

PATTERNS OF COOPERATIVE ADMINISTRATIVE FEDERALISM IN THE GERMAN RESPONSE TO COVID-19

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INTRODUCTION

Early on in the fight against COVID-19, cooperation of federal and state administrations became a key feature of the German approach. In mid-March 2020, Germany passed the threshold of 1,000 new cases per day for the first time.¹

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1. ROBERT KOCH INST., CORONAVIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: MARCH 15, 2020, at 2 (2020), <https://www.rki.de>

In response, the federal government and the governments of the sixteen states issued a first version of common guidelines to ensure a “uniform approach” on containment measures.² In a short time, an updated version of these guidelines intensified measures of social distancing and hygiene.³ The close cooperation of federal and state administrations enabled a fast and broad response and a significant lowering of the curve of new infections (and fatalities); by the end of August 2020, the overall number of confirmed COVID-19 infection cases in Germany stood at 239,507 and COVID-19-related fatalities at 9,288.⁴ Relative to other countries, such as the United States, the United Kingdom, or France,⁵ Germany’s numbers were relatively low, even if compared to the total population quantity.⁶

This Essay will explore the role of cooperative administrative federalism in COVID-19 containment from March to August 2020. First, this Essay will sketch the constitutional framework and statutory details of federal competence allocation in the field of infectious disease control.⁷ Second, we will connect the notion of cooperative administrative federalism to related concepts in the theory of federalism.⁸ Third, we will trace the evolution of

/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Situationsberichte/2020-03-15-en.pdf?__blob=publicationFile.

2. See *Guidelines to Slow the Spread of the Coronavirus*, BUNDESREGIERUNG (Mar. 16, 2020), <https://www.bundesregierung.de/breg-de/themen/coronavirus/guidelines-to-slow-the-spread-of-the-coronavirus-1731708>. The term in the German original for “uniform approach” is “*einheitliches Vorgehen*.”

3. See *Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder* [Consultation Between the Chancellor and the Heads of Government of the Federal States], BUNDESREGIERUNG (Mar. 22, 2020), <https://www.bundesregierung.de/breg-de/themen/coronavirus/besprechung-der-bundeskanzlerin-mit-den-regierungschefinnen-und-regierungschefs-der-laender-1733248>.

4. For the numbers as of August 28, 2020, see EUR. CTR. FOR DISEASE PREVENTION & CONTROL, COMMUNICABLE DISEASE THREATS REPORT: WEEK 35, 23-29 AUGUST 2020, at 4 (2020), <https://www.ecdc.europa.eu/sites/default/files/documents/Communicable-disease-threats-report-29-aug-2020.pdf>.

5. As of August 28, 2020, the United States reported 5,867,785 infection cases and 180,824 COVID-19-related deaths; the United Kingdom reported 330,368 infection cases and 41,477 deaths; and France reported 259,698 and 30,576 deaths. See *id.*

6. In early 2018, the estimated population in Germany was 82.9 million, in France 67.2 million, and in the United Kingdom 66.2 million. See Press Release, Eurostat, First Population Estimates EU Population up to Nearly 513 Million on 1 January 2018 (July 10, 2018), <https://ec.europa.eu/eurostat/documents/2995521/9063738/3-10072018-BP-EN.pdf/ccdfc838-d909-4fd8-b3f9-db0d65ea457f>. The estimated population in the United States was about 328.2 million in mid-2019. See *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Jan. 30, 2021).

7. See *infra* Part I.

8. See *infra* Part II.

cooperative administrative federalism over time. We will identify patterns shifting from the initial “uniform” approach to more nuanced forms of cooperation in later phases of containment.⁹ Fourth, we will discuss factors that explain the key role of cooperative administrative federalism in the context of COVID-19.¹⁰ Fifth, we will identify and address legal limits to cooperative administrative federalism as a governance approach in the sector of infectious disease control.¹¹

I. FEDERAL COMPETENCE ALLOCATION IN THE FIELD OF INFECTION DISEASE CONTROL

A. Constitutional Framework

The German Federal Constitution, the “*Grundgesetz*” (GG),¹² contains different sections for federal competence allocation for legislation¹³ and implementation.¹⁴ Both sections start from the default rule that all competences are with the states.¹⁵ Federal competences depend upon specific constitutional provisions.

For federal legislation, the GG constitutes two basic categories of competences: Exclusive federal legislative competences and concurrent federal legislative competences.¹⁶ In subjects of concurrent competences, state legislation is possible “so long as and to the extent that the [federal level] has not exercised its legislative power.”¹⁷ Within the broad range of concurrent competences,¹⁸ Article 72, Section 2 GG establishes additional legal

9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Part V.

12. *See generally* GRUNDGESETZ [GG] [BASIC LAW], translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. The terminology of the German constitutional law in this Essay largely follows this translation.

13. *See id.* art. 70–82 (outlining the legislative power of Germany’s federal government).

14. *See id.* art. 83–91e (outlining the division of administrative government powers between Germany’s federal government and its states).

15. *See id.* art. 70, § 1, art. 83 (stating that the power to both legislate and execute laws in any field rests with the state governments, absent an express provision stating otherwise).

16. *See id.* art. 70–74 (describing how legislative power of the federal and state governments is divided between competences under the concurrent authority of both the federal and state governments, and those competences that fall under the exclusive authority of the federal government).

17. *Id.* art. 72, § 1.

18. *See id.* art. 74 (listing matters where concurrent legislative power between the federal government and states is permissible).

requirements for several of these competences.¹⁹ The key concurrent federal legislative competence title for matters of infectious disease control is Article 74, Section 1(19) GG, addressing “measures to combat human and animal diseases which pose a danger to the public or are communicable.”²⁰ Article 74, Section 1(19) GG is not subject to the additional requirements of Article 72, Section 2 GG.²¹

Article 80 GG is the key constitutional provision on executive rulemaking.²² It applies across the board to all sectors of federal legislation. Article 80, Section 1 GG allows for statutory enactments to delegate rulemaking authority to the federal government, singular federal ministries, or state governments.²³

In regard to implementation of federal legislation, the GG provides several explicit federal competences (but not explicitly for infectious disease control).²⁴ In addition, there is a specific clause that allows for the creation of “autonomous federal higher authorities” through federal statute in sectors in which a federal legislative competence exists.²⁵

B. Allocation of Competences in the Federal Infectious Disease Control Act (IfSG)

The Federal Infectious Disease Control Act (*Infektionsschutzgesetz* (IfSG)) is based upon the concurrent legislative competence in Article 74, Section 1(19) GG.²⁶ The IfSG was initially enacted in 2000,²⁷ and received significant

19. Federal legislation is only admissible “to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.” *Id.* art. 72, § 2.

20. *Id.* art. 74, § 1(19).

21. *See id.* art. 72, § 2 (not including the subject of infectious disease control among those matters that are subject to additional requirements for federal action to be permissible).

22. *See* Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213, 230–38 (1994) (discussing the application of art. 80 § 1 by the courts to questions of permissible delegation of authority).

23. *See* GRUNDGESETZ [GG], art. 80, § 1 (“The Federal Government, a Federal Minister or the *Land* governments may be authorized by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law.”).

24. *See id.* art. 83–91e (defining certain areas as subject to federal implementation measures).

25. *Id.* art. 87, § 3.

26. *See id.* art. 74, § 1, no. 19 (reserving the response to dangerous and communicable diseases for federal legislative action).

27. *See generally* Infektionsschutzgesetz [IfSG] [Federal Infectious Disease Control Act], July 20, 2000, BUNDESGESETZBLATT [BGBL I] at 1045, last amended by Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise [Corona-Steuerhilfegesetz] [Corona Tax Aid Act], June 19, 2020, BGBL I at 1385, art. 5 (Ger.), <https://www.gesetze-im-internet.de/ifsg/ifsg.pdf>.

amendments—including in the early phase of COVID-19 containment in late March 2020.²⁸

The key statutory purpose is to detect infectious diseases early and prevent their spread among the population.²⁹ The IfSG explicitly acknowledges that cooperation between federal, state, and other authorities is central to achieving the statutory purpose of the Act.³⁰ The statute provides for a broad range of legal instruments and allocates implementation competences between federal and state authorities.³¹

The IfSG assigns various tasks to the Robert Koch Institute (RKI),³² a federal agency with the legal status of “autonomous federal higher authorit[y].”³³ As the national agency for the prevention, early discovery, and prohibition of the transmission of infectious diseases, the RKI is responsible for containment planning and advises on infectious diseases, epidemiological and laboratory analyses, and administration and communication of data related to certain infectious diseases.³⁴ Moreover, the RKI is obliged to cooperate with relevant federal and state authorities under certain conditions.³⁵ The IfSG establishes the competence of the Federal Parliament (*Deutscher Bundestag*) to declare an “epidemic situation of national scope” and to reverse this declaration if circumstances change.³⁶

28. *See generally* Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite [Statute on Protection of the Population in an Epidemic of National Scope], Mar. 27, 2020, BGBl I at 587 (amending the IfSG in response to the coronavirus pandemic). For an additional amendment, see Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite [Third Statute on Protection of the Population in an Epidemic of National Scope], Nov. 18, 2020 BGBl I at 2397 (Ger.) (further amendments of the IfSG in response to the coronavirus pandemic).

