

COVID and the Era of Emergencies

What Type of Freedom is at Stake?

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Abstract: The threat of emergency measures introduced in face of COVID-19 has largely been framed in terms of individual rights. We argue that it is not the protection of the sovereign individual that is most at stake, but the relations between political subjects and the institutions that enable their robust political participation. Drawing on Hannah Arendt's analysis of the ways in which isolation and the incapacity to discern truth or reality condition totalitarianism and are exacerbated by it, we argue that the dangers for the evacuation of democratic politics are stark in our era. We consider contemporary political action in concert in Germany to illustrate this critique of COVID-19 emergency measures. Drawing on the legal concept of "appropriateness," we explicate how the German critical response to the shutdown is founded on a concern for democratic principles and institutions, and aims to achieve two crucial goals: governmental transparency and social-political solidarity.

Keywords: appropriateness [*Verhältnismäßigkeit*], coronavirus, COVID-19, emergency, freedom, Germany, isolation, republicanism, rights, solidarity

In the midst of the pandemic, peer-reviewed, scholarly material has yet to appear. Nevertheless, the main contours of the political theoretical debate are already becoming apparent. Numerous theorists and civil society organizations have expressed concern about the dangers that government measures to combat the virus pose to individual rights and democratic institutions (Amnesty 2020; Owen 2020; Eliadis 2020; Freedom House 2020). Thus, a dominant frame that has been brought to the normative debate over the political response to COVID-19 concerns the stakes of how we navigate the conflict between, on the one hand, the need to act decisively in the face of the threat that the virus poses to life (and other rights, such as health), and, on the other, the ethical and political imperative to retain appropriate deference to procedural safeguards and individual rights. Insofar as the imperative to respect the principles of liberal democracy is framed in terms of a zero sum competition between basic security (of life in this case), and individual rights and the proceduralist requirements designed to protect them, then, and as one



theorist remarks, “the apparition of Carl Schmitt . . . ghosts into view” (Owen 2020). In other words, and as has already become familiar in debates about environmental authoritarianism (Beeson 2010), the situation is presented as a choice between democracy and security.

Our concern here is not whether this frame correctly describes the situation, but with the limited purchase it provides as an analytic tool to support the realization of robust democratic politics. What it fails to account for is the critical role that relations between political subjects, specifically republican political relations oriented toward the positive freedom to act politically, play in the protection of democracy. Placing such relationships and the institutions that enable them, and not liberal rights or freedoms, at the center of the analysis is particularly important in our own era, where the need for robust collective action to protect against large scale disasters is likely to accelerate.

In making this argument, we move away from the crisis of the present, to Hannah Arendt’s reflections on mid-20th century totalitarianism. In the final pages of *Origins of Totalitarianism* (1973), Arendt transitions from her sweeping historical analysis of totalitarian politics to consider its relationship with the ways in which people live together and how they understand the world. Totalitarianism is, she suggests, both facilitated by and in turn engenders certain basic experiences in living together, or characteristic states. One is isolation, a political condition that she distinguishes from the more personal condition of loneliness, and which, she writes, is totalitarianism’s “most fertile ground” and always “its result” (Arendt 1973: 474). The second is the loss of the capacity to distinguish between “fact and fiction (i.e., the reality of experience),” and, “between true and false (i.e., the standards of thought)” (474). Those in whom these capacities have been weakened are particularly vulnerable to totalitarian rule. At the same time, insofar as one of the features of totalitarian rule is its ideological insistence that all parts of reality, past, present, and future, can be explained through the simple application of a logical formula, she explains, it decimates even those weak capacities people might retain to have real experiences and to differentiate truth from falsity.

We are not claiming that the threat of our historical moment ought to be called totalitarianism, nor do we draw an equivalence between the historical circumstances. Rather, we take the totalitarian phenomenon as a place holder for the mass transfer of power from the people to a centralized state and, as such, in the various forms it might take, the hollowing out of the conditions for democracy. Arendt’s analysis is particularly pertinent to this historical moment for three reasons. First, apart from the predicted heightened risk of other pandemics, we can anticipate that as the effects of climate change intensify, people across the world will

increasingly face grave threats to life and fundamental security (Figueres and Rivett-Carnac 2020). This means that the conditions most likely to trigger the introduction of emergency measures will become more common. Second, it is well-documented that 40 years of neo-liberalism, as a form of politics, economics, and a cultural norm, have eroded political bonds that would have formed the basis of political organization, at the same time as we have seen the decline of many traditional forms of solidarity (Brown 2015). Third, under the encouragement of populist political leaders whose currency is affect, and through the targeted efforts of corporate interests to undermine science, much of the world finds itself in a post-truth moment (McIntyre 2018).

