German Law Journal (2022), **23**, pp. 672–686
doi:10.1017/glj.2022.35

CAMBRIDGE UNIVERSITY PRESS

DEVELOPMENT

The Effects of SARS-CoV-2 on Criminal Procedure in Germany

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(Received 16 March 2021; accepted 20 October 2021)

Abstract
The German legal system and, in particular, German criminal procedure have been severely affected by the Corona Virus pandemic. The *Konzentrationsmaxime*, the maxim that the main hearing should be consolidated into as short a timeframe as possible in order to expedite proceedings, the *Unmittelbarkeitsgrundsatz*, the principle that witnesses must be present in person, and the *Öffentlichkeitsgrundsatz*, the principle that the oral proceedings in criminal litigation should be open to the public in order to guarantee transparency, have all been called into question. The requirement to consolidate the main hearing can no longer be guaranteed due to unavoidable interruptions in the trials in accordance with the newly established Section 10 of the Introductory Law to Germany's Criminal Procedure Code (*Einführungsgesetz zur Strafprozeßordnung*; EGStPO) which aims to minimize the risk of infection. Wide-ranging curfews have been imposed so that the general public can no longer leave their homes to attend a court hearing as a spectator. The *Beschleunigungsgrundsatz*, the principle of expedited criminal proceedings, is being challenged by longer periods of pre-trial detention due to trials having to be suspended in the face of the pandemic. One further obstacle is the measures implemented in order to impede infections with the disease within the period of pre-trial detention whilst other hygiene measures, such as the requirement to wear a face mask in the courtroom, could well clash with the newly established ban on facial concealment (*Verhüllungsverbot*). In this article, the problems mentioned above are examined in more detail in order to provide an overview of the situation involving criminal proceedings in a Germany firmly in the grip of COVID-19. In addition, the situation reignites previous discussions on the further digitalization of criminal proceedings – this time as a solution for the ongoing threat of infection.

Keywords: COVID-19; German Code of Criminal Procedure; Pandemic Effects; Developments of Criminal Procedure

A. Introduction

The new Corona Virus is an infectious disease which is encumbering all countries worldwide, burdening them with the onerous challenge of protecting their citizens from a rapidly spreading virus while, at the same time, attempting to maintain at least a semblance of normality. The Federal Republic of Germany primarily reacted to the pandemic by implementing social-distancing

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regulations and contact restrictions on the basis of Sections 28–31 of the Law for the Prevention and Control of infectious Diseases Among Humans (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen*; IfSG). Prima facie, these measures appear to be in contravention of a number of the essential principles of criminal procedure in Germany. In the following, a number of consequences for criminal proceedings will be highlighted and the compromises with essential principles that have had to be implemented in order to tackle the pandemic will be elucidated. The temporal focus of this article will be on the time from the outbreak of the COVID-19 pandemic in Germany, for example, March and April, 2020, through September, 2021.

However, rapidly increasing numbers in infection rates in September, 2021 and an increasing fear of a fourth wave of infections of the new Delta variant means that the situation is, some nineteen months later, far from being better.

B. Problems for Criminal Proceedings in COVID-19 Times

I. Adjournment in the Main Hearing vs. Consolidation of the Main Hearing

German criminal law allows for an adjournment in the main hearing for up to one month. At the same time, the principle of the consolidation of the main hearing is firmly enshrined in criminal law and stipulates that the main hearing must be completed as expeditiously as possible. When the pandemic started, and the information available regarding COVID-19 was still rather vague and unreliable, calls for an extended period of adjournment in the main hearing in order to protect all the parties to the proceedings became louder.

1. Adjournments Prior to the Introduction of the New Section 10 EGStPO

1.1 Inhibition System of Section 229 StPO

Pursuant to Section 229 I of the German Code of Criminal Procedure (Strafprozessordnung; StPO), an adjournment in the main hearing of up to three weeks is possible.[1] Under Section 229 II StPO, an adjournment to the main hearing for up to one month is only possible if the main hearing has already taken place for a minimum of ten days before the intended adjournment.[2]

1.2 The Aim of Section 229 StPO

The aim of Section 229 StPO is, ideally, to hold the main hearing en bloc so as to comply with the principle of the consolidation of the main hearing,[3] to avoid protracted and/or intermittently held hearings and to adhere to the principle of immediacy[4] (*Unmittelbarkeitsgrundsatz*) in accordance with Section 261 StPO and also to the principle of expedited proceedings.[5] The principle of orality (*Mündlichkeitsgrundsatz*), according to which solely what has been discussed orally in the main hearing can be the basis of a criminal judgment, transpires to be fundamental in this context.[6] This is due to the fact that in order to abide by the principle of orality and, at the same time, to take account of the fact that the main hearing cannot, by its very nature, take place entirely without interruptions, the principle of expedition and the principle of immediacy find their inherent limit in the possibility of adjourning the main hearing in accordance with Section 229 StPO.[7] However,

[1] *See* Denis Gerull, *"Auswirkungen der Corona-Gesetzgebung" auf das Strafverfahren*, Juristsches Informationssystem Für Die Bundesrepublik Deutschland [Juris] (Apr. 17, 2020), https://www.juris.de/jportal/nav/services/juris-magazin/corona-strafverfahren/index.jsp.

[2] *Id.*

[3] *See* Christine Scheel & David-Alexander Busch, Ausgangssituation, Leitfaden Für Unterhemen In Der Coronapandemie, para. 7; *see also* Olaf Arnoldi, Munchener Kommentar Zur StPO – Band 2, § 229, para. 1 (2016).

[4] *See* Scheel & Busch, *supra* note 3, at 8; *see also* Arnoldi, *supra* note 3, at 1.

[5] *See* Arnoldi, *supra* note 3, at 2.

[6] *See* Scheel & Busch, *supra* note 3, at 9; Arnoldi, *supra* note 3, at 1.