29. *See* Federal Infectious Disease Control Act, BGBl I at 1046, § 1, para. 1 (Ger.).

30. *Id.* § 1, para. 2.

31. Parallel to the federal IfSG, several state statutes on the matter exist and apply within the boundaries of Article 72, Section 2 GG. *See, e.g.*, Gesetz zur konsequenten und solidarischen Bewältigung der COVID-19-Pandemie in Nordrhein-Westfalen und zur Anpassung des Landesrechts im Hinblick auf die Auswirkungen einer Pandemie [Statute on Infectious Disease Control and Implementation Competences of North Rhine-Westphalia], Apr. 14, 2020, NORDRHEIN-WESTFÄLISCHES GESETZ- UND VERORDNUNGSBLATT [NRW GVBL] at 217b (North Rhine-Westphalia) (Ger.); Bayerisches Infektionsschutzgesetz [BayIfSG] [Bavarian Statute on Infectious Disease Control], Mar. 25, 2020, BAYRISCHES GESETZ- UND VERORDNUNGSBLATT [BAY GVBL] at 174 (Bavaria) (Ger.).

32. Federal Infectious Disease Control Act, BGBl I at 1047, § 4 (Ger.).

33. GRUNDGESETZ [GG], art. 87, § 3.

34. *See* Federal Infectious Disease Control Act, BGBl I at 1047, § 4, paras. 1–2 (Ger.).

35. *See id.* § 4, para. 1.

36. *Id.* § 5, para. 1.

Drawing on this declaration, the IfSG contains a range of authorizations for the Federal Ministry of Health, including: the issuance of regulations³⁷ upon measures to guarantee the supply of pharmaceuticals, vaccines, protective gear and disinfection products;³⁸ and, the issuance of regulations upon the continuation of health care services regarding doctors' offices, pharmacies, hospitals, and laboratories.³⁹

Within the rules on prevention of infectious diseases,⁴⁰ the key provision on vaccination addresses both federal and state authorities.⁴¹ The IfSG authorizes the Standing Committee on Vaccination at the Robert Koch Institute (STIKO)⁴² to issue recommendations on the conduct of vaccinations.⁴³ § 20, Paragraph 6 IfSG provides the statutory authority for the Federal Ministry of Health to issue regulations on mandatory vaccinations against infectious diseases, with the *Bundesrat*.⁴⁴ In the absence of regulatory action by the Federal Ministry of Health, § 20, Paragraph 7 IfSG grants a subsidiary competence for regulations on mandatory vaccinations to state authorities.⁴⁵

The provisions of the IfSG on infectious disease containment⁴⁶ include an authorization for investigations⁴⁷ and a general clause for “necessary protective measures.”⁴⁸ Moreover, there are specific authorizations for prohibition and restriction of social events and visits to certain locations,⁴⁹

37. For an overview of legal categories of administrative action in German law, see Johannes Saurer, *Administrative Law*, in INTRODUCTION TO GERMAN LAW 97, 107–12 (Joachim Zekoll & Gerhard Wagner eds., 3rd ed. 2019). On regulations, see *id.* at 109.

38. See Federal Infectious Disease Control Act, BGBl I at 1047, § 5, para. 2, no. 4 (Ger.).

39. See *id.* § 5, para. 2, no. 7.

40. See *id.* §§ 16–23.

41. See *id.* § 20.

42. On the Standing Committee on Vaccination (STIKO), see Wiebke Hellenbrand et al., *Progress Toward Measles Elimination in Germany*, 187 J. INFECTIOUS DISEASES S208, S208–09, S212, S214 (Supp. 1 2003) (describing the origins of STIKO and its role in combatting measles in Germany).

43. See Federal Infectious Disease Control Act, BGBl I at 1047, § 20, para. 2 (Ger.).

44. See *id.* § 20, para. 6.

45. See *id.* § 20, para. 7 (providing for state governments to regulate mandatory vaccinations in the absence of action by the Federal Ministry of Health).

46. See *id.* §§ 24–32 (containing provisions aimed at combating communicable diseases).

47. See *id.* § 25 (describing the procedures and requirements for initiating investigations upon the discovery of suspected communicable diseases).

48. See *id.* § 28, para. 1 (empowering the relevant authorities to impose restrictions as necessary to prevent the spread of disease when a suspected illness is discovered).

49. *Id.*

social distancing requirements,⁵⁰ mandatory face covering,⁵¹ stay-home orders and restrictions on social contacts for private and public spaces,⁵² closing of kindergartens, schools or universities,⁵³ observation,⁵⁴ quarantine,⁵⁵ and restrictions of professional activities.⁵⁶ The authorizations of §§ 24–32 IfSG empower administrative authorities at the state level—either the health authorities or simply the “competent authority”; both legal terms imply designation on the state level⁵⁷—to implement the IfSG.⁵⁸

In addition, §32 IfSG authorizes state governments to enact statewide rules on infectious disease containment.⁵⁹ The statutory enactment incorporates the requirements and range of instruments set out in §§ 28–31 IfSG,⁶⁰ including the general clause in § 28, Paragraph 1, Sentence 1 IfSG.⁶¹ Legal challenges against state COVID-19 regulations have contested the constitutionality of the statutory enactment in § 32 on the ground of a potential violation of constitutional determinacy requirements.⁶² However, the courts have rejected these challenges and confirmed the constitutionality of § 32 IfSG.⁶³

50. *See id.*, as amended by Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite [Third Statute on Protection of the Population in an Epidemic of National Scope], Nov. 18, 2020, BGBl. I at 2400, § 28a, para. 1, no. 1 (Ger.). Note that § 28a IfSG was only recently amended; previously, authorities based the respective measures on the general clause IfSG § 28.

51. *See id.* § 28a, para. 1, no. 2.

52. *See id.* § 28a, para. 1, no. 3.

53. *See id.* § 28a, para. 1, no. 16.

54. *See id.* § 29 (requiring examination and observation of those who are believed to be sick with a communicable disease).

55. *See id.* § 30 (detailing the requirements for quarantine and isolation when authorities identify an individual with a communicable disease).

56. *See id.* § 31 (permitting authorities to restrict sick individuals’ ability to work).

57. *See id.* § 2, no. 14 (defining “Health Department[s]” as entities at the state level).

58. *See id.* §§ 24–32 (detailing the provisions of the statute aimed at controlling the spread of communicable diseases).

59. *Id.* § 32.

60. *See id.* (authorizing state governments to issue regulations pursuant to the requirements and conditions detailed in “sections 28 to 31” of the Act).

61. *See id.* § 28, para. 1.

62. *See* GRUNDGESETZ [GG] art. 80 (requiring that delegations of authority be explicit and specific in their “content, purpose, and scope”).

63. *See, e.g.*, Bayerischer Verfassungsgerichtshof [BayVerfGH] [High Administrative Court of Bavaria] Mar. 30, 2020, 20 NE 20.632, paras. 38, 41–45, <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2020-N-4618?hl=true> (holding the IfSG to be a permissible statutory authorization of authority under the requirements of Germany’s Basic

II. COOPERATIVE ADMINISTRATIVE FEDERALISM

The notion of “cooperative administrative federalism” combines two traditional features of German federalism: administrative federalism and cooperative federalism.