Under such conditions, a political response to the totalitarian dangers of emergency that emphasizes the need to protect the sovereign individual from political infringement represents a failure to understand what most places democracy at risk. In the context of political responses to COVID-19, this type of response, which frames any action on the part of the government as an affront to individual freedom and thus as a violation of fundamental rights, has been most starkly evident in the USA (BBCa 2020). As distinct from this type of framing of the relationship between freedom and collective action, what is needed are educational, institutional, and social actions that will better enable individuals to form political bonds among each other and with the world in ways that inspire their participation in shaping the conditions of their collective lives. This is not to undermine the value of rights. Indeed the protection of a number of rights – the rights to non-discrimination, to association, to speech, to decent social and economic conditions, and to a free press – themselves constitute the conditions for robust egalitarian participatory democracy. Nevertheless, drawing on Jenny Nedelsky’s recasting of rights as relational (Nedelsky 2020) and Alison Weir’s recasting of freedom as connection (Weir 2103), we contend that in this context rights’ principal value lies in their enabling the relations that form the foundation for robust political participation. To explicate our case, we offer a concrete example of acting in concert in the political context of contemporary Germany.

By focusing on Germany, our aim is to consider in some detail what a republican democratic response to governmental restrictions can look like in the context of a life-threatening situation. To this end, we will home in on the crucial concept of “appropriateness [*Verhältnismäßigkeit*],” which German citizens, legal experts and health-care practitioners have invoked in order to interrogate and assess governmental restrictions, and which they have called upon in order to develop a more capacious democratic response to the crisis. As we will show, the notion of

appropriateness allows for a more encompassing understanding of both the social whole and societal health, one which focuses on the collective good and calls for clear and transparent discussions of how restrictions are determined and how they affect this good.

Advocating Political Freedom in Germany

In mid-March 2020, the German government called for massive restrictions (“Kontaktssperre”) citing the COVID-19 crisis as justification. Originally designated for just over five weeks (from March 18 until April 19), a few days before the April 19 deadline, the government extended the restrictions without offering a new date. In the first weeks of May, certain restrictions were eased, while new ones were brought in.

Throughout the process of both enacting and easing restrictions, there has been a lack of transparency concerning how decisions are made, why and how certain goals are set, and on what basis the restrictions are justified. Thus, on March 28, Chancellor Merkel announced that restrictions would be eased if new infections do not double within a 10-day period (Henning and Parkin 2020). One week later, she announced that this doubling should only occur within a 12- to 14-day period (Endt, Fried, and Ludwig 2020). When this goal was reached in mid-April, she once again offered a new number: an infection rate of less than 1 (Marcus 2020). This rate, which had already been achieved before the lockdown (Kleine 2020), was (again) achieved in April (0.7 on April 22 according to the Robert Koch Institute). No restrictions were, however, lifted at that point. Nor was it made clear why restrictions were lifted two weeks later on May 6 (when the infection rate had increased), or why certain businesses were allowed to resume, but not others.

This has led both to legal challenges and to various forms of citizen action – petitions, interviews and articles in the media, academic papers, and on-street demonstrations – all of which demand greater transparency from the government, and an open, evidence-based discussion of the restrictions and their effects on the whole of society.

At the heart of the legal challenges and the wider citizens’ movement is the (legal) notion of “appropriateness.” The claim is that it is not evident that the shutdown and the related restrictions of rights and freedoms are “appropriate” in this context (i.e., Germany) and in relation to our understanding of COVID-19, and of the negative impacts of the shutdown on other aspects of our overall well-being, that is, our political, social, psychological, economic, and physical well-being. By drawing on the notion of appropriateness, the German response to the shutdown has

three aims: (1) unpacking the legal status of the shutdown, (2) throwing light on the various questions and considerations that governments must take into account when restricting individual rights and freedoms, and (3) demanding that the government take an encompassing approach to the social whole and of societal health. The underlying claim is that a restriction can be deemed “appropriate” if and only if it has collective well-being as its goal, where well-being does not only refer to our physical health, but also to our social, psychological, political, and economic health. Accordingly, *appropriate* restrictions are ones which take into account the various factors that make up and enable a healthy democracy and are justified in light of, or in relation to, these factors.

