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The Pandemic and Criminal Law – A Look at Theory and Practice in Germany

Abstract: This article provides an overview of the topic of the pandemic from the perspective of criminal law theory and practice in Germany. First of all, the major criminal offences of bodily injury and murder are discussed in the context of infecting a person with the Coronavirus and the (possible) consequences of having Covid-19, such as risk of death. The dilemmatic situation of triage, *i.e.*, allocating limited intensive care resources, is illustrated in relation to the same offences. Then, the more specific crimes that came to the fore in the course of the pandemic are addressed. Subsidy fraud due to the state aids intended to compensate for the financial damage in the marketplace because of pandemic-related measures, and issuance or use of incorrect health certificates for exemption from the obligation to wear a face mask fall within this scope. Finally, the administrative offences law of the German Infection Protection Act was discussed, primarily with regard to regulations that violate the principle of legal certainty.
Keywords: Infection Protection Act (IfSG), non-difference of the worth of life, pandemic, SARS-CoV–2, subsidy fraud, triage

Introduction

The SARS-CoV–2 virus, which first appeared in the People's Republic of China in winter 2019, and the resulting lung disease COVID-19, have had a firm grip on the entire world since the beginning of 2020 at the latest. The pandemic announced by

the WHO on 11th of March,[1] has radically changed almost all areas of life. Public and social interaction was rigorously restricted to reduce the spread of the virus and the economy was faced with the greatest challenges since the Second World War. While the natural sciences, especially virology, have played an important role in public discourse, legal sciences and practice are also confronted with numerous questions and problems. This also applies *pars pro toto* to criminal law. A remarkable amount of literature has been produced in this area in Germany;[2] a textbook on "pandemic criminal law" has even been published.[3] However the German criminal courts have so far only had to decide on a few specific types of conduct related to the pandemic. The focus of the sanctioning of such misconducts is anyway in the fine regulations of the Infection Protection Act (Infektionsschutzgesetz - IfSG) and thus within the law of administrative offences. The following article is intended to provide a brief overview of selected aspects of the pandemic in terms of criminal and administrative offence.

1. Criminal Law in the Pandemic

The article begins with the regulations of criminal law. As already mentioned, this has less to do with the constancy of their actual relevance in practice during the pandemic. However, the criminal law constellations are simply discussed most intensively in the subject literature, probably concerning the consequences for the victims and the criminal penalty as the most sensitive sanction.

1.1. The Offences of Bodily Injury and Murder (Totschlag)

The issue of viral infections and criminal law is not new. A broad debate had already taken place on the occasion of the rapid spread of HIV in Europe at the end of the 1980s and the beginning of the 1990s.[4] Back then, the central question was the

1 The media briefing of WHO General-Director, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (24.06.2021).

2 For example, well-known reference books have included special parts on the pandemic, cf. K. Gaede, Chapter 1, Teil 16, (in:) K. Ulsenheimer, K. Gaede (eds.), Arztstrafrecht in der Praxis, 6. Edition, 2021. *Cf.* exemplarily from further literature, Fahl, Das Strafrecht in den Zeiten von Corona, Juristische Ausbildung 2020, vol. 10, pp. 1058 *ff.*; E. Hoven, J. Hahn, Strafrechtliche Fragen im Zusammenhang mit der Covid-19-Pandemie, Juristische Arbeitsblätter 2020, vol. 7, pp. 481 *ff.* or I. Rau, Chapter 23: Straf- und Strafverfahrensrecht, (in:) H. Schmidt (ed.), COVID-19, Rechtsfragen zur Corona-Krise, 3. Edition, 2021. Eventually, a journal specialized in the related legal issues with the name of "COVID-19 und Recht" (Covid-19 and Law) has started to be published since the outbreak of the pandemic.

3 R. Esser, M. Tsambikakis (eds.), Pandemiestrafrecht, 2020.

4 Cf. in preference to all on the insights gained in the debate and more recent empirical developments, W. Frisch, Die strafrechtliche AIDS-Diskussion: Bilanz und neue empirische

punishability of the communication of HIV from someone who had been informed about his/her infection to his/her unsuspecting sexual partner. This earlier discussion concerned the individual-protective offences of bodily injury, and murder, which can be applied to the current pandemic.

The prevailing doctrine and the case law assume dangerous bodily injury according to Sec. 224 par. 1 no. 1 alt. 2 of the German Penal Code (StGB), if another person is demonstrably and intentionally infected with a not negligible disease or virus ("other harmful substances").[5] This applies at least if a course with symptoms develops. However, in its judicature on HIV infection, the Federal Court of Justice declared the symptom-free infection an element of the offence[6] which accords with the definition of health in the constitution of the WHO.[7] In view of the actual peculiarities of the HI-virus (lifelong carrier, infectiousness, and the preventability of outbreak of AIDS disease only by permanent medication) and the differences to SARS-CoV–2 (clearly time-limited carrier and infection can undergo without treatment, without any symptoms, without outbreak of COVID-19), the transfer of this jurisprudence about SARS-CoV–2 is not self-evident and is therefore controversial.[8] If this is chosen, a proof of the causality between the contact and the

Entwicklungen, (in:) J. Joerden (ed.), Festschrift für Szwarc, pp. 495 *ff*. Early from a comparative law perspective on Polish law: Szwarc (ed.), AIDS und Strafrecht, 1996.

5 Instead of all T. Fischer, Kommentar StGB, 68. Edition 2021, § 223 paragraph no. 13, § 224 paragraph no. 5.

6 BGH, NJW 1989, 781 (783).

7 https://www.who.int/governance/eb/who_constitution_en.pdf (6.07.2021), p. 1. Also see E. Turhan, Salgın Dönemlerinde Ortaya Çıkabilecek Ceza Sorumlulukları - Korona Tecrübesi, "Suç ve Ceza" 2020, vol.1, p. 200.