“Administrative federalism” captures the strong role of state administrations in the German federal system. The term “executive federalism” is used interchangeably.⁶⁴ One aspect is the strong influence of state governments on federal legislation via the *Bundesrat*, the federal chamber in the legislative process. The *Bundesrat* is not comprised of individually elected representatives, as in the U.S. Senate, but rather by nominees of the state governments,⁶⁵ often by the state prime ministers in person.⁶⁶ Important competences of the *Bundesrat* include participation not only in the legislative process but also in the election of justices of the Federal Constitutional Court.⁶⁷ A second aspect is the constitutionally determined⁶⁸ predominance of state administrations in the implementation of federal legislation.⁶⁹

“Cooperative federalism” refers to the traditionally strong interconnection of federal and state levels.⁷⁰ The institutional culture of German federalism,

Law). For additional references and explanation, see Stephan Rixen, *Gesundheitsschutz in der Coronavirus-Krise – Die (Neu-)Regelungen des Infektionsschutzgesetzes*, 73 *Neue Juristische Wochenschrift* 1097, 1098–1101 (2020). For further discussion and critique, see Uwe Volkmann, *Heraus aus dem Verordnungsregime*, 73 *Neue Juristische Wochenschrift* 3153–60 (2020).

64. On the interchangeable use of “[a]dministrative federalism” and “executive federalism,” see Arthur Gunlicks, *German Federalism and Recent Reform Efforts*, 6 *GER. L.J.* 1283, 1285 (2005).

65. See GRUNDGESETZ [GG], art. 51, § 2 (“Each *Land* shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five and *Länder* with more than seven million inhabitants six votes.”).

66. For example, North Rhine-Westphalia and Bavaria, as the most populous states, have six votes; the smallest states of Bremen and Saarland have three votes. Jacek Czaputowicz & Marcin Kleinowski, *The Voting Systems in the Council of the EU and the Bundesrat – What Do They Tell Us About European Federalism?*, 10 *PERSP. ON FEDERALISM* 174, 180–81 (2018).

67. See Bundesverfassungsgerichtsgesetz [BVerfGG] [Statute on the Federal Constitutional Court], Aug. 11, 1993, BGBl I at 1473, § 5, para. 1, last amended by Gaesetz [G], Nov. 20, 2019, BGBl I 1724, art. 4, <https://www.gesetze-im-internet.de/bverfGG/BVerfGG.pdf> (allocating power to the Bundesrat to elect half of the justices).

68. See GRUNDGESETZ [GG], art. 83–91e (containing those provisions detailing the role of the states in the execution and administration of federal laws).

69. See *supra* Part I.

70. See Gunlicks, *supra* note 64, at 1283 (defining “cooperative federalism” as the strong interrelationship between the federal government, which makes laws, and the state governments, which administer the laws).

with “multilateral bargaining and consensus-seeking” as dominant features,⁷¹ are particularly visible in the interplay of *Bundestag* and *Bundesrat* in federal legislation. In part, federal and state competences are so heavily intertwined that gridlock effects and accountability deficits arise. Fritz W. Scharpf has captured this phenomenon in the term “joint-decision trap.”⁷² As the governance structures of cooperative federalism tend toward consensual modes of decisionmaking, there is a corresponding tendency toward strong veto positions of each federal or state entity that is required to consent.⁷³

However, both traditional dimensions that confluence in cooperative administrative federalism are not universal features of German administrative law. For one, administrative organization can depart significantly from the basic structure of administrative federalism. Rather, as a result of specific sectoral provisions in the federal constitution or statutory specifications, some sectors of the administration have strongly centralized features with significant implementation capacities of federal agencies with nationwide jurisdiction.⁷⁴ A classic example is the social insurance administration. As reflected in the text of the GG, key parts of the social insurance system (pensions, health care, unemployment) are administered through corporations under public law that operate at the federal level.⁷⁵ A more recent example of administrative centralization is energy law. In the context of energy transition from fossil fuels to renewable energy, important implementation competences have been assigned to federal agencies such as the Federal Net Agency (*Bundesnetzagentur*),

71. See TANJA A. BÖRZEL, STATES AND REGIONS IN THE EUROPEAN UNION 45–50 (2002) (discussing the division of legislative action and enactment of laws between the German federal government and states, and the incentives that drive cooperation between them).

72. See Fritz W. Scharpf, *The Joint Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239, 239 (1988) (explaining that this arises from the participation of multiple bodies in central decisionmaking, where the tendency by member bodies to bargain over decisions results in suboptimal policies).

73. On “veto players” theory in federalism, see GEORGE TSEBELIS, VETO PLAYERS 2 (2002) (explaining that having multiple actors involved in policymaking makes it difficult to enact policy that departs significantly from the status quo).

74. In political sciences, scholars have hinted to the “asymmetric” nature of German federalism across various fields of policy. See generally Arthur Benz, *From Unitary to Asymmetric Federalism in Germany: Taking Stock after 50 Years*, PUBLIUS, Fall 1999, at 55, 55–57, 76–77 (providing an overview as to how cooperation in the German federal system has been hampered by asymmetries in economic and political power). For (another) analysis on great variations of de/centralization in Germany, see generally André Kaiser & Stephan Vogel, *Dynamic De/Centralization in Germany*, PUBLIUS, Winter 2019, at 84, 84 (examining the ebb and flow of centralization and decentralization throughout twenty-two different fields of policy in the German federal system).

75. GRUNDGESETZ [GG], art. 87, § 2.

including competences for gridline planning that have formerly been state competences.⁷⁶ Second, there are examples of “non-cooperative” implementation structures as well. In the context of the phaseout of nuclear energy, the Land of Hesse sued the federal government for being excluded from negotiations with the nuclear energy industry on the grounds of an alleged constitutional duty of cooperation and consultation between federal and state governments.⁷⁷ The Federal Constitutional Court (*Bundesverfassungsgericht*), however, rejected the claim—at least for the nuclear energy sector at stake.⁷⁸

III. COOPERATION OF FEDERAL AND STATE ADMINISTRATIONS IN COVID-19 CONTAINMENT

Analysis reveals an evolution of patterns in the approach of German federal and state administrations toward COVID-19 containment—relative to the changing empirical and normative context including development of infection curves, stability of the health care system, and demands of fundamental rights.

A. *Horizontal Introduction of Uniform Containment Measures*

In mid-March 2020, when the COVID-19 pandemic had reached Germany and infection numbers were rapidly rising, federal and state governments issued a set of common guidelines that aimed explicitly at a “uniform approach” toward containment measures.⁷⁹ These guidelines introduced a broad spectrum of containment measures horizontally across the states. They included, *inter alia*, the closure of bars, clubs, theatres, museums, playgrounds, sporting facilities and most retail outlets; strict rules on social contacts in hospitals and nursing homes; and a ban on social gatherings including those of religious communities.⁸⁰ The guidelines also expressed a common understanding that universities, schools, and kindergartens will widely be closed.⁸¹ Shortly afterwards, a second set of common guidelines of

76. Johannes Saurer & Jonas Monast, *Renewable Energy Federalism in Germany and the United States*, TRANSNAT'L ENV'T L., Dec. 23, 2020, at 1, 24.

77. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 19, 2002, 104 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 249, 258, 260.

78. *See id.* at 267–68 (rejecting the argument that the federal government overstepped its constitutional authority in negotiating the retrofit of a nuclear power plant without the participation of the state government).

79. *See supra* notes 1–2 and accompanying text.

80. *Guidelines to Slow the Spread of the Coronavirus*, *supra* note 2.

81. *Id.*; *see also* Angela Merkel, C. of Germany, Pressekonferenz von Bundeskanzlerin Merkel zu Maßnahmen der Bundesregierung im Zusammenhang mit dem Coronavirus [Press Conference by Chancellor Merkel on Measures by Federal Government in Connection with the

federal and state governments gradually intensified the containment measures, particularly on social distancing.⁸² They included a ban of public gatherings of more than two people outside of families and households, a minimum distance between people in public of 1.5 meters, and the closure of restaurants except for food delivery and collection.⁸³

Common federal and state guidelines, as those mentioned, are not legally binding instruments.⁸⁴ Accordingly, there are no specific procedural requirements for their deliberation or publication either. However, the broad political power of the joint authority of federal and state governments ensured the immediate implementation of guidelines through formal legal measures.

COVID-19 regulations of state governments based on §§ 28 and 32 IfSG became the single most important legal source of containment restrictions.⁸⁵ The state COVID-19 regulations implemented the broad range of instruments included in the common federal and state guidelines mentioned above, and included additional instruments as well.⁸⁶ The duty to wear face masks in shops and public transport was first established by some state COVID-19 regulations before it evolved into a horizontal, nationwide standard.⁸⁷ Regularly, the state COVID-19 regulations include sunset clauses that provide

Coronavirus] (Mar. 16, 2020), <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenz-von-bundeskanzlerin-merkel-zu-massnahmen-der-bundesregierung-im-zusammenhang-mit-dem-coronavirus-1731022>.

