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GERMANY

I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

1/ Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures? Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

Within the German legal order, a detailed system of constitutional norms addressing situations of “exceptionality” – in the sense of “emergency” – and “urgency” can be identified which is denoted as the *Notstandsverfassungsrecht* or *Notstandsverfassung* (“Emergency Constitution”). The *Notstandsverfassung* is a creation of the “German Emergency Acts” (*Notstandsgesetzgebung*) passed on 30th of May 1968 as the 17th constitutional amendment to the Basic Law (*Grundgesetz*, “GG”).¹ These structured and meticulous regulations on different “state(s) of emergency” are designed as a deliberate counter-framework to Art. 48 of the Constitution of the Weimar Republic (henceforth “CWR”) and Germany’s experience with authoritarian rule and dictatorship.² In that

¹ Ulrich Scheuner, in: Carl Otto Lenz, *Notstandsverfassung des Grundgesetzes – Kommentar*, 1971, p. 11 (13). The enactment of these amendment was motivated by the ultimate goal of the German authorities to attain full sovereignty which required the resolution of the “reserved rights” of the Allies. Art. 5 para. 2 of the Convention on the Relations between the Three Powers and the Federal Republic of Germany of 1955 (BGBl. II/305) provided that the Three powers would retain their rights regarding the security of their armed forces stationed in Germany as long as the German government did not obtain similar rights, Rainer Grote, *Regulating the State of Emergency – The German Example*, 33 *Israel Yearbook on Human Rights* 2003, p. 153 (154). See generally *Recent Emergency Legislation in West Germany*, 82 *Harvard Law Review* 1969, p. 1704 (1707). Art. 5 para. 2 1st sent: “The rights of the Three Powers, heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained, shall lapse when the appropriate German authorities have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the ability to deal with a serious disturbance of public security and order.” Decisive draft for emergency constitution BT-Drucksache V/1879. The adoption of the “emergency constitution” was accompanied and provoked an intense public debate, see Rainer Grote (see above), p. 156.

² *András Jakab*, *German Constitutional Law and Doctrine on State of Emergency – Paradigms and Dilemmas of a Traditional (Continental) Discourse*, 7 *German Law Journal* 2005, p. 453 (455). The two crucial paragraphs of Art. 48 CWR provided as follows: “1. If a state [*Land*] does not fulfil the duties imposed on it by the Constitution of the Reich or by a law of the Reich, the President can ensure that these duties are performed with the help of armed force. 2. If the public safety and order of the German Reich is seriously disturbed or endangered, the President may take the measures necessary for the restoration of public safety and order, and may intervene if necessary with the help of armed force. To this end he may temporarily revoke in whole or in part the

regard, the Weimar Constitution operates as a negative blueprint for the German constitutional model of “containing” emergencies³ and serves as a guideline for the interpretation and application of the provisions it is comprised of. The main objective of the German *Notstandsverfassung* is to prevent an abusive exercise not only of special emergency powers but also procedures. Democratic legitimacy and the rule of law shall be preserved even and particularly in “extraordinary” times.⁴ It is the most elaborate set of rules governing emergencies in the EU context resembling a “constitution within the constitution” and displaying a high level of sophistication. Exactly this complexity and “technicality” has provoked considerable critique and its feasibility as well as “problem-solving” potential has been doubted: The *Notstandsverfassung* – as some voices claim – would be too complex and narrow in scope rendering its effective application in times of crisis nearly impossible.⁵

Whilst this *Questionnaire* focuses on special legislative procedures designed for exceptional and/or urgent circumstances (these can be identified within the *Notstandsverfassung* in cases in which a particular kind of “external emergency” – the so-called “state of defence” – manifests), it appears sensible in light of the overall objective of this project to sketch the contours of the German “Emergency Constitution” concerning both “external” and “internal emergencies” more comprehensively. This is due to several reasons: First of all, a closer analysis will generate important insights as to the specific rationalities of processing and reacting to “exceptional” and/or “urgent” circumstances with “constitutional” means which might serve as inspiration for a corresponding EU framework. Secondly, the special legislative procedures established in the GG for a “state of defence” can only be understood in all their dimensions when situated within the grander context of the *Notstandsverfassung*. Thirdly, whilst the German framework does not entail a special legislative procedure for cases of “internal emergencies” (e.g. natural catastrophes) and not even for all cases of “external emergencies” an examination of all emergency notions that the Basic Law operates with

