contact:
Bibliothek der Hochschule Trier, Umwelt-Campus Birkenfeld
Publikationsservice: Open Access Server
Phone: +49 6782 17-1477
E-Mail: bibliothek@umwelt-campus.de
Web: https://www.umwelt-campus.de/campus/organisation/verwaltung-service/bibliothek

ISSN 2940-1992

Bibliographische Information der Deutschen Bibliothek:
Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über www.dnb.de abrufbar.

Inhalt

PROLOGUE

The following collection of manuscripts emerged from an international and interdisciplinary Virtual Exchange that took place during Covid-19 Pandemic in March/April 2021 organised by Prof. Milena Valeva and Prof. Kathrin Nitschmann.

Covid 19 had -and still has in parts of the world- led to severe restrictions of fundamental liberties worldwide and thus enhanced debates on ethics and human rights. This debate appeared as a common denominator connecting citizens in countries all over the world. One of the concrete consequences for students was certainly the reduction of mobility, not only in the sense of not being allowed to visit the university but also in canceling planned international exchanges. In this context, the virtual exchange offered a chance not only to overcome the still lasting restrictions on mobility but also to exchange daily life experiences of students in Covid-times, merging into restrictions and/or violation of human rights in a legal and ethical dimension.

Students from Peru, Israel and Bulgaria participated in the virtual exchange, which was supported by the International Teaching Award of Trier University of Applied Sciences, within the frame of of a summer school and had the opportunity to work synchronously and asynchronously in international and interdisciplinary teams on the topic COVID-19 - ETHICAL DILEMMAS AND HUMAN RIGHTS - EXPLORING INTERNATIONAL DIMENSIONS.

Colleagues from Cape Town, Peru, Spain and Israel supported the event by their professional presentations. This special issue and at the same time first issue of the **JOURNAL OF INTERNATIONAL AND DIGITAL COMMUNICATION: SUSTAINABILITY PERSPECTIVES** is a collection of the manuscripts of the speakers, which at the same time reflects the diversity of the topics discussed and the international perspectives. Since this is a compilation of manuscripts, the authors were responsible for the scientific formulation of the texts.

FREEDOM OF TRADE, OCCUPATION AND PROFESSION IN TIMES OF THE COVID-19 PANDEMIC IN SOUTH AFRICA

Prof. Dr. Letlhokwa George Mpedi
Professor and Deputy Vice-Chancellor: Academic, University of Johannesburg, Johannesburg, South Africa. Visiting Professor, Faculty of Law, University of Cape Coast, Cape Coast, Ghana.

I. Introduction

Coronavirus of 2019 (hereinafter Covid-19) is the designation that the World Health Organisation (hereinafter the WHO) assigned to the disease caused by the novel coronavirus SARS-CoV2. This virus, which is said to have originated in Wuhan (China) towards the latter part of 2019, has affected every facet of life throughout the world. The WHO declared the outbreak of Covid-19 a global pandemic on the 11th of March 2020. The first case of Covid-19 was confirmed in South Africa by the National Institute for Communicable Diseases on 5 March 2020. To curb the spread of the virus, South Africa, similarly to many other countries across the globe, declared a national state of disaster on 15 March 2020 and a national lockdown that commenced on 26 March 2020.

These measures were introduced after the total number of confirmed cases of Covid 19 increased from 61 to 402 cases in eight days. The national lockdown entailed, among others, that individuals would not leave their places of residence (except under certain limited circumstances such as seeking medical attention, purchasing food, medicine, and other similar supplies), interprovincial travel was banned, except in certain limited instances such as travel to attend a funeral; and the sale of alcohol and tobacco products was prohibited. The national lockdown, which is still in place albeit in a more relaxed form, was introduced by the *Disaster Management Act* 57 of 2002. These regulations limit some basic rights and freedoms (section 27(2) of the *Disaster Management Act*). It was inevitable that the restrictions imposed on persons (both natural and juristic) would result in some hardship.

To mitigate the potential negative impact of the restrictions, the government introduced a suite of Covid-19 relief measures. These are part of the R500 billion Covid-19 fiscal package comprising of the following interventions:

- Measures of income support: These measures consist of temporary tax relief which includes tax deferrals and postponements to the South African Revenue Service (e.g., employee tax).
- Credit guarantee scheme: This scheme provides private banks loans, guaranteed by the government, to qualifying businesses.
- Wage protection: This intervention consists of temporary employee/employer relief scheme benefit, funded by the unemployment insurance surplus funds, to employees and employers who have closed operations or part thereof due to Covid-19 (see *COVID-19 Temporary Relief Scheme, 2020* (Published under GenN 215 in *GG* 43161 of 26 March 2020 as amended by GenN 240 in GG 43216 of 8 April 2020, GN R486 in GG 43265 of 4 May 2020, GN R541 in GG 43330 of 15 May 2020, GN R595 in GG 43353 of 26 May 2020, GN R878 in GG 43611 of 13 August 2020, GN R968 in GG 43693 of 7 September 2020 and as corrected by GN R486 in GG 43265 of 4 May 2020).
- Main or direct budget funding: This measure comprises budget allocations to national, provincial, and local governments.

This chapter evaluates the freedom of trade, occupation, and profession in South Africa from a Covid-19 pandemic context. It does that by focusing on the pertinent provisions and rights contained in the *Constitution of the Republic of South Africa, 1996* (the Constitution) and relevant international and regional human rights instruments. It proceeds by discussing the interlinkage between (the freedom of trade, occupation, and profession and other pertinent fundamental) rights, limitation, enforcement, and interpretation of rights. This is followed by some final observations.

II. Pertinent Rights

1. National Perspective

During the apartheid period, South Africa was characterised by legislated unfair discriminatory policies and practices. Within the context of the theme of this chapter, these policies and practices comprised of job reservation (e.g., the *Bantu Building Workers Act* 27 of 1951 made it illegal for Black Africans to perform skilled work in urban areas except in sections designated for black occupation), restricted movement of persons (e.g., *Group Areas Act* 36 of 1966, *Bantu Authorities Act* of 1970 and *Native Labour (Settlement of Disputes) Act* 26 of 1970) and unequal access to trade, profession and occupation (see, for further reading, Hepple, 1963 and Ogura, 1996). This unequal treatment of persons according to, among others, race restricted access to certain trades, occupations and professions as well as the movement of persons. Thus, it is hardly surprising that the *Freedom Charter* (adopted at the Congress of the People at

Kliptown, Johannesburg, on 25 and 26 June 1955) provided that '[a]ll people shall have equal right to trade where they choose, to manufacture and to enter all trades, crafts and professions' and '[a]ll shall be free to travel without restriction from countryside to town, from province to province, and from South Africa to abroad; pass laws, permits and all other laws restricting these freedoms shall be abolished.'

Democratic South Africa moved from a system of parliamentary sovereignty to constitutional supremacy (see, for further reading on the concept of constitutional supremacy, Limbach, 2001; Rosenberg, 1969 and Ver Loren van Themaat, 1954). The supremacy of the South African Constitution implies that the Constitution is 'supreme law of the Republic [of South Africa]; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled' (section 2 of the Constitution). South Africa is based on values such as 'human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law' (section 1(a)-(c) of the Constitution). The post-apartheid Constitution has a Bill of Rights (Chapter 2 of the Constitution) that provides every citizen with the right to choose their trade, occupation or profession freely (section 22 of the Constitution). This right, as discussed in paragraph 4 below, is not set in concrete. It can be limited under the provisions of the Constitution (section 7(3) of the Constitution). The freedom of trade, occupation and profession could, even before the advent of Covid-19, be limited by, for instance, restraint of trade clauses and law and rules that regulates certain trades, professions and occupations (see, for example, Henkin, 1979).

The inclusion of section 22 in the Constitution is aimed at correcting the injustices of the past. As clearly articulated by the court in *JR 1013 Investments CC v The Minister of Safety and Security* 1997 JDR 0485 (E) (at 9-10):

> 'We have a history of repression in the choice of a trade, occupation or profession. This resulted in a disadvantage to a large number of South Africans in earning their daily bread. In the pre-constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs. Any lawful pursuit which qualifies as a trade, occupation or profession is now open to all in the sense that all are free to choose it. This is, of course, not to say that all may practise it. For that, any number of other considerations become relevant; not least, natural talent and ability, persistence and hard work, the acquisition of the necessary qualifications, skill, training or expertise, and satisfaction of the

requirements prescribed by any law regulating a particular trade, occupation or profession.'

The Constitutional Court, in *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC), explained the scope of section 22 as follows:

> 'In broad terms this section has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection. Yet the significance of the section goes further' (at paragraph 58).

The rights contained in the Bill of Rights, including the freedom of trade, profession and occupation, bind both natural and juristic persons (section 8(2) of the Constitution). The State must respect, promote and fulfil the freedom of trade, profession and occupation (section 7(2) of the Constitution). It is important to note that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state (section 8(1) of the Constitution. See Bhana, 2013). This implies that all the Covid-19 rules and regulations and all other steps were taken by the executive and organs of state to deal with the pandemic are bound by the Bill of Rights. Therefore, they must be in line with the provisions of the Constitution. Otherwise, such rules and regulations, as well as the actions by the executive and the organs of state, maybe declared unconstitutional.

2. International Framework: Selected Instruments

After the end of the apartheid era, South Africa was readmitted to international organisations such as the United Nations (the UN), Africam Union (the AU) and the Southern African Development Community (the SADC). It is therefore bound by the hard and soft law of these organisations (see paragraph 6 below). The UN's *International Covenant on Economic, Social and Cultural Rights* (adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force on 3 January 1976, following article 27) requires 'the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and will take appropriate steps to safeguard this right' (article 6(1)).

The AU's *African [Banjul] Charter on Human and Peoples' Rights* (adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986) provides that:

> ‘Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. Every individual shall have the right to leave any country including his own and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality’ (article 12(1)-(2)).

It provides further that ‘every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work’ (article 15).

The SADC’s *Charter of Fundamental Social Rights in SADC* (2003) makes provision for employment and remuneration. It directs the Member States, including South Africa, to create an enabling environment so that every individual shall be free to choose and engage in an occupation or that person’s choice (article 14(a)).

III. Interlinkage between Rights

1. Equality

Every person in South Africa is equal before the law and has the right to equal protection and benefit of the law (section 9(1) of the Constitution). Equality in the context of the Constitution includes the full and equal enjoyment of all rights and freedoms. In its quest to address the Covid-19 challenges, the state may not unfairly discriminate directly or indirectly against anyone in South Africa based on any one or more grounds which include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (section 9(2) of the Constitution).

2. Human Dignity

All persons in South Africa have “inherent dignity and the right to have their dignity respected and protected” (section 10 of the Constitution). Human dignity is interconnected with section 22 of the Constitution (Rautenbach, 2005: 855) for the following reasons that have been articulated by the Constitutional Court as follows:

> ‘Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole’ (*Affordable Medicines Trust and Others v Minister of Health and Another* at paragraph 59).

3. Life

The Constitution makes provision for every person the right to life (section 11 of the Constitution). Many persons provide for themselves and their families to stay by selling their labour potential and or trading in South Africa. Accordingly, there is a clear connection between the right to life and the freedom of trade, occupation and profession. The limitation of the aforementioned freedom due to the Covid-19 restriction does impact negatively of the right to life. It is therefore sensible that the state made provision for the social security measures (see, for example, paragraph 1 above) to support those who could not work or trade due to the lockdown. It should be mentioned that the Constitution makes provision for the right to health care, food, water and social security (section 27 of the Constitution). This right is subject to the availability of resources (section 27(2) of the Constitution). The state is required by the Constitution to take reasonable legislative and other measures to achieve the progressive realisation of the aforementioned rights (section 27(2) of the Constitution).

4. Freedom of Movement and Residence

Freedom of movement and residence is recognised as a fundamental right in the Bill of Rights of the Constitution (section 21 of the Constitution). The Constitution provides that every person with the right to freedom of movement (section 21(1) of the Constitution); right to leave the country (section 21(2) of the Constitution); right to enter, to remain in and to reside anywhere, in the country (section 21(3) of the Constitution) and the right to passport (section 21(4) of the Constitution). These rights are connected with the freedom of trade, occupation and profession for the reason that freedom of movement to and from work is a daily occurrence for many workers. In some instances, this movement is inter-provincial and across borders. Thus, the restrictions on movement limited the freedom of trade, occupation and profession of the affected workers in South Africa and neighbouring countries. Such workers include informal cross-border traders (see African Union, 2020) and migrant workers. Some migrant workers travelled to their countries of origin to escaped the looming lockdown when it was first introduced. As a result, many struggled to travel back to South Africa due to border closures. It must be pointed out that there are migrant workers who chose to remain in South Africa. The reasons for such a decision have been summarised as follows:

> ‘More than four-fifths (82%) of migrant respondents considered South Africa as their home, while 11% felt that the COVID-19 pandemic was global and that they would still be at risk, regardless of whether they moved. Five per cent of migrant respondents indicated that they were concerned that if they left South Africa they would be unable to re-enter South Africa, when they wanted to (Statistics South Africa, 2020: 7).

IV. Limitation of Rights

1. Limitation Clause

The freedom of trade, occupation or profession is, just like other rights enshrined in the Bill of Rights, is not absolute. It can be limited by section 36 of the Constitution, also known as the limitation clause (see, for further reading, Rautenbach, 2006: 857-861). This restriction can only be effected by 'the law of general application to the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' (section 36(1) of the Constitution). In limiting the freedom of trade, occupation or profession regard must be had to all the relevant factors which should include, 'the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose' (section 36(1)(a)-(e) of the Constitution).

2. Selected pertinent Covid-19 Restrictions

To curb the spread of the virus and, in the process, save lives (see, for example, Pittaway, 2020) several restrictions were imposed through a series of regulations. Several of the restrictions have a direct and or indirect impact on the freedom of trade, occupation or profession. These limitations include restrictions on the sale of liquor and tobacco products, prohibition of cross-border and interprovincial movement which negatively affected cross-border trade (see *Disaster Management Act: Directions: Once-off movement of persons and transportation of goods during Alert Level 4 Coronavirus COVID-19, 14 May 2020*) and other industries such as hospitality and tourism, and hours of permissible trade restricted due to curfews. In some respects, the freedom of trade, occupation or profession was limited in the sense that it could only be enjoyed with a relevant permit. For example, during the so-called hard lockdown when the movement was severely curtailed, the informal traders could only trade with a special written permit issued by the municipal authorities (see, for example, *Disaster Management Act: Directions to assist micro and small businesses trading during Coronavirus COVID-19 lockdown, 12 May 2020*).

V. Enforcement of Rights

1. Access to Courts

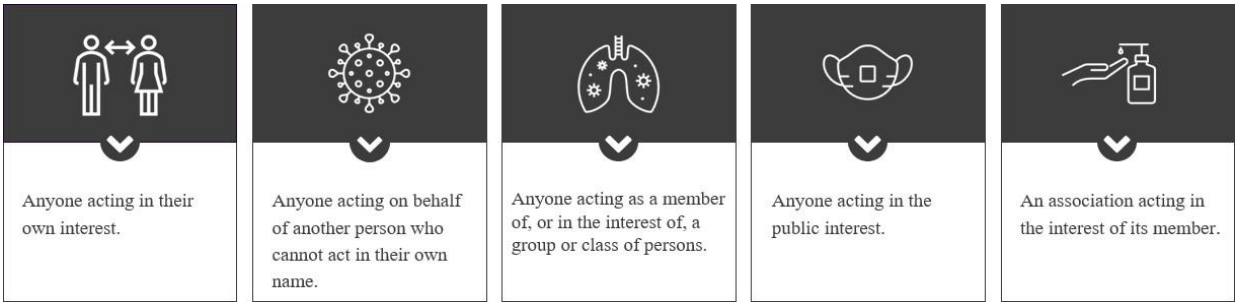
South Africa is founded on, among other values, the rule of law (section 1(c) of the Constitution. See *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paragraph 85 and *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC)). This value has been described by De Waal *et al* (2001) as 'the value-neutral principle of

legality.' Accordingly, every person in the country has 'the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum' (section 34 of the Constitution). The South African judicial system consists of the following courts: the Constitutional Court, the Supreme Court of Appeal, the High Court of South Africa, the Magistrates' Court, and any other court established in terms of an Act Parliament (section 166 of the Constitution). The disputes that may need to be resolved include those arising from the law, rules and regulations aimed at dealing with the Covid-19 pandemic. It was refreshing to read that the Chief Justice of the Republic of South Africa, Mooeng Mogoeng, encourage members of the public to approach the courts of law to challenge the government decision in respect of the lockdown that infringes on the fundamental rights (The Citizen, 2020).

2. Enforceability of the Freedom of Trade, Occupation and Profession

The freedom of trade, occupation and profession is, just like other rights enshrined in the Bill of Rights, enforceable (section 38 of the Constitution). The following persons have the right to approach a competent court and allege that the freedom of trade, occupation and profession has been infringed (section 38(a)-(e) of the Constitution) by the Covid-19 rules and regulations:

Figure 1: Persons who may approach a competent court



3. Pertinent Constitutional Institutions

Apart from courts of law, persons who are of a view that their freedom of trade, occupation and profession have been infringed, may approach constitutional institutions such as the Public Protector, and the South African Human Rights Commission. The Public Protector has the power to:

> '…investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action' (section 182(1)(a)-(c) of the Constitution).

Furthermore, the Public Protector has additional powers and functions as stipulated by national legislation (section 182(2) of the Constitution). Distinct from the Public Protector, the South African Human Rights Commission has the power to:

'promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic [of South Africa]' (section 184(1)(a)-(c) of the Constitution).

4. Remedies

The courts can issue the following remedies when adjudication a matter concerning an alleged infringement of the freedom of trade, occupation or profession due to Covid-19 regulations:

- any order that is just and equitable,
- grant 'appropriate relief',
- orders of invalidity, or
- declaratory order (section 172 of the Constitution).

VI. Interpretation of Rights

When interpreting the freedom of trade, occupation and profession, the Constitution requires 'a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom' (section 39(1)(a) of the Constitution). In addition, it requires a court, tribunal or forum to consider international law (section 39(1)(b) of the Constitution). International law, in this context, includes binding and non-binding laws. A court is obliged to, when interpreting any Covid-19 (related) legislation, prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law (section 233 of the Constitution). In addition, customary international law is deemed to be law in South Africa unless it is inconsistent with the Constitutional or and Act of Parliament (section 232 of the Constitution). Furthermore, they have the discretion to consider foreign law (section 39(1)(c) of the Constitution).

VII. Concluding Summary

As shown in this chapter, the rights contained in the Bill of Rights are interconnected. Accordingly, the freedom of trade, occupation or profession is interlinked with other fundamental rights. These rights which must be taken into account, particularly from the Covid-19 perspective, include the right to equality, human dignity, life and freedom of movement and residence. However, these rights are not absolute. They can be limited under the Constitution. Furthermore, these rights are enforceable. This bodes well

with the rule of law principle. Therefore, the Covid-19 rules and regulations do not operate in a legal vacuum. This is essential given the negative impact of the Covid-19 pandemic and measures introduced to eliminate it on both natural and juristic persons.

VIII. Bibliography

African Union. (2020) Statement of the African Union (AU) Labour Migration Advisory Committee (LMAC) on the novel Coronavirus Disease Covid-19 and the condition of African Migrant Workers. Available from: https://au.int/en/pressreleases/20200414/statement-lmac-condition-african-migrant-workers-covid-19 [Accessed 27th July 2021].

Bhana, D. (2013) The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution. *South African Journal on Human Rights*. 29(2), 351-375.

De Waal. J., Currie. I & Erasmus. G., (2001) *The Bill of Rights Handbook* (4th ed.), Lansdowne, Juta.

Henkin, L. (1979) What of the right to practice a profession? *California Law Review.* 67(1), 131-141.

Hepple, A. (1963) Job reservation – Cruel, harmful and unjust. *The Black Sash/Die Swart Serp*. July, 6-8.

Limbach, J. (2001) The concept of the supremacy of the constitution. *The Modern Law Review*. 64(1), 1-10.

Ogura, M. (1996) Urbanization and apartheid in South Africa: Influx controls and their abolition. *The Developing Economies*. 34(4), 402-423.

Pittaway, D.A. (2020) To save lives: The ethical precedent set by South Africa's leadership during lockdown. *Phronimon*. 21, 1-19.

Rautenbach, I.M. (2005) The right to choose and practise a trade, occupation or profession – The momentous and meaningless second sentence of section 22 of the Constitution. *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg*. 4, 851-862.

Rosenberg, L.B. (1969) Constitutional supremacy: An early advocate of judicial review. *Duquesne Law Review*. 7(4), 514-541.

Statistics South Africa. (2020) *Social Impact of Covid-19 (Wave 3): Mobility, Migration, and Education in South Africa*, Statistics South Africa, Pretoria.

The Citizen. (2020) *Chief Justice Mogoeng encourages people to legally challenge lockdown laws*. Available from: https://citizen.co.za/news/south-africa/courts/2290234/chief-justice-mogoeng-encourages-people-to-legally-challenge-lockdown-laws/ [Accessed 7th July 2021].

Ver Loren van Themaat, H. (1954) Legislative supremacy in the Union of South Africa. *University of Western Australia Annual Law Review*. 3, 59-66.

IMPACT OF COVID-19 ON COMPANY & INSOLVENCY LAW: AN OVERVIEW OF LUXEMBURGISH RESPONSES

Larissa Glidja-Yao
Research Assistant at Hochschule Trier (Umwelt Campus),
L.L.M Bonn University

Abstract: Covid-19 outbreak had a huge impact on the economy worldwide as businesses had to close or cease their activities due to the lockdown regulations. The "luckiest" firms were able to operate but under restricted conditions. In order to avoid what certain authors called "bankruptcy epidemic" (Madaus and Arias, 2020: 318) European countries took economic and fiscal measures to help companies compensate their financial losses. In addition to Government Grants, emergency legislations have been adopted with the aim to adapt insolvency and restructuring procedures to the sanitary situation and specific rules relating to company Law have also been implemented. This paper deals with the measures taken by the state of Luxembourg and gives a brief overview of the legal amendments.

I. Context

The lockdown same like in other European countries, began in March 2020. The situation led the government to declare a state of emergency on March 18, 2020 and different Grand Ducal Regulations (GDR) have been passed. The GDR of 18 March 2020 introducing a series of measures in the context of the fight against Covid-19, provided for the principle of closing commercial and artisanal businesses which are open to the public, while at the same time this regulation listed activities which will not be affected by the closure. In order to stay open, the businesses have to offer activities that are essential for the maintenance of the vital interests of the population and the country as required by Art. 5. This means that, businesses that do not meet the conditions of the above-mentioned provision were not able to continue their operations. For those who were not affected by the ban, it was not certain that their turnover would not suffer, since once the authorization to open was obtained, the health and opening restrictions affected the way the businesses operated. In different ways, the sanitary situation was causing financial distress and liquidity problems for several business operators. The

conditions for a chain reaction leading to the opening of massive insolvency proceedings were met and for avoiding this scenario legal measures have been implemented.

II. Impact on Insolvency Law

1. Suspension of the Debetor´s Obligation to make a Declaration of Cessation of Payment

Bankruptcy Law is regulated in Luxembourg by the Commercial Code (C.com). For more than two decades, a process of amendment of the Law on bankruptcy proceedings has been underway, but has not yet resulted in a legislative reform. The latest draft was submitted to the National Assembly on February 1, 2013 (explanatory memorandum to Bill n°6539). This bill on the modernization of bankruptcy Law was related to the rescue of businesses (Winandy, 2019: 920). Amongst other objectives, it intends to introduce new procedures more adapted to the needs of businesses while favoring, where necessary preventive insolvency proceedings. The proposed new legislation also aims to make the prosecution of fraudulent bankruptcy (banqueroute frauduleuse) more efficient and faster. According to the current legislation the fraudulent bankruptcy is punished as a felony and the trial procedure requires the intervention of an examining magistrate (juge d'instruction). This makes the procedure considerably more cumbersome. If the bill is finally adopted, the offence of bankruptcy will therefore be downgraded from a felony to a misdemeanor (délit). The rules applicable to this offence will also be unified because the distinction between fraudulent bankruptcy and simple bankruptcy will not exist anymore (explanatory memorandum to Bill n°6539, p.16).