8 In favour of this A. Deutscher, Die „Corona-Krise" und das materielle Strafrecht, „Straf Rechts Report" 2020, vol. 4, p. 6; R. Eschelbach, Commentary to Sec. 223 *ff*. StGB, in: B. v. Heintschel-Heinegg (ed.), Beck´scher Online-Kommentar StGB, 50. Edition, 1.5.2020, § 229 paragraph no. 1, § 224 paragraph no. 44; Fahl, Das Strafrecht in den, *op. cit*., p. 1059; D. Neuhöfer, N. Kindhäuser, Commentary to Sec. 73 *ff*. IfSG, (in:) C. Eckart, M. Winkelmüller (eds.), Beck´scher Online-Kommentar Infektionsschutzrecht, 5. Edition, 1.5.2021, § 74 paragraph no. 37 f.; T. Pörner, Die Infektion mit Krankheitserregern in der strafrechtlichen Fallbearbeitung, „Juristische Schulung" 2020, vol. 6, p. 499; H. Schmidt (ed.), COVID-19, Rechtsfragen zur Corona-Krise, 3. Edition, München 2021, § 23 paragraph no. 46; F. Weisser, Strafrecht in Zeiten des Coronavirus – Konsequenzen des Verstoßes gegen Quarantänemaßnahmen bei Infektionskrankheiten, „Zeitschrift für Medizinstrafrecht" 2020, vol. 3, p. 156; B. Weißenberger, Die Corona-Pandemie und das Strafrecht, insbesondere in Verbindung mit dem (neuen) IfSG, „Höchstrichterliche Rechtsprechung im Strafrecht" 2020, vol. 4, p. 180; against this L. Cerny, J. Makepeace, Coronavirus, Strafrecht und objektive Zurechnung, „Kriminalpolitische Zeitschrift" 2020, vol. 3, pp. 148 *ff*.; J. Makepeace, Coronavirus: Körperverletzung ohne Symptome?, „Zeitschrift für das Juristische Studium" 2020, vol. 3, pp. 189 *ff*.; D. Hotz, Die Strafbarkeit des Verbreitens von Krankheitserregern am Beispiel der Corona-Krise, „Neue Zeitschrift für Strafrecht" 2020, vol. 6, pp. 321 f.; M. Tsambikakis, Chapter 8: Straf- und Bußgeldvorschriften, (in:) Kluckert (ed.), Das neue Infektionsschutzrecht, 2. Edition, 2021, § 17 paragraph no. 8.

infection must be established for assuming a completed offence. This would often be difficult in practice. A viral sequence comparison by which the infection can be tracked right up to the contact with a specific person is currently not possible, unlike in the case of HIV[9].[10] The exclusion of other sources of infection, taking into account *in dubio pro reo* (Sec. 261 of the Penal Procedure Code [StPO]), should be very rarely possible in the time of the widespread infection in the population, especially because of the dark number of symptomless cases which are left unreported. However, once this is the case, criminal liability may fail due to the objective attribution (objektive Zurechnung) to the result.[11] In addition, at least an attempt can be considered, depending on whether a (conditional) intent can be established. It is also conceivable that intention of killing may be accepted, particularly in the case of the approved infection of persons at risk (old age, previous illness *etc*.). On the other hand, in the case of not knowing about one's own infection, negligence (Secs. 222, 229 of StGB) may be considered, unless there are indications for the suspicion (contact with infected persons; being in a risk area; non-specific symptoms such as cough, fever *etc*. would be insufficient; the proof of causality is certainly problematic here, too).

In Germany, bodily injury and murder offences during the pandemic were of negligible practical relevance. To date, there have been no published decisions and no convictions are known. Only the District Court (AG) of Braunschweig sentenced a person for deliberately coughing on another person to pay compensation for considerable insomnia.[12]

1.2. The Decision in a Dilemmatic Situation: Triage

During the SARS-CoV–2 pandemic, a debate has erupted about the admissibility and bounds of allocating limited intensive care resources. Under the keyword triage (French: selection or sorting), the prioritization and posteriorization of patients in the event of insufficient lifesaving personnel, and material treatment resources, were discussed. Fortunately, unlike in Italy such dilemmatic situations involving fateful decisions have not come up in the clinical practice in Germany. Nevertheless, the debate on this topic has been very intensive as evidenced by the recently published

9 W. Frisch, Die strafrechtliche AIDS-Diskussion…, *op. cit*, pp. 495 *ff*. und J. Teumer, Neues zum Thema Aids und Strafrecht, „Medizinrecht" 2010, vol.1, pp. 11 f.

10 H. Lorenz, Corona und Strafrecht, „Neue Juristische Wochenschrift" 2020, vol. 12, p. 17.

11 On autonomous self-endangerment L. Cerny, J. Makepeace, Coronavirus, Strafrecht und objective…, *op. cit*., pp. 148 *ff*. and H. Lorenz, M.T. Oğlakcıoğlu, Commentary to Sec. 73 *ff*. IfSG, (in:) Kießling (ed.), Kommentar IfSG, 2. Edition, 2021, § 74 paragraph no. 6. For further explanations due to permitted risk ("erlaubtes Risiko") see E. Turhan, Salgın Dönemlerinde Ortaya Çıkabilecek…, *op. cit*., p. 201.

12 H. Lorenz, Annotation to AG Braunschweig decision of 29.10.2020–122 C 1262/20, Juristische Rundschau 2021, vol. 12, p. 659 ff.

comprehensive anthology "Triage in the Pandemic".[13] Triage is commonly addressed in two constellations.[14]

Ex-ante-triage is characterized by the need to decide which of several patients should receive an available life-saving treatment. In this process, doctors find themselves as guarantors[15] in a conflict of obligations towards their patients. There is a clear agreement up to this point. Moreover, there is a broad consensus on the abstract standards of resolving a conflict of obligations.[16] As an expression of the legal principle "*ultra posse nemo obligatur*" ("No one is obligated beyond his ability."), the guarantor must only do what is possible for him, in other words, fulfil one of the obligations. If there is a conflict of unequal-ranking obligations, this would be the higher-ranking obligation. Thus, failure to comply with the lower-ranking duty, for example killing by omission in the case of failure to care for a patient, is then justified. In contrast, in the case of a conflict of equal-ranking obligations, the guarantor has the freedom to choose. He may decide which one to fulfil.