82. *Consultation Between the Chancellor and the Heads of Government of the Federal States*, *supra* note 3.

83. *Id.*; see also Markus B. Siewert et al., *A German Miracle? Crisis Management During the COVID-19 Pandemic in a Multi-Level System*, PEX (June 25, 2020), <https://pex-network.com/category/special-reports/sr-2-coronavirus-outbreak-and-presidents-responses-special-reports/> (emphasizing that the German government's regulations in response to the coronavirus were less strict than those instituted by France, Italy, or Spain).

84. See Annette Guckelberger, *Ausgangsbeschränkungen und Kontaktverbote anlässlich der Corona-Pandemie*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT, May 1, 2020, at 1, 3, https://rsw.bek.de/rsw/upload/NVwZ/NVwZ-Extra_9a_2020.pdf (referencing *Consultation Between the Chancellor and the Heads of Government of the Federal States*, *supra* note 3) (characterizing the content of the consultation as lines of communication across levels of governance that include only nonbinding guidelines).

85. See, e.g., Verordnung zum Schutz vor Neuinfizierungen mit dem Coronavirus SARS-CoV-2 [CoronaSchVO] [Ordinance on Protection Against New Infections with the Coronavirus SARS-CoV-2], Mar. 22, 2020, NRW GVBL 177a (North Rhine-Westphalia) (Ger.) (adopting local coronavirus measures based upon the authority delegated by §§ 28 and 32 IfSG).

86. Compare *id.* §§ 1, 3, 5–7, 11 (including language that closely matches the joint federal and state announcement dated March 16 on COVID-19 regulations), with *Guidelines to Slow the Spread of the Coronavirus*, *supra* note 2.

87. See, e.g., Fünfte Corona-Bekämpfungsverordnung Rheinland-Pfalz [5. CoBeLVO] [Fifth Corona Control Ordinance Rhineland-Palatinate], Apr. 30, 2020, RHEINLAND-PFALZ GESETZ- UND VERORDNUNGSBLATT [RP GVBL] §§ 1(2), 4(4) (Ger.).

for their expiration, typically after one to several weeks.⁸⁸ The time limits are legal features intended to ensure the proportionality of ends versus means and to ease the enormous burden on fundamental rights that the containment measures represent.⁸⁹ State governments regularly replace expiring COVID-19 regulations with new, updated versions.⁹⁰

The containment measures announced in the federal and state guidelines of March 16 and 22 began to take measurable effect about three to four weeks after. The daily count of new COVID-19 infections peaked in early April, with around 6,000 new cases daily,⁹¹ the numbers dropped to about 4,000 cases on April 8, and eventually under 1,000 new cases per day in early May. Within this scope of cases, the German healthcare system proved largely capable of coping with the challenges, especially regarding intensive care capacities.⁹²

B. State and Regional Differentiation

By the end of April 2020, against the backdrop of the lowering curve of new infections, political and legal discourse turned to strategies to ease containment measures. The degree of uniformity in joint federal and state

88. See, e.g., Ordinance on Protection Against New Infections with the Coronavirus SARS-CoV-2, NRW GVBl § 15 (North Rhine-Westphalia) (Ger.) (setting the regulations to expire on April 20, 2020, several weeks after enactment).

89. See *infra* Part V (explaining how the fundamental rights implicated in pandemic response regulations impose substantive and procedural limits on those enacted measures).

90. See, e.g., Siebte Verordnung der Landesregierung zur Änderung der Corona-Verordnung [Seventh Ordinance of the State Government Amending the Corona Ordinance], May 2, 2020, BADEN-WÜRTTEMBERG - UND VERORDNUNGSBLATT [BW GVBl] art. 1 (representing the seventh amendment to, and extension of, the State's pandemic ordinance).

91. ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: APRIL 1, 2020, at 1 (2020) (reporting 5,453 new cases); ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: APRIL 2, 2020, at 1 (2020) (reporting 6,156 new cases); ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: APRIL 3, 2020, at 1 (2020) (reporting 6,174 new cases); ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: APRIL 4, 2020, at 1 (2020) (reporting 6,082 new cases); ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: APRIL 5, 2020, at 1 (2020) (reporting 5,936 new cases).

92. See Fabian Hatke & Helge Martin, *Collective Action During the COVID-19 Pandemic: The Case of Germany's Fragmented Authority*, 42 ADMIN. THEORY & PRACTICE 614, 624 (2020), <https://www.tandfonline.com/doi/pdf/10.1080/10841806.2020.1805273?needAccess=true> (finding that Germany's healthcare capacity was able to provide sufficient care for those who contracted the virus).

action was reduced. Federal and state governments held on to a common core of containment measures but increasingly emphasized the significance of differentiation at the state and regional levels.⁹³ This development reflected the perceived constitutional value of state autonomy. Moreover, state and regional differentiation can be better suited to accommodate fundamental rights concerns. A more targeted approach, with a strong emphasis on the regional evolution of infection curves, can help to structure the balancing of the individual rights and public interests at stake more clearly and transparently vis-à-vis the public.⁹⁴

Various horizontally implemented restrictions were eased—including those on museums, playgrounds,⁹⁵ shops, restaurants, and visits to care homes—while others remained in place, including the distancing requirement of one and a half meters between people in public.⁹⁶ Accordingly, the gradual lift of restrictions was implemented through amendments of state COVID-19 regulations, or as a result of expired and nonrenewed clauses in state COVID-19 regulations. A follow-up joint federal and state decision in mid-June 2020 kept nationwide rules on social distancing and hygiene in place, but allowed the individual states to decide on the return of school teachers and pupils to in-class present teaching; the return to the regular (on the ground) operation mode of kindergartens and other child care facilities; and the step-by-step opening of gastronomy, hotels, cultural institutions, and gatherings of religious communities.⁹⁷ In mid-July 2020, a specific federal–state decision addressed

93. See Jenny Hill, *Coronavirus: Germany Divided as States Lift Lockdown*, BBC (June 1, 2020), <https://www.bbc.com/news/world-europe-52879321> (noting that disagreements among state leaders and the federal government on how to proceed were resulting in an uneven lifting of restrictions throughout the country).

94. See generally Thomas Kleinlein, *Federalisms, Rights, and Autonomies: The United States, Germany, and the EU*, 15 INT'L J. CONST. L. 1157, 1159–62 (2017) (comparing U.S. and German perspectives on federalism and fundamental rights).

95. Press Release, Die Bundesregierung [The Fed. Gov't], Telephone Conference Between Federal Chancellor Merkel and the Heads of Government of the Länder on 30 April 2020, at 5 (Apr. 30, 2020), <https://www.bundesregierung.de/resource/blob/997532/1749952/8c502a1351b207c96ad3a12227900160/2020-04-30-beschluss-bund-laender-eng-data.pdf?download=1>.

96. Press Release, Die Bundesregierung [The Fed. Gov't], Telephone Conference Between Federal Chancellor Merkel and the Heads of Government of the Länder on 6 May 2020, at 2 (May 6, 2020) [hereinafter Press Release, May 6 Telephone Conference], <https://www.bundesregierung.de/resource/blob/997532/1751456/c197062365f7e60780e9039dc4e336ee/2020-05-06-beschluss-bund-laender-eng-data.pdf?download=1>.

97. Press Release, Die Bundesregierung [The Fed Gov't], Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 17. Juni 2020 [Meeting between the Chancellor and the Heads of Government of the Länder on June 17, 2020] (June

the risk of increasing infections resulting from international travel activities during the summer holiday season.⁹⁸

Federal and state governments established a quantitative threshold of fifty new infections per 100,000 residents within seven days to limit state and regional differentiation.⁹⁹ The specifically chosen number of fifty new infections for the so-called “seven-day incidence” of COVID-19 cases reflected the assumption of health experts that, beyond this quantitative threshold, health care authorities would increasingly lose the capability to effectively contract trace infected persons.¹⁰⁰ This decision obliged local authorities and overseeing state governments to react swiftly to local and regional increases beyond the threshold, e.g., through general orders based on § 28 IfSG,¹⁰¹ to implement additional containment measures, e.g., through temporary restrictions on social gatherings and extension of face mask requirements.¹⁰²

C. *Toward a Common Regulatory Floor*

In August 2020, infection numbers in Germany increased again, ranging from 1,000 to 2,000 new recorded infections per day.¹⁰³ Many of the new cases were related to international travel activities in the summer holiday season. The question of reinstating a stricter level of common containment measures was looming. Federal Chancellor Merkel and state prime ministers resumed law and policy coordination. However, finding a

17, 2020), <https://www.bundesregierung.de/resource/blob/973812/1761548/94bdb647e1b03200d8430ee22e504ea9/2020-06-17-infektionen-data.pdf?download=1>.