With regards to the conditions for the opening of a bankruptcy proceeding, Art. 440 C.com provides for that any trader and any commercial company which ceases to make payments shall, within one month, make an admission thereof at the registry of the district court having jurisdiction in commercial matters of his domicile or registered office. If the declaration of cessation of payments (aveu de faillite) is not submitted within the legal deadlines, the bankrupt debtor or the managing partner of the bankrupt company may engage his criminal liability (Art. 495, 495-1, 573-585 C.com).

As expressly mentioned, traders and commercial companies are under an obligation to make a declaration of cessation of payment within a specific period. However, it remains to be clarified what the Law means by "being in cessation of payment". Two cumulative conditions have to be fulfilled in order to meet the requirements of Art. 440 C. com. Firstly, the company or the trader is unable to pay its debts as they fall due and secondly, the company or the trader is unable to obtain credit. The notion of cessation of payment therefore includes the lack of liquidity on the one hand and the impossibility for the company or trader to obtain credit on the other. This is precisely the financial situation that most of companies will be facing due to sanitary crisis of Covid-19 and the reason why Luxembourg legislation had to be adapted. As a state of emergency was declared on March 18, 2020 the government was validly entitled to govern by

regulatory measures, which derogate from existing Laws (Art. 32. 4 Luxembourg Constitution).

Art. 1 (1) of the GDR on March 25, 2020 provided for that the time limits prescribed in proceedings before the judicial, administrative, military and constitutional courts are suspended. It can be reasonably inferred that this general suspension of different legal deadlines expressed the need for the government to react very quickly and on a large scale to the prevailing sanitary situation. As the proceeding for the declaration of payment is a proceeding before a judicial court, - in this case before the jurisdiction in commercial matters - this suspension also applied to the one-month period prescribed by Art. 440 C. com. Furthermore, the above-mentioned GDR takes care to specify the areas in which the suspension does not apply. Indeed, the other provisions of this regulation (Art. 1(2), Art. 2), which reduce ratione materiae the scope of application of this measure, do not refer to the obligation to declare the cessation of payment. This confirms the application of this measure to the deadline of Art. 440 C.com.

Under Article II of the Law of 25 November 2020 amending the Law of 6 June 2020, the suspension of the obligation for traders and commercial companies to make a declaration of cessation of payment was extended to June 30, 2021. In contrast to the GDR of 25 March 2020, these two Laws expressly refer to Art. 440 C. com. However, this suspension did not prevent the debtor from filing a declaration of cessation if he wished so (Comp. Art. 1. I 1° Ordinance n° 2020-341 of 27 March 2020 (France); comp. Art. 2 of Royal Order (Arrêté royal) n° 15 of 24 April 2020 (Belgian). Indeed, the Luxembourg model offers the creditor the discretion to decide whether or not to use the legal suspension due to the sanitary crisis. The renewal of this prorogation has been once again decided by the Luxembourg legislator. Until December 31 2021, the legal suspension remains applicable (Art. 2, Law of 30 June 2020).

Similar amendments have been adopted in the legislations of other European countries. In Spain, for example, a debtor who was bankrupt, was not obliged to make a declaration of cessation of payment, as long as the state of emergency was in force (Art. 43.1 Royal Decree-Law 8/2020 of 17 March 2020). A temporary suspension of the debtor's obligation to file for insolvency had been passed until 14.3.2021(Torres et al., 2021: para. 130).

In France, the ordinance n°2020-341 of 27 March 2020 adapting the rules relating to business difficulties during the health emergency provides in its article 1 I 1° for an adjustment of the deadline for declaring the state of cessation of payments. Indeed, the state of cessation of payments is assessed in consideration of the debtor's situation on 12 March 2020 and this until 23 August 2020. Therefore, if the company's state of cessation of payments occurred between 13 March and 23 August 2020, it had until 7 October 2020 to request the opening of bankruptcy proceedings.

The Belgian measures also provided for a suspension of the debtor's obligation to file for bankruptcy, while indicating that this suspension was only valid if the conditions of the bankruptcy were the consequence of the Covid-19 pandemic and its aftermath

(Art. 1, Royal Order No. 15 of 24 April 2020 on the temporary suspension in favor of companies of enforcement measures and other measures for the duration of the Covid-19 crisis).

2. The Rejection of Limiting the Creditor´s Right to request the Opening of Bankruptcy Proceedings

Bankruptcy proceedings may be initiated either by the debtor's admission of bankruptcy as previously mentioned, or by a writ of summons (assignation) issued by one or more creditors, or ex officio (Art. 442 I C. Com). It is on the second mode of triggering bankruptcy proceedings that another legislative proposal has been submitted to the Luxembourg Parliament.

This proposal has the objective to render during the state of emergency and two months after it ends, petitions for bankruptcy field by creditors inadmissible (Koch et al., 2020). By withdrawing temporarily, the right of unpaid creditors to request the opening of a bankruptcy proceedings, the aim was to provide commercial enterprises and trad- ers with another legal instrument to mitigate the effects of the health crisis. This option has not been taken up by the Luxembourg authorities because a lot of financial aid had been made available to businesses. Moreover, this measure according to the govern- ment did not seem to be the most appropriate one to prevent the companies from bank- ruptcy and a two-month suspension would in any case not be sufficient to solve their liquidity issues (Koch et al., 2020).

Contrary to the Luxembourg model, the possibility to limit temporarily the creditor's right to initiate the opening of a bankruptcy proceeding have been adopted in other European countries. The French regulation rendered inadmissible between 13 March and 23 August 2020, any petition to open bankruptcy proceedings on the basis of a creditor's writ and even on the basis of a referral from the public prosecutor (Art. 2. I 1° of the Ordinance n°2020-341 of 27 March 2020). In Spain, creditor petitions were postponed between 14 March and 31 December 2020 (Torres et al., 2021: para. 130).

Relatively to the Belgian legislation, the opening of insolvency proceedings by a creditor was inadmissible unless the debtor gave its consent (Art. 1 para. 3, Royal Order No. 15 of 24 April 2020). However, the possibility to request an opening of insolvency proceeding was still possible on the initiative of the public prosecutor or through the request of the provisional administrator who was appointed by the President of the court. These special measures have been in force until 17.6.2020 (Art. 1 para. 3, Royal Order No. 15 of 24 April 2020; see, for further reading Heynickx and Goldschmidt, 2021: 239-251). Another distinctive characteristic of Belgian Law was that the Royal Order expressly stated that the exceptional measures taken during the health crisis (sursis temporaire) only concerned companies falling within the scope of Book XX of the Economic Law Code that were not in a state of cessation of payment on March 18, 2020 (Art. 1 para. 1, Royal Order No. 15 of 24 April 2020). Furthermore, any interested party (partie intéressée) could request by summon (citation) to the President of the

competent court to decide that an enterprise does not fall within the scope of the exceptional measures. The interested party could also request the President of the competent court to lift the exceptional measures in whole or in part by a specially reasoned decision (Art. 1 para. 6, Royal Order No. 15 of 24 April 2020).

III. Impact on Company Law

1. Digitalization as Solution for fulfilling Corporate Governance Obligations

There are several obligations that can be followed in the governance of companies. The scope of these legal obligations depends under other criteria on the legal form of the company, its size and the number of shareholders or partners. Whether the rules governing decision-making, representation of the company vis-à-vis third parties or accounting obligations, these are all either prescribed by the legislator or contained in the company's statutory clauses. Focusing on the rules relating to decision-making, we can refer to the modalities of exercising the partners' voting rights and to the method of convening general meetings (ordinary and extraordinary general meetings). For example, public limited companies (société anonyme) must hold at least one general meeting each year in the Grand Duchy of Luxembourg. The meeting must be held within 6 months of the end of the financial year and the first general meeting may be held within 18 months of its constitution (Art. 450-8 para. 1, Loi sur les Sociétés Commerciales (LSC)). Limited liability companies (société à responsabilité limitée) on the other hand are required to hold physical general meetings, when they have more than 60 partners. In this case, an ordinary general meeting must be held each year at the time defined in the articles of association (Art.710-21 (1) LSC).

Holding of general meetings have become challenging given the Covid-19 Pandemic. As such, amendments have been made to the existing legislation regarding the general meetings. On a comparative basis, legislation around the world relating to general meetings of shareholders has generally focused on the following 4 aspects: postponing of meetings, shortening the convocation period, relief on formal voting requirements and allowing for virtual shareholders meetings (Zetzsche et al., 2020:10). In Luxembourg, the first Covid-19 responses provided for the Grand-Ducal Regulation of 20 March 2020 granted the right to hold general meetings without a physical meeting, notwithstanding any provision to the contrary in the statutes and irrespective of the number of participants at its general meeting. Shareholders or partners who participate through such means shall be deemed to be present for the purpose of calculating the quorum and majority at those meetings (Art. 1 (1)).

In addition, the exercise of voting rights by shareholders or associates, as well as any other participants entitled to take part in the meeting, could be done exclusively by remote voting in writing or in electronic form; through a proxy appointed by the company; or by videoconference or other means of telecommunication allowing their identification. The same rule is also applicable to the meeting of bondholders (Art. 1 (1)).

This dematerialization of meetings also applies to meetings of the management bodies such as boards of directors. The latter, notwithstanding any provision to the contrary in the articles of association, could hold their meetings by written circular resolutions; or by videoconference or other means of telecommunication allowing the identification of the members of the body attending the meeting (Art.1(2)).

It is important to mention here that the issue of digitization of general meetings is not a new one in Luxembourg, and even in Europe (Directive 2007/36/EC, Art. (3)) - which would have emerged because of the current health crisis. The legislator has left this option of holding virtual meeting to the discretion of the companies, which, if they wanted to take advantage of it, had to include it in the statutory clauses. The novelties in the health context of Covid-19 therefore consisted firstly in allowing electronic meetings for companies that had not provided for them in their articles of association and secondly in permitting these meetings to be held entirely digitally. In fact, Art. 710-21(2) LSC made the holding of electronic meetings in respect of annual general meetings of limited liability companies conditional on the physical presence of a partner or his proxy at the company's headquarters. The exceptional crisis legislation thus enshrined the transition from hybrid annual general meetings to entirely virtual meetings.

Similarly, in Germany the principle of a compulsory face-to-face meeting concerning public limited companies (Aktiengesellschaft) was completely abolished through Art. 2 § 1 II CoronaG. and regarding the participation of shareholders, a purely virtual general meeting has been made possible (Vetter and Tielmann, 2020:1176).

Other measures have been issued after the GDR from March 2020 to extend or give more details about the provisions of the crisis legislation. Regarding the rules stating the right to full digitalization of general meetings and board meetings, the Law of 30 June 2021 extends their validity until 31 December 2021.

2. Postponement Deadline for filing accounting Documents and holding general annual Meetings

One of the purposes of annual general meetings is to approve the annual accounts of the company, which must be provided within specific deadlines and subsequently be filed with the Trade and Companies Register (Régistre de Commerce et des Sociétés, RCS). This filing obligation is incumbent on all commercial companies listed in Art. 8 of the Commercial Code and in accordance with Art. 75 para. 1 of the Law of 19 December 2002 on the Register of Trade and Companies. In observance of the legal requirements, the corporate financial statements must be filed with RCS within one month following their approval, or no later than 7 months after the close of the financial year. In case of breach of this obligation, the director or managing partner of the concerned companies will have to pay between 500 and 25 000 € (Art. 1500-1, 1500-2 2° LSC).

The adoption of the Law of 22 May 2020 allowed companies to be granted an additional period of 3 months to meet the obligations to file and publish accounting documents. Furthermore, the same Law in Art. 3 postponed the convening of annual general meetings until a period of 9 months after the end of the financial year. Under normal circumstances, the meeting should be held within 6 months.

In order not to allow companies that were already overdue in fulfilling their accounting obligations to benefit from the extension of the deadlines, the Luxembourg legislator took care to fix two ratione temporis limitations. The Law of 22 May 2020 extending the deadlines specifies firstly that it shall only apply to annual accounts, consolidated accounts, reports and general meetings relating to a financial year ending on 24 June 2020 (End of the state of emergency). Secondly the deadlines for filing, publishing or keeping these documents should not have expired by 18 March 2020 (Art. 5).

The option of extending the deadlines was also adopted in France. In relation to the convening of the annual general meeting and the approval of the accounts, Ordinance No. 2020-318 of 25 March 2020 prescribed an extension of 3 months (Art. 3). This Ordinance, as in Luxembourg Law, specified the scope of application of these derogatory measures in order to clearly determine the companies which were eligible to benefit from the extension.

IV. Conclusion

The analysis of the Luxembourg responses allows us to conclude that there were no drastic changes in the existing legislation. The Adoption of temporary measures based on the suspension of certain obligations and on the extension of deadlines allowed for a more flexible regime for businesses. This is what some authors have called “simplest form of intervention” by tackling – legally- the Covid-19 Crisis (Enriques, 2020: 260-261). Another approach would have been “the crafting of new special temporary rules” (Enriques, 2020: 261). However, it carries the risk of introducing new rules in a hasty manner that would not have been deeply discussed.

Legal adjustments in combination with economic measures were taken in Luxembourg in a progressive manner and were subsequently renewed if the Luxembourg authorities deemed them necessary and always adapted to the needs of the moment. In insolvency matters, the legislator's concern was to find a right balance between the creditor and the debtor rights while at the level of company Law, the increasing of digitalization in proceedings company’s governance was observed. Furthermore, the availability of accounting information for companies had to be preserved in order to continue to ensure legal security. Therefore, eligibility criteria for companies that could benefit from the extension of the deadlines for filing and publishing accounting documents have been set.

Nearly 18 months after the beginning of the health crisis, what can we learn from the application of the exceptional measures? According to the press release of 30 June 2021 by the Luxembourg Ministry of Justice, these measures are currently being

analyzed to see whether they should be perpetuated. An opinion, which is also shared in Germany with regard to the legal simplifications adopted during the crisis in company Law. These should not be shelved at the end of their period of validity but should serve as a basis for a modernization of the Law (Vetter and Tielmann, 2020:1180).

V. Bibliography

Enriques, L. (2020), Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis: European Company and Financial Law Review (ECFR), Vol. 17 (Issue 3-4), 257-273. https://doi.org/10.1515/ecfr-2020-0014.

Explanatory memorandum to Bill n°6539 (Projet de Loi n°6539), available at: https://www.linklaters.com/pdfs/mkt/luxembourg/draft_law_6539.pdf, (accessed 08.09.2021).

Heynickx, B. and Goldschmidt, E. (2020), "Länderberichte Belgien", in Stürner, R. Eidenmüller, H., Schoppmeyer, H. (Ed), Münchener Kommentar zur Insolvenzordnung, Band 4, 4th ed., Verlag C.H.BECK, München, Para. 239-251.

Koch, A., Tang, K., and Felber, G. (2020), "Luxembourg bankruptcy legal frame in COVID-19 context", available at: https://chambers.com/articles/luxembourg-bankruptcy-legal-frame-in-covid-19-context (accessed 08.09.2021).

Madaus, S. and Arias, F. (2020), Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring Law: European Company and Financial Law Review (ECFR), Vol. 17 (Issue 3-4), 318-352. https://doi.org/10.1515/ecfr-2020-0018.

Torres, A.M., Rúa, B., Köster, M. and Berner H-J. (2021), "Länderberichte Spanien", in Stürner, R. Eidenmüller, H., Schoppmeyer, H. (Ed), Münchener Kommentar zur Insolvenzordnung, Band 4, 4th ed., Verlag C.H. BECK, München, Para. 129-133.

Vetter, E. and Tielmann, J. (2020), Unternehmensrechtliche Gesetzesänderungen in Zeiten von Corona, Neue Juristische Wochenschrift (NJW) 2020, Heft. 17, 1175-1180.

Winandy, J.P (2019), Manuel du droit des sociétés, Légitech, Bertrange, Luxembourg.

Zetzsche, D. A., Anker-Sørensen, L., Consiglio, R., Yeboah-Smith, M. (2020), "The COVID-19-Crisis and Company Law - Towards Virtual Shareholder Meetings", University of Luxembourg Faculty of Law, Economics & Finance WPS 2020-007, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576707 (accessed 08.09.201).

VI. Relevant Legislation, Official Press Release (on French, original version)

Grand Ducal Regulation of 18 March 2020 introducing a series of measures in the context of the fight against COVID-19, available at: https://legilux.public.lu/eli/etat/leg/rgd/2020/03/18/a165/jo (accessed 08.09.2021).

Grand Ducal Regulation of 20 March 2020, introducing measures concerning the holding of meetings in companies and other legal persons, available at:

https://legilux.public.lu/eli/etat/leg/rgd/2020/03/20/a171/jo (accessed 08.09.2021).

Grand Ducal Regulation of 25 March 2020 on the suspension of time limits in judicial matters and the temporary adaptation of certain other procedural rules available at: https://legilux.public.lu/eli/etat/leg/rgd/2020/03/25/a185/jo (accessed 08.09.2021).

Graphic (p.6 of the online document) available at https://meco.gouvernement.lu/dam-assets/dossiers/Tableau-stab-9avril-FR.pdf (accessed 08.09.2021).

Law of 22 May extending the time limits for the filing and publication of annual accounts, consolidated accounts and related reports during the state of emergency, available at: https://legilux.public.lu/eli/etat/leg/loi/2020/05/22/a467/jo (accessed 08.09.2021).

Law of 30 June amending the Law of 23 September 2020 on measures concerning the holding of meetings in companies, available at:

https://legilux.public.lu/eli/etat/leg/loi/2021/06/30/a485/jo (accessed 08.09.2021).

Press release by the Luxembourg Ministry of Justice, available at: https://mj.gouvernement.lu/fr/actualites.gouvernement%2Bfr%2Bactualites%2Btoutes_actualites%2Bcommuniques%2B2021%2B06-juin%2B30-prolongation-delais.html (accessed 08.09.2021).

ON THE DEVELOPMENT OF COMPULSORY VACCINATION IN GERMANY IN THE INTERPLAY BETWEEN GENERAL HEALTH PROTECTION AND INDIVIDUAL SELF-DETERMINATION – A NEVER-ENDING STORY?

Prof. Dr. Kathrin Nitschmann
Professor for Administrative Law and Administrative Procedural Law,
University of Applied Sciences Trier, Environmental Campus

Abstract: The study traces the development of compulsory vaccination in Germany against the background of political discussion and legislative activities, focusing on the area of tension between state health protection and the right to medical self-determination in the context of constitutional balancing. It is based on the assumption that the right to medical self-determination traditionally dominates state decisions in a democratic constitutional state and that the scope for decision-making is constantly being further contoured in the face of current challenges.

Keywords: Right to medical self-determination – state health protection – compulsory vaccination Pandemic - COVID-19 – public health

I. Introduction

In pre-Covid times in Germany, as in other European countries, the fundamental discussion about the constitutional permissibility of compulsory vaccination was repeatedly ignited by the - albeit regionally limited - occurrence of measles cases. In 2017, more than 900 measles cases were reported to the Robert Koch Institute, which is responsible for infectious diseases, meaning that the number had tripled since 2016 (Robert Koch Institute, 2017; Deutscher Bundestag, 2017). The situation in Germany seemed to be symptomatic for the development in the EU, which is why the member states started to focus on recommendations and coordination of the matter, even considering a uniform EU vaccination passport (Council of Europe, 2018; Regarding the effect of an obligation to vaccination and the vaccination rate in the measles scenario see Kerbl, Reinhold, 2017).

At the time, however, it was hardly imaginable that the debate on compulsory vaccination would gain such momentum within a short period of time and polarize society as it did in the pandemic under Covid-19. While compulsory vaccination was not on the political agenda in Germany at first, political decisions were made that were often

perceived as indirect coercion in citizens‘ everyday life: There was talk of a “de facto” compulsory vaccination through the back door (Regarding the discussion in Germany see: Wein, 2021). In the course of the pandemic, politicians officially rejected compulsory vaccination for a long time in favor of a voluntary solution. A joint statement by the Permanent Vaccination Commission, the German Ethics Council and the Leopoldina also went in this direction; at least with regard to an "undifferentiated" compulsory vaccination, i.e. detached from specific groups of people (Standing Committee on Vaccination, German Ethics Council, National Academy of Sciences Leopoldina, 2020; For the discussion see for instance: Frankfurter Allgemeine Zeitung, 2020).

Nevertheless, the idea of a general vaccination requirement in Germany continued to smolder and was once again the focus of public debate at the latest with the fourth pandemic wave - not least because of the comparatively poor vaccination rate in this country (on the low vaccination rate in German-speaking Europe and its consequences see Robert Koch Institute, 2021b). While in other countries, even with higher vaccination rates, compulsory vaccination had been implemented at least in institutional contexts quite quickly (for example France, Greece, Italy, for Details see Deutscher Bundestag 2021), in Germany it was (or is?) literally a "back and forth". The decision of the federal government to introduce an occupation-related compulsory vaccination was initially especially questioned in the federal state of Bavaria, where, paradoxically, the world's first compulsory vaccination was introduced in 1807 (Robert Koch Institute, 2021c).

The Federal Constitutional Court (BVerfG) has however, just as in the measles case, in principle confirmed the compulsory institution-based vaccination against Covid-19 decided by the Federal Government in December (Bundesregierung, 2021), in a proceeding for interim legal protection, thus giving priority in both cases to the protection of health of groups particularly at risk of infection (BVerfG, B.v. 11.05.2020, 1 BvR 469/20, marg. no. 1-17).

Resistance to general compulsory vaccination is clearly noticeable in society (up to and including circumvention strategies for applicable regulations that are relevant under criminal law, on this see Hensler, 2020). While justified doubts about the necessity of a general vaccination requirement are being raised against the background of the changed dynamics of the infection incidence, regarding the more harmless virus variant Omicron plus the lack of threat to the health system, and Austria temporarily plans to suspended the general obligation to vaccination (Deutschlandfunk, 2022), the German Government is sticking to its plans to introduce a general compulsory vaccination because, according to Health Minister Lauterbach, more would need to be done in Germany than "getting on the nerves of the vaccination opponents" (Ärzteblatt, 2021c; ; on the political debate see Deutscher Bundestag, 2022; Mikus, 2022; Tagesschau, 2022); a decision on this is planned for the beginning of April.

The discussion about compulsory vaccination shows the now clear division in society and touches on fundamental questions of individual liberties in the constitutional state and the role of the administration as well as economical, ethical and moral questions connected with the responsibility of the individual towards society. Last but not least, the latter also calls for an intercultural perspective, which could offer additional explanations for the hesitancy or non-existence of vaccination and the actions of policymakers in different countries.

Against the background outlined above, the need for government action in vaccination context became apparent already with the re-occurrence of measles and continues nowadays under the intensified conditions of the Covid-19 pandemic with the introduction of compulsory vaccination being traditionally discussed as the ultima ratio. Under which conditions such a requirement can be constitutionally justifiable in a constitutional state will be examined in the following article with a view to the emergence of existing regulations, case law and the actual challenges caused by Covid-19.

II. Legal Situation in Germany

The task of protecting against epidemics is traditionally understood as a task of the state's provision of services of general interest, which not only guarantees individuals a right to protection against the spread of infectious diseases, but also includes compensation in the event of damage during implementation. In this sense, infection protection law is also to be qualified as danger prevention law (in this regard Engels, 2014). This is evidenced not least by Section 1 of the Protection against Infection Act, IfSG, which states in para. 1: “It is the purpose of this Act to prevent communicable diseases in human beings, to detect infections at an early point in time and to prevent their spread.”

To carry out this task, the IfSG contains enabling provisions which entitle the competent authorities to take the necessary measures and the associated encroachments on fundamental rights (§§ 16 et seq. IfSG). Beyond the question of a general obligation to vaccinate, it is questionable (1.) whether a right of the child to protective vaccination can be derived (2.).

1. Evolution towards Epidemical Prevention

A historical view of the legal situation in Germany leads back to the year 1874 (Law of 08.04.1874, Reichsgesetzblatt 1874, pp. 31 ff), in which the Prussian vaccination law was enacted, which provided rules for the compulsory vaccination against small pocks. At the same time the compulsory vaccination provoked massive criticism which led to the so called “Anti-vaccination Movement”. Critical voices of "medical authorities" can be found warning of vaccine damage and questioning the effect of vaccinations (Impfzwangsgegnerverein Dresden (ed.), 2015; Trapp, 2015; on the historical development of vaccination, see Robert Koch Institute, 2021a). Opponents of vaccination claimed that the hygienic conditions at the time would have prevented the spread

of the disease even without vaccination, whereas the vaccinations carried out were the cause of severe diseases. These assertions can still be found at the core of the argumentation of the opponents of vaccination today (in this respect BVerwG, judgement of 14.07.1959, Az. I C 170.56 = BVerwGE 9, 78-83), whose lobby may have grown in the face of Covid-19 vaccines' scenario.