If it is intended to apply these principles to the situation of triage, a number of questions inevitably arise. First of all, it must be decided what form of conflict of obligations is involved. If the concept of triage in the current discussion is understood narrowly – as it is here – and if it is seen as the (safe) decision on the life and death of patients, a conflict of equal-ranking obligations must be assumed.[17] Even if a patient would die faster without a ventilator, this cannot lead to the posteriorization

13 T. Hörnle, S. Huster, P. Poscher (eds.), Triage in der Pandemie, 2021. A brief selection of the published literature: S. Ast, *Quieta non movere*? Ärztliche Auswahlkriterien sowie der Behandlungsabbruch im Fall einer Pflichtenkollision aus strafrechtlicher Sicht, „Zeitschrift für Internationale Strafrechtsdogmatik" 2020, vol. 6, pp. 268 *ff*.; A. Engländer, T. Zimmermann, „Rettungstötungen" in der Corona-Krise? Die Covid-19-Pandemie und die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin, „Neue Juristische Wochenschrift" 2020, vol. 20, pp. 1398 *ff*.; F.J. Lindner, Die "Triage" im Lichte der Drittwirkung der Grundrechte, „Medizinrecht" 2020, vol. 9, pp. 723 *ff*.; R. Merkel, S. Augsberg, Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen, „Juristenzeitung" 2020, vol.14, pp. 704 *ff*.

14 It is also argued that "precautionary triage" is conceivable if life-saving resources are withheld for patients arriving later. See only O. Gerson, Chapter 3: Pflichtenkollision beim Lebensschutz (Triage), (in:) R. Esser, M. Tsambikakis (eds.), Pandemiestrafrecht, op. cit., § 3 paragraphs no. 6, 50 *ff*. However, such a withholding should always be punishable, since the obligations are always determined by the current, actual situation.

15 The guarantor position of the doctors towards all arriving patients could already be doubted, since the actual assumption of life-saving treatment is only possible within the framework of the available capacities. However, a guarantor position regarding all patients is supported by the fact that otherwise any guarantor position prior to selecting a patient would have to be excluded, and therefore a failure to save a patient at all would have to go unpunished *sub specie* of a non-genuine crime of omission.

16 For the prevailing opinion, the following and the counter opinions, C. Roxin, L. Greco, Strafrecht Allgemeiner Teil, vol. I, 5. Edition, 2020, § 16 paragraphs no. 115 *ff*.

17 Exemplary for this prevailing opinion, A. Engländer, T. Zimmermann, „Rettungstötungen" in der Corona-Krise?..., *op. cit.,* p. 1400.

of another patient who would survive a little longer but would also surely die without the ventilator.[18] The obligations to save from the certain death do not weigh differently and are therefore ranked equal. However, this could possibly change if the specifications about the order of treatment were laid down by law. This is currently not the case in Germany.[19] Only non-binding clinical[20] or ethical[21] recommendations exist so far and various criteria are being discussed regarding a possible regulation. Although the debate is too extensive to be presented here in detail, it can be doubted whether there is any constitutional scope at all for prioritizing and posteriorizing criteria concerning definitive decision on life[22] and death.[23] This is negated by many under the keyword of the non-difference of the worth of life (Art. 2 par. 2 sent. 1 i.c.w. Art. 1 par. 1 i.c.w. Art. 3 of the German Basic Law [GG]).[24]

Doctors in Germany are currently in a conflict of equal-ranking obligations when it comes to triage. It was therefore often assumed in the subject literature that they are allowed freely to decide which of the patients to save.[25] Indeed, this is questionable. What would be obviously incorrect to accept this for doctors who work as public officials (Sec. 11 par. 1 no. 2 StGB), *e.g.*, in university hospitals. They are directly bound by fundamental rights in decision-making.[26] The only remaining option, as some have argued,[27] would be an arbitrary decision within the frame of the aforementioned constitutional scope. In addition, even doctors who are not as public officials are not allowed to make a free selection decision. It has been rightly pointed

18 See R. Merkel, S. Augsberg, Die Tragik der Triage…, *op. cit*., pp. 706 *ff*.

19 The German Federal Constitutional Court (BVerfG) had rejected an urgent application for the issuance of regulations on triage because of the currently recognizable, non-critical condition with regard to the incidence of infection and treatment capacities, cf., BVerfG, NVwZ 2020, 1353 f.

20 Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin (DIVI), Entscheidungen über die Zuteilung von Ressourcen in der Notfallund der Intensivmedizin im Kontext der COVID-19-Pandemie, Klinisch-ethische Empfehlungen, https://www.divi.de/joomlatools-files/docman-files/publikationen/covid-19-dokumente/200325-covid-19-ethik-empfehlung-v1.pdf (22.5.2021).

21 Deutscher Ethikrat, Solidarität in der Corona-Krise, S. 3 *ff*., https://www.ethikrat.org/fileadmin/Publikationen/Ad-hoc-Empfehlungen/deutsch/ad-hoc-empfehlung-corona-krise.pdf (22.05.2021).

22 It is certainly necessary that the life of a patient can be saved at all or extended in a relevant way, *i.e*., that the so-called minimum benefit threshold is exceeded.

23 The further, utilitarian considerations of E. Hoven are therefore to be rejected, Die "Triage"-Situation als Herausforderung für die Strafrechtswissenschaft, JuristenZeitung 2020, Vol.9, pp. 449 *ff*. Rightly critical therefore R. Merkel, S. Augsberg, Die Tragik der Triage…, *op. cit*., pp. 704 *ff*.