fundamental rights contained in Articles 114 [inviolability of personal liberty], 115 [inviolability of the home], 117 [privacy of mail, telegraph, and telephone], 118 [freedom of opinion and press], 123 [freedom of assembly], 124 [freedom of association], and 153 [inviolability of private property].” [Translation taken from *David Dyzenhaus, States of Emergency*, in: Michel Rosenfeld/András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 2012, p. 442 (448). Art. 48 CWR is an essentially “deformalized” norm effectively freeing the state of emergencies of constitutional or legal restraints, see *Gerhard Anschütz, Die Verfassung des Deutschen Reichs vom 11. August 1919 – ein Kommentar für Wissenschaft und Praxis*, 14th ed. 1960, Art. 48, para. 7. Paragraph 48 of the CWR set a very low bar for the proclamation of a state of emergency and conveyed nearly absolute powers on the President of the Weimar Republic especially with regard to the abolishment of basic rights and the use the armed forces. Within the inter-war period Article 48 was invoked more than 250 times.

³ On the preceding debates see *Hans-Herbert Gather, Das Notstandsrecht der Weimarer Reichsverfassung und nach dem Bonner Grundgesetz*, 1963, p. 117 et seq.

⁴ *Ulrich Scheuner* (fn. 1), p. 18; *Rainer Grote* (fn. 1), p. 154.

⁵ *Konrad Hesse, Das neue Notstandsrecht der Bundesrepublik Deutschland*, 1968, p. 18. See critically from the contemporary perspective *Harald Erkens, Die Krisenmechanismen des Grundgesetzes im Wandel der Bedrohungslagen. Was ist und wozu taugt die Notstandsverfassung?*, 10 *Zeitschrift für Außen- und Sicherheitspolitik* 2017, p. 1 et seq.

(and also of the constitutional “reactive mechanism” that the German constitution attaches to them) promises to be helpful for tailoring a concept of “exceptionality” that might trigger a possible special legislative mechanism on the EU level.

Furthermore, the scope of this contribution will – with view to this research project’s objective – go beyond the *Notstandsverfassung*:

First of all, it will also focus on a distinctive law-making procedure designed for “legislative emergencies” (which are very different from those addressed by the *Notstandsverfassung*). Still the respective procedure shares the rationality of “exceptionality” and “urgency” which merits its analysis within this *Questionnaire*.

Secondly, the “ordinary legislative procedure” for the adoption of statutes on the federal level does entail special procedural options that become available in exceptional and urgent circumstances. Obviously, their depiction will also be included into the scope of this contribution, although they generate only minor modifications to the “ordinary legislative procedure”.

1/1 Overview: Relevant Provisions

Following provisions forming part the *Notstandsverfassung* are significant in light of the purposes of this *Questionnaire*:

- **Arts. 35 paras. 2, 3, 91 paras. 1, 2, 87a paras. 3, 4 GG:** allowing the Federal Border Police and the Armed Forces to exercise authority in the domestic sphere in case of internal emergencies
- **Arts. 53a, 115e GG:** establishment and activation of the “Joint Committee”
- **Art. 80a GG:** *ex ante* and peace-time legislation for *inter alia* a “state of tension” or “state of defence”
- **Arts. 115a, 115l, 80a GG:** determination and implications of a “state of tension” or “state of defence”
- **Arts. 115c para. 1 GG:** extension of concurrent legislative powers of the Federation
- **Arts. 115c para. 3 GG:** regulation of administration and finances of the Federation and the States (henceforth: *Länder*) in times of external emergency
- **Art. 115d GG:** legislative procedure for urgent bills of law during a “state of defence”
- **Art. 115e GG:** “Joint Committee” takes over legislative functions within a “state of defence”
- **Art. 115f para. 1 No. 2 GG:** extension of powers of instruction of the Federal Government towards *Land* governments and authorities⁶

⁶ Beyond that following provisions form part of the “emergency constitution”:

- **Art. 12a GG:** limitation of the freedom of occupation
- **Arts. 9 para. 3, 20 para. 4 GG:** special protection of associations which safeguard and improve working and economic conditions (in the sense of unions) in certain emergency situations and the right of resistance)

The constellation of a “legislative emergency” which entails a modification of the ordinary law-making procedure is addressed by **Art. 81 GG**.

The “accelerated ordinary legislative procedure” is to be found in **Art. 76 para. 2 4th sent.** and **para. 3 4th sent. GG**.