[7] *Id.*

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these are also deliberately temporally limited, in order to take appropriate account of the conflicting interests.[8]

1.3 The Problem with Section 229 StPO in Times of COVID-19

If the main hearing is not to be continued at the latest on the day after the expiry of these time limits, it must, in accordance with Section 229 IV StPO, be suspended and restarted. During the very early stages of the pandemic, it seemed debatable as to whether an adjournment of up to three weeks or, if at least ten days of the main hearing had taken place, one month, would be sufficient to protect the parties to the proceedings from infection. This is especially true as, retrospectively, in the period from March 16, 2020 to April 20, 2020, the majority of main hearings involving multiple persons to the proceedings were indeed adjourned.[9]

2. Introduction of Section 10 EGStPO

On March 28, 2020, the new Section 10 EGStPO came into force under the aegis of the Law to Mitigate the Consequences of the COVID-19 pandemic in Civil, Insolvency and Criminal Proceedings.[10] Its effect was to suspend the time limits under Section 229 I and II StPO, as long as the main hearing is unable take place due to protective measures employed to prevent the spread of infection with the SARS-CoV-2 virus, however, only for a maximum of two months. These time limits end, at the earliest, ten days after the end of the suspension, the beginning and end of the suspension being determined by an unappealable decision of the court.[11]

In purely mathematical terms, this leaves a maximum possible interruption of three months and ten days.[12] Pursuant to Section 10 (II) EGStPO, this suspension also applies to the pronouncement of the judgment. Due to Section 4 of the Law to Mitigate the Consequences of the COVID-19 pandemic in Civil, Insolvency and Criminal Proceedings, this regulation is subject to an "automatic expiry date," so that it will be abolished on March 27, 2021.[13] This automatic expiry date has subsequently been rescheduled to March 27, 2022 with the instruction of Article 11 of the Changes to the Law of Judiciary Costs Act 2021 (*Kostenänderungsgesetz* 2021; KostRÄG) on December 21, 2020.[14]

3. Conclusion regarding the Introduction of Section 10 EGStPO

In conclusion, the criminal courts could not have reacted appropriately[15] to particular challenges of the COVID-19 pandemic without the introduction of Section 10 EGStPO. Nonetheless, this new law severely curtails the principle of expedited proceedings, so that an appropriate and involuntary application is necessary.

Therefore, should the continuation of the main hearing be possible with protective measures against an infection with the virus, the prerequisite of the impossibility of conducting the main hearing in accordance with Section 10 EGStPO is missing and thus the main hearing cannot be adjourned.[16]

[8] *Id.*

[9] *See* Gerull, *supra* note 1; *see also* Scheel & Busch, *supra* note 3, at 9; Arnoldi, *supra* note 3, at 1.

[10] *Id. See also* Federal Law Gazette (Bundesgesetzblatt), Volume 2020, Part I, No. 14, issued in Bonn on March 27, 2020. Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht.

[11] *Id.*

[12] *Id.*

[13] *See* Scheel & Busch, *supra* note 3, at para. 4.

[14] *See* Claudia Gorf, *in* Beck Onlinekommentar Zur STPO, § 229, para. 11 (39th ed. 2021).

[15] *See* Scheel & Busch, *supra* note 3, at 46–47.

[16] *See* Gorf, *supra* note 14, at para 13.

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II. Curfews vs. the Principle of Public Access to Hearings

As early as March 2020, all sixteen of Germany's individual federal states (*Länder*) undertook measures based upon the IfSG, which also included far-reaching curfews.[17] This made it considerably more difficult for the public to participate in criminal proceedings. The question thus arose as to whether the principle of the publicity of the proceedings could still upheld as any violation of this principle can lead to an absolute ground for appeal under Section 338 No. 6 I

1. The Principle of Public Access to Hearings

Under German criminal law, the principle of public access to the oral proceedings exists as a fundamental procedural maxim that is anchored in the principle of democracy and the rule of law under Article 20 I, III of the Basic Law (*Grundgesetz*; GG).[18] In addition, it acts as the public scrutiny of criminal proceedings in order to guarantee transparency, thereby protecting against any arbitrariness on the part of the state[19] and ensuring the general preventive purpose of punishment through visibility, information, and public participation.[20] It also covers the protection of access for the general public by guaranteeing that anyone can participate passively in the main proceedings at any time without significant difficulty.[21] It is for this very reason that, from an abstract point of view, regardless of a rush of actual spectators, entry must be possible without substantial difficulty.[22]

2. The Curfews

Each of Germany's sixteen Länder imposed curfews at various stages after the outbreak of the pandemic—status: April 16, 2020). A number of them (Brandenburg, Saarland) have prohibited meetings or other gatherings as well as forbidding people to leave place of residence unless they can prove sufficient grounds for doing so. Attending court hearings as a spectator is not deemed sufficiently important, however, urgent appointments at court are explicitly mentioned as being an acceptable reason and thus solely those directly involved in the case, but not spectators, may actually attend the court.[23]

Other federal states—Bavaria, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate—have generally prohibited assemblies, gatherings or meetings without explicit exceptions for court hearings.[24] Although sufficient reasons for leaving one's abode were merely cited as examples, but not enumeratively, it is nonetheless difficult, to subsume a casual visit to court as a public spectator as a sufficiently compelling reason in the context of the required social distancing and the minimization of social and physical contact.[25] As violations of these curfews are punishable with a fine of up to €25,000—at least in Bavaria—this is essentially a de facto expulsion of the general public from court proceedings.[26]

[17] *See* Olaf Arnoldi, *Hauptverhandlungen in Zeitin von Sars-CoV-2/COVID-19*, 2020 Neue Zeitschrift Für Strafrecht [NStZ] 313–14; Tobias Kulhanek, *Saalöffentlichkeit unter dem Infektionsschutzgesetz*, 2020 Neue Juristiche Wochenschrift [NJW], 1183, 1183.

[18] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1 BvR 2623/95, 1 BvR 622/99 (Jan. 24, 2001); Tobias Kulhanek, *in* Münchener Kommentar Zur StPO – Band 3/2, § 169 GVG, para. 7 (1st ed. 2018).

[19] *See* Kulhanek, *supra* note 19, at 1.

[20] *See* Rudolf Kissel & Herbert Mayer, in Gerichtsverfassunggesetz Kommentar, § 169, para. 1 (9th ed. 2018).

[21] *See* Kulhanek, *supra* note 19, at 1, 10.

[22] *See* Bavarian Supreme Court in criminal matters [BayObLGSt] Nov. 30, 1981, 1982 Neue Juristiche Wochenschrift [NJW], 395, 396; Higher Regional Court Celle [OLG Celle], 2012 Neue Zeitschrift Für Strafecht [NStZ], 654, 654.