24 Exemplarily F. J. Lindner, Die "Triage" im Lichte…, *op. cit*., p. 726.

25 Exemplarily T. Rönnau, K. Wegner, Grundwissen – Strafrecht: Triage…, *op. cit*., pp. 404 *ff*.

26 A. Engländer, Die Pflichtenkollision bei der ex-ante-Triage, (in:) T. Hörnle, S. Huster, P. Poscher (eds.), Triage in der Pandemie 2021, pp. 142 *ff*.

27 T. Walter, Lasst das Los entscheiden!, Zeit online v. 02.04.2020, https://www.zeit.de/gesellschaft/2020–04/corona-krise-aerzte-krankenhaeuser-ethik-behandlungen-medizinische-versorgung (22.05.2021).

out in the literature that the third-party effect of fundamental rights must also be respected regarding the publicly financed health care system.[28]

Hence, the only remaining question is what consequences in criminal law will result from a decision made in violation of the constitutional requirements. Example: A doctor assigns a life-saving ventilator to a patient because he is a man. The female patient who was disregarded in the decision dies. In this constellation, it might be tempting to reject the doctor's justification because of his decision on the conflict of obligations which is incompatible with the constitution (Art. 3 par. 3 var. 1 GG: "No person shall be favoured or disfavoured because of sex [...]").[29] However, the fact would be overlooked in this way that in the terms of the personal injustice doctrine[30], both the disvalue of act[31] (due to knowledge of the justifying situation) and the disvalue of result[32] (due to the only possible way to rescue at least one person) are compensated.[33] Only the disvalue of the motive of the doctor's conduct remains, which is not able to sustain the conviction for murder by omission.[34] In order to figure this in criminal law, legislation about special or general prohibition of discrimination would be required.[35]

In *ex-post* triage, all available life-saving treatment resources are already in use and one or more patients arrive who are also in need of them. A decision must then be made as to whether the *status quo* should be maintained with regard to allocation or whether a reallocation of treatment resources should take place. The evaluation of this constellation is strongly dependent on the external circumstances. As far as scarce personnel resources are involved, there will often be no difference between this and *ex-ante*-triage. If a doctor decides not to continue the monitoring and treatment of a patient by further actions in order to do so with a newly arriving patient who, from his or her point of view, is preferable to be treated, the only accusation which can be made is an omission, and the conflict of obligations takes effect as a matter of justification. During the pandemic, however, the discussion focused almost exclusively on the constellation of lack of material resources, especially ventilators.[36] Aborting an already initiated treatment in order to assign the ventilator to another person is phenomenologically a positive act ("aktives Tun"). If a patient dies as a result of this reallocation, murder (Totschlag) according to Sec. 212 par. 1 StGB could be

28 F.J. Lindner, Die "Triage" im Lichte…, *op. cit*., pp. 724 *ff*.
29 In this sense likely F.J. Lindner, Die "Triage" im Lichte…, *op. cit*., p. 728.
30 Ger.: Persönliche Unrechtslehre.
31 Ger.: Handlungsunwert.
32 Ger.: Erfolgsunwert.
33 A. Engländer, Die Pflichtenkollision bei…, *op. cit*., pp. 138, 148).
34 In the result likewise S. Ast, *Quieta non movere*? Ärztliche…, *op. cit*., p. 270.
35 If applicable, the discriminating decision may also be seen as an insult according to the Sec. 185 StGB.
36 Exemplarily I. Rau, Chapter 23: Straf- und…, *op. cit*., paragraphs no. 42 *ff*.

therefore relevant. The justification due to the conflict of obligations would then not be applicable. According to the very prevailing opinion, it can only be applied to the conflict of obligations to act but not of obligations to omit. If an obligation to act and an obligation to omit collide, only the Sec. 34 StGB (necessity as justification) can be used.[37] After that, it would be necessary to reason that the life of the newly arrived patient "substantially outweighs" that of the currently ventilated patient "upon weighing the conflicting interests" (Sec. 34 par. 1 sentence 1 StGB). Such a weighing decision of life against life is actually prohibited, as already mentioned, in view of the non-difference of the worth of life.[38] Possible grounds of excuses under Sec. 35 StGB or supra-legal necessity are also excluded.[39]

This result – the criminal liability of the doctor – however, could be doubted. It is related to the classification of the accusation as commission. The comparison with *ex-ante*-triage makes this clear. If the phenomenologically active doing could be accepted as omission in the criminal law sense, impunity – as there – would be conceivable. In fact, this problem is already known from the field of passive assisted dying. For a long time, the subject literature and subsequently the case law have classified the phenomenologically active termination of life-sustaining measures by the treating doctor as "omission by commission".[40] Criminal liability for murder (Totschlag) by omission, is then, already excluded at the level (of fulfilling the statutory elements) of the offence[41] due to the limitation of the doctor's guarantor position or obligation based on the declared or presumed will. BGH departed from this line in its judgment in the Putz-case in 2010.[42] It has turned to a naturalistic view, according to which sensual perceptibility is decisive. Pressing a button to switch off a ventilator is therefore to be examined as a positive act from the perspective of commission. According to Federal Supreme Court (BGH), this conduct, which is defined with the evaluative generic term "treatment interruption", is henceforth to be regarded as justified under certain conditions.

It is not the place here to analyse this judicature in a detailed and critical way.[43] It seems convincing to make a normative determination of the form of conduct, contrary to that naturalistic approach. The decisive factor for the assessment of the

37 C. Roxin, L. Greco, Strafrecht Allgemeiner Teil, *op. cit*., § 16 paragraph no. 117.

38 H. Rosenau, Commentary to Sec. 34 StGB, (in:) H. Satzger, W. Schluckebier, G. Widmaier (eds.), Kommentar StGB, 5. Edition, 2021, paragraph no. 20.