The Prussian Vaccination Law lasted 102 years before being replaced in 1976 (Law of 18.05.1976, Federal Law Gazette I, p. 1216) by the Smallpox Vaccination Act. With the repeal of this law in 1982 (Act repealing the Smallpox Vaccination Act of 24.11.1982, Federal Law Gazette I, 1529), the general vaccination obligation also ended. The protection against epidemics was granted by the Epidemic Protection Act of 1979 (Law of 18.12.1979), which was replaced in 2001 (Act of 20.07.2000, Federal Law Gazette I, 1045, last amended by Law Amending the Protection against Infection Act and other laws on the occasion of the repeal of the determination of the epidemic situation of national importance, 22.11.2021) by the Protection against Infection Act valid today. Originally, this Act did not provide regulations for compulsory vaccination, but relies generally on a system of recommendations by the Permanent Vaccination Commission (STIKO) of the Robert Koch Institute and voluntary vaccination. The German concept has been given somewhat more shape by the Prevention Act of 2015 (Act to Strengthen Health Promotion and Prevention, Prevention Act – PrävG of 17.07.2015, Federal Law Gazette I, 1368.), which had the specific aim of strengthening vaccination prevention. Among other details, it regulated

- the collection, processing and use of personal data of employees in hospitals and other medical institutions by the employer with regard to vaccine-preventable diseases, Art. 23a
- the temporary exclusion of persons not immunized against measles from communal establishments, Art. 28 para 2, and
- the obligation to present a certificate of a medical vaccination consultation carried out in accordance with the recommendations of the STIKO shortly before the first admission to a day-care centre, Art. 34 para 10a.

While the 2015 version of the legal scenario already took a further step in the di-rection of the supporters of compulsory vaccination, this tendency got confirmed some years later through the Measles Protection Act, which came into in 2020 (Law for protection against measles and to strengthen vaccination prevention, Measles Protection Act, 10.02.2020, Federal Law Gazette, p. 148).

2. The Measles Protection Act

The RKI's problem child was for a long time undoubtedly measles infection. The Regional Verification Commission of the ¬European Regional Office ¬in Copenha-gen certified that the transmission of measles had been interrupted in Germany in 2016 (World Health Organization Regional Office for Europe, 2013). Reports from the RKI,

however, sounded more critical: "Despite stricter laws, too few children continue to be vaccinated against measles. (…) in 2016, for the first time, all German states ¬ reached the vaccination rate of 95 percent for the ¬ first measles vaccination. ¬ In the crucial second measles vaccination, ¬ however, the nationwide vaccination rate increased only slightly to 92.9 percent." (Robert Koch Institute, 2018b; refering to the discussion before the introduction of the vaccina-tion mandate see Neufeind, Betsch, Zylka-Menhorn, Wichmann, 2021)

With the Measles Protection Act from 2020 another crucial step towards more state coercion in community related health issues was done and sharpened the states' double role in the health sector. The regulation on temporary exclusion from communal facilities in § 28 para. 2 IfSG pursues a dual protective goal: on the one hand, the individual is protected from infection, and on the other hand, further transmission of the infection can be prevented. In contrast to the previous regulations on the ban on entering schools, which were based on case law, the new regulation extends the scope of application of bans on entering schools to include "non-disruptive persons", i.e., persons who are not identified as sick or suspected of being sick. Under the previous legal situation, there had to be a suspicion of infection, which case law interpreted to mean that concrete facts made the assumption of infection appear more probable than the opposite. However, this was not considered to take sufficient account of the course of the disease, since transmission of the disease can occur even before the onset of symptoms (BVerwG, Judgment of 22 March 2012 - 3 C 16/11 -, BVerwGE 142, pp. 205-219).

The above-mentioned regulations and their evolution imply that the state tends to have a say in the decision on whether to vaccinate or on the consequences of non-vaccination, but that still for a long time the principle of self-determined medical decision remained untouched. § 28 IfSG, which contains the regulations on state protective measures, prohibits in general compulsory medical treatment in para. 1, sentence 3. However, this rule is broken by § 20 para. 6,7 IfSG and since the measles protection act by § 20 para. 8-14. § 20 para. 6,7 IfSG authorizes the Federal Ministry of Health or the state government to order compulsory vaccination based on a legal ordinance; § 20 para. 8-14 prescribe compulsory vaccination against measles in community settings. The prerequisite for the first, legally disputed scenario of § 20 para. 6,7, whose application is recently being discussed in the context of the Covid-19 vaccination, among other things, to compulsory vaccination of people over 60 years of age (Wissenschaftlicher Dienst des deutschen Bundestages, 2021), is the occurrence of a communicable disease with a clinically severe course that is expected to spread epidemically (Aligbe, 2021a).

In view of the German vaccination coverage rate of approx. 93% in the measles case in 2018, however, this wasn't assumed. It might have been conceivable in individual cases of regional occurrence of the infection to demarcate threatened sections within a highly mobile society, but this would have involved a great deal of effort (Zuck, 2017). There were also doubts about the existence of a threat in the sense of § 20 Para. 6,7 IfSG. In the sense of danger defense law, a danger would have to be presupposed here,

i.e. circumstances which, in the case of an unhindered course of events, would lead to damage with sufficient probability (for the concept of danger in police and public order law, see representative for many Krüger, 2013). By the time there were substantial doubts, that the mentioned legal conditions were fulfilled in the case of measles; epidemic occurrence with severe forms of progression with the weight required in § 20 para. 6, 7 IfSG were not to observed (Zuck, 2017). After all the decision of the legislator to act by completing § 20 in para. 8-14 and recently adding § 20a was the only way to implement a compulsory vaccination.

3. The Covid-19 Vaccination

While it was previously assumed that a vaccination offer, and thus even more a concept of compulsion, presupposed a secure state of research into the effectiveness and consequences of vaccines, this approach was called into question by the Covid-19 pandemic. A concept of voluntariness presupposes sufficient information to support an individual decision in such a way that the person concerned can act in full knowledge of the consequences of vaccination or non-vaccination (on voluntary informed consent, see Nitschmann, 2007, pp. 116-216). In the context of pandemic prevention, this is legally based on § 20 Para. 1-3, § 3 IfSG. According to § 20 para. 2 IfSG, the permanent vaccination commission of the Robert Koch Institute is responsible for the content of information on vaccinations. This commission develops its recommendations on standard vaccinations according to a formalized standard procedure (Robert Koch Institute, 2016). On the basis of these recommendations, which have no direct legal effect, the supreme federal or state health authorities inform the population through the ap-propriate agencies.

The system of public vaccination recommendations is interlinked with the obligation of physicians to provide information under the treatment contract. Thus, within the framework of the respective treatment contract, the treating physicians have the duty to point out vaccinations, regardless of their own attitude towards vaccinations (in this regard, with further references Nassauer and Mayer, 2004). Public health services and physicians are jointly responsible for ensuring that as much information as possible is available to enable citizens to make a responsible, voluntary decision. Information includes not only the dangers of infection but also information about possible vaccine damage; details on the scope of the information discussion are typically dealt with by courts in the context of medical malpractice suits.

Regarding the infinite discussion about compulsory vaccinations which actually focuses on the Covid-19 vaccination, the legal dynamics around the fighting of the measles might be perceived as a precursor of change towards a less liberal system of disease control. While politicians initially ruled out compulsory vaccination overall, it became clear during the course of the pandemic that there would be a need for action, at least in the area of facilities for vulnerable groups. Therefore, it was not surprising that mandatory vaccination became law in Ger-many on a sector-specific basis in December

2021. § 20a IfSG which was introduced in December 2021 (Act on Strengthening Vaccination Prevention against COVID-19 and Amending Other Provisions in Connection with the COVID-19 Pandemic Federal Law Gazette, 11.12, 2021, 5162) regulates an institutional based proof of immunity to Covid-19 from 15 March 2022 onwards aiming to protect vulnerable groups from infection with SARS-CoV-2. The Federal Constitutional Court rejected the constitutional complaint against § 20a and the connected § 22a, § 73 (1a) nos. 7e to 7h of the Protection Against Infection Act and declared the interferences with fundamental rights to be justified (see BVerfG, decision of 27.04.2022, I BvR 2649/21). Regarding the possibility of a legal ordinance within the meaning of § 20 para. 6, 7 IfSG, the possibility of compulsory vaccination for people over 60 was also discussed, as already indicated. Regarding the possibility of a legal ordinance within the meaning of § 20 para. 6, 7 IfSG, the possibility of compulsory vaccination for people over 60 was also discussed, as already indicated. However, if one places the right to medical self-determination in the foreground, there is much to suggest that imposed health protection should also be rejected in this age group. At most, considerations of the common good and social costs would then open the possibility of a different, constitutionally tenable decision (Gebhard and Kießling, 2021; Huster and Kingreen, 2021; Aligbe, 2021b).

Apart from the strong standing of the right to self-determination, most likely the lack of a reliable licensing procedure and the associated risks of vaccination in individual cases, especially in a long-term perspective were among the reasons to prevent the legislator from enhancing the restrictive direction taken by inventing a general obligation of vaccination.

III. Compulsory Vaccination in the light of Fundamental Rights

The discussion about the measles vaccination not only brought the fundamental right to medical self-determination in connection with bodily integrity back into focus which can be perceived as part of the right to privacy in general, but also revolved around the restriction of freedom rights affecting daily life. Whereas at that time it was essentially a matter of restricting access to public facilities, with the Covid-19 pandemics almost all areas of everyday life got affected to a greater or lesser extent.

The question of the constitutionality of compulsory vaccination in Germany brings into focus not only the fundamental right to physical integrity under Article 2 (2) sentence 1 of the Basic Law, but also the fundamental parental right un-der Article 6 of the Basic Law (on regulatory competence, see Deutscher Bundestag, 2016).

The classic case law on compulsory vaccination in Germany is a frequently cited ruling of the BVerwG from 1959, which considered the compulsory vaccination against smallpox, introduced by the Vaccination Act of 1874 to be constitutionally permissible. (BVerwG, judgement of 14.07.1959, I C 170.56 = BVerwGE 9, pp. 78-83). The anchor point of the court's argumentation was the right to life from Article 2 (2) sentence 1 of the Basic Law which should guarantee that one is protected from infection (BVerwG,

judgement of 14.07.1959, Az. I C 170.56 = BVerwGE 9, 78-83, juris, marg. no. 19). In the light of the fundamental rights' understanding of the human being the Court referred to a positive right to be protected from infection correlating with the obligation to vaccinate and from which individuals may not be excluded without special reason - such as belonging to a risk group (BVerwG, judgement of 14.07.1959, I C 170.56 = BVerwGE 9, 78-83, juris marg. no. 19). Based on the assumption that there is an encroachment on the scope of protection of Article 2 (2) sentence 1 of the Basic Law, the essence of which is not affected precisely when it is a matter of preserving integrity, the court refers to an expert opinion of the Federal Court of Justice from 1952, which documents the success of vaccination in the fight against the disease, and the decision of the court based on this to justify compulsory smallpox vaccination at the time (BVerwG, judgement of 14.07.1959, I C 170.56 = BVerwGE 9, 78-83, juris, marg. no. 18. BGH, Expert opinion of 25.01.52, VRG 5/51).

Recourse to the expert opinion makes clear that the core of the BVerwG's decision was closely linked to the conditions prevailing at the time and the development of the pandemics. Regarding the historical context and the sanitary conditions at the time a transfer of the supreme courts' jurisprudence on the Prussian Vaccination Act of 1874 to today's situation does not seem obvious (expressly stated by Zuck, loc. cit. and Trapp, loc.cit.). Although two aspects should be kept in mind to guide the actual debate: the fact that preserving integrity – also for society as a hole – can mean that a certain limitation of the individual's right must be tolerated and the fact that the measurable success of the vaccination should be considered as an indicator.

In the case of the institution-specific mandatory vaccination the guarantee of Art. 2 para 2 first sentence GG which protects the individual's right to physical integrity and the related right to self-determination is restricted by the obligation to provide proof of vaccination in certain institutional contexts which leads to a weakening of this fundamental freedom as an indirect effect of the state measure.

Generally, when examining the question of compulsory vaccination in infectious contexts, it is necessary to look closely at each set of facts and to conduct the fundamental rights examination underlying the principle of proportionality step by step. In particular, the question of the legitimate aim, the necessity and the appropriateness of an infringement of the fundamental rights require closer con-sideration. The basic prerequisite for an encroachment is the existence of a legal basis in accordance with the principle of legal reservation.

4. Compatibility with Article 2 para 2 sentence 1 GG

a. Legitimate Purpose

The constitutional balancing decision principally takes place against the background of a clearly definable objective that is permitted by the rule of law. Obviously, the concern is to prevent the spread of a disease but on closer inspection, the precise

description of the objective may well pose difficulties. First of all, with regard to compulsory vaccination, one could assume that combating the epidemic spread of an infection with a severe form of progression is a collective medical objective defined by law (Zuck, loc. cit.). This approach which has be-come standard during the Covid-19 pandemics to justify fundamental rights infringements, describes the requirements for the legitimate purpose more concretely than the mere intention of contributing to an improvement or protection of public health as a health policy standard. At the same time the state's duty to protect physical integrity as an individual medical goal is also used to describe the legitimate goal (BVerfG, NJW 1987, p. 2287; Schaks and Krahnert, 2015; Deutscher Bundestag 2016).

In this sense the BVerfG states that "Both the protection of life and health and the functioning of the health care system are already in themselves overridingly important public welfare concerns and therefore constitutionally legitimate legislative purposes".

From Article 2 (2) of the Basic Law, (...) the state may also have a duty to protect, which includes precautionary measures against health impairments (with further proofs BVerfG, B.v. 19.11.2021, 1 BvR 781/21, marg. no. 1-306, 176).

Other approaches to describe the legitimate purpose in the measles context were to meet the 95% vaccination rate or even to eradicate measles (Schaks and Krah-nert, loc. cit.; in contrast Zuck, loc. cit.). In this respect, a concrete legal definition is missing to define the legitimate goal, but through the legal mandate to the RKI from § 20 IfSG and its technical competence, a legal anchoring can be ascerted indirectly. In addition, even though not binding, since 1984 the agreements of the EU member states on the elimination of infectious diseases such as measles and rubella in the EU member states have served as a starting point for considerations on the legitimate purpose. As a consequence of the different approaches, the concrete concept of the objective pursued may have an impact on the further proportionality test. Finally, the Covid-19 scenario gives a good example of how the primary goal behind state intervention might change. From: preventing a wide spread of the disease in order to protect the weakest, medical professionals or even everybody to: avoiding the congestion of hospitals different nuances of these goals guided legislative and administrative decisions.

b. Suitability

While the suitability of vaccination for measles control can be understood relatively quickly in view of the contribution it makes to combating the infection when carried out properly on the basis of current professional knowledge and standards, this seems to be more difficult for Covid-19 vaccinations. Research on the effectiveness of the different vaccinations is still into course and might provoke doubts on the suitability. One problem might be that the Corona vaccination - unlike the measles vaccination - does not lead to the eradication of the dis-ease or the virus – provided that one puts eradication as a legitimate goal in the foreground (critically, but with a view to the broad understanding of the characteristic of "suitability", affirming that Rixen, 2019).

Even though the threshold for suitability is traditionally considered to be low and actual developments in the pandemic's scenario can lead to the conclusion that vaccination is a key element to control the virus spreading (Schaks and Krahnert, loc. cit.; Trapp, loc. cit.; the BVerfG, c. 120, 224 = NJW 2008, p. 1137; Deutscher Bundestag, 2016), remains the doubt on the reliability of the vaccinations and the question whether a means which is not yet underlying recognized scientific standards can at all be suitable.

The BVerfG grants the legislature leeway in assessing the suitability of a regulation on a case-by-case basis, which relates to the assessment and evaluation of the actual circumstances, to any necessary prognosis and to the choice of means to achieve the objectives of the law. According to case law, the importance of the legal interests at stake is also decisive i.e., also the right affected by the encroachment and the weight of the encroachment (with further proofs BVerfG, B.v. 19.11.2021, 1 BvR 781/21 ,marg. no. 1-306, 185).

With regard to possible prognostic uncertainties, the court states: "If, however, the intervention is made in order to protect important constitutional goods and if, in view of the actual uncertainties, it is only possible to a limited extent for the legislature to form a sufficiently certain picture, the constitutional court's review is limited to the justifiability of the legislature's prognosis of suitability." (BVerfG, B.v. 19.11.2021, 1 BvR 781/21, marg. no. 1-306, 185).

c. Necessity

The necessity of an interference with a fundamental right is based on the protection of the common good and, according to the established case-law of the BVerfG, requires that (..) there is no "equally effective means available to achieve the objective of the common good, which burdens the holder of the fundamental right less and third parties and the general public no more." In addition, the objective equivalence of the alternative measures for achieving the purpose must be given (with further proofs BVerfG, B.v. 19.11.2021, 1BvR971/21, 1 BvR 1069/21, marg. no. 134.). In its jurisprudence, the ECHR focuses on the "urgent social need" to achieve a justified goal, which is legally concretized in the state's duty to protect life and health, and further refers to the discretion that the state organs have in their assessment (Vavřička and Others v. the Czech Republic- 47621/13, 3867/14, 73094/14 et al, Judgment 8.4.2021 [GC] = EGMR, NJW 2021, p. 1657, 1659; regarding the legislators marge of appreciation BVerfG, B.v. 19.11.2021, 1BvR971/21, 1 BvR 1069/21, marg. no. 135).

Some object to the necessity of compulsory vaccination that the still prevailing concept of voluntary vaccination makes compulsory state measures unnecessary, since it offers a basis on which individuals can protect themselves effectively against infection (Trapp, loc. cit.; Schaks and Krahnert, loc. cit.). Against this it was already in the measles-scenario argued that the introduction of compulsory vaccination had to be considered precisely because of gaps in vaccination within the population (Zuck, loc. cit.) and that the system based on voluntary vaccination seemed to be less effective at the time

(Deutscher Bundestag, loc.cit.) . Obviously same could be said regarding the voluntary Covid-19 vaccinations, even though the reservations and hesitations are far more understandable for the rea-sons already mentioned.

In the end, the decisive aspect might be whether the system of STIKO recommendations is considered effective and reliable, depending itself on the chosen legitimate purpose, i.e., either to prevent an epidemic spread of the respective infectious disease or simply to protect public health including the functioning of healthcare institutions or to achieve a vaccination coverage rate of 95% or eradication (Zuck, loc. cit.). However, the differentiation with regard to the stated purpose is obsolete if each one of them is achieved by voluntary vaccination, based on the system of recommendations, education and voluntary action. The need for state coercion would thus be eliminated on the basis of a milder, equally effective means (the inadequate vaccination advice criticised Rixen, loc.cit.). Regarding the requirement in § 20 IfSG to combat the spread of infectious diseases, it gets clear, that this parameter is subject to interpretation and can only be measured by scientific experts. Whether the vaccination quota has been reached or whether an infection has been eradicated can ultimately only be determined by corresponding central surveys, such as those controlled by the RKI. Either way, it is clear that the legal decision is ultimately based on an external scientific knowledge process.

d. Proportionality

Even if one wanted to adhere to the necessity of compulsory vaccination, it would still have to withstand the test of proportionality. The precondition for constitutional admissibility is that the burden associated with the infringement on fundamental rights is not disproportionate to the weight of the reasons justifying it. This requires a consideration of individual rights concerned and the aims and interests served by the encroachment (for example BVerfGE 124, 43, 62 = NJW 2009, p. 2431). On the one hand, there is the individual's right to physical integrity under Article 2.2 sentence 1 of the Basic Law, which, as part of the right of personality, has its roots in human dignity and includes the right of self-determination to decide whether to run the risk of vaccine damage. As a right of defense, it requires the state to refrain from unreasonable interference with life and health. On the other hand, there is the state's duty to protect, which justifies restricting other fundamental rights, and which also arises from Article 2.2 sentence 1 of the Basic Law.

For a long time, the proportionality test in the measles-scenario excluded a constitutional justification of compulsory vaccination, taking into account, the low mortality rate of 0.1% compared to the former smallpox disease, which had a mortality rate of 30% (Deutscher Bundestag, 2016). Otherwise, so it was argued there would be the danger that "the physical right to self-determination would be eroded to the extent to what is medically achievable" (Trapp, loc. cit. p.18.), the ultima ration character of a compulsory vaccination dominated the picture (Erdle, 2018).

In the context of the Covid-19 pandemic the determination of the weight of the duty to protect, was partly based on uncertain facts, not only concerning the course of the infection but also the effectiveness of measures, up to and including vaccination and the effects on society (on the review of the constitutionality of individual acts Kingreen, 2020). Thus, seemingly unsteady state measures manifested the state's scope for decision-making when it comes to achieving the most effective protection status possible on an uncertain factual basis combined with the desire to limit the rights of freedom as little as possible. Whereas the high risk of contagion across societies was predominantly considered negligible in the measles-scenario, so that a low duty to protect was argued (Zuck, loc. cit; Trapp, loc. cit.) , the same could not be assumed in the Covid-19 scenario, where clinically severe courses seemed to dominate the picture at least at some point, the functioning of the health system was repeatedly called into question and hence a higher duty to protect was argued. The dimension of the state's marge of appreciation regarding the duty to protect became progressively clearer in the course of the pandemic; in addition to the temporal significance of measures, the aspect of their consistency also came increasingly into focus (on both with further references Kingreen loc. cit.). It is certainly true that the state should orient its maxims of action rationally and - unlike the individual - must focus on the best possible health protection for the individual and the collective (in this sense Schaks, 2019). The assumption that the vaccines used so far have little effect on the omicron variant admittedly weakens the health protection argument.

The extensive encroachment on the right to bodily self-determination proves to be serious in both the measles and the Covid-19 scenario – far more of course in the latter regarding all the uncertainties surrounding the vaccination. The question of the contour of the right to medical self-determination and physical integrity as the currently paradoxical counterpart of the state's duty to protect is joined by a plethora of previously unknown restrictions on freedom that have completely changed everyday life. Regardless of the fundamental right affected, the proportionality test is enriched by aspects that have played no or only a subordinate role in the history of pandemic control. In addition to the still insufficiently re-searched consequences of the Covid-19 infection, these include the comparatively little-tested vaccines and their possible medium- or long-term side effects, as well as the economic and social dimension. One thing is certain, however: proven serious consequences of disease, overburdened hospitals and increasingly serious consequences for the economy and society as a whole leave room for arguments in favor of compulsory vaccination.

This calls on the responsible politicians to emphasize the economic and social consequences of the pandemic more strongly in public discourse to promote the population's propensity to vaccinate and thus to make vaccination the dominant rational strategy (against the background of example models from game theory Wein, loc. cit.). It is possible that individual incentives are necessary for this, since in our society, which is more individual-orientated than collective, the well-being of the collective is apparently not sufficient as an incentive for the decision to vaccinate. At the very least, this

interculturally based finding could be another explanation for the lack of willingness to vaccinate in Germany.

IV. Conclusion

As a result, from a constitutional point of view, it can be argued, that the right to physical self-determination should take precedence over nationwide state intervention by means of compulsory vaccination with its consequence of possible administrative coercion unwanted social side-effects. There were already in the context of the measles debate indications that this position could be relativized in favor of states' intervention in certain scenarios, depending on the severity of the infectious disease or the social context. It is the moment when the administration positions itself vis-à-vis the citizen and can save lives as a "good, determined administration". At the same time, it may intervene in a regulating way in the social field of tension between autonomy and commitment, freedom and responsibility, self-determination, and heteronomy, and accentuate the importance of the individual's relationship to the community (with regard to the Hobbesian under-standing of the state, cf. Kingreen, loc. cit.).

Statutory regulations prohibiting access to communal facilities as well as the tendency of the courts to let the parent in favor of vaccination decide in cases of doubt prove that the state's duty to protect is nevertheless taken seriously. The actual politic decision on the obligation to vaccination in special professional context, the so called "vaccina- tion obligation light", confirms this tendency – being understood by some as a behav- ioral incentive that could be associated with an increase in freedom, being understood by others as an indirect restriction of freedom (for a differentiated view, see Kersten/Rixen 2021 p. 83 f.).