1/2 The Fundamentals: “Exceptionality”, “Internal” and “External Emergencies” and the Special Case of “Legislative Emergencies”

The following paragraphs shall briefly sketch the notion of “exceptionality” as well as the conceptual core of “internal”, “external” as well as the special case of “legislative emergencies” as addressed by the Basic Law and depict some of their effects on the “ordinary” constitutional order.

The concept of “exceptionality” can be identified within the Basic Law and is addressed by various of its norms.⁷ Amongst these are Art. 76 para. 2 4th sent., para. 3 4th sent. GG. Exceptional circumstances deviate from the “ordinary” hence challenging rules whose regulative objective focuses of the state of normalcy.

Whilst the *Notstandsverfassung* employs the conceptual scheme of “emergency”,⁸ it is fair to say that the notion of “exceptionality” underlies and permeates it. The same is true for Art. 81 GG. “Emergencies” represent emanations of “exceptionality” *par excellence* exceptionality being the broader category. This is supported by Art. 104b para. 1 2nd sent. GG which speaks of “exceptional emergency situations”.

Scholarship defines a state of emergency as a “situation threatening the existence of the state, its security and its legal order in a way that cannot be handled by ordinary means sufficiently”⁹ or as “a situation that produces a grave disturbance of the political system or order, threatening its survival”.¹⁰ The emergency concept of the Basic Law goes, however, beyond a situation which threatens the existence of the state encompassing also (“solely”) major disturbances to public security and order.¹¹

⁷ The term “exceptional” is to be found in following provisions of the Basic Law: Art. 84 para. 1 5th sent. [*Länder* administration – Federal oversight]; Art. 104b para. 1 2nd sent. [Financial assistance for investments]; Art. 109 para. 3 3rd sent. [[Budget management in the Federation and the *Länder*]; Art. 76 para. 2 4th sent., para. 3 4th sent. GG [Bills].

⁸ The term “emergency” is to be found in following provisions: Art. 135a para. 1 No. 3 [Old debts]; Art. 143d para. 5th sent. [Transitional provisions relating to consolidation assistance]; Art. 81 [legislative emergency]; Art. 104b para. 1 2nd sent. GG [Financial assistance for investments]; Art. 109 para. 3 2nd sent. [Budget management in the Federation and the *Länder*]; Art. 109a [Budgetary emergencies]; Art. 115 para. 2 5th sent [Limits of borrowing].

⁹ [Translation by the author]: „Mit dem Ausnahmezustand ist eine Lage bezeichnet, in der so Schwere Gefahren für den Bestand eines Staates, seiner Sicherheit und (Rechts-)Ordnung bestehen, dass deren Bewältigung mit den im Normalfall zu Gebote stehenden Mitteln als nicht mehr möglich erscheint.“, *Eckart Klein*, Innerer Staatsnotstand in: Josef Isensee/ Paul Kirchhof (eds.), 7 Handbuch des Staatsrechts, 2014, p. 935, 936. Furthermore *Klaus Stern*, 2 Das Staatsrecht der Bundesrepublik Deutschland, 1980, p. 1457.

¹⁰ *John Ferejohn/Pasquale Pasquino*, The Law of Exception: A Typology of Emergency Powers, 2 International Journal for Constitutional Law 2004, p. 210 (231).

¹¹ *Eckart Klein* (fn. 9), p. 938 para. 8.

In particular, the *Notstandsverfassung* addresses different kinds of emergencies thereby simultaneously establishing distinctive legal “emergency sub-concepts” in various provisions. Once triggered, these provisions render significant normative consequences which in varying degrees allow to depart from the ordinary constitutional order. These rules can be broadly categorized into two threads: provisions dealing with “external emergencies” (mainly Arts. 115a-115l, Art. 80a GG) as well as provisions dealing with “internal emergencies” (mainly Arts. 91,¹² 35 paras. 2, 3,¹³ 87a para. 4 GG¹⁴). Schematically speaking “internal emergencies” are endogenous in origin, whilst “external emergencies” are induced by exogenous factors.¹⁵

Provisions of the GG entail three types of “internal emergencies”: a state of danger created by a natural disaster or a particularly serious accident (Art. 35 para. 2, 3 GG), the emergency caused by a threat to public safety or order (Art. 35 para. 2 GG) as well as the emergency resulting from an imminent danger to the existence or to the free democratic

¹² Art. 91: “(1) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, a *Land* may call upon police forces of other *Länder*, or upon personnel and facilities of other administrative authorities and of the Federal Border Police. (2) If the *Land* where such danger is imminent is not itself willing or able to combat the danger, the Federal Government may place the police in that *Land* and the police forces of other *Länder* under its own orders and deploy units of the Federal Border Police. Any such order shall be rescinded once the danger is removed, or at any time on the demand of the *Bundesrat*. If the danger extends beyond the territory of a single *Land*, the Federal Government, insofar as is necessary to combat such danger, may issue instructions to the *Land* governments; the first and second sentences of this paragraph shall not be affected by this provision.” [Translations of provisions of the Basic Law are taken from the translation by *Christian Tomuschat/David P. Currie* in cooperation with the Language Service of the German *Bundestag*, see https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0061.