98. Press Release, Die Bundesregierung [The Fed Gov’t], Besprechung des Chefs des Bundeskanzleramtes mit den Chefinnen und Chefs der Staats- und Senatskanzleien am 16. Juli 2020 [Meeting of the Head of the Federal Chancellery with the Heads of the State and Senate Chancelleries on July 16, 2020] (July 16, 2020), <https://www.bundesregierung.de/breg-de/aktuelles/besprechung-des-chefs-des-bundeskanzleramtes-mit-den-chefinnen-und-chefs-der-staats-und-senatskanzleien-am-16-juli-2020-1769380>.

99. Press Release, May 6 Telephone Conference, *supra* note 96.

100. See Interview by Dirk-Oliver Heckmann with Frank Ulrich Montgomery, Chairman, World Med. Ass’n (WMA) (Oct. 13, 2020), https://www.deutschlandfunk.de/corona-massnahmen-das-ist-kein-alarmismus.694.de.html?dram:article_id=485684.

101. See Johannes Saurer, *Administrative Law*, in INTRODUCTION TO GERMAN LAW 97, 109 (Joachim Zekoll & Gerhard Wagner eds., 3rd ed. 2019) on general orders as a specific type of administrative act.

102. See Press Release, May 6 Telephone Conference, *supra* note 96, at 3 (requiring regions that hit this outbreak threshold to institute general control measures until infection numbers fall below the threshold for seven consecutive days).

103. See ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: AUGUST 26, 2020 I (2020) [hereinafter RKI AUG. 26 DAILY REPORT] (reporting a daily increase of 1,576 cases).

consensus proved much more difficult than in the early phase of COVID-19 containment in March.¹⁰⁴ The diverging infection quantities on a state level played an increasing role in the discussion. For example, a COVID-19 situation report from late August 2020 related the overall number of recorded COVID-19 cases to overall population in each state.¹⁰⁵ It reported for the south German state of Bavaria 426.5 cases per 100,000 people and for neighboring Baden-Württemberg, 367.5 cases per 100,000 people, but reported significantly lower infection proportions for the northeastern states of Mecklenburg-Western Pomerania, with 62.0 cases per 100,000 people, and Saxony-Anhalt, with 99.6 cases per 100,000 people.¹⁰⁶ Moreover, by mid-June, the RKI launched the “Corona-Warn-App,” a voluntary digital tool for use on smart phones to improve the user’s knowledge of personal risk of infection and to potentially accelerate the time span from infection to COVID-19 testing.¹⁰⁷ The underlying digital infection information system was intended to enable the lifting of some more burdensome measures and found broad support by the public. Within the first month after the launch, the Corona-Warn-App was downloaded almost sixteen million times.¹⁰⁸

In deliberations among federal and state governments, proponents of more restrictive horizontal measures had a difficult stand. Perhaps most notably, Federal Chancellor Merkel reportedly unsuccessfully advocated to limit private gatherings to twenty-five individuals at home and fifty individuals outside the home.¹⁰⁹ Instead, proponents and critics of more uniform

104. See Manuela Kasper-Claridge, Opinion, *Germany Needs a Clear Coronavirus Protection Plan Now*, DW (Aug. 27, 2020), <https://www.dw.com/en/opinion-germany-needs-a-clear-coronavirus-protection-plan-now/a-54710077> (reflecting on diverging approaches from state to state).

105. RKI AUG. 26 DAILY REPORT, *supra* note 103, at 3.

106. *Id.*

107. See CORONA-WARN-APP OPEN-SOURCE PROJECT, <https://www.coronawarn.app/en/> (last visited Jan. 30, 2021) (explaining that the app notifies users of potential infection exposure and helps effectuate contact tracing).

108. *Positives Zwischenfazit des Robert Koch-Instituts nach einem Monat Corona-Warn-App* [Positive Interim Conclusion from the Robert Koch Institute After a Month of the Corona-Warn-App], ROBERT KOCH INST. (July 16, 2020), https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/WarnApp/Zwischenfazit.html [http://web.archive.org/web/20201018130841/https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/WarnApp/Zwischenfazit.html].

109. Florian Gathmann et al., *Deutschstunde im Kanzleramt* [German Lesson in the Chancellery], SPIEGEL (Aug. 27, 2020, 8:04 PM), <https://www.spiegel.de/politik/deutschland/coronakonferenz-der-ministerpraesidenten-mit-merkel-deutschstunde-im-kanzleramt-a-c45f139a-8a3a-4e00-9dbf-d92903e203a1>; Georg Ismar, *Das Sind die Neuen Corona-Regeln in Deutschland*

measures compromised on a more nuanced approach. The common federal and state decision of August 27, 2020 emphasizes both the national scope of the challenge and the regionally diverging infection curves.¹¹⁰ The combination of measures established at the federal and state levels of government in late August resembles a floor–ceiling model of regulation,¹¹¹ in line with the differentiation in state and regional level measures that was introduced in May.¹¹²

In this perspective, rather robust elements of the common floor (i.e., containment measures unlikely to be substantially modified on state level) were the prolonged instruments of minimum social distances (i.e., 1.5 meters), mandatory facemasks in certain public areas, such as supermarkets and in public transport, and a mandatory quarantine (with option for exemption by specified testing) for international travelers returning from “high-risk areas.”¹¹³

Regarding enforcement, the federal–state decision of August 27 introduced a nationwide minimum fine of 50 € for not wearing a face mask in designated places and public transport.¹¹⁴ The figure of 50 € marked the lower end of the range of possible fine amounts. It left ample space for higher fine ceilings at the state level, such as those adopted by Bavaria (between 250 and 500 €)¹¹⁵ and Mecklenburg-Vorpommern (between 50

[*These Are the New Corona Rules in Germany*], TAGESSPIEGEL (Aug. 27, 2020, 7:20 PM), <https://www.tagesspiegel.de/politik/gegenwind-fuer-merkel-das-sind-die-neuen-corona-regeln-in-deutschland/26135098.html>.

110. See *Tackling the Pandemic Together*, BUNDESREGIERUNG (Aug. 27, 2020), <https://www.bundesregierung.de/breg-en/news/federal-state-resolution-1780654> (announcing agreement between federal and state governments to unified coronavirus guidelines); see also Press Release, Die Bundesregierung [The Fed. Gov’t], Telefonschaltkonferenz der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder am 27. August 2020 [Telephone Conference Between the Chancellor and the Heads of Government of the Federal States on August 27, 2020] (Aug. 27, 2020), <https://www.bundesregierung.de/resource/blob/975226/1780568/2f9c77a8e8a549bcac8123fbeck4ee27/2020-08-27-beschluss-mpk-da-ta.pdf?download=1>.

111. On floor–ceiling models in regulatory theory, see William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1557–59 (2007) (explaining how the regulatory floor and ceiling dynamic creates a permissible regulatory range in which jurisdictions may then operate).

112. See *supra* Part III.B.

113. See *Tackling the Pandemic Together*, *supra* note 110.

114. *Id.*

115. Eva Lell, *Bayern verschärft Bußgelder bei Verstößen gegen Corona-Auflagen* [Bavaria is Tightening Fines for Violations of Corona Requirements], BR24 (Aug. 24, 2020, 10:37 AM), <https://www.br.de/>

and 150 €).¹¹⁶ In addition, the state of Saxony-Anhalt opted out of fines completely.¹¹⁷

For the operation of schools, the federation and states agreed upon a common floor of classroom teaching by observing hygiene concepts. However, the question of face mask requirements and minimum distances for classroom teaching was left to the states. The state of Bavaria introduced a multistep hygiene plan with relatively strict requirements that resulted in face mask requirements at the beginning of the new school year in September 2020.¹¹⁸

A rather “thin” element of the common floor was regulation of private and public events. Federal and state governments agreed on a ban on “[l]arge-scale events where contact tracing and hygiene/distancing are impossible” until the end of 2020, but did not give precise content to the rather open framed terminology.¹¹⁹ The ceiling on the number of people allowed at public and private gatherings differs across the states. In Berlin, up to 5,000 people were allowed,¹²⁰ while other states had much lower limits. The question of common rules for the return of soccer fans to stadiums of the National German Soccer League (*Fußball-Bundesliga*), a question widely discussed in public, was postponed for further deliberation.¹²¹

The adjusted focus on a common floor to states’ containment measures and substantial leeway highlights the evolutionary, open structure of

nachrichten/bayern/bayern-ministerpraesident-markus-soeder-kuendigt-hoehere-bussgelder-bei-corona-auflagen-an,S8ZFrXu.