In the context of both the measles and the Covid-19 vaccination, one may nevertheless wonder, whether everything possible has been done within the framework of the system of recommendations and voluntary action to achieve sufficient vaccination coverage. Already since the measles story, the question arises whether the politically controlled information culture and discussion has not contributed to the fact that the scope for action in favor of voluntariness has not been exhausted. It is definitely the right way to emphasis public relations work for vaccination strategies that strengthen the free decision of the individual through education and the motivation to vaccinate in order to achieve the highest possible social welfare (Wein, loc. cit.). But also, financial vaccination incentives and more transparency regarding the follow-up costs may be beneficial for the willingness to vaccinate (Wein, loc.cit.) . This also requires addressing the arguments of vaccination critics, whether on health or religious grounds and an "effective risk communication" as well as an optimization of the interplay between the actors (with reference to the Finnish model, Marckmann, 2009; Council of Europe, loc. cit.). In this respect, the social media campaigns that the Federal Ministry has been running for several months on channels such as Instagram and Facebook are certainly an important step (Bundesministerium für Gesundheit, 2022). Last but not least,

doctors as direct actors also play a key role when it comes to the question of willingness to vaccinate, which is why it is quite interesting to get a picture of the psychological parameters determining the vaccination behavior of this professional group (Neufeind/Betsch/Zylka-Menhorn/Wichmann, loc. cit.). Regarding the vaccination against Covid-19, it is certainly also true that questions concerning the safety and effectiveness of vaccines must be considered transparently when weighing up the advantages and disadvantages to maintain or strengthen confidence in vaccination (appellative in this sense Robert Koch Institute, loc. cit.; Voitl, 2020).

At the same time, in a democratically constituted state governed by the rule of law, in order to protect health and to decide on conflicts of highest-ranking interest, it is acceptable that even in the case of uncertain scientific knowledge, the legislative discretion is used in conformity with the constitution, insofar as the assessment is properly based on all available information and possibilities of knowledge (BVerfG, B.v. 19.11.2021, 1 BvR 781/21, marg. no. 1-306, 171). Against this background, a general vaccination obligation - not understood as compulsory vaccination - remains constitutionally justifiable at least if vaccination campaigns fail and it is the only possibility to break through the repeated restriction of other civil liberties; here, the depth of the respective encroachments on civil liberties is decisive (statements by constitutional lawyers go in this direction, Redaktion Beck-aktuell, 2019, 2021; Schaks, loc. cit.). When introducing compulsory vaccination, attention will also have to be paid to the overall concept of rule and exception as well as consequences for those who refuse vaccination (Vavřička and Others v. the Czech Republic- 47621/13, 3867/14, 73094/14 et al, Judgment 8.4.2021 [GC] = EGMR, NJW 2021, p. 1657, 1657). Finally, the history of vaccination remains, despite all reservations, a success story in human evolution.

---

i A regional delimitation would be conceivable in cases such as that of the measles outbreak in Coburg, to which -in the result successfully- the recommendation of a bar vaccination was reacted, so that there are doubts about the necessity of official compulsory order (Nassauer/Meyer, 2004).

ii Concerning the concept of danger in German on the concept of danger in police and regulatory law. For the concept of danger in police and public order law, see representative for many Krüger, 2013.

iii Interesting in this context is the study of see Neufeind, Betsch, Zylka-Menhorn, Wichmann, 2021, pp. 1 10.

iv With regard to Art. 8 ECHR and the right to physical integrity as part of respect for private life in the context of compulsory vaccination of children, see only ECtHR, 2021, which points out, inter alia, that the legality depends on the overall concept of compulsory vaccination in the member states.

v Quoted from juris. The background of the decision was a case in which parents asserted the right tovaccination of their 2-year old child, who was supposedly not to be vaccinated for health reasons. However, in the court's view, the fact that the defendant authority was afraid

of the vaccination causing vaccination damage was ultimately decisive and it considered the refusal of vaccination legitimate, since the child had already exceeded the intended age limit. In its observations concerning compulsory vaccination, it referred, among other things, to the inadequacies of voluntary vaccination as it existed in England in the 1920s, where only about half of the children were subjected to vaccination and epidemics lasted longer. In favour of a childs' right to vaccination, the Federal Civil Court confirmed in a more recent decision that the vaccination of a child is "a matter of considerable importance for the child". If parents disagree about the implementation of a vaccination, according to the BGH a transfer of the decision to the parent in favour of the vaccination is possible, BGH, decision of 03 May 2017 - XII ZB 157/16 - = NJW 2017, 2pp. 826-2927, juris; similarly, Thüringer OLG, decision of 07.03.2016, 4 UF 686/15, quoted juris.

vi "The Regional Verification Commission of the European Regional Office in Copenhagen already verified measles and rubella elimination in 33 of 53 countries in the WHO European Region for 2016. A further 9 countries, including Germany, were certified as having interrupted measles transmission in 2016." See World Health Organization Regional Office for Europe loc. cit.

vii Schaks/Krahnert, loc. cit., pp. 864-865 deal with the objections of "lack of effectiveness", "disease despite vaccination" and "disease due to vaccination"; under the special aspect of the precautionary measure, cf. the examination in Trapp, loc. cit., p. 16; on the requirements of suitability, cf. the constant case law of the BVerfG, c. 120, 224 = NJW 2008, p. 1137.

viii With reference to the stagnation of the vaccination rate despite the Prevention Act of 2015 Schaks, loc. cit., p. 8.

ix pointing out that the goal of increasing the vaccination rate and eradication are precisely not legitimate goals. In contrast, Schaks/Krahnert, who point to the recurring epidemics in the absence of adequate treatment options, loc. cit.

x But also Schaks/Krahnert, loc. cit., who, in view of the fact that only a small group of persons is actually affected, also assume the appropriateness of a compulsory import.

xi For the added value of non-vaccination in an exemplary benefit/cost calculation, see Wein, loc. cit.

xii Who concludes that "letting oneself be vaccinated" is not a dominant rational strategy, p. 119. on the use of vaccination incentives in the employment relationship see Bayer, 2021; also Benkert, 2021.

xiii Questioning the effectiveness of obligation to vaccination in case of non-medical exception Kerbl, loc. cit. p. 152 f.; Voitl, loc. cit. p. 294 f.

V. Bibliography

Aligbe, Patrick (2021a): Eckart/Winkelmüller, BeckOK Infektionsschutzrecht; 7th edition, 2021, § 20 marg. no. 85.

Aligbe, Patrick (2021b): Infektionsschutzrecht in Zeiten von Corona, 2021, chap. 6.10.

Bayer, Bastian (2021):Impfpflicht, Corona-Test, Corona-Pass – Möglichkeiten zur schrittweisen Rückkehr an den Arbeitsplatz, ArbRAktuell 2021, p. 233-236.

Benkert, Daniel (2021): Wege aus der Pandemie – Impfpflicht im Arbeitsverhältnis, NJW Spezial 2021, p. 50 f.

Council of Europe (2018): Recommendation on enhanced cooperation in the fight against vaccine preventable diseases, COM (2018) 244 final 2018/0115 (NLE), 26.04.2018.

Deutscher Bundestag (2017): doc. Nr. 19/320, 22.12.2017.

Deutscher Bundestag (2016): Verfassungsrechtliche Zulässigkeit einer Impfpflicht, WD 3 - 3000 - 019/16, January 2016.

Deutscher Bundestag (2021): Wissenschaftliche Dienste, Corona-Impfpflicht in ausländischen Mitgliedsstaaten, der EU, WD 9 – 3000 – 098/21, 03.12.2021.

EctHR (2021): Vereinbarkeit einer Impfpflicht für Kinder mit der EMRK, NJW 2021, p. 1657 f.

Engels, Andreas (2014): Infektionsschutzrecht als Gefahrenabwehrrecht?, DöV 2014, pp. 464-474.

Erdle, Helmut (2018): Infektionsschutzgesetz, Kommentar, 6th Ed. 2018, § 20, no. 7.

Gebhard, Friederike/ Kießling, Andrea (2021): IfSG, 2. Auflage 2021, § 20 marg. no. 27.

Hensler, Sven (2020): Masernimpfpflicht, Maskenpflicht und unrichtige Gesundheitszeugnisse, MedR 38 2020, p. 1000-1003.

Huster, Stefan/Kingreen, Thorsten (2021): Handbuch Infektionsschutzrecht, 2021.

Impfzwangsgegenerverein Dresden (ed.) (2015): Der Imfpspiegel. 300 Aussprüche ärztlicher Autoritäten über die Impffrage und zwar vorwiegend aus neuerer Zeit, 1890.

Kerbl, Reinhold (2017): Impfpflicht in Europa. Derzeit in aller Munde – aber gibt es wissenschaftliche Evidenz?, Pädiatrie&Pädologie 3 2020.

Kersten, Jens/Rixen, Stephan (2020): Der Verfassungsstaat in der Corona-Krise, München 2020.

Kingreen, Thorsten (2020): Das Studium des Verfassungsrechts in der Pandemie, Juristische Verwaltung 2020, p. 1019-1035.

Krüger, Elmar (2013): Der Gefahrbegriff im Polizei- und Ordnungsrecht, Juristische Schulung, 2013, pp. 989-990 ff.

Marckmann, Georg (2009): Ist eine gesetzliche Impfpflicht ethisch zu rechtfertigen?, Public Health Forum 17, issue 63, 2009, p. 8 f.

Nassauer, A./Meyer, C. (2004): Impfungen von Kindern und Jugendlichen auch gegen den Elternwillen? Ein Diskussionsbeitrag zu ärztlichen Aufgaben und rechtlichen Rahmenbedingungen, Bundesgesundheitsblatt 12, 2004, pp. 1230-1238.

Nitschmann, Kathrin (2007): Das Arzt-Patient-Verhältnis im "modernen Gesundheitssystem", Baden-Baden 2007.

Redaktion Beck-aktuell (2021): Juristen halten Impfpflicht für vereinbar mit Grundgesetz, becklink 2021568, 23.11.2021.

Redaktion Beck-aktuell (2019): Staatsrechtler sieht keine Verfassungsprobleme bei Masern-Impfpflicht, becklink 2013002, 06.05.2019.

Robert Koch Institute (2021a): Bundeszentrale für politische Bildung, Das Impfbuch für alle, Rostock 2021, pp. 40-53, 60 f.

Robert Koch Institute (2021b): Die 4. Covid-19-Welle wurde durch fehlenden Impfschutz angestoßen: Was ist zu tun?, Epidemiologisches Bulletin 49/2021.

Robert Koch Institute (2021c): Das Impfbuch für alle, Bundeszentrale für politische Aufklärung.

Schaks Nils/Krahnert, Sebastian (2015): Die Einführung einer Impfpflicht zur Bekämpfung der Masern. Eine zulässige staatliche Handlungsoption, MedR 2015, pp. 860-866.

Trapp, Dan (2015): Impfzwang – Verfassungsrechtliche Grenzen staatlicher Gesundheitsvorsorgemaßnahmen, DVBl 2015 p. 11-19, 12.

Voitl, Peter (2020): Zur Impfpflicht in Europa, Monatsschrift Kinderheilkunde 4 2020, 294 f.

Wein, Thomas (2021): Ist eine Impfpflicht gegen das Coronavirus nötig, Wirtschaftsdienst 2021/2, p. 114-120.

Zuck, Rüdiger (2017): Gesetzlicher Masern-Impfzwang, ZRP 2017, pp. 118-121.

VI. Internetsources

Ärzteblatt (2022a): Einrichtungsbezogene Impfpflicht: Bayern und Hessen legen Pläne vor, http://www.aertzeblatt.de/nachrichten/132166/Einrichtungsbezogene-Impfpflicht-Bayern- und-Hessen-lege-Plaene-vor, last accessed 01.03.22.

Ärzteblatt (2022b): Lauterbach dringt auf eine allgemeine Impfpflicht, 09.02.2022, https://www.aerzteblatt.de/nachrichten/131669/Lauterbach-dringt- auf-allgemeine- Impfpflicht last accessed 03.03.22.

Bundesministerium für Gesundheit:
https://www.facebook.com/bmg.bund/;
https://www.instagram.com/bundesgesundheitsministerium/?hl=de,
last accessed 09.03.22.

Bundesregierung (2021): Impfpflicht für Beschäftigte in Kliniken und Heimen beschlossen,
https://www.bundesregierung.de/breg-de/themen/coronavirus/einrichtungsbezogene-impfpflicht-1990672, last accessed 10.02.22.

Deutscher Bundestag (2022): Kontroverse Impfpflicht-Debatte mit ersten Vorschlägen, 26.01.22,

https://www.bundestag.de/dokumente/textarchiv/2022/kw04-de-impfpflicht-877070,
last accessed 09.03.22.

Deutschlandfunk (2022): Österreich/Allgemeine Corona-Impfpflicht wird ausgesetzt, 09.03.2022,
http://www.deutschlandfund.e/allgemeine-corona-impfpflicht-wird-ausgesetzt-102.html,
last accessed 09.03.2022.

Frankfurter Allgmeine Zeitung (2020): Lambrecht warnt vor Impfpflicht durch Hintertür, 03.12.2020,
https://www.faz.net/aktuell/politik/inland/corona-lambrecht-warnt-vor-impfpflicht-durch- hintertuer-17082871.html,
last accessed 03.03.22.

Neufeind, Julia/ Betsch, Cornelia/ Zylka-Menhorn, Vera/ Wichmann, Ole (2021): Determinants of physician attitudes towards the new selective measles vaccine mandate in Germany, Public Health 2021 21:566,
https://doi.org/10.1186/s12889-021-10563-9,
last accessed 09.03.22.

Mikus, Renate (2022): Einrichtungsbezogene und allgemeine Coronaimpfpflicht, haufe.de 24.02.2022,
https://www.haufe.de/recht/weitere-rechtsgebiete/strafrecht-oeffentl-recht/vereinbarkeit-einer-corona-impfpflicht-mit-dem-gg-und-eu-recht_204_556372.html, last accessed 09.03.22.

Rixen, Stephan (2019): Verfassungsfragen der Masernimpfpflicht: Ist die Impfpflicht nach dem geplanten Masernschutzgesetz verfassungswidrig, Rechtsgutachten, 11.10.2019,

https://inviduelle-impfentscheidung.de/fileadmin/Downloads/Rechtsgutachten_Rixen_Langfassung.pdf, p. 5
last accessed 09.03.22.

Robert Koch Institute (2017): Annual Status Update on Measles and Rubella Elimination 2017,
https://www.rki.de/DE/Content/Kommissionen/NAVKO/Berichte/Bericht_2017_en.pdf?__blob=publicationFile.de/DE/Content/Service/Presse/Pressemitteilungen2017/01_2017.html,
last accessed 03.03.22.

Robert Koch Institute (2018a): Epidemiological Bulletin, No. 16, 2018,
https://www.rki.de/DE/Content/Infekt/EpidBull/Archiv/2018/Ausgaben/16_18.pdf?__blob=publicationFile, last accessed 09.03.22.

Robert Koch Institute (2016): Standing Commission on Vaccination Standard Practice of the Standing Commission on Vaccination for the Systematic Development of Vaccination, https://www.rki.de/EN/Content/infections/Vaccination/Vaccination_node.html, last accessed 09.03.22.

Robert Koch Institute (2018b): VacMap, Measles Vaccinination Corverage in Germany, http://www.vacmap.de, last accessed 09.03.22.

Schaks, Nils (2019), Schriftliche Stellungnahme zum Gesetzesentwurf der Bundesregierung „Entwurf eines Gesetzes für den Schutz von Masern und zur Stärkung der Impfprävention (Masernschutzgesetz) of 23.09.2019, Deutscher Bundestag, Ausschuss für Gesundheit, Ausschussdrucksache 19(14)112(14), p. 4, https://www.bundestag.de/resource/blob/664474/8d6a13763e5f5747b3f5e230898d875a/19 14_112-14-_ESVProf-Dr-Schaks_Masernschutz-data.pdf, last accessed 09.03.22.

Standing Committee on Vaccination, German Ethics Council, National Academy of Sciences Leopoldina (2020): How should access to a COVID-19 vaccine be regulated?, Position paper of the joint working group of members of the standing committee on vaccination, the German ethics council and the national academy of sciences Leopoldina, https://www.ethikrat.org/fileadmin/Publikationen/Ad-hoc-Empfehlungen/englisch/joint-position-paper-stiko-der-leopoldina-vaccine-prioritisation.pdf., last accessed 09.03.22.

Tagesschau (2022): Scholz weiter für Impfpflicht, http://www.tagesschau.de/newsticer/liveblog-coronavirus-mittwoch-295.html, last accessed 09.03.22.

Wissenschaftlicher Dienst des deutschen Bundestages (2021): Corona-Impfpflicht durch Rechtsverordnung nach § 20 Abs. 6 IfSG für die Altersgruppe der über 60-Jährigen, WD 3 - 3000 - 198/21, https://www.bundestag.de/resource/blob/874866/ab4b2f5f5db50791e7930daa69191f72/WD-3-198-21-pdf-data.pdf, last accessed 09.03.22.

World Health Organization Regional Office for Europe (2013): Experts meet to discuss verification process for measles and rubella elimination, https://www.euro.who.int/en/health-topics/disease-prevention/vaccines-and-immunization/news/news/2013/02/experts-meet-to-discuss-verification-process-for-measles-and-rubella-elimination, last accessed 09.03.22.

THE USE OF TECHNOLOGICAL TOOLS IN THE FIGHT AGAINST COVID-19 & ITS IMPLICATIONS ON THE FUNDAMENTAL RIGHT TO THE PROTECTION OF PERSONAL DATA AN APPROACH

Diego Zegarra Valdivia PhD. [**]
Senior Lecturer in Administrative Law
Pontifical Catholic University of Peru

Abstract: This paper analyzes some of the assumptions in which the varied use of technologies to confront the spread of the COVID-19 pandemic and protect people's health has impacted on the fundamental right to the protection of personal data; to do so, it starts from the premise that the use of these technologies cannot mean an affectation to the referred fundamental right, much less an indiscriminate treatment of such data without any minimum control whatsoever.

Keywords: Fundamental Right - Personal data protection - Pandemic - COVID-19 - Consent - Public Health -Technology - Public Health

Summary: I. Introduction. II. The Bases of Legitimacy of Health Data Processing. 1. Consent in the Processing of Health Data. 2. Purpose, Proportionality, and Data Minimization. 3. Security. 4. Quality or time-limited Storage. III. The Use of technological Tools based on the Processing of Personal Data to fight the COVID-19 Pandemic. 1. Information and Diagnosis of the Virus. 2. Geolocation and Tracking of infected People. 3. Mass Temperature Measurement in Public Spaces. IV. By way of Conclusion.

I. Introduction

The COVID-19 pandemic has led almost all countries worldwide to progressively adopt various types of measures to contain its spread, protect public health and people's lives (Gómez-Córdoba et al., 2020, p. 273). These measures include mandatory social isolation, social distancing, capacity control, the use of technological tools for data processing and mitigation of contagion, the establishment of information channels on

* This research is part of the activities of the Research Line on Personal Data Protection and Transparency of the Research Group on Administrative Law GIDA and its elaboration counted with the collaboration of Camila Chinchay, Ángela Casafranca, Christian Hernández, Alexandra Olivera, Piero Curi and Camila Atencio.

** D. in Law from the University of Alicante, Master in Telecommunications and Information Technology Law from the University Carlos III of Madrid, Director of the Master in Administrative Law and the Second Specialization Program in Administrative Law at the Pontificia Universidad Católica del Perú. Head of the Academic Office of Internationalization and Coordinator of the Administrative Law Area at the Law School of the Pontificia Universidad Católica del Perú.

COVID-19, geolocation of infected people, mobility studies, contact tracing and registration, control, and measurement of body temperature, among others.

All these actions in one way or another have limited fundamental rights and freedoms such as privacy, protection of personal data, freedom of movement, freedom of expression, freedom of assembly, among other rights. Of those mentioned, the fundamental right to the protection of personal data is important for the purposes of this paper, due to the type of information collected and required for the implementation of epidemiological surveillance systems and control of the spread of the disease (Gómez-Córdoba et al. , 2020, p. 273).

Measures to mitigate COVID-19 necessarily involve the processing of different personal data, whereby appropriate and lawful processing must be ensured. While the severity of the current health crisis allows for the use of emergency powers in response to major threats - as noted by a group of UN human rights experts on 16 March 2020 - it is imperative that the response to be implemented by States in the face of COVID-19 is proportionate, necessary, and non-discriminatory (UN, 2020).

It should be noted then, that under no circumstances does the declaration of health emergency assumed globally by countries imply, either expressly or tacitly, the suspension of the fundamental right to the protection of personal data, it only implies adopting certain measures that bring with them the limitation and not the suspension in the exercise of rights and freedoms (Piñar, 2020). However, as Arenas (2020) argues, the important thing is that these limitations must comply with a series of requirements and offer a series of guarantees and responsibilities in case of non-compliance: they must be necessary, appropriate, and proportional in a democratic society (p. 10).

It is a different matter whether it is necessary to adapt this fundamental right to, as the Spanish Data Protection Agency (hereinafter, AEPD) has stated, "(...) legitimately permit the processing of personal data in situations, such as the present one, in which there is a health emergency of general scope" (2020, p.1). The latter has been reiterated by the European Committee for the Protection of Personal Data, having emphasized that respect for the privacy of individuals does not constitute a stumbling block in making decisions that involve containing the current pandemic, when we are talking about sensitive data such as those relating to the health of individuals (EDPB, 2020, p. 1).

In the months that this pandemic has been going on, voices have arisen to express whether "privacy will be one of the victims of COVID-19" (Renda, 2020), expressions such as "to death by data protection" (Martínez, 2020) have been coined, or statements regarding whether the concessions and restrictions on surveillance, tracing, tracing and security of citizenship could become permanent (Calzada cited by Recuero Linares, 2020, p. 141), which makes manifest the uncertainty regarding the guarantees that legal systems have established for the exercise of this fundamental right and the rights linked to it. Therefore authors such as Andreu (2020) consider problematic the application of the regulations "in the use of technological solutions for the fight against the pandemic,

which has led to restrictive statements about their use and great confusion about their efficacy and safety" (p. 851).

Indeed, these innovations have generated new concerns worldwide about the inappropriate use of certain applications that affect the fundamental right to the protection of personal data and the privacy of citizens, which has led to a tension between the right to collective health and individual rights. And the fact is that, unfortunately,

These strategies are not always contextualized within a robust personal data protection regime, nor within legal instruments that guarantee that in their development and implementation the rights of individuals are protected, that only truly necessary data are obtained, that the impact on human health that justifies the restrictions of freedoms is evaluated, or that the information obtained will not be used in the long term for other state or private purposes (Gómez-Córdoba et al., 2020, pp. 274-275).

It is for these considerations that this paper aims to analyze that, although the context of COVID-19 requires rapid measures to address its expansion and mitigate its impacts, relying on technology as a suitable and necessary means for this purpose by accessing sensitive data such as the health of individuals or personal data and their geolocation, there is great concern about the proper treatment and use of these personal data collected in these circumstances because the use of these technologies can not mean an affectation of the fundamental right to the protection of personal data, much less a treatment of personal data, there is a great concern for the proper treatment and use of these personal data collected in these circumstances because the use of these technologies can not mean an affectation of the fundamental right to the protection of personal data, much less an indiscriminate treatment of such data without any minimum control.

II. The Bases of Legitimacy of Health Data Processing

The processing of personal data in these health emergency situations continues to be carried out in accordance with the regulations on personal data protection, so that all its principles are applied, including the processing of personal data with lawfulness, loyalty and transparency, purpose limitation, the principle of accuracy and data minimization (AEPD, 2020, pp. 6-7). Therefore, without reaching the alarmist excess of the aforementioned expressions, under the premise that the legal systems legitimize the processing of personal data that are essential to fight against the global pandemic of COVID-19, this article identifies the possible risks and affectations to the fundamental right to the protection of personal data derived from the implementation by States and individuals of technological tools in order to control the spread of the virus, protect public health and the life of people, and formulates some reflections on the scope of the same in the guarantee of the aforementioned fundamental right.

The protection of personal data is a fundamental right recognized in various international texts, in comparative legislation, as well as in the Peruvian legal system.