¹³ Article 35 [Legal and administrative assistance and assistance during disasters] (1) [...] (2) In order to maintain or restore public security or order, a *Land* in particularly serious cases may call upon personnel and facilities of the Federal Border Police to assist its police when without such assistance the police could not fulfil their responsibilities, or could do so only with great difficulty. In order to respond to a grave accident or a natural disaster, a *Land* may call for the assistance of police forces of other *Länder* or of personnel and facilities of other administrative authorities, of the Armed Forces, or of the Federal Border Police. (3) If the natural disaster or accident endangers the territory of more than one *Land*, the Federal Government, insofar as is necessary to combat the danger, may instruct the *Land* governments to place police forces at the disposal of other *Länder*, and may deploy units of the Federal Border Police or the Armed Forces to support the police. Measures taken by the Federal Government pursuant to the first sentence of this paragraph shall be rescinded at any time at the demand of the *Bundesrat*, and in any event as soon as the danger is removed.

¹⁴ Art. 87a (1) – (3) [...] (4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organised armed insurgents. Any such employment of the Armed Forces shall be discontinued if the *Bundestag* or the *Bundesrat* so demands.

¹⁵ See also *John Ferejohn/Pasquale Pasquino* (fn. 10), p. 231.

basic order¹⁶ of the Federation or a *Land* (Art. 91 GG).¹⁷ These categories of “internal emergencies” do overlap and display a tendency to blur. Furthermore, they denote different levels of gravity and endangerment.

The modifications of the “normal” constitutional order in cases of internal emergencies concern solely administrative and police powers and their distribution between the Federation and the *Länder* allowing for a centralization of powers on the federal level [see further details below in Section 3/2]. The GG does not provide special law-making procedures for cases of internal emergencies.

With regard to “external emergencies” the Basic Law operates with different legal notions: most importantly these are the “state of tension” (*Spannungsfall*) (Art. 12a para. 5, 80a GG) – and a “state of defence” (*Verteidigungsfall*) (Art. 115a-115l GG).¹⁸

A “state of defence” is given if an ongoing or imminently threatening attack against the federal territory can be asserted by the competent bodies (see Art. 115a para. 1 GG). The “state of defence” renders considerable normative consequences when determined, proclaimed and promulgated in accordance with specific procedural requirements. These implications touch upon the democracy principle, the principle of federalism as well as the rule of law as the fundamentals of the constitutional order of the GG. More specifically, they include the extension of the concurrent legislative powers of the Federal Government, the extension of powers of instruction of the Federal Government towards authorities and governments of the *Länder*, the regulation of administrative and financial matters of the Federation and the *Länder* as well as – which is particularly significant in light of the objective of this *Questionnaire* – an accelerated legislative procedure for “urgent” bills of law.¹⁹

In contrast, the circumstances that form the basis of a “state of tension” are not defined in the German constitution explicitly. However, the (still) prevalent view²⁰ understands the “state of tension” as a pre-stage of the “state of defence”. This reading seems to be supported by a literal interpretation of the term “tension” as well as the systematics of

¹⁶ The “free democratic basic order” is to be defined as “an order governed by the rule of law and based on the self-determination of the people according to the will of the respective majority and on liberty and equality, excluding any rule of force and arbitrary rule”, see BVerfGE 2, 1 (12 et seq.) as translated by *Rainer Grote* (fn. 1), p. 158.

¹⁷ *Eckart Klein*, The States of Emergency according to the Basic Law of the Federal Republic of Germany, in: *Bernhardt/Beyerlein* (eds.), *Reports on German Public Law*, 1990, p. 63 (63); *Id.* (fn. 9), p. 938, para. 8.

¹⁸ Furthermore a “state of approval” as well as a “state of alliance” can be identified [see *Harald Erkens* (fn. 5), p. 14 et seq.] which shall be elaborated in more detail later on, see 2/3/2.