116. Verordnung der Landesregierung zur Corona-Lockerungs-LVO MV und zur Änderung der Quarantäneverordnung [Ordinance of the State Government on the Corona-Loosening-LVO MV and to Change the Quarantine Regulation], Jul. 7, 2020, MECKLENBURGISCH GESETZ- UND VERORDNUNGSBLATT [MV GVBL] at 521, § 11, para. 2, as amended Vierte Verordnung zur Anpassung der Anlagen der Corona-Lockerungs-LVO [Fourth Regulation to Adapt the Systems of the Corona-Loosening-LVO], Sept. 22, 2020, MV GVBL 875 (Mecklenburg-Vorpommern) (Ger.).

117. Technically, the exemption of Saxony-Anhalt from (minimum) fines is subject to a “protocol reservation” attached to the common decision of August 27. *Tackling the Pandemic Together*, *supra* note 110.

118. *FAQ zum Unterrichtsbetrieb an Bayerns Schulen* [FAQ on Teaching in Bavaria’s Schools], BAYERISCHES STAATSMINISTERIUM FÜR UNTERRICHT UND KULTUS, <https://www.km.bayern.de/eltern/meldung/7047/faq-zum-unterrichtsbetrieb-an-bayerns-schulen.html> (last updated Feb. 26, 2021, 2:00 PM).

119. *Tackling the Pandemic Together*, *supra* note 110.

120. *See Measures Against the Corona Virus*, BERLIN, <https://www.berlin.de/corona/en/measures/> (Feb. 11, 2021) (permitting up to 5,000 people at open air events).

121. *See Tackling the Pandemic Together*, *supra* note 110 (noting that a working group would develop options to return spectators to national sporting events).

administrative “cooperative federalism.” Cooperation of federal and state governments has a diverse nature, as one scholar has observed in the United States context.¹²² In public discourse, the measures implemented in late August received support, but were also criticized as “sometimes fragmented federal governance” with allegedly insufficient coherence and legal certainty for citizens and enterprises.¹²³

IV. FACTORS FAVORING COOPERATIVE ADMINISTRATIVE FEDERALISM IN THE CONTEXT OF COVID-19 CONTAINMENT

What explains the key role of cooperation of federal and state governments in the context of COVID-19 containment? There is a plurality of factors favoring cooperative administrative federalism over approaches in which federal and state levels implement constitutional framework and statutory tasks more separately.

First, an important motive for cooperation of federal and state administrations is the conceptual structure of the IfSG. While the IfSG, in the overall picture, assigns competences to federal and state authorities,¹²⁴ the Sections on containment measures focus on state authorities.¹²⁵ As seen above, § 28 IfSG authorizes state administrative authorities to issue administrative acts and general orders, and state governments to issue regulations.¹²⁶ Thus, in the context of a pandemic like COVID-19, in which effective risk prevention depends on implementation measures based on § 28 IfSG, state authorities become key players. The federal government and the states have mutually strong incentives to cooperate in the determination of containment measures because containment failures of federal authorities or particular state authorities will very likely backfire on all levels of governance (first of all, by way of cross-state transmission of the disease).

122. Cf. Abbe R. Gluck, *Intrastatutory Federalism & Statutory Interpretation: State Implementation of Federal Law in Health Reform & Beyond*, 121 Yale L.J. 534, 550 (2011) (noting the diversity of approaches to implementation of cooperative federalism).

123. See Mark Hallam, *Coronavirus in Germany: How the Federal System Hampers the Fight Against the Pandemic*, DW, <https://www.dw.com/en/coronavirus-in-germany-how-the-federal-system-hampers-the-fight-against-the-pandemic/a-55241135> (Oct. 12, 2020).

124. See discussion *supra* Part I.B.

125. See *Infektionsschutzgesetz* [IfSG] [Federal Infectious Disease Control Act], July 20, 2000, BGBl I at 1045, §§ 28–32, last amended by *Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise* [Corona-Steuerhilfegesetz] [Corona Tax Aid Act], June 19, 2020, BGBl I at 1385, art. 5 (Ger.) (outlining those areas where states can issue ordinances pursuant to described conditions).

126. See discussion *supra* Part I.B (explaining the division of authority between federal and state governments pursuant to the IfSG).

Second, significant EU legislation or regulatory activity of EU authorities is largely absent in infectious disease containment.¹²⁷ Rather, EU authorities focus on coordination of activities on the Member–State level.¹²⁸ This differs significantly from areas such as financial regulation, environmental law, energy law, product safety or data protection.¹²⁹ Legal reform following the COVID-19-pandemic may well lead to a greater role of EU law in disease control and, in turn, to a smaller role of federal and state cooperation on the national level.¹³⁰

Third, in German society, the equivalence of living conditions across the sixteen federal states is highly valued.¹³¹ Research in the social sciences shows broad public support for the goal of comparable living standards across the German states.¹³² Scholars found that Germans have “positive attitudes towards all actors in the federal system working together, as opposed to competition between the Bund and the Länder.”¹³³ They conclude that the “majority of Germans reject competition among the Länder as a structural principle, while solidarity is endorsed, even among those residing in Länder that are net contributors to the federal financial equalisation system.”¹³⁴ Thus, societal acceptance of state-regulated

127. Joana Mendes, *Rescuing the European Economy from COVID-19*, REGUL. REV. (May 7, 2020), <https://www.theregreview.org/2020/05/07/mendes-rescuing-european-economy-from-covid-19/> (discussing “limited competencies” of the EU as reason for the “struggle[] to coordinate a health response” for EU Member States).

128. See generally *COVID-19 Coronavirus Pandemic: In the Spotlight*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/coronavirus/> (last visited Jan. 30, 2021) (providing a general overview on EU coordination activities for coronavirus response).

129. *Areas of EU Action*, EUR. COMM’N, https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en (last visited Jan. 30, 2021).

130. See Daniel Boffey, *EU Seeks Greater Public Health Powers After COVID ‘Wake-Up Call’*, GUARDIAN (Nov. 11, 2020, 7:34 PM), <https://www.theguardian.com/world/2020/nov/11/eu-seeks-greater-public-health-powers-in-wake-of-covid-wake-up-call>.

131. For a constitutional expression of the value of “equivalent living conditions,” see GRUNDGESETZ [GG], art. 72, § 2 (authorizing federal regulation over certain matters where necessary to promote equal living conditions and economic unity).

132. See BERTELSMANN STIFTUNG, BÜRGER UND FÖDERALISMUS: EINE UMFRAGE ZUR ROLLE DER BUNDESLÄNDER [CITIZENS AND FEDERALISM: A SURVEY ON THE ROLE OF THE FEDERAL STATES] 6–7 (2008), https://www.bertelsmann-stiftung.de/fileadmin/files/BSSt/Presse/imported/downloads/xcms_bst_dms_23798_23799_2.pdf (listing evidence from surveys showing broad public support for uniformity across the German states, including support for the financial equalization scheme, equal standards for schools, and uniform tax rates).

133. Thieß Petersen et al., *Public Attitudes Towards German Federalism: A Point of Departure for a Reform of German (Fiscal) Federalism? Differences Between Public Opinion and Political Debate*, 17 GER. POL. 559, 573 (2008).

134. *Id.* at 582.

restrictions on social life (e.g., social distancing requirements, restrictions on private and public gatherings, cultural and sports events) depends, to a significant extent, on a similar approach vis-à-vis restrictions in the other German states. Accordingly, federal and state governments that seek social acceptance for policy measures on problems that transcend individual states are inclined to seek substantial consensus and administrative cooperation.¹³⁵ This classical pattern of German federalism is also present in the challenge of COVID-19.