At the international level, as Razquin points out, the protection of personal data is provided for in:

Art. 12 of the Universal Declaration of Human Rights of 1948 and Art. 17 of the International Covenant on Civil and Political Rights of 1966, which refer to the protection of privacy and intimacy. Also within the Council of Europe, Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 establishes the principle of protection of privacy; Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 guarantees the protection of data against automated processing; and also the Council of Europe Convention on Access to Public Documents of 2009 includes as one of the limits of the right of access to documents the protection of privacy (Article 3.1.f). The Treaties of the European Union also protect the protection of personal data (art. 16 TFEU and art. 39 TEU). And the Charter of Fundamental Rights of the European Union regulates the right to the protection of personal data (Art. 8). (2019, p. 142).

Likewise, at the European level, in Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (hereinafter, GDPR), regulates the processing of personal data and the free movement of such data in a reality associated with the new digital society, having collected for it in its Article 5 the basic principles that should govern them, such as lawfulness (whose scope has been developed in Article 6 of the RGPD), fairness and transparency; purpose limitation; data minimization; accuracy; limitation of the retention period; and, integrity and confidentiality.

For its part, in the Peruvian legal system, the recognition of the protection of personal data as a fundamental right has been included in Article 2, paragraph 6 of the Political Constitution of Peru, which stipulates the right of every person to ensure that computer services, whether computerized or not, public, or private, do not provide information that affects personal and family privacy.

The normative development of the aforementioned constitutional precept has been carried out in Law No. 29733 - Personal Data Protection Law (hereinafter, LPDP), enacted in 2011 and in full force since 2013, and in its Regulations approved by Supreme Decree No. 003-2013-JUS (hereinafter, RLPDP). Through this regulation seeks to guarantee the fundamental right of the holders of personal data, that is, the ability of the same to control their treatment in the field of Public Administration as that which occurs in the private sector.

During this pandemic, the collection and processing of personal data related to health is constant. These data are considered as a special category in the personal data protection regulations, whose main characteristic is their sensitive nature. These are data whose processing may involve a greater risk of infringement of the rights and freedoms of the data subject and therefore are worthy of special protection because they can significantly affect the individual.

Health data consists of those information "that refer to past, present or future health in healthy or sick people, with diseases of a physical or psychological nature, and includes addiction to alcohol and drugs" (Cristea, 2018, p. 46). Personal data referring to health, contain, as Cristea points out, information about people that makes it possible to know the ailments or diseases they have suffered, suffer, or may even suffer (2018, p. 46). Solernou further refers that the European Group on Ethics in Science and New Technologies considers that personal health data includes information relating not only to diseases, but also to interventions, prescribed medicines, diagnoses, etc.; as well as administrative health data referring to registration, and admissions, insurance, etc. (2006, pp. 51-52).

It is, in short, personal data that are part of the most intimate sphere of the person, which may be revealing critical situations related to certain diseases, to the application of assisted reproduction techniques or related to genetic information, whose potential violator of personal privacy no one dares to doubt (Piñar, quoted by Cristea, 2018, p. 46).

It is because of the scope of the definition of health data that it is essential to analyze the framework of guarantees of the principles of legality, consent, purpose, proportionality, quality, security, availability of the resource, and adequate level of protection, contained in the LPDP (Title I) and in the RLPDP (Title II) since they delimit the processing of personal data, have binding force, practical application and define whether or not a data processing is being carried out in a fair, lawful, transparent and adequate manner. However, in the health emergency situation, the previous principles contained in the Peruvian legislation, to which it is reasonable to add - due to their connection - those that have been included in the European GDPR, are difficult to comply with for the processing of health data in a digital environment. Therefore,

There is an urgent need to clarify and specify the application of data protection principles to new technologies, in order to ensure real and effective protection of personal data, whatever the technology used to process these data, and that data controllers are fully aware of the implications of new technologies on the protection of personal data (Cristea, 2018, p. 224).

It is then necessary to identify the scope of the aforementioned principles and the effects derived from the implementation of technological tools that involve the processing of health data in the understanding that it is a series of material rules designed to develop and ensure the achievement of the purposes of the personal data protection regulations.

1. Consent in the Processing of Health Data

The principle of consent implies that third parties may access personal data, provided that there is free, express, unambiguous and informed consent from the owner. This

principle is contained in article 5[1] of the LPDP and articles 7, 11, 12 and 14 of the RLPDP.

In accordance with what is regulated in the LPDP, Article 7[2] of the RLPD, provides that the data subject's consent implies any free, specific, informed and unambiguous expression of will by which the data subject accepts, either by a statement or a clear affirmative action, the processing of personal data concerning him/her. Thus, as Arias (2016. p. 122) argues, consent has its own way of being granted:

- by a clear affirmative act reflecting a freely given, specific, informed and unambiguous indication of the data subject's free, specific and unambiguous wish to consent to the processing of personal data concerning him/her. It may be a written statement, including by electronic means or a verbal statement, if the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not necessarily disruptive to the use of the service for which it is provided;
- for all processing activities carried out for the same purpose(s), i.e. where the processing has several purposes, consent must be given for each of them;
- by a means which enables the controller to be able to demonstrate that the data subject has consented to the processing operation.

Likewise, the LPDP has provided in article 14[3] the cases in which the processing of personal data without consent is legitimate. Thus, paragraph 6 of the previously mentioned article provides that the consent of the owner of the personal data is not required, for the purposes of its processing, "when there are reasons of public interest

---

1 Law No. 29733, Personal Data Protection Law, „Principle of consent For personal data tob e processed, the consent oft he data subject must be obtained“.

2 Supreme Decree No. 003-2013-JUS, Regulation of Law 29733.
„Article 7 – Principle of consent: In accordance with the principle of consent, the processing of personal data is lawful when the owner of the personal data has given his free, prior, express, informed and unequivocal consent. Consent formulas in which consent is not directly expressed, such as those in which it is required to presume or assume the existence of a will that has not been expressed, are not admissible. Even the consent given with other declarations must be expressed expressly and clearly“.

3 Law No. 29733, Personal Data Protection Law
"Article 14. Limitations on consent to the processing of personal data
The consent of the holder of personal data is not required, for the purposes of its processing, in the following cases: (...)
6. When it concerns personal data relating to health and it is necessary, in circumstances of risk, for the prevention, diagnosis and medical or surgical treatment of the holder, provided that such treatment is carried out in health establishments or by professionals in health sciences, observing professional secrecy; or when there are reasons of public interest provided by law or when they must be treated for reasons of public health, both reasons must be qualified as such by the Ministry of Health; or for the performance of epidemiological or similar studies, provided that appropriate dissociation procedures are applied. (...)".

provided by law or when they must be processed for reasons of public health, both reasons must be qualified as such by the Ministry of Health".

The scope of this rule has been explained in Advisory Opinion No. 07-2019-JUS/DGTAIPD-DPDP of the National Authority for the Protection of Personal Data, according to which, the exception regulated by paragraph 6 of article 14 of the Law on the Protection of Personal Data "refers to specific situations that involve a circumstance of risk, such as an epidemic, in which the life or health of the owner of the personal data and of persons close to him or her is endangered" (2019). Thus, when there are reasons of public interest or declared public health, such as the Health Emergency in force in Peru, the processing of personal data is allowed without requiring the consent of the owner of the personal data in order to take preventive measures against possible contagions. A similar provision has been foreseen in paragraph i of Article 9[4] of the European GDPR: "sensitive data may be processed for rea-sons of public interest in the area of public health, such as protecting against threats to public health or ensuring medical device quality" (Scheibner et al., 2020, p. 12).

Therefore, given the need to have information for the proper management of the pandemic, it is admissible to process personal data of a general nature and those relating to health without the consent of the data subjects. However, this processing must be justified, necessary, proportional, reasonable and effective as a measure to contain the spread, and the security of the data processing must be guaranteed.

It should also be borne in mind that the processing of health data for the purposes of prevention or medical diagnosis, for the provision of health care and for the management of health services is legitimate, provided that the processing is carried out by persons subject to the duty of confidentiality (Solernou, 2006, p. 56). "This processing includes the collection, storage and communication of data and is lawful provided that it pursues these purposes and is carried out by persons bound by professional secrecy" (Solernou, 2006, p. 56).

With regard to the initiatives from the States and the private sector that have involved the implementation of technical solutions and mobile applications for the collection of health data in order to improve the operational efficiency of health services, as well as to achieve better care and accessibility by citizens, they are not within the exception mentioned above since we are dealing with functionalities that are made available to citizens and their use is voluntary and requires express consent.

---

4 Regulation (EU) 2016/679
"Article 9. Processing of special categories of personal data (...)
2. Paragraph 1 shall not apply where one of the following circumstances applies: (...)
(i) processing is necessary for reasons of public interest in the field of public health, such as protection against serious cross-border threats to health, or to ensure high standards of quality and safety of healthcare and of medicinal products or medical devices, on the basis of Union or Member State law providing for appropriate and specific measures to protect the rights and freedoms of the data subject, in particular professional secrecy. (...)".

The use of applications ("app") that allow the owner of the personal data to self-assess based on the medical symptoms he/she communicates, the probability of being infected with COVID-19, to receive information, advice and recommendations, or to enable geolocation to verify that he/she is where he/she claims to be, must be entirely voluntary, so that any person who wants to submit to them will have to give their express consent, where the controller will be the state health authority or the private company that makes it available (Rodriguez, 2020, p. 143).

2. Purpose, Proportionality, and Data Minimization

The processing of health data that are collected must be exclusively limited to the intended purpose, without extending such processing to any other personal data not strictly necessary for that purpose, or that may be confused convenience with necessity, because the fundamental right to data protection must continue to apply without prejudice to the emergency situations established in the regulations for the protection of essential public health interests (Piñar, 2020).

According to the latter, the collection of personal data should be minimal for the achievement of public health objectives, being in line with the principle of proportionality, whose purpose is "to avoid collecting information that is not reasonably relevant to fulfill the purpose of the processing, which implies a limitation for any form of collection that is not justified" (Zegarra 2014, p. 631).

The guarantee that the processing of personal data is determined, explicit, lawful and that it will not be incompatible with the purposes for which it was collected; as well as that the processing of personal data is adequate, relevant, and not excessive, all for the purpose of making health prevention measures effective, are regulated in articles 6[5] and 7[6] of the LPDP, respectively. In accordance with the aforementioned rules, it is necessary to verify the compliance of the purpose and relevance of the personal data requested with the regulations that the health authorities have approved whose purpose is to address COVID-19 and reduce its spread.

---

5 Law No. 29733, Personal Data Protection Law
"Article 6. Principle of finality
Personal data must be collected for a specific, explicit and lawful purpose. The processing of personal data must not be extended to any purpose other than the one unequivocally established as such at the time of collection, excluding cases of activities of historical, statistical or scientific value when a dissociation or anonymisation procedure is used".

6 Law No. 29733, Personal Data Protection Law
Principle of proportionality
Any processing of personal data must be adequate, relevant and not excessive to the purpose for which the data were collected".

Linked to the principle of proportionality of the Peruvian legislation is the principle of data minimization, contained in Article 5[7] of the European GDPR, according to which personal data can only be collected strictly necessary for the processing and at the time they are going to be processed, not to use them later; also, the request for personal data from their owners must be fully justified, depending on the purpose pursued by such processing (Puyol, 2017, p. 138).

Faced with the new challenges in times of pandemics, the principles that underpin the processing of personal data must be reinterpreted to have a regulatory framework that provides legal certainty, protects the rights of individuals and generates trust in society (Gómez-Córdova et al., 2020, p. 285). Thus, for example, the principle of purpose in the processing of personal data is linked to the ethical recommendations of the WHO in the COVID-19 pandemic referring to (i) the restriction of its use; (ii) proportionality in the collection of data; and (iii) the minimum collection of data for the achievement of public health objectives (Gómez-Córdova et al., 2020, p. 286).

It is necessary to note that there is a tendency to collect a lot of health data and the use of information technology contributes to this, thus affecting the efficiency of health care provision (Souleron, 2006, p. 57). "The system must ensure that health workers have necessary and relevant information when exercising their functions and this involves deciding and, if possible, questioning what data is entered into the system and in what form." (Souleron, 2006, p. 57).

From what has been expressed, it is clear that, although these considerations are prior to the health emergency generated by the COVID-19, they point to warn that the use of information technologies in the processing of health data may result in the non-observance of the principles of purpose, proportionality and data minimization, This has a significant impact in the event of access to personal data by unauthorized third parties, since it may result in processing for unauthorized uses or processing that limits the exercise of the rights of the owner of the personal data, hence the importance of establishing mechanisms to ensure compliance with the aforementioned principles.

3. Security

The principle of security implies that any personal data processing mechanism adopted must guarantee the security of personal data to prevent any loss, deviation or adulteration of the personal data obtained. In the specific case of health data, the security measures to be implemented are of high level, attending to the nature of the

[7] Regulation (EU) 2016/679
"Article 5. Principles relating to treatment
1. The personal data will be: (...)
(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimisation"). (...)".

referred data and according to the greater need to ensure the confidentiality and integrity of such information when it is treated (Cristea, 2018, p. 108).

Peruvian law has included these terms. Thus, in accordance with article 9[8] of the LPDP and article 10[9] of the RLPD, the principle of security guarantees that the owner of the personal data bank and the person in charge of its processing must adopt technical, organizational and legal measures necessary to safeguard the security of personal data, avoiding any processing contrary to the Law or the Regulation, including adulteration, loss, diversion of information, intentional or not, whether the risks come from human action or from the technical means used.

For its part, Article 4.12[10] of the European GDPR states that a breach of security of personal data means any breach of security resulting in the accidental or unlawful destruction, loss, or alteration of, or unauthorized disclosure of or access to, personal data transmitted, stored or otherwise processed. Furthermore, Article 5[11] of the GDPR ensures adequate security of personal data, which implies protection against unauthorized or unlawful processing and against accidental loss, destruction, or damage by appropriate technical or organizational measures ('integrity and confidentiality').

The guarantee of the principle of security is directly linked to the right to confidentiality of personal data. However, the availability of measures that aim to guarantee the right

---

8 Law No. 29733, Personal Data Protection Law
"Article 9. Principle of security
The owner of the personal data bank and the processor must take the necessary technical, organisational and legal measures to ensure the security of personal data. The security measures must be appropriate and commensurate with the processing to be carried out and the category of personal data concerned.".

9 Supreme Decree No. 003-2013-JUS, Regulation of Law 29733
"Article 10.- Principle of security
In accordance with the principle of security, in the processing of personal data, the necessary security measures must be adopted in order to avoid any processing contrary to the Law or to these regulations, including adulteration, loss, diversion of information, whether intentional or not, whether the risks arise from human action or from the technical means used".

10 Regulation (EU) 2016/679
"Article 4. Definitions (...)
breach of security of personal data" means any breach of security resulting in the accidental or lawful destruction, loss or alteration of, or unauthorised disclosure of or access to, personal data transmitted, stored or otherwise processed; (...)".

11 Regulation (EU) 2016/679
"Article 5. Principles relating to treatment
1. The data shall be: (...)
(f) processed in such a way as to ensure appropriate security of personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, by implementing appropriate technical or organisational measures ("integrity and confidentiality")".

to health and that make it possible to provide timely and accurate information, improving access to health data fusing information technologies, does not necessarily guarantee the security of such data.

It is necessary to note that the patient's trust in confidentiality depends on the security of the technical apparatus and the transparency of the treatment of personal health data, both of physicians and non-physicians involved in the operations and processes. (Almada & Maranhão, 2021). Therefore, access should not be indiscriminate, even when it is based on scientific reasons, so mechanisms should be implemented to avoid affecting the security of health data, i.e., its integrity and confidentiality.

4. Quality or time-limited Storage

The processing of personal data collected within the framework of the exemption from the obligation of consent by health authorities or by private companies, within the framework of the exemption from the obligation of consent, should be limited, as for any processing, to the duration of the health emergency situation, thus ensuring that the information obtained will not be used in the long term for other state or private purposes.

This rule has been included in Article 8[12] of the PDPL, which provides that personal data must be kept in a manner that ensures their security and only for the time necessary to fulfil the purpose of the processing. Likewise, article 28[13] of the LPDP establishes the obligation of the data controller, when the data are no longer relevant, necessary, and adequate for the established purpose, to delete or anonymize them or must apply a mechanism of dissociation or pseudonymization with code, the data will remain active, but without being able to easily identify the owner of the data, safeguarding his right to the protection of personal data.

The European GDPR includes a provision whose content is in harmony with the aforementioned rules of the Peruvian DPL.

---

12 Law No. 29733, Personal Data Protection Law
"Article 8. Principle of quality
The personal data to be processed must be true, accurate and, as far as possible, up to date, necessary, relevant and adequate in relation to the purpose for which they were collected. They must be kept in a form which ensures their security and only for the time necessary to fulfil the purpose of the processing".

13 *Law No. 29733, Personal Data Protection Law*
"Article 28. (...)
7. Delete the personal data being processed when they are no longer necessary or relevant to the purpose for which they were collected or when the time limit for their processing has expired, unless anonymisation or disassociation procedure is used. (...)".

In its article 5[14], the GDPR provides that personal data must be kept in a form that allows the identification of data subjects for no longer than is necessary for the purposes of the processing of the personal data ("limitation of the retention period").

After that time they can only be kept for longer periods for the purposes of archiving in the public interest, scientific or historical research purposes or statistical purposes, being sometimes necessary, in order to safeguard the principle of minimization, to proceed to the pseudonymization of the data (RGPD art. 89.1), and without prejudice to the application of appropriate organizational techniques imposed by the RGPD to protect the rights of the data subject (López, L.F., 2016, p. 61).

III. The Use of technological Tools based on the Processing of Personal Data to fight the Covid-19 Pandemic: Identification of some Risks and Effects on the Fundamental Right to the Protection of Personal Data

With the declaration of the pandemic by COVID-19, several nations around the world have implemented numerous initiatives aimed at mitigating the harmful effects of the virus through the development of technological tools based on the processing of health data. The latent threat to human life posed by COVID-19 makes it necessary to contain it through the correct management of personal data and suitable means to this end.

Therefore, in recent months various governments and private companies have implemented digital strategies that complement the epidemiological surveillance tools for case detection, contact tracing, diagnosis of the disease, documentation of places where people have been, determination of sites and times of greatest influx, in order to implement measures to limit contagion. In addition, they have been used to communicate and educate citizens or provide health care through telepresence (Gómez-Córdoba et al. , 2020, p. 274). This has been recognized at the international level in Resolution No. 1/2020 of the Inter-American Court of Human Rights, entitled "Pandemic and Human Rights in the Americas":

Regarding the containment measures to confront and prevent the effects of the pandemic, the IACHR has observed that some rights have been suspended and restricted, and in other cases "states of emergency," "states of exception," "states of catastrophe due to public calamity," or "sanitary emergencies" have been declared

[14] Regulation (EU) 2016/679
"Article 5. Principles relating to treatment
The data will be: (...)
(e) kept in a form which permits identification of ¬data subjects for no longer than is necessary for the purposes for which the ¬personal data are processed¬; personal data may ¬be kept for longer periods provided that they are processed exclusively for ¬archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1), without prejudice to the application of appropriate technical and organisational measures imposed by this ¬Regulation in order to protect the rights and freedoms of the data subject ('limitation of the retention period')".

through presidential decrees and regulations of various legal natures in order to protect public health and prevent an increase in contagion. Likewise, measures of different nature have been established that restrict the rights of freedom of expression, the right of access to public information, personal liberty, the inviolability of the home, the right to private property; and the use of surveillance technology has been used to track the spread of the coronavirus, and the massive storage of data. (IACHR, 2020, p.4).

The so-called surveillance technology has materialized in applications whose main intention is to inform about the virus and provide a diagnosis based on the data entered in the application and identify infected individuals, foci of contagion and allow the tracking and tracing of the contagion. Likewise, technological tools have been implemented that have allowed massive temperature measurements in public spaces.

There is no doubt that the implementation of new technologies based on the processing of personal data, together with the use of data analytics and Artificial Intelligence techniques, bring significant benefits and represent an important opportunity to stop the spread of COVID-19, as they improve the forecasting and decision-making capacity of health authorities, contribute to strengthening the effectiveness of social distancing measures, thereby significantly reducing the spread of the pandemic and minimizing the cost of human lives (Domínguez, 2020 p. 610).

However, as previously noted, these strategies are not always configured within a robust personal data protection legal regime that duly guarantees the protection of personal data and its principles, which justifies identifying, for their prevention, the risks that are generated when using technological tools that process personal data and the possible affectations to the fundamental right to the protection of personal data, especially when their use has made the methods of collecting personal data increasingly abundant, complicated and more difficult to detect (Cristea, 2018, p. 226).

This context raises the need to analyze those issues that will make it possible to achieve the difficult balance between the promotion of technological instruments that contribute to controlling the effects of COVID-19 by increasing the resources made available to the health authorities and the safeguarding of the fundamental right to the protection of personal data.

1. Information and Diagnosis of the Virus

Having information channels that are permanently updated about COVID-19, its symptoms, prevention measures and diagnosis is a matter of interest for anyone who has even the slightest symptom or seeks information that needs to be shared in their family environment.

Faced with the collapse of the telephone service for consultations, States, private companies, supranational organizations developed apps, websites, chatbots, Telegram channels, among others, so that citizens can obtain accurate and official information or perform self-assessments in a simple way, without having to make a phone call or go

to the emergency of a public or private health center (Cascón-Katchadurian, 2020, p. 4).

As for the self-assessment applications, they provide recommendations on how to act according to the symptoms, including contacting users for coronavirus testing or monitoring the evolution of the disease (Cascón-Katchadurian, 2020, p. 4). All these data are also used to make an approximate representation of the possible level of immunity of the population (Cascón-Katchadurian, 2020, p. 4).

In Spain, the General Secretariat for Digital Administration, under the Secretary of State for Digitalization and Artificial Intelligence of the Ministry of Economic Affairs and Digital Transformation, developed the mobile application Radar COVID. By downloading it, users of this app receive a notification if, in the event that in the fourteen days prior to the download, they have been exposed to an epidemiological contact with another user who has declared in the application to have given a positive result in the COVID-19 test, after accreditation by the corresponding health authorities (Domínguez, 2020).

In South Korea, the app Self-quarantine safety protection was developed with the aim of preventing the uncontrolled spread of the disease and the collapse of hospitals, for which it records the data of users and their answers to questions about the state of health and with the same doctors offer a remote diagnosis which helps to decongest the phones (Cascón-Katchadurian, 2020, p. 5). "In this way a massive diagnosis is achieved and with this data it is decided who should be tested" (Ruiz, 2020 cited in Cascón-Katchadurian, 2020, p. 5).

In the Peruvian case, the app that has taken charge of providing updated information on the areas of contagion and providing citizens with a prognosis of their possible status as carriers of COVID-19 was called "Peru in your hands", which "offers the option "Map of affected areas" (....) to access a map near it where the incidence of infection is marked....) to access a map of the vicinity where the incidence of contagion is marked; there is also the option "Triage" (...) through which, according to the symptoms that are recorded, you can determine whether or not you are a possible carrier of the virus". (Vásquez, 2020, p. 158).

With regard to the risks or possible effects on the right to the protection of personal data that may arise from this type of apps, those linked to the principle of consent of individuals should be considered, since there is a danger that both the data entered by individuals to receive informative updates about the virus and the data entered to generate a self-diagnosis of the app are used for a purpose other than that which the user believed and consented to.

The analysis is based on the consideration that when a user provides their identification and health data to be informed and/or self-assessed by the application, their consent will revolve around the specific purpose of the service; therefore, the data controller

managing the app could not use the data for a purpose other than diagnosing the virus with the user's data.

Regarding the applications that are able to perform a self-diagnosis, there are those that achieve it based on the voice recording of people. In Spain, for example, the company Biometric Vox is developing an app that will be able to detect a COVID-19 contagion index, using artificial intelligence. This system would make it possible to analyse - remotely, without physical contact and in real time - the state of the speaking apparatus and, as a result, be able to provide an index of contagion and serve the health authorities as a complementary aid for the control of the spread and any other data management (Biometric Vox, 2020, para. 4).

In Brazil, SPIRA and SoundCov are two applications in which users make a recording of their voice that is then analyzed through machine learning algorithms resulting in a diagnosis of COVID-19 (Almada & Maranhão, 2021, pp. 1-2).