39 T. Rönnau, K. Wegner, Grundwissen – Strafrecht: Triage, „Juristische Schulung" 2020, vol. 5, pp. 405 f.

40 C. Roxin, An der Grenze von Begehung und Unterlassung, (in:) Bockelmann (ed.), Festschrift für Engisch, 1969, pp. 395 *ff*. und BGHSt 40, 257 (265 f.).

41 Ger.: Tatbestandsebene.

42 BGHSt 55, 191 *ff*.

43 For a comprehensive study see S. Ast, Begehung und Unterlassung – Abgrenzung und Erfolgszurechnung. Begehung und Unterlassung – Abgrenzung und Erfolgszurechnung, „Zeitschrift für die gesamte Strafrechtswissenschaft" 2012, vol. 3, pp. 612 *ff*.

conduct from the perspective of omission is that the treating doctor provides his patient with a service – in the form of ventilation – that can be attributed to him.[44] If he switches off the ventilator, he omits the further service. Applied to *ex-post*-triage, this means that when a ventilator is reallocated, the omission of (further) ventilation must be justified towards the patient who has been disconnected from the ventilator. In doing so, the doctor is in a justifying conflict of obligations. According to the approach represented here, the colliding obligations to act are to be classified as equal-ranked. The fact that the treatment in favour of a patient had already been initiated (*status quo*) does not change this. The principle of "*quieta non movere*" ("Do not move settled things.") is by no means binding.[45]

1.3. Forms of Pandemic-Related Crime: Subsidy Fraud and Incorrect Health Certificates

Other offences came into focus in practice during the pandemic. It would be beyond the scope of this article to list and describe all in detail.[46] Therefore, only two of the most relevant forms of pandemic-related criminality will be discussed here by way of example. These are subsidy fraud and the offences about incorrect health certificates.

Back in March of 2020, the first aid package for the self-employed persons, small enterprises, freelancers, and farmers who are in a difficult financial situation due to the SARS-CoV–2 pandemic was announced by the Federal Ministry of Economics, and the Federal Ministry of Finance, in agreement with all federal states.[47] This provided for a non-bureaucratic process via online application, where a liquidity shortage caused by the pandemic or the control measures (*e.g.*, store closures) had to be proven by means of appropriate documentation. This system without a high level of control was abused in many cases in order to make an unfair profit. Suspicions of subsidy fraud came to the fore.[48]

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44 S. Ast, Begehung und Unterlassung – Abgrenzung…, *op. cit.,* pp. 623 *ff.*; S. Ast, *Quieta non movere*? Ärztliche…, *op. cit.*, pp. 271 *ff.*; same conclusion also R. Merkel, S. Augsberg, Die Tragik der Triage…, *op. cit*., p. 711.

45 S. Ast, *Quieta non movere*? Ärztliche…, *op. cit*., p. 274; different view by D. Sternberg-Lieben (Corona-Pandemie, Triage und Grenzen rechtfertigender Pflichtenkollision, „Medizinrecht" 2020, vol. 8, pp. 635 f.) who classifies the conduct as a positive act. Under the premise of an omission also R. Merkel and S. Augsberg (Die Tragik der Triage…, *op. cit*., pp. 711 *ff.*) reach this conclusion.

46 A good and comprehensive overview is provided by, R. Esser, M. Tsambikakis (eds.), Pandemiestrafrecht, *op. cit., passim.*

47 The press statement of the Federal Ministry for Economic Affairs and Energy, https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200329-weg-fuer-gewaehrung-corona-bundes-soforthilfen-ist-frei.html (1.06.2021).

48 This problem was addressed in a minor interpellation by several MPs in the Bundestag. See BT-Drs. 19/27644 for the interpellation and BT-Drs. 19/28367 for the answer.

The most common variant of subsidy fraud is regulated in Sec. 264 par. 1 No. 1 StGB.[49] The legal definition of the act is to furnish incorrect or incomplete particulars regarding facts which are relevant for the granting of a subsidy and advantageous to the perpetrator or another person. The other variants of the offence are – generally formulated – the use of an object or a cash benefit contrary to the restriction of use (No. 2), withholding of the facts relevant to the subsidy (No. 3) and the use of a certificate of entitlement to a subsidy or about facts relevant to a subsidy which was obtained by furnishing incorrect or incomplete particulars (No. 4).[50]

A central question is whether the aid can be classified as a "subsidy" and whether the particular that was not truthfully furnished can be classified as "relevant to the subsidy". The term subsidy is legally defined in Sec. 264 par. 8 StGB. The Corona-Emergency-Aid is undoubtedly subject to this definition because it constitutes a non-repayable ("granted without market-related consideration") financial support from public funds.[51] This also accords with the recent decision of BGH.[52] Relevance to the subsidy is also defined by the legislation. According to Sec. 264 par. 9 StGB, these are the facts which are "designated as being relevant to a subsidy by law or by the subsidy giver on the basis of a law" (No. 1) or on which "the approval, granting, reclaiming, renewal, or continuation of a subsidy or of an advantage of subsidisation is dependent […] for reasons of law or under the subsidy contract" (No. 2).

A relevance to the subsidy on the basis of Sec. 264 par. 9 No. 1 Var. 1 StGB is ruled out because no formal or material law has been passed yet[53] which explicitly designates certain facts concerning the Corona-Emergency-Aids as relevant to subsidy.[54] These must therefore be determined as relevant to the subsidy by the

49 About the speciality of subsidy fraud in relation to fraud (§ 263 StGB) in the sense of the principle *lex specialis derogat legi generali* BGH decision of 23.04.2020 – 1 StR 559/19 (BeckRS 2020, 24146).

50 Within the regulation are also included especially serious cases (par. 2), commission as a member of a gang (par. 3), punishability due to the attempt at par. 1 No. 2 (par. 4), punishability due to the reckless act in the context of par. 1 nos. 1 to 3 (par. 5), active remorse (par. 6), measures and other legal consequences (par. 7).