¹⁹ The Basic Law allows the restriction of basic rights in external emergencies [see Art. 115c para. 2 GG (modification of right to property/extension of time limit for being deprived of liberty without judicial decision and Art. 12a para. 2 to 6 GG (freedom of occupation)] and internal emergencies only to a very limited extent [Art. 11 para. 2 GG (further restrictions with regard to freedom of movement)].

²⁰ Still it has to be stressed, that debates as to whether the concept of the “state of tension” should in light of contemporary security dangers and constitutional dynamics be emancipated from its interstate focus persist in scholarship and jurisprudence [see also 5/2].

Art. 80a para. 1 GG. This provision allows statutes tailored for the “state of defence” to be applied also in cases of the “state of tension” if certain conditions are met²¹ which signifies the kinship of these “emergencies”. The external dimension of the “state of tension” is furthermore reflected by Art. 80a para. 3 GG. Assuming that the “state of tension” precedes a “state of defence”²² denoting a different level of escalation it follows logically that the latter has to define the conceptual core of the former. Consequently, the “state of tension” is – on the factual level – characterized by an enhanced potential of external conflict: It refers to a situation in which an armed attack against the federal territory appears probable²³ and self-protective and -preserving measures – in the sense of Art. 87a GG – on part of the Federation potentially necessary.²⁴ The existence of a “state of tension” in the legal sense does, however, beyond this factual dimension require its specific determination by the competent bodies (but in contrast to the “state of defence” not its formal promulgation). The determination of a “state of tension” is the gateway towards activating statutes that have been adopted for this situation following the rationale of Art. 80a GG.

Art. 81 GG presents a special case of “emergency” outside the *Notstandsverfassung*. It addresses a constellation in which the Federal Parliament (*Bundestag*) and the Federal Government block each other. It is designed for a situation of a governmental crisis in which the Chancellor and its government have lost parliamentary support.²⁵ The “emergency” dealt with here is – if it materializes – intrinsic to the system of government and the interdependencies between the legislature and executive as established by the GG. It presents a kind of “disruption of the constitution” and a “constitutional gridlock” in the widest sense in which “upheaval stems from the internal sphere”.²⁶ Hence it is distinct from the “emergencies” dealt with by the *Notstandsverfassung* and is therefore also denoted as “legislative emergency improper” (*unechter Gesetzgebungsnotstand*).²⁷ Still it is relevant in light of the objective of this research project: Its normative consequences entail a modification of the legislative procedure, which merits its closer examination.

²¹ Critically *Otto Depenheuer*, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 10.

²² *Roman Schmidt-Radefeldt*, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 80a, para. 2. For the contrary view *Otto Depenheuer*, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 13 et seq.

²³ *Roman Schmidt-Radefeldt*, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 80a, para. 2.

²⁴ *Otto Depenheuer*, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 17. See also *Knut Ipsen*, States of Emergency, in: Christian Stark (ed.), Rights, Institutions and Impact of International Law according to the German Basic Law, 1987, p. 134 (144).

²⁵ *Roman Herzog*, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 81, para. 1.

²⁶ *András Jakab* (fn. 2), p. 454, fn. 3; *Johannes Heckel*, Diktatur, Notverordnungsrecht, Staatsnotstand, 22 Archiv des Völkerrechts 1932, p. 257 (310).

²⁷ *Friedrich August v. d. Heydte*, in: Festschrift für Laforet, 1952, p. 62 et seq.

1/3 “Exceptional Law-Making Procedures” and “Law-Making for the Exceptional”

Art. 76 para. 2 4th sent., para. 3 4th GG allow to deviate in exceptional circumstances from certain time restrictions that would normally apply in the initial phase of the “ordinary legislative procedure”. Their modifying effect is rather limited and it would be an exaggeration to assume that they generated a distinct law-making procedure in kind. Nevertheless, they can be qualified as (minor) instances of “exceptional law-making procedures”.

The most significant “exceptional law-making procedures” are addressed by Arts. 115d, 115e and 81 GG.

Within a “state of defence” two special law-making procedures are potentially available: Art. 115d GG installs an accelerated procedure for urgent bills. It deviates from the provisions of the common law-making procedure regarding the initiative for and enactment of statutes – namely the provisions of Art. 76 para. 2, Art. 77 para 1 2nd sent., paras. 2-4, Art. 78 and Art. 82 GG. In this case the ordinary legislative bodies – *Bundestag* and the Federal Council (*Bundesrat* – legislative chamber representing the *Länder*) remain the focal point of legislative powers, whilst the law-making procedure is modified considerably. Art. 115e GG goes beyond that and entails a fundamental organizational reconfiguration (and hence necessarily also procedural modification) by empowering the so-called “Joint Committee” – essentially an emergency constitutional organ – to take over the powers of the *Bundestag* and *Bundesrat* in a “state of defence” under certain conditions.