[23] *See* Silvia Maria Deuring, *Der Öffentlichkeitsgrundsatz in Zeiten der COVID-19-Pandemie: Über die Vereinbarkeit des "Corona-Lockdowns" mit einem Kernprinzip des Prozessrechts unter besonderer Berücksichtigung des Zivilverfahrensrechts*, https://www.degruyter.com/journal/key/gvrz/3/2/html?lang=en.

[24] *Id.*

[25] *See* Kulhanek, *supra* note 17, at 1183.

[26] *Id.*

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Other federal states—Baden-Wuerttemberg, Berlin, Schleswig-Holstein, Bremen, Hamburg, Hesse—created exceptions to their prohibitions on gatherings specifically for court hearings, although it was unclear whether these also applied to spectators. In Saxony, attending a court hearing as a member of the public was qualified as a sufficient reason and in Thuringia and Saxony-Anhalt attendance at a court hearing remained permitted under strict regulations.[27]

3. A Potential Infringement of the Principle of Publicity Nature of the Proceedings

The question thus arises as to whether such a state-imposed obstacle[28] undermines the principle of public access in criminal proceedings, due to the fact that it is obviously not a natural, real obstacle as, for instance, are encountered in negotiations on the verge of the motorway[29] or within confined spaces.[30] This is particularly interesting with regard to a possible ground for appeal under Section 338 Number 6 StPO and to a violation of the requirement to expedite proceedings in cases involving potential incarceration due to a suspended and postponed main hearing, despite a public hearing being practically and dogmatically possible, especially in the case of Section 121, 122 StPO.[31]

4. Potential Solutions

1.1 Exclusion of the Public in Accordance with Section 172 GVG

Section 172 of Germany's Courts Constitution Act (*Gerichtsverfassungsgesetz*; GVG) lists rationales for the exclusion of the public on the grounds that the interests of the general public, or the interests of an individual whose protection is also in the public interest, are endangered.[32] These may also cover the exclusion of the public from criminal proceedings due to the COVID-19 pandemic.

a) Section 172 Number 1 GVG: Threat to State Security or Public Order

This particular provision allows for exclusions on the basis of state security, alternative 1, public order, alternative 2, or morality, alternative 3. There is no evidence indicating an exclusion on moral grounds in accordance with alternative 3. A threat to state security is regularly assumed to exist if certain sensitive matters are being discussed during the hearing, the disclosure of which could endanger internal or external security in the sense of Section 92 III Number 2 of the German Criminal Code (*Strafgesetzbuch*, StGB).[33] Even a wide interpretation of that term which would qualify an epidemic as a threat to internal security is unlikely to classify several members of the public participating in a court hearing as a threat to the state,[34] especially in the context of the low mortality rate of SARS-CoV-2 in Germany of 4.7%—status: June 10, 2020).[35]

The concept of public order includes serious disturbances which call into question the orderly and lawful conduct of the trial or where measures taken by the officers of the court cannot guarantee the elimination of such disturbances.[36] To include within the scope of this the attendance of

[27]*See* Silvia Maria Deuring, *supra* note 24, at 2–3.

[28]*See* Kulhanek, *supra* note 17, at 1184.

[29]*See* Higher Regional Court Cologne [OLG Köln] Nov. 28, 1975, 1976 Neue Juristiche Wochenschrift [NJW], 637, 637.

[30]*See* Federal Court of Justice in criminal matters [BGHSt] June 10, 1966, 1966 Neue Juristiche Wochenschrift [NJW], 1570, 1571.

[31]*See* Kulhanek, *supra* note 17, at 1184.

[32]*See* Kulhanek, *supra* note 19, at § 172, para. 1.

[33]*See* Walter Zimmermann, Munchener Kommentar Zur ZPO – Band 2, § 192 GVG, para. 2 (5th ed. 2017).

[34]*See* Christian Auf der Heiden, *Prozessrecht in Zeiten der Corona-Pandemie*, 2020 Neue Juristiche Wochenschrift [NJW], 1023, 1024.

[35]*See SARS-CoV-2 Steckbrief zur Coronavirus-Krankheit-2019 (COVID-19)*, Robert Koch Institute (Nov. 26, 2021), https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Steckbrief.html.

[36]*See* Herbert Diemer, Karlsruher Kommentar Zur Strafprozessordnung, § 172, para. 5 (8th ed. 2019).

https://doi.org/10.1017/glj.2022.35 Published online by Cambridge University Press

members of the general public who, in the abstract, are merely suspected of being infectious or ill, appears questionable.[37]

b) Section 172 Number 1a GVG: Endangering the Life, Limb, or Liberty of a Witness or Another Person

If the life, limb, or liberty of a witness or another person is endangered by a truthful testimony in a public hearing, the public can, pursuant to Section 172 II GVG, be excluded. If only certain spectators are a threat to a witness or a third person, only those causing a threat, and not the entire public, shall be excluded. The threat must be a result of the public testimony.[38] Notwithstanding this, the possible risk of transmitting the virus exists for all parties to the proceedings and, as such, Section 172 Number 1 a GVG cannot be considered applicable.[39]

1.2 Section 174 I 2 GVG and Section 173 I GVG: Public Nature of the Exclusion Decision and the Delivery of the Judgment

Furthermore, the problem arises that both the pronouncement of any decision to exclude pursuant to Section 174 I 2 GVG and the delivery of the judgment itself in accordance with Section 173 I GVG must be made in public[40] so that, at least during these phases of the proceedings, the public can no longer be excluded. Therefore, approaches that call for the creation of new grounds for exclusion in accordance with Section 172 GVG in times of the pandemic[41] do not provide a solution to the problem at hand.

1.3 Absolute Grounds for an Appeal on Points of Law under Section338 VI StPO and the Lack of a Judicial Measure

One further approach to this issue negates any suggestion that there has been a violation of the principle of public hearings and of any grounds for appeal under Section 338 Number 6 StPO resulting therefrom. This is due to the fact that the initial restrictions—the curfews— were issued by the executive and not the judiciary.[42] Consequently, a greater degree of liability in the hands of the judiciary for measures adopted by the executive would not be in keeping with the classification of the absolute grounds for appeal pursuant to Section 338 StPO. Germany's Federal Court of Justice (*Bundesgerichtshof*; BGH) has already ruled that if causes beyond the control of the court result in spectators not being able to attend the hearing, or attending it late, are not to be deemed a violation of the principle of a public hearing.[43] Joint and several liability on the part of the judiciary for measures implemented by the executive is therefore unacceptable.[44]

1.4 The Media as an Intermediary

Nonetheless, this view is not convincing. Until now, in the above-mentioned context, the argument has always involved limiting, controlling or physically inhibiting barriers and not about the factual and deliberate exclusion of the public from the hearing.[45] The courts cannot evade their responsibility for upholding the principle of public proceedings by shifting the blame to the executive.[46]

[37]The same opinion is held by Auf der Heiden, *supra* note 35, at 1024.