51 LG Hamburg, NJW 2021, 707 (708); I. Rau, M. Sleiman, Subventionsbetrug im Zusammenhang mit Corona-Soforthilfen für Kleinstunternehmen und Soloselbstständige, Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 2020, vol. 10, p. 374; I. Rau, Chapter 23: Straf- und…, *op. cit*., paragraph no. 68 (with further references).

52 BGH decision of 4.5.2021 – 6 StR 137/21, paragraph no. 7 (BeckRS 2021, 10616).

53 On this discussion and rejection of the law quality of the federal regulation, see LG Hamburg, NJW 2021, 707 (708). On the opinion that the federal regulation of Corona-aid constitutes formal and substantive law, see M. Schmuck, C. Hecken, C. Tümmler, Zur Rechtswidrigkeit innerhalb der Strafandrohungen in den Verwaltungsbestimmungen zur "Bundesregelung Kleinbeihilfen 2020" – Stichwort "subventionserhebliche Tatsache"?, „Neue Juristische Online-Zeitschrift" 2020, vol. 23, p. 675.

54 The latest version of the regulation, https://www.ueberbrueckungshilfe-unternehmen.de/UBH/Redaktion/DE/Downloads/kleinbeihilferegelung-2020.pdf?__blob=publicationFile&v=3 (30.6.2021).

subsidy giver on the basis of a law (Sec. 264 par. 9 no. 1 var. 2 StGB) – in this case Sec. 2 par. 1 Subsidy Act (SubvG) – or of the subsidy contract (Sec. 264 par. 9 no. 2 var. 2). Thus, the concrete context of the application forms of the federal states is decisive, whereas they are very diverse. In some states the single facts were explicitly designated as relevant for the subsidy, other states referred extensively to whole passages or declared all facts to be relevant to the subsidy.[55] BGH did not see this as a constellation of an improper blanket or formulaic reference and therefore assumed that the designation of the relevant facts by the subsidy giver was explicit enough.[56] Even if this is not embraced, in some extreme cases (like fictitious transactions) the same result could be derived from Sec. 264 par. 9 no. 1 var. 1 StGB i.c.w. § 4 SubvG.

Offences about incorrect health certificates have also come to the fore during the pandemic. Some people untruthfully claimed that wearing masks is completely ineffective for containment and may even be harmful to individuals, especially children. Even some doctors propagated this myth publicly,[57] and in addition, issued medical attestations of convenience for exemption from the general mask obligation. They did this without examining whether the patient's personal state of health is endangered by mask-wearing which would be required for this under the containment regulations of the states.[58] Furthermore, there were cases of doctors offering already signed attestations online on which the user only had to input his name.[59] Some cases of this type have been uncovered and have come before the courts.[60] The issuance and the use of incorrect health certificates under Secs. 278, 279 StGB are thereby addressed.

The first question is whether the attestations for exemption from the obligation to wear a face mask are a health certificate in the sense of Secs. 277 to 279 StGB. In this context, a health certificate is understood to be a "certificate [...] about the current state of health of a person, about previous diseases and their traces, and consequences

55 BGH decision of 4.5.2021 – 6 StR 137/21, paragraphs no. 9 *ff.* (BeckRS 2021, 10616).

56 BGH decision of 4.5.2021 – 6 StR 137/21, paragraphs no. 9 *ff.* (BeckRS 2021, 10616). Partly different view on single points, NJW 2021, 707 (710); M. Schmuck, C. Hecken, C. Tümmler, Zur Rechtswidrigkeit innerhalb der…, *op. cit*., pp. 675 *ff.*; I. Rau, M. Sleiman, Subventionsbetrug im Zusammenhang mit…, *op. cit*., p. 375.

57 One example is the association "Doctors for Enlightenment", https://www.aerztefueraufklaerung.de/masken/index.php (4.06.2021).

58 *Eg.,* Sec. 1 par. no. 2 of the 12th BayIfSMV (Bavarian Regulation on Infection Protection Measures) and Sec. 1 par. 2 no. 3 of the 13th SARS-CoV–2-EindV of Saxony-Anhalt (SARS-CoV–2 Containment Regulation).

59 LG Frankfurt a. M. decision of 6.4.2021 – 5/26 Qs 2/21 (BeckRS 2021, 9575).

60 *Cf*. the report published by Report Mainz at 8.7.2020, https://www.swr.de/report/atteste-gegen-maskenpflicht-warum-aerzte-die-corona-gefahr-herunterspielen/-/id=233454/did=25301340/nid=233454/1t1kplc/index.html (8.06.2021). On the lack of credibility of a reason for not wearing a mask and on the necessity of concrete and comprehensible particulars, see VG Würzburg decision of 16.9.2020 - W 8 E 20.1301, ZD 2021, 287 paragraph no. 17.

or about health expectancy, whereby information of a factual nature, for example about treatments carried out or their results [...]."[61] According to this definition, at least the attestations issued in relation to a specific person and his health fall under the concept of a health certificate. An example would be an attestation incorrectly stating an asthma condition that makes wearing a mask endangering to health. Moreover it must be also asked whether blanket attestations that generally attribute a health endangering effect to masks for everyone constitute a health certificate. In this case, the attestation is not individually tailored to the user, which is why the judgments have been partly in favour[62] and partly against[63] the assumption of a health certificate. Nevertheless, a proper justification is hardly to be found in the rulings. The last issue addressed by courts is whether the document in the present case can be recognized as an "obvious fantasy document" or whether it can be mistaken by laypeople for a valid document on superficial examination. Behind this consideration lies the idea that the document quality – also a health certificate is a document – is excluded if it is by no means suitable for influencing the formation of convictions.[64] From this point of view, the District Court of (AG) Kempten assumed in one case that it was "immediately apparent to everyone that it was a fake and not a health certificate" based on "the appearance and especially due to the superimposing of an illegible 'approbation certificate'".[65] However, the Regional Court of (LG) Frankfurt has decided otherwise in a very similar case.[66] As the court correctly pointed out; if police officers previously sensitized to this problem recognize a forgery, this would not necessarily speak in favour of an "obvious fantasy document". The document in question was created by copying of the approbation document on the attestation, which is objectively unusual, but just not recognizable as unusual by everyone.