The focus on appropriateness significantly distinguishes the German critical response to the shutdown from the demonstrations in the United States, where protesters have challenged the government’s impingement of their individual rights. In Germany, the critique has less to do with an abstract notion of individual freedom, and more to do with a concern for the well-being of the social whole and the institutions that facilitate and maintain democratic activity and social-political solidarity. In turn, the notion of appropriateness implies the very opposite of an abstract understanding of freedom and rights. What it implies is a context-sensitive and capacious approach that takes into account the various needs, interests, and conditions that make up a healthy democracy, as well as the democratic norm of needing to account for political decisions. Thus, by invoking appropriateness, the German critique of the shutdown switches the focus: away from an abstract conception of individual freedom, to an encompassing view in which individual flourishing and social flourishing are regarded as inextricably connected.

In the last days of March, Berlin lawyer Viviane Fischer started a petition requesting that the government undertake a “baseline study” to achieve “clean data” on COVID-19 (Fischer 2020). Within days, the petition had over 80,000 signatures, and private support to undertake the study it had demanded from the government. As a lawyer, Fischer argued that restrictions can only be legally imposed on the basis of data that clearly demonstrate the dangers of COVID-19, which includes understanding how widespread it had become, the extent of immunity already present, and an accurate mortality rate. Given the lack of data, and the lack of widespread scientific consensus regarding these points, Fischer contends that the government is obliged to support and publicize empirical research (“baseline study”). Anything less would be illegal, because it would fail to demonstrate how the restrictions are “appropriate.”

In order to justify the restrictions, the German government drew on Article 28 of the constitution, the “infection law.” However, as Mainz

lawyer Jessica Hamed has argued, the article is too limited to permit the kind of mass restrictions that the government has enacted (for instance, the restriction of movement across the whole country). For this reason, Hamed has taken the government to court, maintaining that it is the government's obligation to justify restrictions – that is, to explicate how and why the restrictions are appropriate – and without this justification, the government's actions are illegal (Gräser 2020).

However, despite calls for transparency and legal justification, the government has not provided them. For this reason, citizens continue to make demands. Thus, in May, a petition asking the government to illuminate how decisions regarding restrictions are made, and to justify their appropriateness in relation to the situation, was begun – and within hours achieved over 10,000 signatures (Mayer 2020). Hamed's perspective has since been repeatedly confirmed, with a recent article in the *Süddeutsche Zeitung* noting the increasing awareness of a lack of clear legal foundations for the restrictions (Janisch 2020).

In an article in the *Frankfurter Allgemeine Zeitung*, Frankfurt University Professor of Law, Uwe Volkmann, argued that the shutdown is unconstitutional. His claim is based on the constitution's central notion of human "dignity [*Würde*]," and revolves around the matter of appropriateness. As he explains, if German hospitals were overwhelmed, and doctors were required to make decisions regarding patients' lives, then human dignity would have been undermined and the government's actions would be "appropriate." German hospitals were, however, never overwhelmed (including during the period before the shutdown). Accordingly, Volkmann contends, the shutdown is "inappropriate," and thus illegal, insofar as it undermines human dignity; for example, the dignity of patients whose surgeries have been delayed on account of COVID-19 (including cancer patients), or the dignity of children whose right to education has been significantly challenged (Volkmann 2020).

In a paper published on April 5, some of the country's most respected healthcare experts argued that insofar as the shutdown affects every part of our lives—not only our physical health, but also our social, psychological, and economic health – it follows that appropriate restrictions must take account of these other facets. Their claim is that the government's response has failed to do so, and the shutdown is – on health, social, political, and economic grounds – inappropriate. For instance, they note that the government did not adequately consider the social facet of the shutdown, and go on to conclude that the shutdown will only "intensify social inequalities and other social conflicts" (Schrappe et al. 2020).