[38]*See* KULHANEK, *supra* note 17, at 1185.

[39]*Id. See also* Sina Aaron Moslehi, *Der Ausschluss der Öffentlichkeit in Strafverfahren zu Pandemiezeiten – Braucht das GVG einen weiteren Ausschlussgrund* (§§ 171 a ff. GVG), at 8, https://jura.uni-koeln.de/extern-divider/effer-uhe/online-tagung-2-das-verfahrensrecht-in-zeiten-der-pandemie.

[40]*See* KULHANEK, *supra* note 17, at 1185.

[41]*See* Moslehi, *supra* note 40, at 9–12.

[42]*See* ARNOLDI, *supra* note 17, at 316.

[43]*See* BGHSt, *supra* note 31, at 1571.

[44]*See* ARNOLDI, *supra* note 17, at 316.

[45]*See* KULHANEK, *supra* note 17, at 1185.

[46]*Id.*

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A solution which, therefore, appears convincing is one according to which the principle of public hearings during the pandemic is guaranteed through the multiplier function of media representatives.[47] Crimes are communicated as a part of current events by the media, taking into account the problem of selective reporting, which is largely characterized by sensationalism.[48]

5. Conclusion on the Potential Infringement of the Principle of Public Hearings

In summary, in combination with a transparent judiciary acting arbitrarily, the principle of public hearings in the form of a compromise with the functioning of the administration of justice and the minimization of social and physical contact is not violated due to the media acting as an intermediary.[49] Therefore, there would appear to be no grounds for appeal under Section 169 (I) GVG.

On November 17, 2020, the German Federal Court of Justice decided that holding the main hearing during a COVID-19 lockdown is not a violation of the principle of publicity and hereby confirmed the aforementioned assessment.[50]

Meanwhile all the curfews imposed by the Länder have been lifted. In light of declining infection numbers, the *Bundesnotbremse*, Federal emergency brake measures, expired on June 30, 2021. This piece of legislation had ordered inter alia nighttime curfews and restrictions on private and public gatherings as well as on teaching and the maximum customer capacity of shops once more than 100 infections per day per 100,000 inhabitants were registered within 7 days in a specific region, incidence.[51]

Prior to attending a court hearing at a German Court, spectators now have to fill out a self-disclosure form so that people who are recognizably ill, pursuant to the information they provided, can be rejected. Furthermore, visitors have to maintain the required safety distance of 1.5 meters at all times and disinfect their hands in the entrance hall.[52]

Nevertheless, in view of a possible fourth wave of infections by the Delta variant in autumn 2021,[53] curfews are once again being discussed, hereby reigniting the aforementioned debate on whether the principle of publicity with regard to the main hearing will be upheld.

III. The Principle of Expedition in Trials Concerning a Potential Custodial Sentence

Pre-trial detention describes the situation whereby the accused is detained as a remand prisoner based upon a judicial arrest warrant in order to ensure orderly criminal proceedings and the subsequent execution of a custodial sentence.[54] It is determined in Sections 112 and other sections of StPO and, as such, it is a possible constituent of criminal proceedings. As a complete deprivation of liberty, pre-trial detention encroaches upon the accused's fundamental rights as no other coercive measure of criminal procedure in preliminary proceedings does. For this reason, such periods of deprivation of liberty may only be ordered and maintained if it is imperative for overriding reasons of the common good. Such concerns, one of which is an accused person's claim to liberty, include the irrefutable needs of an effective criminal justice system.[55] In the context of the ongoing

[47]*Id.* at 1186.

[48]*See* KULHANEK, *supra* note 19, at para. 2.

[49]*Id.* at 1187

[50]*See* BGHST, Nov. 17, 2020, 2021 JURISTICHE SCHULUNG [JUS], 274, 274.

[51]*See* Neue Zürcher Zeitung, *Corona-Notbremse: In diesen Regionen gelten noch weitere Beschränkungen* (May 7, 2021), https://www.nzz.ch/international/deutschland/ausgangssperren-corona-notbremse-ld.1614580.

[52]*See* Landgericht Nürnberg-Fürth, *Justice Operations in Nuremberg Are Maintained Even During the Corona Crisis*, https://www.justiz.bayern.de/gerichte-und-behoerden/landgericht/nuernberg-fuerth/.

[53]*See* Bayerischer Rundfunk, *Steigende Inzidenz: Drohen wieder Einschränkungen?* (Aug. 14, 2021), https://www.br.de/nachrichten/wissen/steigende-corona-inzidenz-droht-eine-vierte-welle-und-neue-einschraenkungen,SfyQd7V.

[54]JÜRGEN-PETER GRAF, KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG, before § 112, para. 1 (8th ed. 2019).

[55]Carsten Grote & Ri'in Kyra Niehoff, *Das Beschleunigungsgebot in Haftsachen in Zeiten der Corona-Pandemie*, 2020 JURISTISCHE ARBEITSBLÄTTER [JA], 537, 537.

https://doi.org/10.1017/glj.2022.35 Published online by Cambridge University Press

COVID-19 pandemic, the question arises as to how sufficient protection against the virus can be reconciled with the constitutionally guaranteed principle of expedited proceedings in cases where the convicted offender is likely to receive a custodial sentence, so-called *Haftsachen*.

The requirement for expedited proceedings means that pre-trial detention shall not be disproportionate to the expected sentence. The Basic Law requires that the criminal prosecution authorities and the criminal courts take all possible and reasonable measures to conclude the investigations with the necessary speed and to deliver a swift judgment. The longer the period of pre-trial detention, the higher the requirements for its justification. Therefore, the weight of the right to liberty increases in relation to the interest in effective prosecution the longer the period of pre-trial detention lasts.[56]

In the event of a trial being adjourned for longer in accordance with the new Section 10 I EGStPO, the effects on a continuation of pre-trial detention are unclear because this section deals only with the adjournment period regarding the main proceedings and does not mention pre-trial detention. Once the court has issued a suspension decision for the trial, the courts must examine whether the detention on remand is still proportionate or whether the arrest warrant should instead be revoked. It is not deemed proportional when there is no possibility of ensuring expeditious progress in the proceedings. The proceedings should then be continued as if it were not a *Haftsache*.[57] Thus, the court must decide—even more carefully than it is already required to do so by the principle of expedition—whether or not an arrest warrant can be upheld.