Fourth, there are virologic aspects of COVID-19 that favor a distinctively cooperative approach within the German federal administrative law system—at least under the empirical conditions of the time frame analyzed (March to August 2020).¹³⁶ For one, available scientific evidence documents the fast and far-reaching transmission potential of COVID-19.¹³⁷ Importantly, COVID-19's ability to be transmitted by asymptomatic carriers or those that are not yet showing symptoms contributes to its particularly rapid and expansive spread.¹³⁸ An additional cause seems to be the possibility of airborne transmissions in the form of aerosols.¹³⁹ From a federal policy perspective, these aspects suggest containment strategies beyond single states. In Germany, a densely populated country in which large parts of the population live in close proximity to a neighboring state, a noncooperative strategy would undoubtedly run the risk of failure because COVID-19 would still cross intra-federal borders quickly and easily from a neighboring state with a different, less stringent, containment strategy.

Moreover, during the time frame analyzed in this Essay, (March to August 2020), neither German nor EU authorities had approved a COVID-19 vaccine or determined a universally effective treatment for those experiencing

135. See Charlie Jeffery, *German Federalism from Cooperation to Competition*, in GERMAN FEDERALISM: PAST, PRESENT, FUTURE 172, 177 (Maiken Umbach ed., 2002) (“[German] [c]ooperative federalism has rested on a capacity and will for coordination and compromise.”).

136. In contrast, another virus may require states to handle restrictions independently to be appropriately tailored to the needs of the local population. Cf. Richard Griffith, *Using Public Health Law to Contain the Spread of COVID-19*, 29 BRIT. J. NURSING 326 (2020) (discussing administrative measures available to the British government, and providing insight into one perspective a nation could have regarding possible government action to fight COVID-19 spread).

137. Editorial, *Progress Report on the Coronavirus Pandemic*, 584 NATURE 325 (2020), <https://www.nature.com/articles/d41586-020-02414-1>.

138. See *id.* (referencing COVID-19 as an “[i]nvisible disease”).

139. See generally Dyani Lewis, *Coronavirus in the Air*, 538 NATURE 510 (2020), <https://www.nature.com/articles/d41586-020-02058-1> (discussing concern among the scientific community that COVID-19 may be transmitted through short-range aerosols; though, there is currently insufficient conclusive evidence to be certain).

severe infections.¹⁴⁰ Rather, the interruption of infection chains through social distancing and hygiene remained key. A change in both aforementioned factors—the approval and availability of one or more vaccines and universally effective treatment—could potentially alter the federal–state dynamic. As seen above, federal institutions hold key competences regarding vaccination.¹⁴¹ The Standing Committee on Vaccination at STIKO issues recommendations on how to conduct vaccinations,¹⁴² while the Federal Ministry of Health controls the regulation of any mandatory vaccination—so long as the *Bundesrat* consents.¹⁴³ Depending on a plurality of factors, such as vaccination coverage of population, vaccination effectiveness, and availability and affordability of medicines, new medicinal approaches toward COVID-19 may develop into serious alternatives to the broad deployment of containment measures. In such a scenario, the cooperation of federal and state administrations under § 28 to § 32 IfSG would decrease in importance.¹⁴⁴

V. LIMITS OF COOPERATIVE ADMINISTRATIVE FEDERALISM

The cooperative approach of federal and state administrations toward COVID-19 containment can only unfold within certain legal limits. There is a broad spectrum of relevant constitutional and statutory provisions to which the cooperating institutional actors in federal and state administrations must adhere. The constitutional framework and the statutory details of competence allocation between federal and state authorities in the GG and in the IfSG have already been set out above.¹⁴⁵

Moreover, the mechanisms of cooperation of federal and state administrations must be squared with the prerogative of the Federal Parliament in the federal legislative process. The German Federal Constitutional Court

140. Cf. Shamil Shams, *Coronavirus: Germany Expects Vaccine Approval by Mid-December*, DW (Nov. 28, 2020), <https://www.dw.com/en/coronavirus-germany-expects-vaccine-approval-by-mid-december/a-55756724> (noting that Germany does not expect an approved vaccine until mid-December).

141. See *supra* Part I.B (discussing allocation of responsibilities for vaccinations).

142. See *Infektionsschutzgesetz* [IfSG] [Federal Infectious Disease Control Act], July 20, 2000, BGBl I at 1045, § 20, para. 2, last amended by *Gesetz zur Umsetzung steuerlicher Hilfsmaßnahmen zur Bewältigung der Corona-Krise* [Corona-Steuerhilfegesetz] [Corona Tax Aid Act], June 19, 2020, BGBl I at 1385, art. 5 (Ger.).

143. See *id.* § 20, paras. 6–7 (noting that state governments may issue ordinances on vaccination only in the absence of action by the Federal Ministry of Health).

144. *Id.* § 28 (explaining that state governments, under cooperative agreements with the federal government, can issue ordinances to combat communicable diseases under the Act).

145. See discussion *supra* Part I (analyzing how the provisions of the GG and IfSG divide authority between state and federal governments in the response to a pandemic).

has captured this core guarantee of parliamentary democracy in the doctrine that “the legislature is obligated . . . to make all crucial decisions in fundamental normative areas, especially in those cases where basic rights become subject to governmental regulation.”¹⁴⁶ In the context of infectious disease containment, the Federal Parliament had already built statutory foundations in the IfSG. It quickly stabilized these foundations in March 2020 with both far reaching amendments to the IfSG¹⁴⁷ and an official declaration by the *Bundestag* in accordance with § 5 of the IfSG designating the COVID-19 crisis as an epidemic of national concern.¹⁴⁸ Later amendments in 2020¹⁴⁹ further improved the determinacy of key parts of the IfSG.¹⁵⁰

On the state level, parliaments are in a different position. The key statutory enactments of § 28 IfSG authorize state administrations directly, without a stop at state parliaments.¹⁵¹ This structured delegation of power is per se a legitimate expression of the federal legislature’s competence to legislate upon “measures to combat human and animal diseases which pose a danger to the public or are communicable”¹⁵² and its competence to delegate legislative powers under certain conditions.¹⁵³ While state administrations are empowered to issue regulations to combat COVID-19, there are good political arguments for the involvement of state parliaments. Emphasizing public parliamentary debate and formally including elected officials in the rulemaking process would broaden the interests represented, enhance transparency, and ensure that the discourse is as diverse as the populace. Baden-Württemberg

146. BVerfG, Aug. 8, 1978, 49 BVerfGE 89, 126, *translated in Kalkar Case I (1978)*, GER. L. ARCHIVE (June 14, 2013), <https://germanlawarchive.iuscomp.org/?p=67> (Donald P. Kommers trans.).

147. *See* Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite [Law to Protect the Population in an Epidemic of National Importance], Mar. 27, 2020, BGBl I at 587, art. 1–3 (Ger.) (enacting various substantive amendments to the IfSG); *see also supra* note 24 and accompanying text.

148. Stenografischer Bericht [Stenographic Reports] 154, Sitzung des Deutschen Bundestages am Mittwoch, dem 25. März 2020 [154th Session of the Federal Parliament on Wednesday, Mar. 25, 2020], Deutscher Bundestag: Drucksachen [BT] 19/19169 (Ger.).

149. *See* Law to Protect the Population in an Epidemic of National Importance, BGBl I at 587, art. 1–3; Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite [Third Statute on Protection of the Population in an Epidemic of National Scope], Nov. 18, 2020, BGBl I at 2397 (Ger.).

150. Third Statute on Protection of the Population in an Epidemic of National Scope, BGBl I at 2397; *see also supra* notes 24–28 and accompanying text.

151. *See supra* Part I.B (explaining state authority to act under the IfSG).

152. GRUNDGESETZ [GG], art. 74, § 1(19); *see also supra* note 20 and accompanying text.

153. GRUNDGESETZ [GG], art. 80, § 1; *see also supra* note 23 and accompanying text.

now requires that their parliament consent to any state regulations that are in effect for any longer than two months.¹⁵⁴

Fundamental rights impose substantive and procedural limits on COVID-19 containment measures, including those originating from institutional forms of cooperative administrative federalism.¹⁵⁵ These limitations aim to provide balance: COVID-19 restrictions on professional activities have to be measured against the guarantee of freedom of occupation;¹⁵⁶ the obligation to wear face masks in public areas and on public transportation against the general right of personality;¹⁵⁷ and the obligation to provide personal data for contact tracing at bars and restaurants against the right to informational self-determination.¹⁵⁸ Religious gatherings are strongly protected under the

154. The state of Baden-Württemberg requires the consent of their Parliament for regulations pursuant to § 32 IfSG that are implemented for two months or longer. *See* Gesetz über den Erlass infektionsschützender Maßnahmen [Statute on Enactment of Measures of Infectious Disease Control], July 23, 2020, BW GVBL 649, § 2, para. 5 (Baden-Württemberg) (Ger.).