> The SPIRA project, currently under development at the University of Sao paulo, seeks to detect severe respiratory insufficiency associated with the SARS-COV-2 virus, to indicate whether the user of the app must seek hospitalization. To obtain this diagnosis, the SPIRA app records the patient's reading of a few pre-defined sentences. These recordings are analyse by a machine learning model trained to distinguish the voices of healthy persons from those of pleople afflicted with respiratory insufficiencies (Almada & Maranhão, 2021, p. 2).
>
> [The SPIRA project, currently under development at the University of Sao Paulo, aims to detect severe respiratory failure associated with the SARS-COV-2 virus, to indicate whether the user of the application should be hospitalized. To obtain this diagnosis, the SPIRA application records the patient's reading of predefined phrases. These recordings are analyzed by a machine learning model trained to distinguish the voices of healthy people from those of people affected by respiratory failure].
>
> SoundCov, an app developed by Fiocruz, Intel, and Instituto Butantan, trains a machine learning system to distinguish between the coughing sounds of a Covid-19-positive person and those of healthy people and people afflicted by other respiratory illnesses, such as pneumonia or tuberculosis. The application then combines the analysis of the coughing sounds with additional information about epidemiological variables and patient's health history, thus producing a final diagnosis (Almada & Maranhão, 2021, p. 2).
>
> [SoundCov, an application developed by Fiocruz, Intel and the Butantan Institute, trains a machine learning system to distinguish between the cough sounds of a person who tests positive for Covid-19 and those of healthy people and people affected by other respiratory diseases, such as pneumonia or tuberculosis. The application then combines the analysis of cough sounds with additional information

> on epidemiological variables and the patient's health history, resulting in a final diagnosis].

With this type of technology, the principle of consent may be violated, since consent must be obtained by providing health data subjects with all the information about the form and duration of the processing, so that if this does not occur, the consent is considered invalid (Almada & Maranhão, 2021, p. 7). Linked to the latter, it should be noted that applications based on machine learning systems are notoriously opaque to external observers, which poses additional difficulties to the task of providing users with the information they need to give informed consent (Almada & Maranhão, 2021, p. 7).

Furthermore it identifies the possibility of transgressing the principle of purpose applicable to the processing of personal data and, therefore, affecting the owner of such data, since

> Storing voice data, makes it possible for unauthorized entities to use the data to identify individuals, maliciously gain access to systems that implement voice recognition, or simply process data and build voice artifacts that could be used to impersonate individuals creating scenarios that are problematic (Alva, 2020, p. 171).

Another situation that can generate risks and impacts is the one that occurs when those responsible for the apps keep health data indefinitely. The latter is directly related to the principle of quality and implies that those responsible for the processing of health data must ensure that the information obtained will not be used in the long term for other state or private purposes but must be limited to the duration of the pandemic.

Thus, the exposure that the owner of the health data who accesses this type of app may have to the use of their information being used for different purposes is high, so it is essential to identify the company that makes the application available and review their privacy policies, prior to entering personal data in order to obtain information and / or perform a self-diagnosis.

2. Geolocation and Tracking of infected People

At this point, it is necessary to make a preliminary conceptual clarification because the use of mobile phones to help control the pandemic, there are two main possibilities: one based on geopositioning (or tracking) and another based on the automated tracking of contacts (or tracing) (Buchland, 2020).

According to the distinction, while the actual tracking uses the app which is installed on a mobile phone saving the location of the person constantly, tracing seeks to carry out an automated monitoring of contacts, which involves direct communication between a person's mobile phone and all those people with whom he or she wants to be in close contact (Buchland, 2020).

The truth is that, as we will see below, neither the tools focused on tracking, nor the apps aimed at tracing are free from the great dangers that arise in terms of personal data.

a. Geopositioning (Tracking)

Faced with the advance of COVID-19, the States have implemented technological initiatives aimed at knowing the movements of the population so that through their study they have patterns of mobility of people around a city, region or country, in order to record the location of infected people (or not infected, so that they do not avoid confinement) to assist them if necessary. Therefore, the knowledge of this data is beneficial for the Administration entities in charge of health, security and infrastructure, at the time of articulating and dimensioning the actions that mitigate the virus, so that they can do it in the most appropriate way (AEPD, 2020a, p. 5).

The tool that allows to use this data is the geolocation or geopositioning. Geopositioning uses an app (application on the smartphone) that uses the Global Position System (GPS). What should be considered is that this type of tool has some practical problems, such as the lack of accuracy in geolocation (especially indoors), or that mobile phones only report that users have been close to a person, among others. (Buchland, 2020).

However, although the limitations that accompany technology are well known, the truth is that the context of the pandemic has involved a proliferation of technological solutions that have been intended to support the fight against the pandemic (Andreu, 2020, p. 851). This is the case of the HaMagen app, which has been an example of how tracking can be an interesting tool for a government to undertake efficient actions for its population. The functionalities of this application have been explained by the Ministry of Health of Israel:

> HAMAGEN is an app that allows the identification of contacts between diagnosed patients and people who came in contact with them in the 14 days prior to the patient's diagnosis of the disease.
>
> Cross-referencing your location data with the corona patients' lo-cation is done on your device and as soon as a match is identified, you will be directed to a link to the Ministry of Health to let you know what steps to take and to report the match to The Ministry (Israel National Cyber Directorate, 2020, p. 1).
>
> [HAMAGEN is an app that allows you to identify contacts between diagnosed patients and the people who were in contact with them in the 14 days prior to the diagnosis of the patient's disease. The cross-referencing of your (the user's) location data with the location of Corona patients is performed on your device and, as soon as a match is identified, you will be directed to a link to the Ministry of Health to inform you of the steps to take and to report the match to the Ministry].

Geolocation through mobile devices can operate in two ways: by telecommunications operators and from social networks[15]. However, neither of these forms is devoid of risk.

In the case of geolocation carried out through mobile phones by telecommunications operators, mobile phone operators are "providing anonymized information on the location of their users in the telephone cells that define their antennas" (AEPD, 2020a, p. 4). The risk is that, in case of incomplete anonymization, lax outsourcing or a cyber-attack, the users´ information such as location and other shared information may be available to a non-authorized third party.

The geolocation of mobile phones from social networks is a technique used before the pandemic due to the fact that the IP addresses of users can be traced by the administrators of the websites. This is commonly used for advertising purposes. The shared information, in this case the location, can be of use to health authorities but only if it is in accordance with a previously defined purpose and is applied to their prevention and control strategies (AEPD, 2020a, p. 6).

Geolocation can provide some trends and statistics of contagion to government operators so that there is more action on their part in different areas. Geopositioning today can also be an excuse for abuses against the fundamental right of the protection of personal data, there are even those who consider that "the unprecedented expansion of state surveillance and control through digital technologies to monitor the possible transmission of the virus implies a significant regression in human rights that will be difficult to reverse in the post-pandemic scenario" (Bizberge and Segura, 2020, p. 71).

b. Contact Tracing and Tracking (Tracing)

Contact tracing follows the logic of services traditionally used by health services: "it is any written record that identifies a patient and follows his or her medical history, which is monitored by health workers, who in turn can deliver medical recommendations personally or technically" (Weidenslaufer, C. and Meza, M. 2020, p. 1).

New ways to design applications have emerged in the environment, with the purpose that they collaborate beyond a simple localization. We refer to those applications that manage to do a work of tracing and not only tracking, previously developed. The objective to which they are oriented is not only to track patients, but also to alert those who have been physically close to a patient of COVID-19 to adopt the most appropriate sanitary measures necessary to help contain the spread of the virus (Weidenslaufer, C. and Meza, M. 2020, p. 1).

It is practically impossible for a subject to remember, and to know, all the contacts he or she may have had over a period of two days to a week after showing symptoms. The important thing is to break the chain of transmission of infection as effectively as possible. And this can be done by contact tracing apps (Arenas, M. 2020, p.3).

15 Classification proposed by the Spanish Data Protection Agency.

In tracing type apps whose predominant technology is Bluetooth, what is of interest is not so much the exact location of the person, but to register the possible people with whom they have been in contact so that when someone tests positive, everyone else is alerted and thus detect asymptomatic people (Cascón-Katchadurian, 2020, p. 10). One of the advantages of these bluetooth applications is that they are anonymous and decentralized in general, so users would be told that they have been in contact with a patient who has tested positive but will not reveal the identity of the person (Cascón-Katchadurian, 2020, p. 15).

It should be noted that the fact that States monitor their population by their geolocation helps to provide assistance at specific geographic points in a more prompt and effective manner; however, it should not be considered that this is free of affectations to the fundamental right to the protection of personal data due to the practices that may result from the objective described above. The latter has been identified by Access Now[16], noting that "tracking the geographic location of smartphones provides information about the movement of people's phones rather than the virus" (2020, p. 10), and that tracking how COVID - 19 evolves by cross-referencing people's geographic data with cases of infection carries inherent risks (2020, p. 10).

The aforementioned organization also refers that, although the information that is recorded through tracking and tracing apps is anonymous, such characteristics can be reversed so that people can be easily re-identified, and that the information may be incomplete with respect to the place where the person carries out his or her activities (Access Now, 2020, p. 10),

The risks and the possible affectation to the right to the protection of personal data of this type of solutions can be produced when maps of relationships between people are made, re-identification by implicit location of the fragility of the protocols when configuring almost anonymous cards, and when the signals of the contagions are dispersed in such a way that the identity of the infected is not identified in any case.

3. Mass Temperature Measurement in Public Spaces

As fever is the most recurrent symptom in those infected by COVID-19, temperature scanning in people is especially relevant (Wilches-Visbal et al, 2021). Thus, one of the ways of mass temperature measurement in public spaces has been through thermal cameras with facial recognition.

Thermal cameras are devices that "detect the infrared radiation emitted by anybody with a temperature above absolute zero and transform it into an electrical signal, which is then processed to obtain a value or a temperature map" (Wilches - Visbal et al, 2020, pp. 305-306). As the AEPD points out, "(...) they add the ability to take the

16 Access Now is non-profit organization that has been operating since 2009. Its mission is to defend the digital rights oft he world´s users.

temperature of individuals crossing an area, in many cases without requiring any action on their part" (2020a, p. 11).

In this regard, although the use of thermal cameras involves the use of an interesting technology to identify contagion, it can become a practice that compromises the personal data of individuals if it goes hand in hand with facial recognition, as Van Natta et al. have argued: "In such exceptional times, one could argue that fever checks offer substantial population health benefits with limited long-term impacts on personal privacy. Yet, several private companies have integrated thermal imag-ing with facial recognition technology". [In such exceptional times, one could argue that fever checks offer substantial population health benefits with limited long-term impacts on personal privacy. However, several private companies have integrated thermal imaging with facial recognition technology] (2020, p. 5).

In the field of work and, in particular, in occupational health and safety regulations, temperature taking can be useful, but placed in a more extensive data processing framework of which other additional checks and guarantees are part, in which the rights and freedoms provided for in the personal data protection regulations are respected (AEPD, 2020a, p. 12).

In Peru, Article 49 (c) of Law No. 29783, the Occupational Safety and Health Act, states that it is the employer's obligation to "identify any changes that may occur in working conditions and to make the necessary arrangements for the adoption of measures to prevent occupational hazards". This obligation means that the employer must pay particular attention to the measures he takes to ensure that his workers are in a situation of controlled risk in their workplace.

Regarding the risks to the possible impact on the right to the protection of personal data, it should be noted that the thermal camera and data collection can only be understood as part of a larger treatment and cannot take a person's health data and treat it spontaneously by any manager of a public place simply because he believes it is the best for his customers and users (AEPD, 2020a, p. 12), which can directly affect the principle of purpose.

It is also particularly problematic not to have the possibility of knowing the scope of the information that can be obtained using personal health data collected through this technological tool, because it may be information based on temperature measurement that reveals sensitive information about the health status of the person, such as pregnancy, menopause or the use of drugs, which would directly affect the principle of proportionality in the protection of personal data (Van Natta et al., 2020, p. 7).

In the absence of adequate regulation, such inaccurate monitoring can inadvertently cause harm to individuals who are labelled in a shopping mall during a trip without the slightest possibility of rectification (Van Natta et al., 2020, p. 8), which is a violation of the principle of quality. There will also be a risk of discrimination, stigmatization, and perhaps public dissemination of health data. All this can be aggravated by the risk

of leaks of sensitive information if the principle of security in the protection of personal data is not considered.

IV. By way of Conclusion

What has been developed in this paper leads to a reflection on the care that States and the private sector should take when adopting measures to address the expansion of COVID-19, which may have irreversible consequences on the fundamental right to the protection of personal data and which may be guided only by urgency, fear and, what is worse, by other interests.

As a result of the pandemic, States and individuals have implemented various technological tools to protect public health and prevent the spread of contagion. However, in certain cases, the implementation of these tools leads to assume risks and affectations to the right to the protection of personal data.

Having verified the existence of these risks, it is pertinent to rescue what is considered by the previously discussed resolution of the IACHR, insofar as it recommends to the governments of the Member States that they should guide their actions in accordance with two general obligations related to the protection of personal data:

> 35. Protect the right to privacy and personal data of the population, especially sensitive personal information of patients and individuals undergoing testing during the pandemic. States, health care providers, businesses, and other economic actors involved in pandemic containment and treatment efforts should obtain consent when collecting and sharing sensitive data from such individuals. They should only store personal data collected during the emergency for the limited purpose of combating the pandemic, without sharing it for commercial or other purposes. Affected individuals and patients will retain the right to erasure of their sensitive data.
>
> 36. Ensure that, where digital surveillance tools are used to identify, monitor or contain the spread of the epidemic and track affected individuals, they must be strictly limited, both in terms of purpose and time, and rigorously protect individual rights, the principle of non-discrimination and fundamental freedoms. States must make transparent the surveillance tools they are using and their purpose, as well as put in place independent oversight mechanisms for the use of these surveillance technologies, and secure channels and mechanisms for receiving complaints and grievances.

As can be seen, there are various risks associated with applications that provide information about the virus or facilitate self-diagnosis by the user. However, it is the responsibility of States and companies to provide proper management of the personal data of the users of the applications to achieve the objectives of providing information and care in the pandemic efficiently and respectful of the principles of the fundamental right to the protection of personal data.

It is for this reason that the guarantee of the fundamental right to the protection of personal data must be reinforced through an adequate design of technological tools and new models of information management, which means that not only experts in information systems, but also data scientists, specialists in artificial intelligence, bioethics, biolaw and human rights must participate in their development.

The processing of personal data in the current health emergency must have an overall objective based on scientific evidence, in which its proportionality has been assessed in relation to its effectiveness, efficiency and considering, in an objective manner, the necessary organizational resources.

V. Bibliography

Arias, M. (2016). Definitions for the purposes of the General Data Protection Regulation. In J.L. Piñar (Dir.) Reglamento general de protección de datos. Towards a new European privacy model (115-134). Reus.

Access Now. (2020). Recommendations for privacy and data protection in the fight against COVID-19. 28. Available at: https://www.accessnow.org/cms/assets/uploads/2020/04/Recommendations-for-the-protection-of-privacy-and-data-in-the-fight-against-COVID-19.pdf

Spanish Data Protection Agency (AEPD). (2020). Report N/Ref. 0017-2020 on the processing of personal data in relation to the spread of the COVID-19 virus.

Spanish Data Protection Agency (AEPD). (2020a). Report on the use of technologies in the fight against COVID-19. A cost-benefit analysis.

Spanish Data Protection Agency (AEPD). (2018). Guía Práctica de Análisis de Riesgos en los Tratamientos de Datos Personales sujetos al RGPD [Guide].

Almada, M., & Maranhão, J. (2021). Voice-based diagnosis of covid-19: Ethical and legal challenges. International Data Privacy Law, 11(1), 63-75. Accessed April 15, 2021. Available at:https://doi.org/10.1093/idpl/ipab004

Alva, V. (2020). The COVID-19 pandemic, social distancing, the use of information and communication technologies and the lack of international regulation that protects personal data. Academic Journal of the Faculty of Law of La Salle University. Date of consultation: June 28, 2021. Available at: https://repositorio.lasalle.mx/handle/lasalle/1695

Andreu Martínez, B. (2020). Privacy, geolocation and contact tracing applications in the public health strategy generated by COVID-19. Actualidad Jurídica Iberoamericana 12, pp. 848-859.

Angarita, N. R. (2012). Constitutional approach to personal data protection in Latin America. International Journal of Personal Data Protection, 13.

Angarita, N. R. (2010). (2010). Does Colombia have an adequate level of personal data protection in light of the European standard? International Law: Colombian Journal of International Law, 8(16).

Arenas, M. (2020): Testing, Tracing, Isolation? On the Guidelines 04/2020 of the European Data Protection Committee. LA LEY Privacy, 4.

Arenas, M. (2020): To track or not to track? That's the question. Contact tracking apps and the protection of personal data. LA LEY Privacy, 5.

National Authority for the Protection of Personal Data. (2019). Advisory Opinion No. 07-2019-JUS/DGTAIPD-DPDP. Limitations to consent when processing health-related data, pursuant to Article 14, paragraph 6, of Law No. 29733. 06 February.

Biometric Vox (2020). Biometric Vox initiates research with artificial intelligence to de tect COVID19 through voice. Available at: https://biometricvox.com/blog/general/biometriricvox-initiates-investigation-artificial-intelligence-detect-covid19-by-voice/

Bizberge, A. and Segura, M.S. (2020). Digital rights during the COVID-19 pandemic in Argentina, Brazil and Mexico. Journal of Communication. 19 (2) pp. 61- 85.

Buchland Gidumal, J. (2020). Are geolocation apps reliable? The Conversation. Accessed May 23, 2021. Available at: https://theconversation.com/son-fiables-las-aplicaciones-de-geolocalizacion-y-seguimiento-de-contactos-141069

Cascón-Katchadourian, Jesús-Daniel (2020). Technologies to fight the Covid-19 pandemic: geolocation, tracking, big data, GIS, artificial intelligence and privacy. Information Professional, v. 29, n. 4, e290429. https://doi.org/10.3145/epi.2020.jul.29.

Cate, F. H., Cullen, P., & Mayer-Schonberger, V. (2013). Data protection principles for the 21st century.

Corredor, F. A., Suárez, J. C., & Patarroyo, L. J. (2020). Protección De Datos Personales en Sistemas De Monitorización y Vigilancia Masiva De Personas Ante La Pandemia De Covid-19.

Inter-American Court of Human Rights. (2020). Resolution 1/20: Pandemic and Human Rights in the Americas.

Cristea, L. (2018). The protection of sensitive data: digital health records and Big Data in Health. Bosch

Cubillos Sánchez, M. C., and Restrepo Rojas, M. A. (2020, December 7). CoronAPP-Colombia and its data processing policy. Computer Law Department. https://derinformatico.uexternado.edu.co/coroappcolombia/

De', R., Pandey, N., & Pal, A. (2020). Impact of digital surge during Covid-19 pandemic: A viewpoint on research and practice. International Journal of Information Management, 55, 102171. https://doi.org/10.1016/j.ijinfomgt.2020.102171

Domínguez, J. (2020). The necessary protection of special categories of personal data. A reflection on health-related data as an essential axiom to achieve the longed-for technological development in the face of COVID-19. Journal of Communication and Health, 10(2), pp. 607-624.

European Data Protection Board (EDPB). (2020). Statement on the processing of personal data in the context of the COVID-19 outbreak. Adopted 19 March 2020. Accessed 17 May 2021 Available at:

https://edpb.europa.eu/sites/default/files/files/file1/edpb_statement_art_23gdpr_20200602_es_1.pdf

Herrera Bravo, R. (2011). Cloud computing and security: Clearing clouds to protect personal data. Journal of Law and Criminal Science: Social and Political Science, (17), 43-58.

Gómez-Córdoba, A., Arévalo-Leal, S., Bernal-Camargo, D., Rosero de los Ríos, D., Gómez-Córdoba, A., Arévalo-Leal, S., Bernal-Camargo, D., & Rosero de los Ríos, D. (2020). The right to the protection of personal data, digital technologies and COVID-19 pandemic in Colombia. Journal of Bioethics and Law, 50, 271-294.

Lopez, Luis Felipe (2016). Personal data protection: necessary adaptations to the new European Regulation. Francis Lefebvre.

Martinez, Ricard. (2020). To death by data protection. Accessed on: 20 April 2021. Available at: http://lopdyseguridad.es/a-la-muerte-por-proteccion-de-datos/

Mendoza Enriquez, O. A. (2018). Legal framework for the protection of personal data in service companies established in Mexico: challenges and compliance. IUS Journal, 12(41), 267-291.

United Nations. Human Rights Council. (2020). Press release. COVID-19: States must not abuse emergency measures to repress HRDs. 16 March. Accessed 17 May 2021. Available at:

Oliver, N., Lepri, B., Sterly, H., Lambiotte, R., Deletaille, S., De Nadai, M., ... & Vinck, P. (2020). Mobile phone data for informing public health actions across the COVID-19 pandemic life cycle. Sci Adv 6 (23) Accessed May 24, 2021. Available in:

https://advances.sciencemag.org/content/advances/6/23/eabc0764.full.pdf

Piñar, José Luis. (2020). Data protection during the coronavirus crisis. General Council of Spanish Lawyers. Accessed on: 20 April 2021. Available at: https://www.abogacia.es/actualidad/opinion-y-analisis/la-proteccion-de-datos-durante-la-crisis-del-coronavirus/

Puyol, J. (2016) XI. The principles of the Right to Data Protection. In José Luis Piñar (Dir.), Reglamento General de Protección de Datos. Madrid, pp. 135-150

Razquín, M. (2019). The necessary balance between transparency and protection of personal data. In Diego Zegarra Valdivia (Coord.), La proyección del derecho administrativo peruano: estudios por el centenario de la Facultad de Derecho de la PUCP. Lima, Palestra, pp. 137-164.

Recuero Linares, M. (2020). The international sharing of personal health-related data in times of COVID-19: Ethical and legal aspects for boosting the necessary cooperation. Journal of Bioethics and Law, 50, 133-146.

Renda, A. (2020). Will privacy be one of the victims of COVID-19? Centre for European Policy Studies. Published 23 March 2020. Available at:

Scheibner, J., Ienca, M., Kechagia, S., Troncoso-Pastoriza, J.R., Raisaro, J.L., Hubaux, J.P:, Fellay, J., & Vayena E. (2020). Data protection and ethics requirements for multisite research with health data: a comoaratove examination of legislative governance frame-works and the role of data protection technologies. Journal of Law and the Biosciences, 1-30. https://doi.org/10.1093/jlb/lsaa010

Van Natta, M., Chen, P., Herbek, S., Jain, R., Kastelic, N., Katz, E., Struble, M., Vanam, V., & Vattikonda, N. (2020). The rise and regulation of thermal facial recognition technology during the COVID-19 pandemic. Journal of Law and the Biosciences, 7. https://doi.org/10.1093/jlb/lsaa038. https://doi.org/10.1093/jlb/lsaa038

Vásquez Rodríguez, R. (2020). El consentimiento para tratamiento de datos personales de salud en tiempos del covid-19. Yachaq Revista De Derecho, (11), 145-164. https://Doi.Org/10.51343/Yq.Vi11.366

Visbal, J. H. W., Pedraza, M. C. C., & Veliz, D. G. A. (2021). Procedure for the usage of pyrometers during the COVID-19 pandemic: Procedure for the usage of pyrometers during the COVID-19 pandemic. Archivos de Medicina (Manizales), 21(1), 305-308.

Weidenslaufer, C. and Meza, M. (2020). COVID - 19: Use of apps with contact tracking and contact respect and privacy respect. Bulletin 10 Library of the National Congress of Chile /BCN. Available at: https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/79593/1/bulletin_coronavirus_10.1_FINAL.pdf

Wilches-Visbal, Jorge-Homero, & Castillo-Pedraza, Midian-Clara, & Apaza-Veliz, Danny-Giancarlo (2021). Procedure for the use of pyrometers during the COVID-19 pandemic. Archives of Medicine (Col), 21(1), 305-309.

Zegarra, D. (2014). The principles of personal data protection in the framework of Law No. 29733 and its Regulations. In Jorge Danós Ordóñez et al. (Coords.), Derecho Administrativo. Innovation, change and effectiveness. Libro de ponencias del Sexto Congreso Nacional de Derecho Administrativo. Lima, ECB Ediciones, pp. 623-635.

Zegarra, D. (2019). Peruvian personal data protection regulations facing the challenge of moving from a data management model to the responsible use of information. In Diego Zegarra Valdivia (Coord.), La proyección del derecho administrativo peruano: estudios por el centenario de la Facultad de Derecho de la PUCP. Lima, Palestra, pp. 165-208.