IV. COVID-19 Measures in Prisons and in Pre-trial Detention—Incompatible?

Furthermore, the question arises as to whether any problems occur regarding the implementation of the conditions of pre-trial detention itself. Many protective measures must also be taken in the prisons to impede infections with the SARS-CoV-2 virus, for example, maintaining necessary social distancing restrictions. Reports from the USA[58] have demonstrated that not all countries have succeeded in implementing the necessary measures inside their prisons. Referring to mass infections and correctional facilities as "Corona hotspots"—the already inadequate hygiene standards and living conditions in many American prisons are leading to them becoming breeding grounds for the pandemic. One example is the US state of California which is no longer able to guarantee the safety of staff and prisoners in overcrowded prisons as a consequence of the COVID-19 pandemic. After the release of around 10,000 prisoners at the beginning of the pandemic, up to 8,000 additional prisoners are due to be released prematurely at the end of August 2020.[59]

However, it must be stressed that the situation in Germany is entirely different from the situation described in these reports. Nevertheless, there are also concerns in German prisons about whether precautions, such as maintaining a minimum distance and implementing hygiene standards sufficient to combat the virus, are actually possible.

1. The Situation in German Prisons: The Example of Hagen

It was precisely this concern that the Higher Regional Court in Hamm (*Oberlandesgericht Hamm*; OLG Hamm) addressed in its decision of May 7, 2020.[60] In this specific case, the defendant applied

[56] *Id.* at 541.

[57] *Id.* at 542.

[58] *See Fast 80 Prozent der Häftlinge eines Gefängnisses infiziert,* Der Tagesspiegel (Apr. 21, 2020), https://www.tagesspiegel.de/gesellschaft/panorama/dramatischer-ausbruch-in-us-haftanstalt-fast-80-prozent-der-haeftlinge-eines- gefaengnisses-infiziert/25758512.html.

[59] *See Corona in den USA: Tausende US-Häftlinge kommen frei*, BR (July 16, 2020), https://www.br.de/nachrichten/deutschland-welt/corona-in-den-usa-tausende-us-haeftlinge-kommen-frei,S4Rt9ya.

[60] Higher Regional Court Hamm [OLG Hamm] May 7, 2020, 2020 Covid-19 und Recht [COVuR] 433, 433.

https://doi.org/10.1017/glj.2022.35 Published online by Cambridge University Press

for a review of his detention[61] as he suffered from a weakened immune system as a result of heart surgery and was, as a consequence, particularly at risk of contracting the SARS CoV-2 virus or suffering particularly serious ramifications for his health as a result of an infection with the COVID-19 virus. He alleged that in pre-trial detention he was not being sufficiently protected from this risk. Hagen Prison, an institution with approximately 350 prisoners and 150 employees where he was being held, had not been spared from the COVID-19 pandemic. Among the accusations levelled by the defendant were the allegations that the minimum distances of 1.5 to 2 meters were not monitored during the yard exercise and were never observed elsewhere. He also maintained that there was no regular cleaning or disinfection of the open spaces in the institution and that no infection tests were carried out upon new admissions. All in all, the institution was, in his view, failing to provide any protection against infection and was exposing the patient to multiple risks of infection.[62] The defendant's allegations were examined by the OLG Hamm based upon the actual conditions in Hagen prison.

1.1 The Decision of the OLG Hamm

The court finally concluded that the defendant's state of health—combined with the risks and effects of the COVID-19 pandemic—should not lead to the suspension of the arrest warrant. The law on pre-trial detention does not contain any autonomous provision on the concept and consequences of incapacity for detention. Nevertheless, it was acknowledged that the state of health of an accused person may, with the appropriate application of Section 455 StPO, prevent the implementation of pre-trial detention. If the accused envisages a considerably high risk of irreversible and serious damage to their health, or even death, if they are remanded in custody, the continuation of their detention violates their fundamental right to freedom in accordance with Article 2 (II) GG. Even if the accused belongs to a so-called "risk group," his risk of infection is not increased by the implementation of pre-trial detention. The orders issued by the Ministry of Justice of North Rhine-Westphalia (*Justizministerium NRW*) and the measures taken in Hagen Prison—at least in the situation and according to the information available at the time—were sufficient to adequately protect the accused, and all other prisoners in North Rhine-Westphalia, from any infection with the SARS CoV-2 virus.

1.2 The Measures Implemented by the Ministry of Justice of North Rhine-Westphalia

a) Visiting Ban

The orders issued by the Ministry of Justice of North Rhine-Westphalia include a ban on visits as an expression of the precautionary measures taken in the prison system.[63]

b) Isolating Suspected Cases

The precautionary measures also included isolating suspected cases of the virus. Accordingly, the prisoner from Hagen Prison, who was accommodated in a room together with a patient infected SARS-CoV-2 during an external hospital stay, was transferred to the Fröndenberg Prison hospital immediately after his release from the external hospital and was isolated there. In addition, the four staff members from Hagen Prison who guarded the prisoner in the hospital were sent into domestic quarantine.[64]

[61]The accused person may request at any time that he be remanded in custody. If such a request is made, the court must examine whether the arrest warrant should be revoked or whether it is to be suspended in accordance with Section 116 StPO.

[62]*See* OLG Hamm, *supra* note 61, at 434.

[63]*Id.* at 435.