Furthermore, the incorrectness of the health certificate is required. This concerns undoubtedly the attestations of non-existent diseases that would exempt the patient

61 LG Frankfurt, BeckRS 2021, 9575, paragraph no. 9 (with further references from the literature). Cf. B. Gercke, Das Ausstellen unrichtiger Gesundheitszeugnisse nach §278 StGB, „Medizinrecht" 2008, vol.10, p. 592 and F. Zieschang, Die telefonische Feststellung der Arbeitsunfähigkeit und § 278 StGB, „Zeitschrift für Medizinstrafrecht" 2020, vol. 4, pp. 202 f.

62 According to LG Frankfurt also the certificates must be taken as health certificate, which are issued by a doctor blanketly without indicating the patient's name, signed, referring only to the inadvisability of carrying a mask for the "above-mentioned" person, and offered on a website. Decision of 6.4.2021 – 5/26 Qs 2/21, paragraph no. 10 (BeckRS 2021, 9575).

63 AG Kempten, decision of 7.10.2020–13 Cs 210 Js 12406/20, paragraphs no. 4 f. (BeckRS 2020, 31415).

64 T. Fischer, Kommentar StGB, *op. cit*., § 267 paragraph no. 14.

65 AG Kempten, decision of 7.10.2020–13 Cs 210 Js 12406/20, paragraph no. 5 (BeckRS 2020, 31415).

66 LG Frankfurt, decision of 6.4.2021 – 5/26 Qs 2/21, paragraph no. 11 (BeckRS 2021, 9575).

from the obligation to wear a mask.[67] But the incorrectness is also to be assumed in the case of blanket attestations of convenience issued without examination of the state of health. In this regard, the doctor accepts a general danger of wearing a mask for the health of the specific patient. In short: A doctor makes himself liable to prosecution according to Sec. 278 StGB if he issues an attestation of convenience without medical indication. Beyond that, the undifferentiated attestation about the danger of carrying a mask might already be considered as incorrect as a rule. Because after that, even wearing a mask for 30 seconds while buying a scoop of ice cream would be declared a health danger. It seems hard to conceive according to which disease picture this prognosis could correspond to a person moving all by himself. In spite of that the punishability of the person because of using this certificate is not equally obvious. According to § 279 StGB the person must have an intention to deceive. Someone who trusts the statement of a doctor and the attestation issued by him does not have this intention in principle as long as he has no knowledge of the incorrectness of the information about his state of health.[68]

2. The Administrative Offences Law of the Infection Protection Act (IfSG)

Lastly, the law on administrative offences in the IfSG will be presented which has gained considerable importance in the recent past.

2.1. General Remarks

With the outbreak of the pandemic, the IfSG emerged from its shadowy existence and became the central set of regulations governing the crisis. It has been reformed several times and serves as the legal basis for the measures taken by the states, municipalities, and authorities to fight the further spread of SARS-CoV–2. Sec. 73 *ff.* IfSG contain penal and administrative offences for effective enforcement of these measures. The former measures, regulated in Secs. 74, 75, 75a[69] IfSG, are of little significance in the pandemic.[70] On the other hand, the administrative offence in Sec. 73 (1a) IfSG is highly relevant in practice. Already by the early fall of 2020, the press

67 V. Erb, Commentary to Sec. 278 StGB, (in:) W. Joecks, K. Miebach (eds.), Münchener Kommentar zum StGB, Vol.5, 3. Edition, § 278 paragraph no. 4.

68 *Loc. cit*.

69 This was added, along with Sec. 74 par. 2 IfSG, on 1.6.2021 (BGBl. I, 1174 *ff.*) and is intended, among other things, to fight forgery in vaccination documentation. *Cf*. in detail H. Lorenz, "Fälschungen sind kein Kavaliersdelikt" – Kritische Überlegungen zu einer nebenstrafrechtlichen Reform anlässlich der Fälschung und des unrichtigen Ausstellens von Impfausweisen, Zeitschrift für Medizinstrafrecht 2021, vol. 4, p. 210 ff.

70 More about the reasons, H. Lorenz, M.T. Oğlakcıoğlu, Commentary to Sec. 73 *ff*..., *op. cit*., Vor §§ 73 paragraph no. 2, § 74 paragraph no. 5

reported that in the seven largest German cities (approx. 10.1 million inhabitants) alone, more than 35,000 administrative fine proceedings had been initiated for violations of the containment measures since the beginning of the pandemic. In addition, numerous court decisions in such proceedings have now been issued and published.[71] Two crucial aspects emerge repeatedly. They alone will be briefly discussed below in view of the scope of this article.[72]