HUMAN RIGHTS IN THE NEW PACT ON MIGRATION ON ASYLUM OF EUROPEAN UNION: AN OPEN SOCIETY OR CLOSED SOCIETY

José Joaquín Fernández Alles
University of Cadiz, Spain
Joaquin.alles@uca.es

Summary: I. Presentation. II. Measures against Covid and Human Rights. III. Constituational and International Principles of Application. IV. The New Pact on Migration and Asylum of European Union: Backgrounds. 1. Backgrounds. 2. The current Pact of Migration and Asylum of 2008: Goals and Achievents. V. Premises of the New Pact. A fresh start on Migration "Building confidence and striking: A new Balance between Responsibility and Solidarity". VI. Legal Assessment of the Proposal on the New Pact. VII. Conclusion.

I. Presentation

This paper is structured into two parts, which are closely related: first, the analysis of the parlamentary and governmental measures against the covid-19 pandemic; and second, the future regulatory framework about freedom of movement and other rights in the European area, according to the new European pact on migration and asylum.

The parliamentary and governmental measures (of the Government of the Nation and the 17 regional governments) adopted in Spain to face the health situation and its impact on human rights, have been approved under the so-called declaration of the state of alarm that regulates the Spanish Constitution in article 116, with intense influence from the Grundgesetz of Germany. In Spain, the state of alarm can only be declared by the National Government for a maximum period of 15 days, although this situation can be extended by the Congress of Deputies (equivalent to the Bundestag in Germany).

In accordance with the Spanish Constitutional regulation, the rights-limiting measures (home confinement/lockdown, territorial confinement, virtual or blended education at all teaching levels, closed labor activity) have not suspended any fundamental right. The Spanish law on the state of alarm is contained in the Organic Law 4/1981, of June 1, which prohibits the suspension of fundamental rights during the application time of the state of alarm. In addition, this law establishes that all limitations of rights must be proportional, justified, motivated, reasonable and subject to judicial control[17]. Generally since the beginning of the pandemic, all restrictions on fundamental rights

[17] M. Revenga Sánchez; J.J. Fernández Alles, „Reflexiones constitucionales (españolas y europeas) a propósito de la pandemia", Revista del Centro de Estudios Constitucionales, VI, 11, 2020, pp. 1-7.

have been justified by the need to preserve the health and life of citizens. In Spain, the management of the pandemic has not been efficient or handled swiftly. Not only has this led to intense economic, social and labor damages, but also to governmental and parliamentary activities which have been carried out within the limits established by the Constitution and the laws.

In March 2020 the country-wide state of alarm, which lasted until April 2020 and was approved by Parliament, caused by the coronavirus pandemic was first declared by the government in Spain. The second state of alarm was declared in October 2020 and extended until May 2021.[18] During the last state of alarm delegating emergency powers to regional authorities for as long as six months. These prolonged "states of alarm" have limited the following rights: a) Freedom of movement: entry and exit of Spain, lockdown at home, perimeter lockdown (district, city, province, region) and national lockdown; b) Right of education: limited to e-learning teaching in primary, secondary and university education, or blended education teaching using virtual learning environments; and c) Right of health (primary care health by pone).

In addition, the Spanish Constitutional Court still has to must resolve an appeal presented by the National Government against a regional law (Autonomous Community of Galicia) that establishes compulsory vaccination.

II. Measures against Covid and Human Rights

The human rights concerned by governmental measures in Spain are mainly the following:

1. The right to health: It is guaranteed under the Universal Declaration of Human Rights (1948), provides the right to access healthcare, the right to access information in correlation with healthcare, the ban of discrimination in the provision of medical services, the freedom to decline non-consensual medical treatment and other important guarantees[19]. Furthermore, the right to health provides that health facilities, goods and services should be available in sufficient quantity, accessible to everyone without discrimination, and affordable for all, even marginalized groups; acceptable, respectful medical ethics as well as culturally, scientifically and medically appropriate, and of good quality[20].

---

18 M. Revenga Sánchez; J.J. Fernández Alles, „Los engranajes del Estado de Derecho a la prueba del coronavirus", J.I. Ugartemendia and A. Saiz Arnaiz (Eds), ¿Está en peligro el Estado de Derecho en la Unión Europea? IVAP, Oñate, 2021, pp. 281-302.

19 World Health Organisation, „The Right to Health", https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health, pp. 3 y 9.

20 V. Digidiki and J. Bhabha, „Perspective EU Migration Pact Fails to Address Human Rights Concerns in Lesvos, Greece", Health and Human Right Journal, 22-2, 2020, pp-291-296, https://www.hhrjournal.org/2020/12/perspective-eu-migration-pact-fails-to-address-human-rights-concerns-in-lesvos-greece/, World Health Organisation, „The Right to Health", cit., p. 7.

2. Freedom of movement: Border controls and quarantines must be proportionate. The Restriction of the the right of freedom of movement, may be justified under international law only if they are proportionate, time bound, undertaken for legitimate aims, strictly necessary, voluntary wherever possible and applied in a non-discriminatory way[21]. Quarantines must be imposed in a safe and respectful manner. The rights of those under quarantine must be respected and protected, including ensuring access to health care, food and other necessities[22].

The Siracusa Principles, adopted by the UN Economic and Social Council in 1984 and UN Human Rights Committee general comments on states of emergency and freedom of movement, provide authoritative guidance on government responses that restrict human rights for reasons of public health or national emergency. Any measures taken to protect the population that limit people's rights and freedoms must be lawful, necessary and proportionate. States of emergency need to be limited in duration and any curtailment of rights needs to take into consideration the disproportionate impact on specific populations or marginalized groups.

3. Right of education: Many countries have closed schools since the Covid-19 outbreak, disrupting the learning and education of hundreds of millions of students. In period of crisis, schools provide children with a sense of stability and normalcy and ensure children have a routine and are emotionally supported to cope with a changing situation. Schools also provide important spaces for children and their families to learn about hygiene, appropriate handwashing techniques, and coping with situations that will break routines.

Without access to schools, this prime responsibility falls upon parents, guardians, and caregivers. When schools are closed, government agencies should step in to provide clear and accurate public health information through appropriate media.

To ensure education systems respond adequately, UNESCO has recommended that:

a) States "adopt a variety of hi-tech, low-tech and no tech solutions to assure the continuity of learning". In many countries, teachers already use online learning platforms to complement normal contact hours in classrooms for homework, classroom exercises, and research, and many students have access to technological equipment at home (however, not all countries, communities, families or social groups have adequate internet access, and many children live in places with frequent government-led internet shutdowns.

---

21 Amnesty International, „Explainer: seven ways the coronavirus affects human rights", https://www.amnistia.org/en/news/2020/02/13530/explainer-seven-ways-the-coronavirus-affects-human-rights; European Comission, Proposal for a council recommendation on a coordinated approach to the restriction of free movement in response tot he COVID-19 pan-demic: COM/2020/499 final, https://eur-lex.europa.eu/legal-co ntent/EN/TXT/PDF/?uri=CELEX:52020DC0499&from=en..

22 Amnesty International, ibidem.

b) Online learning should be used to mitigate the immediate impact of lost "normal school" time. Schools deploying educational technology for online learning should ensure the tools protect children rights and as well as their privacy.

c) Governments should attempt to recover missed in-person class time once schools reopen.

d) Governments must adopt measures to mitigate the disproportionate effects on children who already experience barriers to education, or who are marginalized for various reasons (for example girls, disabled children, children affected by their location or their family situation). Governments need to focus on adopting strategies that support all students equally through closures. For example, monitoring those students who are most at risk due to above-mentioned disadvantages. Moreover, it needs to be ensured that students receive printed or online materials on time. Particular, attention is warranted in ensuring students with disabilities, who may require adapted accessible material, receive this[23].

4. Right of expression and information: Constitutions, treaties and laws guarantee freedom of expression and guarantee access to critical information under human rights laws, and governments, public administrations, legislators as well as courts have the obligation to protect the right to freedom of expression, including the right to seek, receive and impart truthful information[24]. Restrictions, suspensions and limitations legitimately imposed on freedom of expression for reasons of public health or security cannot endanger the essential content of this right. Courts, legislators, governments and public administrations are responsible for providing the information necessary for protection and promotion of rights and freedoms, including the right to health[25]. In this sense, the Committee on Economic, Social and Cultural Rights regards as a "core obligation" providing "education and access to information concerning the main health problems in the community, including methods of preventing and controlling them"[26].

---

23 European Agenca for Special Needs and Inclusive Education, „Country information for Spain – Systems of support and specialist provisions.", https://www.european-agency.org/country-information/spain/systems-of-support-and-specialist-provision.

24 United Nations, Human Rights, Office oft he Higher Commissioner. „COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International experts", https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E..

25 Human Rights Watch, „Human Rights Dimensions of COVID-19 Response", https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response.

26 United Nations, Committee on Economic, Social and Cultural Rights. Twenty-second sesión. Geneva, 25 April-12 May 2000. Agenda item 3. Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights. General Comment No. 14 (2000). The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), https://www.hrw.org/news/2020/06/29/protecting-economic-and-social-rights-during-and-post-covid-19; and the Convention on the rights of persons with disabilities.

Health data is constitutionally relevant because the dissemination, transmission or publication of information online can imply a significant risk for the rights of affected people (moral integrity, image, honor, privacy ...), especially for people who are in positions of vulnerability or marginalization in society.[27] In the current context of the pandemic, various governments, especially Spain, have failed to uphold the right to freedom of expression, taking regulatories and measures against journalists and healthcare workers. This ultimately limited effective communication about the onset of the disease and undermined trust in government actions. International treaties establish that a "rights-respecting" response to Covid-19 needs to ensure that accurate and up-to-date information about the virus, access to services, service disruptions, and other aspects of the response to the outbreak is readily available and accessible to all.

The United Nations has established the following recommendations regarding Covid-19 and the relationship between governments and the people.

a) governments should fully respect the rights to freedom of expression and access to information, and only restrict them as international laws permit.

b) governments should ensure that the information they provide to the public regarding Covid-19 is accurate, timely, and consistent with human rights principles.

c) rights-based legal safeguards should govern the appropriate use and handling of personal health data.

d) all information about Covid-19 should be accessible and available in multiple languages, including for those with low or no literacy.

5. Rights of females: Outbreaks of disease often have gender impacts because Covid-19 is disproportionately affecting women in several ways. For this purpose, when education is moved online:

a) governments and education providers should monitor participation and retention of students in online courses for a gendered impact and respond quickly with strategies to retain and reengage women and girls if their participation falls off[28];

b) they should also address the particular risks of job losses to women who may take on additional caregiving during school closures; and

c) measures designed to assist workers affected by the pandemic should ensure the assistance of workers in informal work and service industries, who are predominantly women.

27 Human Rights Watch, „Human Rights Dimensions of COVID-19 Response", cit.

28 Human Rights Watch, „Human Rights Dimensions of COVID-19 Response", cit.

III. Constitutional and International Principles of Application

According to the principles proclamed by international and comparative constitutional laws, Human Rights Watch remembers that restrictions on rights for reasons of public health or national emergency[29]:

a) In any case, the restrictions, suspensions and limitations must be lawful, justified, suitable, necessary and proportionate.

b) limitations such as mandatory quarantine or isolation of symptomatic persons must, as a minimum, be carried out in accordance with the nation´s Constitution and laws.

c) Measures must be strictly necessary to achieve a legitimate objective, based on scientific evidence, proportionate to achieve that objective, not arbitrary or discriminatory in their application, of limited duration, respectful of human dignity, and subject to jurisdictional control.

d) Long-term quarantines and indeterminate confinements rarely comply with these principles and are often imposed hastily, without ensuring the protection of quarantined persons (especially populations at risk) and due parliamentary scrutiny.

e) In any cases, urgent quarantines and confinements are difficult to control by courts and parliamentary bodies and are often arbitrary or discriminatory in their application.

Freedom of movement under constitutional and international human rights law protects the right of everyone to leave any country, to enter their own country of nationality, and the right of everyone who is legally in a country to move freely throughout the country (article 13 of Universal Declaration of Human Rights)[30]. Restrictions on these rights can only be imposed when lawful, for a legitimate purpose, and when the restrictions are proportionate, including the consideration impacts. Travel regulations and restrictions on freedom of movement cannot be discriminatory, nor can they affect the dignity and safety of individuals or have the effect of denying individuals the right to seek asylum or violating the prohibition of the return to places where they face persecution or torture[31]. If quarantines or closures are imposed, governments and public administrations are obliged to guarantee access to food, water, medical care, and healthcare. Many seniors and people with disabilities depend on continued public services and support in the home and community. Ensuring continuity of these public services and operations means that public agencies, community organizations, health care providers and other essential service providers are able to continue performing essential functions to meet the needs of older people and people with disabilities. Government measures should minimize or avoid the interruption of services and the interruption of social services aimed at people with disabilities and the elderly, which

29 Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

30 Universal Declaration of Human Rights, https://www.un.org/en/about- us/universal-declaration-of-human-rights.

31 Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

may lead to health outcomes that are detrimental to the physical and moral integrity of people, including death[32].

In these cases, Human Rights Watch informs that governments have an obligation to minimize the risk of occupational accidents and diseases including by ensuring workers have health information and adequate protective clothing and equipment. This involves providing healthcare workers and others involved in Covid-19 with proper infection control training and proper protective equipment. Combating the spread of Covid-19 also demands that:

a) health facilities have adequate water, sanitation, hygiene, healthcare waste management, and cleaning; and governments must take steps to make health care available to all, accessible without discrimination, affordable, respectful of medical ethics, culturally appropriate, and of good quality[33].

b) health workers have the right to an occupational risk prevention system and to access adequate protective equipment and social protection programs for family members who die or become ill as a result of their work, ensuring that these programs include informal workers[34].

IV. The New Pact on Migration and Asylum of European Union: Background

1. Background

In Covid-19 pandemic context, the European Union has presented the future regulatory framework for freedom of movement and other rights in the European area, according to the new European pact on migration and asylum, also presented by the EU Commission in September 2020, and adopted by the Council of the EU on December 2020. According this document, several facts are very relevant in this matter[35]:

a) Member States issued around 3 million first residence permits to third-country nationals in 2019 and, since 2015.

b) 600,000 people have been rescued at sea by Member States within frontex operations.

---

32 Human Rights Watch, „Protecting Economic and Social Rights During and Post-Covid-19. Questions and Answers on Economic and Social Assistance“, https://www.hrw.org/news/2020/06/29/protecting-economic-and-social-rights-during-and-post-covid-19, and The Convention on the rights of persons with disabilities, https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf.

33 Human Rights Watch, „Human Rights Dimensions of COVID-19 Response“, cit.

34 Ibidem.

35 EUROSTAT, „Residence permits – statistics on first permits issued during the year“, https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=456573.

c) in 2019, the main reason for a first residence permit being issued in the European Union was for employment-related reasons (1.2 million first residence permits).

d) 1,82 million illegal border crossings were recorded at the EU external border at the peak of the refugee crisis in 2015 (by 2019 this had decreased to 142,000.

e) the number of asylum applications peaked at 1.28 million in 2015 (in 2019 was 698,000).

f) on average, around 370,000 applications for international protection are rejected every year, but only around a third of these persons are returned home; g) the European Union hosted some 2.6 million refugees at the end of 2019, equivalent to 0.6% of the EU population; and h) in 2019, almost 21 million third-country nationals were legally residing in the EU, equivalent to 4.7% of its population[36].

The interesting and incorrect interpretation of these facts has degenerated into a debate about migration as a false cause of the current European crisis and in an electoral manipulation. In this times of globalization, three of the five states that voted against the Global Compact for safe, orderly and regular migration at the United Nations General Assembly in December 2018 were members of the Europeam Union. Five of the 12 countries that abstained from vote were also members of the EU: Austria, Hungary, Poland, Estonia, Bulgaria and Republic Czech.

To face this complex context, the theorical principles that inspire New Pact on Migration and Asylum of European Union are: responsibility, solidarity. comprehensive and integral management of migration, and cooperation with third states[37] (origin and transit states). However, its effective inspiring principles are hard border control, outsourcing, utilitarian approach of people (talent as a requirement for entry and authorization) and voluntary character of solidarity measures: flexibility in solidarity.

The New Pact and the debate on these principles are incorporated in the Conference on the future of Europe (2021), as a proposal of the European Commission and the European Parliament, announced in the end of 2019, with the aim of looking at the medium to long term future of the EU and what reforms should be made to its policies and institutions. In Communication from the Commission on a New Pact on Migration and Asylum, from 23 September 2020, President von der Leyen affirmed: 'We will take a human and humane approach. Saving lives at sea is not optional. And those countries who fulfil their legal and moral duties or are more exposed than others, must

---

36 European Commission, „Statistics on migration to Europe", https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en, European Commission, „A-mended proposal for a Regluation of the European Parliament and oft he Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU", https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611.

37 European Commission, „New Pact on Migration and Asylum: Questions and Answers", https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707.

be able to rely on the solidarity of our whole European Union… Everybody has to step up here and take responsibility"[38].

The new pact on Immigration and Asylum of the European Union will replace the current pact on Immigration and Asylum of 2008, communicated on June 24. 2008, by the Commission and adopted by the Council of the EU on September 24, 2008, that was approved in accordance with "a spirit of solidarity and mutual responsibility between the Member States and of cooperation with other countries outside the EU". The current pact of 2008 was linked to the "Global Approach on Migration and the Stockholm Program "An open and secure Europe serving and protecting the citizens"[39], which replaced the "The Hague Program" (2004- 2009) in 2010. The "Hague Program" superseded the "Tampere Program" (1999-2004).

With the background of the "Tampere Program" and "The Hague Program" councils adopted the "Global Approach to Migration Program" in December 2005. Its fundamental principles are to ensure demographic and labor needs of the member states; mutual responsibility and solidarity between states and cooperation with third states; contribution to the econo mic development of Europe; link with the external relations of the European Union, global management of migrations; migratory activity exclusively within the law; joint, coherent and unitary management of migration and development cooperation, which includes cooperation with the States of origin, transit and destination; recognition of the current inability of the European Union to receive all migrants "with dignity"; the premise that poorly controlled migration policy can damage the social cohesion of destination States[40]. This problem directly concerns the organization of educational, social, health, employment, and accommodation services, as well as a legal system of protection against criminal networks; in the common European area of free movement, especially after Schengen, access to the territory of one member state implies access to the territory of the other member states. The free movement requires a common migration policy: immigration, integration, and asylum, which includes a common visa policy, harmonization of border control and asylum rules, legal emigration conditions, the fight against irregular immigration and the creation of the Frontex Agency[41].

---

38 European Commission, 16 September 2020, „State oft he Union Address by President von der Leyen at the European Parliament Plenary", https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_ 20_1655.

39 The Stockholm Programme „An open and secure Europe serving and protecting he citizens" was adopted by the European Council in December 2009, and provided a framework for EU action on the issues of citizenship, justice, scurity, asylum, immigration and visa policy fort he period 2010-2014.

40 Council of European Union, Presidency, No prev, Doc. 15582/05 ASIM 64 RELEX 747, „Global approach to migration: Priority actions focusing on Africa and the Mediterranean", https://data.consilium.europa.eu/doc/document/ST-15744-2005-INIT/en/pdf.

41 European Commission, Migration and Home Affairs, Common European Asylum System, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

As the next stage in this process, as laid out in the "Green Paper of 6 June 2007" concerning the future of the European asylum system, the European Commission proposed to increase the possibilities for applying for asylum. This could be completed by improving the legal protection for asylum seekers by making their application at the border easier. To achieve this the evaluation of the relevant documents presented by asylum seekers, and the appeal procedures need to be reconsidered. To re-assess certain procedural mechanisms worked out in the first phase, such as the concepts of safe country of origin, safe third country and European safe third country; clarification of the concepts used to define grounds for protection; convergence of the rights and benefits linked to the protection granted, especially those concerning residence permits, social security and health care, education and employment; establishment of a uniform status that would apply to all persons eligible for refugee status or subsidiary protection; to define the status granted to persons who are not eligible for international protection; to establish a system for the mutual recognition of national decisions relating to asylum[42].

2. The current Pact of Migration and Asylum of 2008: Goals and Achievents

The current pact of 2008 regulates the legal aspects of immigration, assumes the priorities, needs and reception capacities determined by the member states and promotes the integration of immigrants. Other goals of the pact[43] are the control the irregular immigration and promotion of voluntary returns to the countries of origin or transit of immigrants. It is vital to improve border controls to increase their effectiveness; establish a European framework for asylum and to create a global collaboration with non-EU countries to promote synergies between migration and development. In accordance with these approaches and objectives, the European Union has implemented some relevant achievements, for example, Directive 2008/115/EC (16 December 2008) of the European Parliament and of the Council regulating procedures in member states for returning illegally staying third-country nationals. Another example is the Directive 2009/50/EC (25 May 2009), regulating the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. Important to mention ist Directive 2011/98/EU (13 December 2011) implemented by the European Parliament and Council, regulating on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a member state and on a common set of rights for third-country workers legally residing in a member state. The Common European Asylum System (CEAS) sets minimum standards for the treatment of all asylum seekers and applications across the European Union; governance of the Schengen area; the European Border Surveillance System (Eurosur) to prevent cross-border crime; new

42 Commission of the European Communities. Green Paper on the future Common European Asylum System. 6 June 2007.

43 European Council, European Pact on Immigration and Asylum, 24 September 2008, https://data.consilium.europa.eu/doc/document/ST-13440-2008-INIT/en/pdf.

tasks and resources provided to the Frontex Agency or significant steps in the field of return policy using best practices by member states and operational cooperation across the European Union and in the fight against the exploitation of immigrants.

To fulfill these achievements, the following financing instruments were approved for the period 2014-2020: the Asylum, Migration, and Integration Fund (FAMI); and the Fund for Internal Security (FSI).

V. Premises of the New Pact. A fresh start on Migration "Building confidence and striking: A new Balance between Responsibility and Solidarity"

Under the motto A fresh start on migration "Building confidence and striking: a new balance between responsibility and solidarity", the new pact is conceived from nine premises[44]. 1. Complexity: Immigration policy is a complex issue, with many facets that must be weighed together; 2. The safety of people seeking international protection or a better life; 3. The concerns of countries at the EU's external borders, which worry that migratory pressures will exceed their capacities and which need solidarity from others; 4. The concerns of other EU Member States, which are concerned that, if procedures are not respected at the external borders, their own national systems for asylum, integration or return will not be able to cope in the event of large flows; 5. Based on a holistic assessment, the Commission proposes a fresh start on migration: building confidence through more effective procedures and striking a new balance between responsibility and solidarity; 6. It aims to create more efficient and fair migration processes, reducing unsafe and irregular routes and promoting sustainable and safe legal pathways to those in need of protection; 7. Begin to apply the Migration Preparedness and Crisis Blueprint; 8. Integrated border management mixed or hybrid migration: formed, at the same time, by migrants and people who require protection; and 9. Creation of Asylum expert teams, who could travel for a specified period of time to assist Member States in case of need.

Regarding asylum policy, the reform of the common European asylum system aims to establish a common framework that contributes to the comprehensive approach to asylum and migration management, make the system more efficient and more resistant to migratory pressure, eliminate pull factors as well as secondary movements and support the most affected member states.

Regarding border security, the new pact proposes an integrated border strategy and more effective procedures, with a new screening in case of irregular arrival. This consists of identification, health, and security check, individual assessment, and human

[44] European Commission, „A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity", https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

right monitoring[45]. Flexible location (can also take place in other locations and two possible scenarios: negative decision likely (security risk) and positive decision likely (unaccompanied children and families). In particular, the new integrated border procedure foresees a new screening for anyone arriving irregularly to direct them into the right procedure, seamless system for arrival to either return or integration, border procedures (rapid identification of the procedure within 5 days, prior evaluation, asylum or prior return -screening- compared to the 12 weeks of the current asylum procedure; legal guarantees and monitoring system to ensure full respect for rights since the beginning to the end of the procedure); the regulation on the European Border and Coast Guard with capacity of 10. 000 operational staff; and information systems for border and migration management Confidence in EU rules: monitoring of and support to national authorities, European monitoring of national systems to ensure consistency on the ground (Commission, peer reviews by other Member States, Frontex vulnerability assessments, new EU Agency for Asylum monitoring); special monitoring of effective access to asylum and respect for fundamental rights by Member States and the Fundamental Rights Agency; Fully-fledged EU Agency for Asylum offering stronger support, more support from Frontex; investment in good asylum procedures and in effective returns; asylum law reforms proposed in 2016 to be adopted (stronger rights, more efficiency); new EU Agency for Asylum for monitoring and guidance; improved IT system (Eurodac) to support screening, asylum and return processes; set of new tools on returns and more support from Frontex newly appointed EU Returns Coordinator and a High Level Network coordinating national action sustainable return and reintegration strategy to help countries of origin.