[64]*Id.*

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c) Procedure for Testing

The fact that not every newly admitted prisoner is tested for SARS-CoV-2 infection complies with the guidelines of the Robert Koch Institute (RKI) and does not increase the risk of infection for fellow prisoners. This is due to the fact that if a person displays no signs of illness, a negative test does not provide any certainty that the person has not already been infected with the virus and is in the incubation period. Conversely, the hospital physicians pay attention to existing symptoms during their initial examination; in this case—in accordance with the guidelines of the RKI—testing is carried out and the patient is isolated as a precaution.[65]

d) Cleaning

According to information from Hagen Prison, the institution is cleaned regularly by staff and external service providers using disinfectants.[66]

e) Yard Exercise

According to the defendant, eighty prisoners take part in each so-called "free hour" in accordance with Section 23 II of the Law on the Implementation of Pre-trial Detention North Rhine-Westphalia (*Untersuchungshaftvollzugsgesetz Nordrhein-Westfalen*; UVollzG NRW). The yard used for this purpose extends twenty meters in width and eigthteen meters in length, a total of 360m2. In compliance with this assertion, each prisoner has an allocated area of 4. 5m^2 of the yard which corresponds to a square with sides of more than two by two meters per prisoner. As such, there is sufficient space in the yard to maintain a distance of more than two meters between all prisoners participating in the free period. According to information from Hagen Prison, an average of only fifty prisoners participate in the free periods at any one time.[67]

1.3 Interim Conclusion

These findings regarding Hagen prison will probably be applied in order to help solve issues in other penal institutions. However, both inside and outside the prison system, the health protection of the accused will depend more upon the hygiene rules a person themself is willing to observe than on the cleaning and disinfection measures taken by the institution or its environment, as one protects oneself and one's fellow human beings from infection by, above all, keeping oneself at a distance from other people, by adhering to a the coughing and sneezing etiquette, by employing sufficient hand hygiene measures, and by refraining from shaking hands. This also stems from the RKI recommendations.[68] It can therefore, along with the opinion of the German Federal Constitutional Court (*Bundesverfassungsgericht*; BVerfG), be stated that a certain risk of infection with the new Corona virus is currently an element of the general risk of everyday life for the entire population and thus, something from which all elements of criminal proceedings cannot be completely excluded.[69]

2. A Brief Look at Bavaria

With regard to the federal state of Bavaria, all thirty-six Bavarian prisons have updated their existing pandemic plans, have taken protective and hygiene measures, and have also increased protective equipment and disinfectants. Staff members and prisoners must, wherever possible,

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *See* Robert Koch Institute, *supra* note 36.
[69] *See* Ingo Rau, *Strafprozessuale Rechte und Pflichten von Verfahrensbeteiligten in der aktuellen Corona-Pandemie*, 2020 COVID-19 Und Recht [COVuR], 406, 409.

https://doi.org/10.1017/glj.2022.35 Published online by Cambridge University Press

maintain the specified minimum distance of 1.5 meters. Where the minimum distance is not ensured, staff members have to wear a mouth-and-nose covering. In addition, measures were taken to reduce the number of new arrivals and thus to reduce the burden on the prisons: Those who have to serve juvenile detention—leisure-time detention (*Freizeitarrest*), short-term detention (*Kurzzeitarrest*) or permanent detention for a maximum of four weeks (*maximal vierwöchiger Dauerarrest*)—or a prison sentence of up to six months, were temporarily not summoned to commence their term of imprisonment. In mid-June 2020, it once again became possible to summon these convicted offenders to commence their detention.

In addition, numerous other measures have been taken to prevent, as far as is possible, the infiltration with, or the spread of, the Corona virus in Bavarian prisons. All prisoners arriving at a facility were accommodated separately from other prisoners for at least two weeks until an infection could be precluded. Measures such as day release or parole were also completely suspended in the first weeks of the COVID-19 crisis. However, the COVID-related restrictions of everyday prison life are accompanied by compensatory provisions. Telephone calls, for example, were more generously allowed due to the ban on visits, which has been ordered. If employment in a company outside the prison cannot be continued as a consequence of Corona restrictions, the prisoners receive a pro rata share of their previous wages so as to enable them to continue shopping in the prisons.[70]

To summarize the situation in figures, there are a total of 9,553 prisoners in the Bavarian prison system—as of July 31, 2021. Since the beginning of the pandemic, 230 prisoners have tested positive for the Corona virus. Of these, 103 prisoners have been newly admitted to the correctional facilities; due to the protection concept described above, these new arrivals were accommodated separately from the other prisoners from the outset. As of August 17, 2021, a total of 6,234 members of staff are employed in the Bavarian prisons, including trainees. Since the beginning of the pandemic, 323 staff members of the Bavarian prison system have tested positive for the Corona virus.[71]

3. Adjustments in Order to Achieve the Best Possible Results

In summary, prisons throughout Germany are making every possible effort to prevent infection with the virus and to implement the necessary measures as best they can. Restrictions are being compensated for as the welfare of the prisoners and the employees always remains the top priority. Enabling prisoner visits and other relaxations of restrictions always depends on the development of the infection rates which are constantly closely monitored. As described above, for example, it was necessary to temporarily suspend prison visits during the first weeks of the COVID-19 crisis. Since June, however, visits have once again been able to take place.[72]

V. Respiratory Masks vs. Ban on Concealment Section 176 II 1 StPO

A further issue arising from the high risk of infection with the virus is the wearing of mouth and nose protection in court. For instance, since January 18, 2021, FFP2 masks have been compulsory in Bavaria in local public transport, retail, and a wide range of other facilities[73] —this is also the case in the courts.[74] It raises the issue of whether chairpersons, by virtue of the powers conferred

[70]*See Corona-Virus: Maßnahmen der bayerischen Justiz - Fragen und Antworten*, Bayerisches Staatsministerium der Justiz, https://www.justiz.bayern.de/service/corona/Umgang_Justiz.php.

[71]The figures cited here are official statistics as of August 19, 2021. Upon request by the authors, these details were provided in personal correspondence with Undersecretary Dr. Koch-Schulte (Ministerialrat) from the Bavarian State Ministry of Justice (Bayerisches Staatsministerium der Justiz; StMJ Bayern).

[72]*See Corona-Informateionen*, Justizvollug, https://www.justiz.bayern.de/justizvollzug/corona/.

[73]For more detail, see *Haufig gestellte Fragen*, https://www.stmgp.bayern.de/coronavirus/haeufig-gestellte-fragen/.

[74]For an example at the OLG Nuremberg, see *Oberlandesgericht Nürnberg*, https://www.justiz.bayern.de/gerichte-und-behoerden/oberlandesgerichte/nuernberg/index.php.