2.2. Blanket Offences and Art. 103 par. 2 GG

From the perspective of constitutional law, the regulation technique of the IfSG, which enables the executive authorities to actualise the penal provisions and administrative offences of the IfSG using statutory instruments and enforceable legal orders, is particularly interesting. The extension and new formulation of the statutory elements of the offence may conflict with the principle of legal certainty (Art. 103 par. 2 German Basic Law [GG]), and of the division of power and the binding rules of law upon government powers (Art. 20 par. 3, Art. 80 par. 1 sent. 2 GG). Basically, the legislator can delegate the actualisation of a conduct norm to the executive bodies by creating a basis for authorization.[73] The constitutionality of this regulation technique was confirmed by the German Federal Constitutional Court (BVerfG) in a highly regarded decision on the Beef Labelling Act.[74] At the same time, the court outlined the requirements for such a delegation. Accordingly, it is unconstitutional if an authority, as the institution authorized issuing the legal act, is completely free to determine which violations are to be considered sanctionable. Penal or administrative offences will therefore have to be regarded as incompatible with Art. 103 par. 2 and Art. 20 par. 3 GG, and thus unconstitutional, if they are based – regarding the act – on legislation that does not specify the violation of the conduct norm precisely, or if the type and scope of the measure are not founded on clearly defined ground of authorization.[75] For this reason, those provisions of the IfSG that refer to general clauses of danger prevention such as Secs. 16, 28 par. 1 sent. 1 IfSG (cf. Sec. 74 in conjunction with Sec. 73 par. 1a no. 6, 24 IfSG) are constitutionally questionable.[76] The courts in Germany have also recognized this, but have decided the matter differently. They have voted

71 *Cf.* a – not complete – list of the decisions in the fine proceedings on Art. 103 par. 2 GG, H. Lorenz, M. T. Oğlakcıoğlu, Commentary to Sec. 73 *ff.*…, *op. cit*., Vor §§ 73 *ff*. paragraph no. 17.

72 On the other ubiquitous issues of administrative accessoriness, H. Lorenz, M.T. Oğlakcıoğlu, Commentary to Sec. 73 *ff.*…, *op. cit*., Vor §§ 73 *ff*. paragraphs no. 4 *ff.*

73 H. Kudlich, M.T. Oğlakcıoğlu Wirtschaftsstrafrecht, 3. Edition, 2020, paragraphs no. 49 *ff*.

74 BVerfGE 143, 38 = NJW 2016, 648.

75 M. Heuser, Das Strafrecht der Ausgangs- und Kontaktsperre in Zeiten der Pandemie, „Strafverteidiger" 2020, vol. 6, pp. 427 *ff*.

76 H. Lorenz, M. T. Oğlakcıoğlu, Keine Panik im Nebenstrafrecht – Zur Strafbarkeit wegen Verstößen gegen Sicherheitsmaßnahmen nach dem IfSG, „Kriminalpolitische Zeitschrift" 2020, vol. 2, p. 108.

partly in favour and partly against a violation of Art. 103 par. 2 GG.[77] In the course of the pandemic, however, the aforementioned general clauses were concretized by Sec. 28a IfSG to the extent that it now lists certain standard measures to combat the pandemic (e.g., mandatory masking, closure of retail stores, *etc*.). Thus, the legislator has probably now created sufficient constitutional basis for the delegation of norm realisation.

2.3. Uncertain Legal Terms and Art. 103 par. 2 GG

A second aspect concerns the use of vague legal terms in the legal ordinances and general orders to contain the pandemic. In this context, too, there may be a violation of the principle of certainty under Art. 103 par. 2 GG. On the one hand, this may be the case for the regulations with a general ban and standardized exceptions to it. In Saxony in the spring of 2020, for example, it was permitted to leave the home for "sports and exercise primarily in the environment of the residential area" despite the curfew. It is not very convincing when the Higher Administrative Court (OVG) of Bautzen stated that this area could be "assumed to be about 10 to 15 kilometres away from the residence, despite all the vagueness".[78] There is already the question, which value is supposed to be the decisive one. Is it already an (administrative) offence to walk 10 kilometres away from one's home or are 15 kilometres required? If the court is already unable to specify a standard and leaves some margin ("approximately"), how is the citizen, as the addressee of the norm, supposed to know what is prohibited to him? In addition, the rationale for these exact numerical values is missing. For example, a body of water must first be reached for practicing a water sport. In this case, seeking out the nearest opportunity for doing that type of sport itself can exceed 15 kilometres. Even the wording of the regulation shows that the exemption is only aimed at the greatest minimization of distance under the premise of the feasibility of the sport. The sport must be practiced only "primarily" without leaving the environment. According to the wording, longer distances remain possible.

On the other hand, the requirement or prohibition of infection control law, which is sanctioned by a fine, may already contain uncertain legal terms. An example of this was provided by the Containment Ordinance of Lower Saxony from spring 2020, according to which "physical contacts [...] were to be reduced to an absolute minimum". The Higher Regional Court (OLG) of Oldenburg rightly stated that this regulation violated the principle of certainty from Art. 103 par. 2 GG.[79] Accordingly, it is completely unclear what specific number of persons was still permissible. This

77 For an overview of the various decisions H. Lorenz, M. T. Oğlakcıoğlu, Commentary to Sec. 73 *ff*…., *op. cit*., Vor §§ 73 *ff*. paragraph no. 17.

78 COVuR 2020, 41 (43).

79 H. Lorenz, Annotation to OLG Oldenburg decision of 11.12.2020–2 Ss (OWi) 286/20, "COVID-19 und alle Rechtsfragen zur Corona-Krise" 2021, vol.2, pp. 119 *ff*.

follows from the fact alone that no purpose at all is apparent on the basis of which the "absolute necessity" of a contact can be objectively determined. If the focus is also on maintaining a social life, it should be pointed out that people are very different, and the minimum level of contact can vary significantly. Finally, such a ban on contact requires clear numerical guidelines, as was the case in other German states and later in Lower Saxony.

Conclusion

It has been shown that the pandemic has raised numerous questions in German criminal law. These reach from the core of criminal law and questions of bodily injury and murder offences as well as the grounds for justification to the administrative accessory in the supplementary criminal law of the IfSG. Notwithstanding the current significant slowdown of the situation, it is to be expected that some amount of criminal law literature and judicature will be published in the coming months. This is to be welcomed, because in view of the constantly evolving virus mutants, it is by no means foreseeable when the SARS-CoV–2 pandemic will be over. In addition, a new pathogen could also bring the topic back into focus in a few years. It remains to be hoped that some answers to the questions raised will have been found by then.

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