155. *See generally* JENS KERSTEN & STEPHAN RIXEN, DER VERFASSUNGSSTAAT IN DER CORONA-KRISE [THE CONSTITUTIONAL STATE IN THE CORONA CRISIS] 45–66 (2020) (discussing the effect of COVID-19 restrictions on Constitutional rights); *see also* Oliver Lepsius, *Vom Niedergang grundrechtlicher Denkkategorien in der Corona-Pandemie* [On the Decline of Fundamental Rights Thinking Categories in the Corona Pandemic], VERFASSUNGSBLOG (Apr. 6, 2020), <https://verfassungsblog.de/vom-niedergang-grundrechtlicher-denkkategorien-in-der-corona-pandemie/>; Gertrude Lübke-Wolff, *Im Kampf gegen das Virus braucht es Abwägung* [The Fight Against the Virus Requires Balancing], FRANKFURTER ALLGEMEINE ZEITUNG (Mar. 24, 2020) <https://www.faz.net/aktuell/gesellschaft/gesundheit/coronavirus/corona-krise-im-kampf-gegen-das-virus-braucht-es-abwaegung-16692724.html>.

156. *See* GRUNDGESETZ [GG], art. 12 (including in the German Constitution a right to occupational freedom); BVerfG, Apr. 28, 2020, 1 BvR 899/20, paras. 4, 6–7, 11–13, <http://www.rechtsprechung-im-internet.de/jportal/portal/t/gqy/page/bsjrsprod.psml?doc.hl=1&doc.id=KVRE436082001&documentnumber=1&numberofresults=1&doctyp=jurisr&showdoccase=1&doc.part=K¶mfromHL=true#focuspoint> (upholding a state COVID-19 regulation against a constitutional complaint of the owner of a professional gym).

157. *See* GRUNDGESETZ [GG], art. 1, § 1, art. 2, § 1 (including in the German Constitution the right of freedom of personality and of basic human dignity); Baden-Württemberg Verwaltungsgerichtshof [BWVGH] [Higher Administrative Court of Baden-Württemberg] May 18, 2020, 1 S 1357/20, paras. 2, 36, 67 (Baden-Württemberg) (Ger.), http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&GerichtAuswahl=VGH+Baden-W%FCrttemberg&Art=en&sid=2035866545410d76c9a0beb3418acfb1&nr=31305&pos=0&anz=1 (upholding the obligation to wear face masks in the relevant state COVID-19 regulation).

158. *See* GRUNDGESETZ [GG], art. 1, § 1, art. 2, § 1; Verfassungsgerichtshof des Saarlandes [SLVerfGH] [Constitutional Court of the Saarland] Aug. 28, 2020, Lv 15/20, at 2–3, 23–27

fundamental right to freedom of faith and creed.¹⁵⁹ The fundamental rights related to communication and public discourse—the freedom of speech¹⁶⁰ and freedom of assembly¹⁶¹—require space for discussion and critique of COVID-19 containment measures in media and civil society.

Apart from exceptional circumstances, freedom of assembly regularly hinders complete prohibitions of public political protests against COVID-19 containment measures. For example, a decision by the Federal Constitutional Court sided with plaintiffs, granting them interim relief in a challenge of a prohibition on an assembly in the city of Stuttgart because administrative authorities had not given sufficient weight to the freedom of assembly.¹⁶² However, the Federal Constitutional Court denied interim relief against a prohibition of an assembly in the city of Hamburg on grounds of insufficient guarantees of adherence to social distancing standards.¹⁶³

CONCLUSION

Cooperation between federal and state administrations has been central to the German approach toward COVID-19 between March and August 2020. However, patterns of cooperative administrative federalism changed within that period. In the initial phase of COVID-19 containment—considering exponentially rising numbers of new infections and fatal cases across Germany—cooperative administrative federalism focused on a “uniform approach.”¹⁶⁴ In later phases—with lowering infection rates and the healthcare system able to cope with the challenges—the focus shifted toward differentiation at state and regional levels, and the development of a common regulatory floor of containment measures.¹⁶⁵ Recent developments occurring

(Saarland) (Ger.), <https://www.verfassungsgerichtshof-saarland.de/frames/index.html> (declaring the obligation to provide personal data for contact tracing at bars and restaurants in the relevant state COVID-19 regulation unconstitutional on grounds of a violation of the requirement of a parliamentary statute).

159. See GRUNDGESETZ [GG], art. 4, §§ 1–2; see also Burkhard J. Berkmann, *The COVID-19 Crisis and Religious Freedom*, 8 J.L., RELIGION & STATE 179, 181–99 (2020) (extended analysis and discussion with special focus on Bavarian law and on relevant church law).

160. See GRUNDGESETZ [GG], art. 5, § 1.

161. See *id.* art. 8.

162. BVerfG, Apr. 17, 2020, 1 BvQ 37/20, paras. 31–34, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200417_1bvq003720.html.

163. See BVerfG, May 1, 2020, 1 BvR 1003/20, paras. 8, 10, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rk20200501_1bvr100320.html (holding that in this specific instance, the size of the planned gathering created a public health danger that outweighed the infringement on the freedom of assembly).

164. See discussion *supra* Part III.A.

165. See discussion *supra* Part III.C.

after the timeframe examined herein, including an unprecedented increase in infection levels¹⁶⁶ and fatalities related to COVID-19,¹⁶⁷ motivated state and federal governments to return to a more uniform approach.¹⁶⁸ The cooperation of federal and state administrations as a mode of governance of COVID-19 containment is favored by a plurality of factors including the conceptual structure of the IfSG, the lack of strong EU law on the issue, positive attitudes in the population towards federal–state cooperation, and virologic specifics of COVID-19. However, significant limits for cooperative administrative federalism arise from Germany’s constitutional framework, the allocation federal competences, the constitutional prerogative of parliament, and constitutional guarantees of fundamental rights.

166. In late October, November, and December 2020, the number of new daily infections exceeded 10,000 on most of the days. *See* ROBERT KOCH INST., CORONA VIRUS DISEASE 2019 (COVID-19) DAILY SITUATION REPORT OF THE ROBERT KOCH INSTITUTE: JANUARY 2, 2021, at 4 fig. 1 (2021), https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Situationsberichte/Jan_2021/2021-01-02-en.pdf?__blob=publicationFile (showing number of COVID-19 cases in Germany electronically reported to the RKI by the date of symptoms onset or—if unknown—by date of reporting since January 3, 2020).

167. As of December 23, 2020, Germany reported 1,510,652 infection cases and 26,275 COVID-19-related deaths. In comparison, the United States reported 17,844,839 infection cases and 317,670 deaths, the United Kingdom 2,040,147 infection cases and 67,401 deaths, and France reported 2,473,354 infection cases and 60,549 deaths. *See* EUR. CTR. FOR DISEASE PREVENTION & CONTROL, COMMUNICABLE DISEASE THREATS REPORT: WEEK 52, 20-26 DECEMBER 2020, at 4 (2020), <https://www.ecdc.europa.eu/en/publications-data/communicable-disease-threats-report-20-26-december-2020-week-52>.

168. *Telephone Conference of the Federal Chancellor and the Heads of the Länder Governments on 13 December 2020: Decision*, BUNDESREGIERUNG (Dec. 14, 2020), <https://www.bundesregierung.de/resource/blob/656632/1827686/e97802de12b5ff6e60f41b73234e618b7/2020-12-14-mpk-beschluss-corona-en-data.pdf?download=1> (drawing on the preceding common decision of November 25, 2020 and extending/instituting time limited measures that include: the closure of restaurants and bars; the closure of most retail shops; the closure of schools; and limiting of private gatherings to a maximum of five people from two households). Unlike the measures taken in March/April 2020, the December 13 decision allowed church services and games of the German Soccer League (*Fußball-Bundesliga*), and other professional sport leagues, to remain open. *See id.*