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upon them under Section 176 I GVG to maintain order,[75] can instruct the parties to the proceedings and any visitors to the court to wear cloth face masks. This could conflict with the ban on face coverings introduced into Section 176 II StPO under the aegis of the Act on the Modernization of Criminal Proceedings (*Gesetz zur Modernisierung des Strafverfahrens*). However, the opposite situation could also be practically relevant, namely ordering to the parties to the proceedings to remove their protective masks.[76]

1. Ratio of Section 176 II 1 StPO

The Act on the Modernization of Criminal Proceedings from December 10, 2019 established, under subsection two, a regulation to prohibit face covering in principle. Generally, persons participating in the proceedings may not cover their face—neither in whole, nor in part— during the course of the proceedings.[77] The prohibition extends to all forms of face coverings, regardless of whether they are religiously motivated or not. Facial concealment describes the use of textiles and other objects which serve to cover the face or parts of it. Thus, in individual cases, it may include, for example, covering the face with a mask, a burka, sunglasses, a balaclava, a motorcycle helmet or even a bandage worn by a person to treat a physical injury to the face.[78] Therefore, hygienic mouth and nose protection clearly falls—*ejusdem generis*—within the scope of this category.

2. Restrictive Regulation Reserving the Right of Permission

However, Section 176 II 1 StPO provides a so-called *Erlaubnistatbestand*, a restrictive regulation reserving the right for permission. The provision authorizes the chairperson to allow exceptions to the ban on facial concealment if its protective purpose is not affected. The protective purpose is to preserve the functioning of the administration of justice, a notion derived from the rule-of-law principle stipulated in Article 20 III GG. According to the legislator, the identification and the assessment of evidence should not be affected by face coverings. For example, in the context of the assessment of evidence, it should always be possible to recognize the fully perceptible facial expression of a party to the proceedings in order to be able to evaluate it and, if necessary, interpret the statement accordingly. The aim is to be able to assess the credibility of both the person and of the information.[79]

The legislator considered a possible interference with the fundamental rights of the parties to the proceedings—such as the general freedom of action under Article 2 I GG and/or the freedom to practice of religion under Article 4 GG—as being justified. This decision is based upon the consideration that the prohibition serves to maintain the functionality of the administration of justice and by virtue of the fact that the chairperson can grant exceptions. It resides with the incumbent chairperson, in the exercise of their dutiful discretion, to weigh up the fundamental rights of the persons concerned against the purposes of the prohibition in each individual case. If, and insofar as the interests in concealment protected by fundamental rights predominate, the chairperson must permit an exception to the general prohibition. Which factors are notably significant in this respect are the role of the person concerned in the trial, the state of the trial and the type of desired obfuscation, on the one hand, and, on the other, the motivation behind it.[80]

[75] *See* Gunnar Groh, Sitzungspolizei, Creifelds Kompakt Rechtswörterbuch (2d ed. 2020).
[76] *See* Arnoldi, *supra* note 17, at 313.
[77] Angelika Walther, Beck'scher Online-Kommentar GVG, § 176, para. 17 (7th ed. 2020).
[78] *Id.* at 18a.
[79] *Id.* at 20.
[80] *Id.* at 20a.

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3. The Pandemic Situation as A Possible Exception?

With particular regard to the fundamental rights, it is questionable whether the very reason for wearing a mouth and nose protection would meet the requirements for such an exception. The purpose of the masks, namely, to preserve the physical integrity and protect the health of others, could permit an exception to the principle of the ban of concealment. In fact, the court's duty to protect all those attending a court hearing requires that protective measures be taken against infection with the coronavirus. Ordering the wearing of a mouth-nose covering in the form of FFP2 masks or simple surgical masks is also suitable and proportionate in order to achieve this goal. Pursuant to Section 238 I StPO and Section 176 I GVG, the court's function of directing and ordering also entitles it to effectively control and enforce the measures prescribed.[81] Ultimately, the interest in containing the spread of the coronavirus and protecting all others present in the courtroom outweighs the right to free development of the personality. The obligation to wear a FFP2 mask or a surgical mask is a conceivably small encroachment on the rights of freedom of the person concerned, however it has a significant effect in reducing the spread of the virus. Furthermore, the court expressly allows people to substantiate any claim that they suffer from a specific medical condition which would render the wearing of a mask impossible or dangerous for them, so that no one must be exposed to any health risks.[82] Furthermore, the protective purpose of maintaining the functionality of the administration of justice must be considered. Without compliance with the obligation to wear a mask, a hearing might not even be able to take place at all.

VI. Previous Options and Unused Opportunities—Digitalization?

As already discussed in detail above, the criminal justice system is currently facing a whole host of problems due to the COVID-19 Pandemic. All over Germany, the Länder are trying to find suitable solutions. As an alternative to the main trial date in times of a high risk of infection, a recommendation by the Bavarian Ministry of Justice includes using criminal proceedings based upon an order of summary punishment (*Strafbefehlsverfahren*) wherever possible. This would allow fines, driving disqualifications, and suspended sentences of up to one year to be imposed by the court without the necessity for a trial. However, this procedure is not feasible without the consent of the accused or their defense counsel because the accused can delay the proceedings by filing an objection, which can, in turn, lead to an uncertain date for the main hearing.[83] One further possibility which has been discussed repeatedly in Germany for a considerable length of time, but is considered incompatible with certain principles of criminal procedure, is digitalization.

1. Disputed Issues

The meaning of the principles of immediacy and orality in criminal proceedings has been discussed for many years.[84] The procedural maxim of immediacy ideally requires the court to gain a direct and unmediated impression of the facts to be adjudged. The procedure is therefore direct if the court bases its decision on its own perceptions.[85] The fundamental question here is whether the impression of a person via video is different from the one that would have been formed in the course of a "real" confrontation.[86] The principle of orality is not explicitly regulated, however can

[81] *See* Regional Court Chemnitz [LG Chemnitz] Dec. 4, 2021, BeckRS 2021, at 7845.

[82] *Id.*

[83] *See* Ingo Fromm, *Über die Auswirkungen der COVID-19-Pandemie auf Straf - und Bußgeldsachen*, 2020 Deutsches Autorecht [DAR], 251, 252.

[84] *See* Regina Michalke, *Der Strafprozess vor neuen Herausforderungen - Über den Sinn oder Unsinn von Unmittelbarkeit und Mündlichkeit im Strafverfahren*, 2000 Neue Juristiche Wochenzeitschrift [NJW], 2004, 2004.

[85] *See* Adrian Dumitrescu, *Das Unmittelbarkeitsprinzip im deutschen und schweizerischen Strafprozessrecht*, 2018 Zeitschrift Für Die Gesamte Strafrechtswissenschaft [ZSTW], 106, 106.