The new pact includes certain reforms. Regulation on Asylum and Migration Management, regulation on control and the regulation on asylum procedures; regulation on the EU Asylum Agency ; revision Eurodac Regulation and finalize negotiations on the EU Blue Card Directive; revision of Directive 2003/109/EC (25 November 2003) concerning the status of third-country nationals who are long-term residents; Directive 2011/98/EU of the European Parliament and of the Council (13 December 2011), on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; and new Regulation on the European Border and Coast Guard.

45 European Commission, „A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity“, cit.; S. Angenendt, N. Biehler, R. Bossong, D. Kipp and A. Koch, „The New EU Migration and Asylum Package: Breakthrough or Admission of Defeat?“, SWP, 46, 2020, pp. 2-4, https://www.swpberlin.org/fileadmin/contents/products/comments/2020C46_EUMigrationandAsylum Package.pdf..

VI. Legal Assessment of the Proposal on the New Pact

The European Commission affirms that managing migration is a shared European responsibility, which makes it essential that member states' policies are coordinated. In this regard, the new Pact proposes a constant and effective solidarity with member states with many arrivals and "under pressure" or "at risk", but this common solidarity reserve of national contributions is based on voluntary commitments and therefore not mandatory. The Commission, on its own initiative or upon request, would determine if a national system is under pressure or at risk. Then, Commission sets out what other member states must do to help the member state in need or at risk. They could accept some asylum seekers into their own state, therefore relocating from the member state in difficulty with the final (destination country receives EU funding). Another opinion is to take responsibility for returning the asylum-seekers to their countries of origin or to take other operational measures to help.

This regulation is completed with the pledging that, once the evaluation is carried out, other member states contribute to its "equitable participation". The calculation for "equitable participation" is 50% based on GDP and 50% based on population. It is the prerogative of the national government to decide whether to accept relocated migrants or sponsor returns.

If the pledges received fall more than 30% short of the total number of relocations or sponsored returns necessary member states that did not pledge are requested to cover at least half of their 'fair share' (in relocations or return sponsorship). The Commission adopts implementing act (Legal confirmation) to confirm contributions and make them legally binding with solidarity and collective responsibility for disembarked persons location for people rescued at sea and vulnerable groups. If unsuccessful, Commission to adopt a legal act requiring member states to either contribute to relocation or other measures. If, after all these measures, still not enough relocation places open up, Commission to apply a correction as in the standard solidarity mechanism.

Regarding its future planning, the Commission would establish a set of commitments from the member states based on the annual projection of needs. If there are not enough pledges (30% deficit), the Commission will call the solidarity procedure.

However, due to the uncertainty concerning the practical acceptance of the new procedure, the new pact proposes a legally binding process for EU countries to develop, plan and prepare a system together, all reinforced with a policy of constant guidance and support, making national systems more efficient, flexible and resilient.

In regards to the asylum policy, an accelerated border procedure is proposed with nationality criteria to quickly examine the asylum applications of people from countries with low recognition rates, which has been doctrinally criticized for being potentially discriminatory and contrary to the criteria of the right of asylum and the principle of non-refoulement. In any case, the proposed procedure would not apply to

unaccompanied children or families with children under 12 years of age, and situations of vulnerability would be assessed on a case-by-case basis.

VII. Conclusion

Taking as a reference context this preparatory phase of the new European Pact on Immigration and Asylum, which replaces the before-mentioned pact of 2008, we must reflect about the rights most harmed by Covid-19 and on the new pact. Both are closely linked to the current process of constitutional reform of the European Union (Conference on the future of Europe) and its commitments to the open society model invoked by the founding fathers seven decades ago.

In this context the EU has presented the future regulatory framework for freedom of movement and other rights in the European area, according to the new Euro-pean pact on migration and asylum. The Commission states that the current system no longer works and proposes to improve the overall system. The proposal includes looking at ways of improving cooperation with the countries of origin and transit, ensuring effective procedures, integration of refugees and return of those with no right to stay. In particular, the Commission proposes to introduce an integrated border procedure which, for the first time establishes a pre-entry screening including identification of all people crossing the EU's external borders without permission or having been disembarked after a search and rescue operation. This procedure would also involve a health and safety control procedure, fingerprinting and registration in the Eurodac database. After identification, people could be directed to the planned procedure, either at the border for certain categories of applicants or in an ordinary asylum procedure. As part of this border procedure, swift decisions on asylum or return will be made, providing quick certainty for people whose cases can be examined rapidly. At the same time, the proposal innovates other procedures and defend stronger monitoring and operational support from EU agencies, an European digital infrastructure for migration management, a common EU system for returns, a more effective legal framework, a stronger role of the European Border and Coast Guard, and a newly appointed EU Return Coordinator with a network of national representatives to ensure consistency across the EU. In addition, the Commission of EU recommends a change of paradigm in cooperation with non-EU countries and, to this end, promotes tailor-made and mutually beneficial partnerships with third countries.

Confirmed by the Commission the restrictive approaches about migration and asylum, its strong controls and its preference for limited mobility to qualified workers, the new proposal on the European Pact confronts us with the problem about the type of society we want: closed or open, with the following challenges: a) achieving a new balance to reconcile the tensions between the rule of law (including the requirements established by constitutional jurisprudence and international treaties, in particular, jurisprudence of the ECHR), the economic capacity of the European Unión and the and the national interests of the Member States; b) to define what society do we want to choose:

inclusive or closed? What do Europeans want to be in the global context? and c) To answer an unavoidable question: Are we ready to make individual and collective sacrifices to achieve a democratic, inclusive, and competitive Europe? These questions must be answered for us, and our responses will determine the future of Europe.

SPINNING ETHICAL PLATES IN TIMES OF PANDEMIC AND SUSTAINABILITY

Prof. Dr. Milena Valeva
Professor of Nonprofit Management and Sustainable Regional Development, Trier University of Applied Sciences, Environmental Campus Birkenfeld

Prof. Yotam Lurie, PhD
Associate Professor of Business Ethics
Department of Management, Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel

Abstract: This article discusses ethics in times of pandemic crisis (COVID-19) taking into consideration the sustainability paradigm. Two related ethical approaches are discussed and contrasted. On the one hand, the relational embodied ethics of the commons is discussed in the background of the pandemic of COVID-19. On the other hand, "lifeboat ethics" is interpreted in considering the pandemic situation. The main goal of the article is to compare the two ethical approaches as a way of dealing with our shared predicament in times of a pandemic, a state of exception, and based on that, to additionally derive conclusions about their application in further crises in the Anthropocene, whereby the primacy of sustainability is presumed.

Keywords: the commons – lifeboat ethics – relational embodied ethics of the commons – pandemic – COVID-19 – relational autonomy – global solidarity – public health – sustainability

1. Introduction

The beginning of the 21st century marks a new geological epoch, the Anthropocene era, that is based on the recognition of human activities as the main force impacting environmental changes (Crutzen & Stoermer, 2000). The epoch of Anthropocene enflames discussions about the responsibility of humanity, whereby most interpretations are rather pessimistic. The scientific data overwhelmingly refer to existential threats to humanity and the environment (Barnosky et al., 2012). In emphasizing the impacts of human actions on nature the frontier of society and nature is reinterpreted as being entangled rather than divided. The fragility of the Earth as the only habitat for humanity is the new presumption for progress going beyond the imperative of economic growth (Federau, 2023).

In the Anthropocene epoch, the idea of sustainability is the only rational response, suggesting a primacy of the last in decision-making. Sustainability has to be recognized

as the only plausible normative framework for human action. However, sustainability is a broad paradigm requiring a more specific normative explication in particular circumstances and contexts. Thus, this paper discusses what the ethics of sustainability demand of us.

The COVID-19 was declared a pandemic by the World Health Organization on 11th March 2020 (World Health Organization, 2023). This state of exception included the inversion of the primacy of the ethical value of individual autonomy. The values related to Freedom of choice by individuals were subordinated to public health. The pandemic crisis gave rise to ethical issues and calls for ethical reflection, thus conclusions for future dealing with exceptional events under the primacy of sustainability can be derived.

Taking into consideration the Anthropocene epoch, the primacy of sustainability is presupposed. The SDGs represent a call for action on the one side a commitment on abstract values on a global scale. On the other side, these SDGs offer a pragmatic way for contributing to the leading idea of sustainability. The pandemic event of COVID-19 is a state of exception (Agamben, Giorgio.2008), which requires exceptional norms and rules. Therefore, the normativity in pandemic times is through the lenses of two different ethical approaches explicitly discussed – lifeboat ethics by Hardin (1968) and relational embodied ethics of the commons (Mandalaki, Fotaki, 2020).

2. Lifeboat Ethics and the Tragedy of the Commons

Garret Hardin's "Tragedy of the Commons" (1968) demonstrates that sustainably managing common resources is essential for long-term survival. However, "the tragedy of the commons", as Hardin phrases this, is due to the inherent dilemma of short-term individual self-interest, there is an incentive for abuse and overuse of shared resources at the cost of collective well-being and shared common interests. Here emerges the free-rider problem consisting in the dilemma of individual's optimization of their own self-interest at the cost of others and the sustainability of the collective good (Hardin 1968).

A distinction between "common goods" and "public goods" is essential for clarifying this point: common goods are depletable and rivalrous; in contrast, public goods are not depletable and not rivalrous. This means that when people use common goods, they deplete its supply. In contrast, other people's usage of a public good does not deplete them. Thus, there is, supposedly, no harm to collective well-being when public goods, such as clean air and effective police services, are being used. Such public goods are in this sense not rivalrous and not depletable. We share both public and common goods, but the challenge with the use of shared common goods comes to exist because the goods under consideration are not public goods.

Initially, the material common resources are in focus in economic debates, whereby resource allocation and the rules for users and non-users are of importance (Ostrom 1999).

The “tragedy of the commons” is challenged by Elinor Ostrom, 2009 Noble Prize recipient for her work on political economics, claiming that extending the commons would overcome the dilemma and create a new economic and social understanding of collective wealth. In summary, Elinor Ostrom's approach to resolving the tragedy of the commons involves promoting self-governance by user communities, developing tailored and adaptable rules, and recognizing the importance of local knowledge and trust.

The logic of the market and individual rationalization challenge the understanding of the commons. However, in his 1974 essay titled "Lifeboat Ethics: The Case Against Helping the Poor", Hardin uses the metaphor of a lifeboat to argue that, since the earth's resources are limited and depletable, if a community does not take care of itself, favor itself, at the expense of other communities, the lifeboat won’t be able to hold everyone. Hardin’s *lifeboat ethics* (1974) is an extension of the ethics of the commons, arguing that if stranded at sea, a lifeboat is a common resource that can save only a limited number of people. If too many people board the lifeboat, it will be non-sustainable, and everyone will drown.

Hardin’s *lifeboat ethics* provides a conception of sustainability that is different from the current global understanding of sustainability. His *lifeboat ethics* predates contemporary ideas of global responsibility, as spelled out in both the United Nations Millennium Development Goals (established in September 2000) and the United Nations 2015 Sustainable Development Goals (SDGs). These international development frameworks have been designed to define global efforts to address environmental and economic challenges. In contrast, the *lifeboat ethics* is an argument against the idea of global responsibility, and against the idea that wealthy nations have a responsibility to poor nations.

Hardin’s argument for an ethics of the commons, rooted in the metaphor of lifeboat ethics, might however be very relevant in the face of a state of exception as was experienced during the Covid-19 pandemic. In order to protect themselves, communities closed themselves off from the outside world. The idea that as members of a community, we’re metaphorically in the same boat, and share a common conception of the good, against outside dangers was manifest in the way nation-states closed their borders to outside threats, villages blocked the roads leading in and out of the village from outsiders and families secluded themselves to protect themselves from virus transmission. The common good that brings us together in this example is not a common pasture (the commons) that is open to all herders in a village (as in Hardin’s paradigmatic example), but rather the individual’s self-interest, individuals qua members of a community, that others within their community will not infect and spread the virus within our community. This is a powerful yet thin sense of the commons and the common good.

3. Relational embodied ethics of the commons

In this chapter we discuss the concept of *relational embodied ethics of the commons* as

suggested by Mandalaki & Fotaki (2020) against the background of the COVID-19 pandemic and a response to the thin notion of the commons that emerges from Hardin's *lifeboat Ethics*. First, the ethical concept is introduced in a general manner. Second, the potential of the concept in dealing with pandemic on the one side and considering a given framework of sustainability on the other side is reviewed.

3.1. Relational embodied ethics of the commons – an overview

Mandalaki & Fotaki (2020) propose to recognize the role of values of reciprocity and relationality as being intrinsic to human actions. The value-laden perspective becomes obvious once the differentiation between the commons and the process of commoning is made. Thus, a further distinction referring to immaterial and the material common resources can be made. The process of commoning evolves around the three axes of social organizing (Fournier, 2013):

- Organizing in the common: distribution of responsibilities for collective allocation of resources.
- Organizing for the common: collective use of the common.
- Organizing of the common: constant reproduction of the common through collective and reciprocal exchange.

This perspective calls for co-creation of resources and communities and participation in developing of rules, so that the pre-arrangement of institutions is in focus. Herein, the relational approach is central. Reciprocity in the process instead of material outputs of a static understanding paves the way for fluid and complex commoning (Mandalaki, Fotaki 2020, p. 747). The value-laden perspective offers new possibilities for overcoming free-riding and asymmetry and promotes a third logic of solidarity in the co-creation between the market logic and the state-ownership.

Next to relationality and reciprocity the embodiment as suggested by feminist int ethics is to be considered in commoning. Only the recognition of mutual dependance of the embodied individuals and the vulnerability of the embodied self presupposes reciprocity and responsibility in relation to the others (Butler 2015). Commoning is constantly constructed through everyday practices as a demonstration of shared values, norms, and physical activities as well (Mandalaki, Fotaki 2020, p. 748). In including the embodied rationality of the feminist ethics in the process of the commons Mandalaki and Fotaki suggest the concept of the *relational embodied ethics of the commons*. First, the focus on abstract ethical norms is broadened through effects and experiences of the participants. Second, the recognized need for integration of the body in business ethics research is met. The effects of the vulnerable bodies on political and social activities are to be deeply explored. The recognition of the body is expressed in the concept of corporeal vulnerability,

whereby social organizing refers to reciprocity and mutual embodied dependence of the others. Reciprocity is therefore a central mechanism in the embodied relational commoning in terms of the exchange of values, resources, and norms (Mandalaki, Fotaki 2020, p. 752).

In addition, to corporal vulnerability and reciprocity, the perspective of the embodied relationality is introduced. The last one is a result of the mutual recognition of the common vulnerabilities and reciprocal modus operandi. Thus, in turn, enables inclusiveness of communities' performance. The compiled suggestion of Mandalaki and Fotaki is formulated as relational embodied ethics of the commons. The recognition of the body leads to the possibility of reciprocity and relationality, so that the actors' bodies performing collectively are capable of social and political collaboration, including transformation and disruption. The suggested ethical concept is framed by the impossibility of generalized ethical patterns of action, "knowing in being" by Barad (2003, p. 829) as a philosophical understanding is of crucial importance. Figure 1 below illustrates the proposed concept of relational embodied ethics of the commons in referring to implications for the communal and individual levels of action (Mandalaki, Fotaki 2020, p. 753).

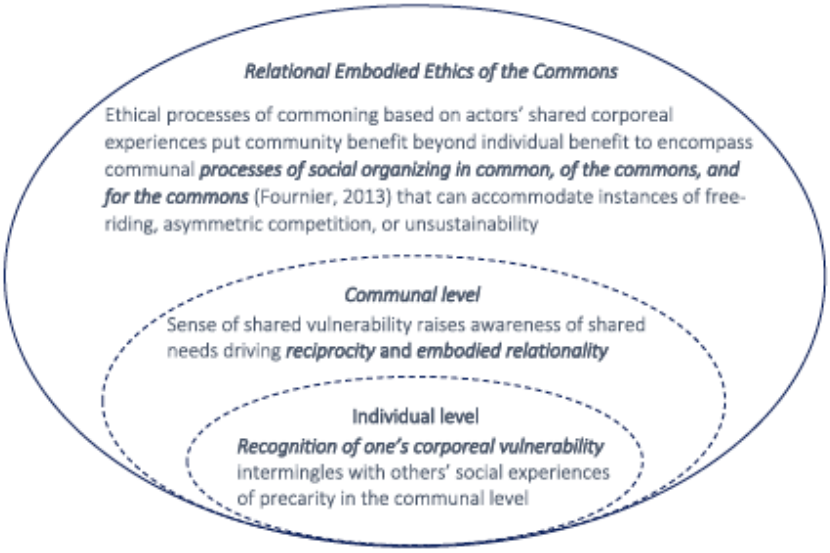


Figure 1: Relational embodied ethics of the commons for the social commoning process (Source: Mandalaki, Fotaki 2020, p. 753)

In the following chapter the relational embodied ethics of the commons is reflected upon the framework of sustainability in pandemic times.

3.2. Relational embodied ethics of the commons in pandemic times under the primacy of sustainability

Within the framework of sustainability, the idea of the commons is gaining in importance as opposed to the self-interest-based profit-maximization of economic-acting individuals. The 17 Sustainable Development Goals (SDGs) of the universal 2030 Agenda for Sustainable Development of the United Nations require global and collective action in different settings upon varying interpretation and diverse actors and governance structures.

Herein, applying the ethics of the commons is of crucial importance. The commoning requires not only the overcoming of the self-interest-based perspective of individuals but also a questioning of the unconditional autonomy of individuals. The limits of autonomy in times of a pandemic were clearly demonstrated during COVID-19's clinical reality. According to Jeffrey (2020), three areas of ethical issues due to COVID-19 can be defined:

- Quarantine, isolation, and social distancing referring to individual freedom.
- Healthcare workers' duty to provide care at their own risk.
- Access to treatment and limited resources.

In addition to the three main areas of ethical issues due to the pandemic, there is a global disparity of public healthcare systems – between high-income countries (HICs) and low- and middle-income countries (LMICs). The burden of the pandemic in LMICs on the national healthcare system is extraordinarily higher than in healthcare systems in HICs. The global disparities refer to pre-pandemic healthcare system inequalities worldwide on the one side and pandemic prevention resources and access to drugs and tests on the other side (Ho, Dascalu 2021).

These circumstances call for global solidarity and overcoming of the national protectionism. *Lifeboat ethics* is an ethics of narrow community protectionism to avoid infection. In contrast, the application of a relational approach to the claimed global solidarity offers a robust rational foundation enabling the global community to strive for the development of vaccinations and for stopping the global spread of the virus. Relational solidarity treats different actors as equals, who contribute differently to common threats. National protectionism and global solidarity can co-exist in evolving processes of collaboration and co-learning (Ho, Dascalu 2021).

Although individual autonomy is considered as the highest good in democratic societies, in exceptional times – pandemic – this good is relativized due to the social value and the common good. This overriding of individual autonomy is justified by broadening the understanding of autonomy as a non-binary interactive process that evolves over time, coined as relational autonomy (Gómez-Vírseda, C., Usanos, R.A. 2021). This extension of the autonomy concept beyond the individualistic-centered and isolated discrete decisions-oriented approach asks for relational rationality of the commons in pandemic times. In unfolding the relationality in community's performative potential for tackling inclusive action for SDGs or collaborating in pandemic times the proposition for an embodied relationality "*as an ethical process emerging through social actors' mutual recognition of shared vulnerabilities, and reliance on reciprocal practical contributions that account for their actual corporeal, localized need for interdependence*" (Mandalaki, Fotaki 2020, p. 752) is well justified. The role of the body is herewith fully recognized in designing localized ethical action. The interdependency of individuals is the underlying assumption

for the commoning of equals in communities for coping with recurring exceptional states in a sustainability framework of our world.

In summary, the framework of sustainability implies a holistic and inclusive approach to social and environmental issues on a global scale, these complex issues cannot be limited in their solution to the limits of national borders. The relationality and reciprocity are guiding principles to navigate in the sustainability framework. In pandemic times these principles are accompanied by embodiment – corporeal vulnerability, social distancing, and care – as the most important element of the *relational embodied ethics of the commons*. Within this ethical approach, solidarity, and therefore civil society as locus of commoning is constantly constructed.

4. Conclusions based on a comparison of the ethical approaches

During the early panic stages of the Covid-19 pandemic, the sustainability of communities justified a lifeboat ethical response based on quarantine, isolation, and social distancing to avoid infection. Under the assumption that Covid-19 is a deadly virus for which there is no cure, closure and protectionism was a solid ethical approach. This might be viable as a means to sustainability in the sense of survival, but it is limited.

In the later stages of the pandemic, as a richer understanding of the pandemic evolved, through a weaving of the relationships between communities, between healthcare providers and between governments and pharmaceutical companies, a process of *commoning* started to evolve. Narrow community protectionism against infection (i.e., lifeboat ethics) was replaced with a broader understanding of shared and common interests with considerations revolving around:

- attempts at limiting the spread of the pandemic and the continuous evolving of virus strains.

- The development of healthcare options, where infected individuals have a better prognosis for overcoming the disease with treatment, and where healthcare workers can provide care without being infected.

- Finally, not just access to treatment but also the development of vaccinations, the mass manufacturing of vaccinations and the global distribution of vaccinations.

Through these three stages of dealing with the pandemic, we see how the narrow sense of the commons, as manifest in the lifeboat ethics during the early stages of the pandemic, had been expanded to a much broader understanding of the common good, through a process of *commoning* and broader global solidarity (referring to relational embodied ethics of the commons). Moreover, what this comparison brings to light is the different normative demands of sustainability.

Bibliography

Agamben, G. (2008). State of exception. University of Chicago Press.

Barad, K. (2003). Posthumanist performativity: Toward an understanding of how matter comes to matter. *Signs Journal of Women in Culture and Society, 28(3)*, 801–831.

Barnosky, A. D., Hadly, E. A., Bascompte, J., Berlow, E. L., Brown, J. H., Fortelius, M., Getz, W. M., et al. (2012). Approaching a state shift in Earth's biosphere. Nature, 486(7401), 52–58.

Butler, J. (2015). Notes toward a performative theory of assembly. Cambridge, MA: Harvard University Press.

Crutzen, P. J., & Stoermer, E. F. (2000). The Anthropocene. *Global Change Newsletter,* 41(May), 17–18.

Federau, A. (2023). Anthropocene. In: Wallenhorst, N., Wulf, C. (eds) Handbook of the Anthropocene. Springer, Cham. https://doi.org/10.1007/978-3-031-25910-4_49.

Fournier, V. (2013). Commoning: On the social organisation of the commons. *Management, 16(4),* 433–453.

Gómez-Vírseda, C., Usanos, R.A. (2021). Relational autonomy: lessons from COVID-19 and twentieth-century philosophy. Med Health Care and Philos 24, 493–505 (2021). https://doi.org/10.1007/s11019-021-10035-2.

Hardin, G. (1968). The tragedy of the commons. *Science, 162(3859),* 1243–1248.

Garrett, H. (1974). Lifeboat ethics: The case against helping the poor. *Psychology Today, 10,* 38-43.

Ho, A., Dascalu, I. (2021) Relational solidarity and COVID-19: an ethical approach to disrupt the global health disparity pathway, *Global Bioethics, 32:1,* 34-50, DOI:10.1080/11287462.2021.1898090.

Jeffrey, D. I. (2020). Relational ethical approaches to the COVID-19 pandemic. *Journal of Medical Ethics 46*: 495–498. https://doi.org/10.1136/medethics-2020-106264.

Mandalaki, E., Fotaki, M. (2020). The Bodies of the Commons: Towards a Relational Embodied Ethics of the Commons. *Journal of Business Ethics 166,* 745–760. https://doi.org/10.1007/s10551-020-04581-7.

Ostrom, E. (1999). Coping with tragedies of the commons. *Annual Review of Political Science, 2,* 493–535.

World Health Organization (2023). WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020. https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (accessed on the 19th of September 2023)