The question of appropriateness and the long-term social, political, economic, and psychological consequences of the shutdown has also

been at the heart of the demonstrations, which began in Berlin at the end of March, spread across the country by the end of April, and on August 1 drew over 20,000 demonstrators in Berlin (BBC 2020b). One of the first protests to take place in the state of Baden-Württemberg was co-organized by a farmer and a school physician, both of whom expressed their worry for children, and the long-term psychological and social consequences of the shutdown. In turn, at the protest in Stuttgart that took place on Saturday May 9 (the weekend celebrating May Day), which the city had limited to 10,000 attendees, Professor of Finance and Director of the Institute of Public Finance at Hannover University, Stefan Homburg, addressed the socio-economic consequences of the shutdown.

While some media outlets have claimed that the protests have been largely populated by right-wing extremists, both the organizers and the attendees have challenged these claims. In Berlin the organizers have openly described themselves as left-oriented (Lenz and Lehrlich 2020), and in Stuttgart, the organizer, Michael Ballweg, asked the May 9 demonstrators to express their political affiliation in the first five minutes of the event. Among the thousands present, only a handful raised their hands when he asked about right-wing political parties. The majority identified with either the center-left (SPD or Green) parties or the center-right (CDU) party (Nassar 2020). In turn, and as the *Süddeutsche Zeitung* reported while covering the May 16 protest in Munich, many protestors are elderly and express no strong political affiliation. Their concerns, according to the report, were focused on the long-term social impacts of the shutdown (Heidenreich and Henzler 2020).

In Berlin, following the May 1 demonstration at Rosa-Luxemburg-Platz in the city's "Mitte" district, the event's main organizer, Anselm Lenz, was taken by police and held in prison without grounds for nine hours. This was not his first encounter with the police, who had previously entered his home with force and harassed him along with other organizers. While in prison, Lenz's fingerprints were taken, and his body was scanned. A dramaturge, journalist, and left-leaning political theorist, Lenz describes the situation by drawing on Hannah Arendt: the unclear and arbitrary regulations of the state of exception have allowed police to act brutally, take people to prison without grounds, and harass individuals who have any political interests (Lenz and Lehrlich 2020).

Raising concerns about police corruption in Germany is not new. However, in a time of crisis, where the state has significantly restricted individual rights and freedoms, Lenz's experiences shed important light on the ways in which the shutdown laws have enabled and supported what Potsdam University historian, René Schlott, has called a "police state" (Schlott 2020). While some may regard this description as exaggerated,

on March 30, *Die Zeit* published a list of regulations enacted by the different German states, many of which are unclear and arbitrary, and allow police to take matters into their own hands (Biermann 2020). According to Berlin lawyer Niko Härting, there is no constitutional basis for the various restrictions, or for their differences. For instance, it is not at all clear why someone is permitted to visit their “partner” with whom they do not cohabit, but not their best friend, or, why (as is the case in Frankfurt) it is permitted to “sunbathe,” but not picnic (Ziegler 2020). This lack of clarity, coupled with arbitrariness, appears to justify Lenz’s and Schlott’s descriptions of police activity. For Härting, the arbitrary nature of the restrictions implies a lack of appropriateness. They are inappropriate in at least two senses. First, they fail to demonstrate how they align with the goal of decreasing the spread of COVID-19, such that it is not at all self-evident how they can contribute to collective well-being. Second, precisely because the government did not clarify and explicate the restrictions, it made room for arbitrary police activity – that is, it has enabled an institution that undermines democratic well-being. Ultimately, the point is that enforcing restrictions cannot be taken lightly; only those restrictions that are founded on an encompassing conception of the social whole and a capacious understanding of its well-being are justifiable. In turn, it is the government’s obligation to demonstrate how they are justified. Lacking these two factors, restrictions are inappropriate.