[86] *See* Gabriele Kett-Straub & Florian Nicolai, *Digitalisierung der Strafvollstreckung und des Strafvollzugs*, 2021 Zeitschrift für Digitalisierung und Recht [ZfDR], 131, 135.

https://doi.org/10.1017/glj.2022.35 Published online by Cambridge University Press

be abstracted from Sections 250, 261, 264 StPO, and from Section 169 GVG. These refer to the assessment of evidence and to reaching a verdict at the main hearing, which considers the principle of orality in the sense of arguments and counterarguments.[87]

However, a number of exceptions to these maxims already exist. Section 255a II StPO, for example, with the aim of protecting victims of the offences listed under this section, permits the playing of audio-visual recordings of the questioning of witnesses under the age of eighteen in lieu of their own questioning at the main hearing. Furthermore, the transmission of a hearing by video conference is permissible if this is required for the benefit of the witness, Sections 168e and 247a StPO.[88]

2. Development of the Digitalization in Criminal Proceedings

Many people would like to see the regulations developed and relaxed so that, for example, digital examination of witnesses is also possible in criminal proceedings, in a similar manner to what has already long been established in civil proceedings in the light of Section 128a of Germany's Code of Civil Procedure (*Zivilprozessordnung*; ZPO). Pursuant to Section 128a ZPO, the court may allow the parties, their representatives or any amici curiae to be present at another place during oral proceedings and to carry out procedural acts there. The hearing is transmitted simultaneously in sound and vision to this location and to the courtroom. However, the presence of the trial court within the courtroom remains necessary.[89]

A large number of lawyers have also been calling for a commensurable regulation in criminal proceedings for some time now. The problems caused by Covid-19 particularly outline the fact that it may well be time to pay renewed attention to previous discussions and to deal intensively with the problems and proposed solutions for a potential digitalization of criminal proceedings. As a result of the pandemic, a veritable boost in digitalization was able to be observed in the education sector, for example. However, the digitalization of the judiciary is still proceeding rather hesitantly and there can certainly be no talk of a boost. However, two current drafts of the law are now intended to make it possible to hold videoconference hearings for convicted offenders in penal execution cases as. On November 16, 2020, the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*; BMJV) submitted a draft of a statutory regulation to expand the use of videoconferencing technology in penal execution proceedings. This draft builds upon a bill already passed by the Bundesrat on July 3, 2020, which provides for an amendment to Sections 453 I 4 and 454 I 3, II 3 StPO, but extends the scope of application. The draft of the Bundesrat provides that the hearing of the sentenced person before the decision on revocation of the suspended sentence due to violation of conditions and instructions, as prescribed in Section 453 I 4 StPO, may in future also be conducted digitally. The same is to apply to the hearing of the sentenced offender before the decision on the suspension of the rest of the fixed-term or life imprisonment to probation, as regulated in Section 454 I 3 StPO, and the hearing before the decision on the revocation of such a suspension of sentence due to a violation of conditions and instructions, as prescribed in Section 454 IV 1 StPO. Pursuant to a new Section 453 II 1 StPO to be inserted, the court may order the oral hearing of the sentenced offender to be transmitted simultaneously in picture and sound both at the place where the sentenced person is and in the courtroom. However, a video conference would not be admissible if the sentenced offender objected thereto. The BMJV's draft, which goes yet further, does not include any changes to Sections 453, 454 StPO, but aims for a wider solution. The new provision Section 463e StPO should be inserted. This would then apply to the entire section of penal execution and would allow the use of video conferencing for hearings that are to be held within the framework of the execution of corrective and protective measures.[90] Overall, the digitalization of the

[87] *Id.* at 112.

[88] *Id.* at 118–19.

[89] *See* Astrid Stadler, § 128a, *in* KOMMENTAR ZUR ZIVILPORZESSORDNUNG, § 128a, para. 1 (17th ed. 2020).

[90] For more detail, see Gabriele Kett-Straub & Florian Nicolai, *Digitalisierung der Strafvollstreckung und des Strafvollzugs*, 2021 ZEITSCHRIFT FÜR DIGITALISIERUNG UND RECHT [ZFDR], 131, 132f.

https://doi.org/10.1017/glj.2022.35 Published online by Cambridge University Press

execution procedure should be regarded somewhat sceptically due to many circumstances and irrespective of the information technology equipment of the courts which is currently still in dire need of improvement.[91]

C. Conclusion

Germany was shocked when Chancellor Angela Merkel, a politician renowned for her composure in times of crisis, described the COVID-19 pandemic as the biggest challenge for the country since World War II.[92] This challenge may very well be true in several respects. The entire German legal system has been—and, at the time of writing, still continues to be—seriously affected by this extraordinary situation.[93]

In addition to the procedural problems, the number of new criminal cases related to the pandemic is now accumulating, demanding even more capacity from the already burdened court system. For example, in September 2021, the number of cases related to the falsification of health certificates and their use and document forgery is on the rise due to forged vaccination certificates, which are principally found among travelers.[94] However, it is also ready to face the challenge of finding suitable solutions for the ensuing problems while respecting both the principles of the rule of law and the welfare of all those involved in the proceedings.

[91]For an intensive consideration of the decisive points and a substantiated conclusion, see *id*. at 136.

[92]*See Merkel sieht Coronakrise als größte Herausforderung seit dem Zweiten Weltkrieg*, SPIEGEL POLITIK (Mar. 18, 2020), https://www.spiegel.de/politik/deutschland/angela-merkel-sieht-corona-krise-als-groesste-herausforderung-seit-dem-zweiten-weltkrieg-a-bd56dc3f-2436-4a03-b2cf-5e44e06ffb49.

[93]While processes have mostly returned to "normal" in many areas, all developments are always dependent on the 7-day incidence and the regulations that accompany it.

[94]This is only one recent example among many others. *See Dutzende Fake-Impfpässe in Niedersachsen aufgetaucht*, NORDDEUTSCHER RUNDFUNK (Sept. 4, 2021), https://www.ndr.de/nachrichten/niedersachsen/Dutzende-Fake-Impfausweise-in-Niedersachsen-aufgetaucht,impfpaesse100.html.

Cite this article: Bühner W, Rank A (2022). The Effects of SARS-CoV-2 on Criminal Procedure in Germany. *German Law Journal* **23**, 672–686. https://doi.org/10.1017/glj.2022.35