Art. 81 GG provides a special law-making procedure for the constellation of “legislative emergencies”.²⁸

Art. 80a GG does not establish a special law-making procedure. It merely addresses the enactment of statutes in “ordinary” times which address situations of emergency and can be activated when these circumstances manifest: Their effectiveness is suspended and conditioned by the determination of a “state of tension”, a declaration of a “state of defence”, upon a special approval by the *Bundestag* or on the basis of a decision of an international body with the approval of the Federal Government. Whilst Art. 80a GG

²⁸ Article 81[Legislative emergency] (1) If, in the circumstances described in Article 68, the *Bundestag* is not dissolved, the Federal President, at the request of the Federal Government and with the consent of the *Bundesrat*, may declare a state of legislative emergency with respect to a bill, if the *Bundestag* rejects the bill although the Federal Government has declared it to be urgent. The same shall apply if a bill has been rejected although the Federal Chancellor had combined it with a motion under Article 68. (2) If, after a state of legislative emergency has been declared, the *Bundestag* again rejects the bill or adopts it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the *Bundesrat*. The same shall apply if the *Bundestag* does not pass the bill within four weeks after it is reintroduced. (3) During the term of office of a Federal Chancellor, any other bill rejected by the *Bundestag* may become law in accordance with paragraphs (1) and (2) of this Article within a period of six months after the first declaration of a state of legislative emergency. After the expiration of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor. (4) This Basic Law may neither be amended nor abrogated nor suspended in whole or in part by a law enacted pursuant to paragraph (2) of this Article.

does not establish a special law-making procedure, it does present an intriguing example of “law-making for the exceptional”.²⁹

All of these instances of “exceptional law-making” and “law-making for the exceptional” will be presented and analysed in more detail further below [see Section 2/3].

1/4 Are the concepts of “urgency” and “exceptionality” used cumulatively or alternatively as conditions for the special law-making procedures?

The provisions concerning the “ordinary legislative procedure” which allow for a shortening of ordinarily applicable time limits in the initial phase of the adoption of a bill operate with the terms “exceptional circumstances” as well as “particularly urgent”³⁰ cumulatively (see Art. 76 para. 2 4th sent., para. 3 4th sent. GG) [for more details see Section 2/3/1].

Art. 115d para. 2 GG, Art. 115e and Art. 81 GG require the determination and declaration of “states of emergency” which are – as has been just explained – constituted and characterized by extraordinary circumstances. This form of “determined and declared exceptionality” is, however, a necessary but not sufficient condition for triggering the respective legislative procedures. At this point the notion of “urgency” becomes vital. Bills which are to be subjected to special legislative procedures have to be denoted as “urgent”: Art. 115d para. 2 GG refers to the enactment of “federal Government bills that the Government designates as *urgent*,”³¹ whilst Art. 81 para. 1 GG empowers the Federal President to “declare a state of legislative emergency with respect to a bill, if the *Bundestag* rejects the bill although the Federal Government has declared it to be *urgent*”. Furthermore, the element of “urgency” is also (implicitly present) in Art. 115e para. 1 GG

²⁹ Since it might serve as a source of inspiration for a possible EU framework, its discussion in the context of this *Questionnaire* appears feasible.

³⁰ The term “urgency” or “urgent” is employed by following provisions within the Basic Law: Art. 115f para. 1 No. 2 [Use of Federal Border Police – Extended powers of instruction]; Art. 120a para. 1 2nd sent. GG [Equalisation of burdens]; Art. 76 para. 1, 4th sent., para. 3 4th sent. GG [Bills]; Art. 81 para. 1 1st sent. [Legislative emergency]; Art. 84 para. 5 2nd sent. [*Länder* administration – Federal oversight]; Art. 85 para. 3 1st sent. [Execution by the *Länder* on federal commission]; Art. 87 para. 3 [Matters]; Art. 115d [Urgent bills].