By invoking the notion of appropriateness, the critique of the shutdown in Germany offers important insights into what a republican democratic challenge to a state of emergency can look like. As we have seen, the German pushback is fundamentally motivated by a concern for democratic principles and institutions, and has two key aims: governmental transparency and social-political solidarity, that is, the collective good. Furthermore, it has not been driven by right-wing political activists who have single-mindedly focused on individual rights, as in the United States, but is largely divorced from political party affiliations. Finally, and perhaps most significantly, in Germany the pushback is not *against the state per se*, and the critics are not lone individuals standing over and against the state. Rather, the critics are, on the one hand, challenging the government on behalf of the institutions that enable and support democratic rights and, on the other, criticizing the undemocratic institutions and actions that the shutdown has enabled. In turn, in the place of lone individuals, what we find is a convergence between expert opinion and a larger citizens’ movement. In a word, in a moment where the checks-and-balances system has been suspended, citizens have come to regard themselves as playing precisely that role: as a check to the state’s ongoing and (arguably unjustified) state of exception.

The Future of Emergencies

For democratic theorists, the case for strengthening the rights and institutions that enable robust participation is perennial. This case takes on a unique salience, however, in the contemporary moment, where the robust political connections and citizens' capacities to differentiate fact and fiction, truth and lie have been weakened and where emergencies might become the norm. Under such conditions, the self-constraints that may be required to ensure collective security can only be achieved through heavy-handed policing, through providing individuals with a calculus where they can see the benefit to themselves, or, as Arendt reminded us, by enrolling them in an ideology, be that the ideology of national belonging, economic progress, or the indubitable rightness of the state nominated experts. As Franco Berardi writes, “[w]hen friendship dissolves, when solidarity is banned and individuals stay alone and face the darkness of matter in isolation, then reality turns back into chaos and the coherence of the social environment is reduced to the enforcement of obsessional acts of identification” (Berardi 2020: 25).

By contrast, political communities that have strong republican orientations and that are supported by institutions that enable robust participation will both be in a better position to participate in decisions about how they ought to live in situations of grave threat and be more likely to freely act toward common goods. To grasp this shift, however, requires a complex understanding of the relationship between individuals, freedom, and the public institutions that enable or constrain different forms of relationship and action. To start with, as feminist theorists like Jenny Nedelsky (2020) and Alison Weir (2013) have argued, the idea of freedom needs to be unhinged from a liberal discourse in which the options are limited to the fantasy of the unencumbered individual or the restraining state. As Weir contends, where we appreciate “the relationships that hold us together constitute not just shackles but sources of freedom” (2013: 5), it becomes possible to look to forms of solidarity – from our affective relationships through to our shared political projects – as the resources for achieving what is most important to us, and what will most support our flourishing as we come to understand that together. At the same time, it would be a mistake to think of this relational work of freedom or of building worlds that most facilitate the realization of fundamental values as disconnected, or in need of protection, from the state. Indeed, building on the relational conception of selves and rights, Nedelsky argues that we ought to look to the law and to rights as instruments that contribute to the normative work of structuring relationships in ways that promote core values, like autonomy or health or safety (2020). In this sense, where

there is an infrastructure and history of experience of cooperative decision making and relational freedom, trust in institutions is likely to be stronger and they will be better able to tailor responses to the local circumstances of those who have been involved in making them and whose relationships will be structured by them.

We are not arguing that the forms of citizen action that we have seen in Germany are a full realization of this ideal. Nevertheless, insofar as they are based on a capacious understanding of society and social well-being, in which broad social solidarity serves as the foundation for political action, they gesture toward forms of democratic resistance that affirm, rather than deny, the critical importance of collective action, including action taken by the state. In their demands for governmental transparency, in their emphasis on the collective good, and in their critique of undemocratic institutions – all encompassed in the notion of appropriateness – they evidence a response that aims to maintain and enable democratic institutions (including governmental institutions), rather than disarm or disable them. As such, the German critical response offers important insights not only into the ideal of republican citizenship, but also into how this republican form of citizenship has been carried out in the world.

People around the world have not simply been shocked by the gravity of the effects that COVID-19 has brought, but also by the rapidity with which they came. It is unlikely that future emergencies, particularly those associated with climate-related events, will come with ample warning and time to prepare. In this regard, and as community resilience programs beginning to gain ground around the world illustrate (Wilson 2012), it is likely to be those political communities that are well practiced in the arts of solidaristic collective action, and that have acquired both republican sensibilities and the affective attachments of the value of robust and productive political relationships, that will be best equipped to offer more-than-totalitarian responses to disasters when they arrive. The moment to undertake the work of building political community and overcoming isolation is before emergency situations arise. If we wait, it will be too late.

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