³¹ Article 115d [Urgent bills] (1) During a state of defence the federal legislative process shall be governed by the provisions of paragraphs (2) and (3) of this Article without regard to the provisions of paragraph (2) of Article 76, the second sentence of paragraph (1) and paragraphs (2) to (4) of Article 77, Article 78, and paragraph (1) of Article 82. (2) Federal Government bills that the Government designates as urgent shall be forwarded to the *Bundesrat* at the same time as they are submitted to the *Bundestag*. The *Bundestag* and the *Bundesrat* shall debate such bills in joint session without delay. Insofar as the consent of the *Bundesrat* is necessary for any such bill to become law, a majority of its votes shall be required. Details shall be regulated by rules of procedure adopted by the *Bundestag* and requiring the consent of the *Bundesrat*. (3) The second sentence of paragraph (3) of Article 115a shall apply to the promulgation of such laws *mutatis mutandis*.

which governs the activation of the “Joint Committee” *inter alia* in cases in which “insurmountable obstacles prevent the *timely* convening of the *Bundestag*.”³²

Whilst Art. 80a GG fits into the scheme of exceptionality, it does not follow the “urgency logic” in a similar way. Due to its rationale – *ex ante* and “prophylactic” enactment of emergency statutes – it is designed to operate in situations which are not urgent in order to provide for situations in which the application and implementation of certain statutes and regulations will be urgent.

To sum up: Both “exceptionality” and “urgency” are cumulative conditions for triggering special law-making procedures which are identifiable in the Basic Law.

2/ Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation? What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

These various questions shall be addressed separately in the following paragraphs.

2/1 Constitutional Embedding of Special Law-Making Procedures

The constitution itself makes room for a “ordinary” yet “special” legislative procedure in Art. 76 para. 2 4th sent., para. 3 4th sent. GG.³³ All other special law-making procedures which deviate considerably from the procedural program of Art. 76 et seq. GG are likewise enshrined and embedded within the constitution (Art. 115d GG, 115e GG, Art. 81 GG). This corresponds with the basic rationale of the Basic Law which aims at regulating and providing for exceptional and urgent circumstances, hence at “regulating the extraordinary”.

Beyond that it is important to note that a plethora of statutes addressing emergencies and enjoying the status of ordinary law have been enacted making use of Art. 80a GG.³⁴ Amongst these are most importantly the so-called “Precautionary Laws” or “Precautionary Statutes” (*Sicherstellungsgesetze*).³⁵ These “Precautionary Laws”³⁶

³² Emphasis by the author.

³³ Beyond that the “ordinary legislative procedure” is modified when the adoption of the budget is at stake, see Art. 110 GG. Since this is, however, not a case of law-making procedures in “exceptional circumstances” it shall not be covered within this *Questionnaire*.

³⁴ However, the German legislator has addressed certain security dangers beyond Art. 80a GG with the enactment of “exceptional statutes” (also within the ordinary legislative procedure) – particularly dealing with terrorism. This legislative strategy has been criticized for mixing the “state of normalcy” with the “state of exceptionality”. In this light some argue that the legislator should rather make extended use of the regulatory potential of Art. 80a GG, *Otto Depenheuer*, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 10.

³⁵ *Roman Schmidt-Radefeldt*, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, para. 1.

³⁶ One of the most important statutes is the “Economic Precautionary Law or Federal Law Securing Contributions in the Field of Economy and Regulating Capital Transactions”

authorize the Federal Government to issue decrees which provide for measures necessary to safeguard the population's supply with basic goods and services in times of crisis.³⁷ This delegated form of legislation is, however, not a unique law-making mechanism for exceptional circumstances but already enshrined in Art. 80 GG. According to Art. 80 GG parliamentary statutes may delegate law-making powers on the Federal Government, federal ministers or *Länder*.³⁸

The question whether law-making mechanisms or practices for exceptional circumstances could be established beyond the explicit text of the constitution is to be seen in light of the dispute concerning the existence of an "extra-constitutional emergency law"³⁹ and the nature of "states of emergency".⁴⁰ Whilst it is clear that the *Schmittian* concept of a "state of emergency"⁴¹ which is based on the idea of a suspension of the legal order is incompatible with the Basic Law,⁴² the more nuanced idea of a "supra-constitutional emergency law" as propagated by *Klaus Stern* merits

(*Wirtschaftssicherstellungsgesetz*) (BGBl. I p. 1069; BGBl. I p. 1474), see *Knut Ipsen* (fn. 24), p. 141. This statute allows the regulation of almost all aspects of commerce, "specifying simply that the regulation be applied only when the free market mechanism fails and then with the smallest possible disruptive impact", see Recent Emergency Legislation in West Germany (fn. 1), p. 1726. On this basis the federal government has issued several decrees ["Decree on State-controlled Supply with Fuel" (*Mineralölbewirtschaftungs-Verordnung*, BGBl. I p. 530; BGBl. I p. 1257, the "Decree of Securing the Supply with Gas" (*Gaslastverteilungs-Verordnung*, BGBl. I p. 1849; BGBl. I p. 1474)]. Furthermore the "Transportation Precautionary Statute" (*Verkehrssicherstellungsgesetz*, BGBl. I p. 1082; BGBl. I p. 1474) as well as the "Labor Security Statute" (*Arbeitssicherstellungsgesetz*, BGBl. I p. 787; BGBl. I p. 772) are to be mentioned.

³⁷ *Knut Ipsen* (fn. 24), p. 141. See e. g. § 5 of the Economic Precautionary Law Securing Contributions in the Field of Economy and Regulating Capital Transactions" (*Wirtschaftssicherstellungsgesetz*) as announced on 3 October 1968 (BGBl. I p. 1069).

³⁸ Article 80 [Issuance of statutory instruments]: "(1) The Federal Government, a Federal Minister or the *Land* governments may be authorised by a law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the law. Each statutory instrument shall contain a statement of its legal basis. If the law provides that such authority may be further delegated, such sub-delegation shall be effected by statutory instrument. (2) Unless a federal law otherwise provides, the consent of the *Bundesrat* shall be required for statutory instruments issued by the Federal Government or a Federal Minister regarding fees or basic principles for the use of postal and telecommunication facilities, basic principles for levying of charges for the use of facilities of federal railways, or the construction and operation of railways, as well as for statutory instruments issued pursuant to federal laws that require the consent of the *Bundesrat* or that are executed by the *Länder* on federal commission or in their own right. (3) The *Bundesrat* may submit to the Federal Government drafts of statutory instruments that require its consent. (4) Insofar as *Land* governments are authorised by or pursuant to federal laws to issue statutory instruments, the *Länder* shall also be entitled to regulate the matter by a law."

³⁹ *David Dyzenhaus* (fn. 2), p. 450.

⁴⁰ See for details *András Jakab*, Das Grunddilemma und die Natur des Staatsnotstandes: Eine deutsche Problematik mit ausländischen Augen, *Kritische Justiz*, Vol. 38, No. 3 (2005), p. 323 (329 et seq.).

⁴¹ *Carl Schmitt*, *Politische Theologie*, Volume I, 1922, p. 9 et seq.

⁴² *Schmitt's* position appears normatively untenable, see *Klaus Stern* (fn. 9), p. 337; *Oren Gross*, The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy, 21 *Cardozo Law Review* 2000, p. 1825 (1829).

some discussion.⁴³ *Stern* contends that it would be impossible to regulate all types of emergencies. Therefore, – his line of argument goes – should a situation occur which would not be manageable with means intrinsic to the constitution, a case for emergency powers of the executive beyond positive constitutional law could be made in light of the necessity⁴⁴ to preserve the constitutional order.⁴⁵ Whilst *Stern's* view does depart from the *Schmittian* “state of emergency” concept, it still remains highly problematic due to its broadness and has therefore neither been acknowledged by jurisprudence nor by scholarship.⁴⁶ *Stern's* position would effectively render the “emergency constitution” meaningless and contradict the will of the original constitutional legislator to exclude any implicit emergency powers.⁴⁷ Hence, strong arguments militate for the view that any special law-making procedures beyond the explicit text of the Basic Law have no place in the constitutional order of Germany.

However, one important *caveat* is to be mentioned: The ordinary legislative procedure pursuant to Art. 76 et seq. GG and specified *inter alia* in the bylaws and procedural rules of the *Bundestag*⁴⁸ and the *Bundesrat*⁴⁹ is – as has been already insinuated – flexible. The overall procedural framework makes it possible to facilitate an expedient adoption of bills by strategically placed motions for a deviation from standard rules and procedural steps (see Section 4).⁵⁰ Hence there are distinct ways in which the ordinary law-making procedure can be adapted to the necessities of “urgent” and “exceptional” circumstances to a certain extent. In fact, the procedural acceleration of the legislative procedure pursuant to Art. 115d GG could also be accomplished by skillful yet legal procedural maneuvering on part of the competent bodies. In light of this, the main function of Art. 115d GG appears to be merely to allow the federal government to impose such an acceleration.⁵¹

2/2 Main Principles

The main idea behind Art. 76 para. 2 4th and para. 3 4th sent. GG is to facilitate an expedient adoption of bills. Simultaneously, the Basic Law rules out the possibility to amend the constitution or to transfer sovereign powers according to Art. 23, 24 GG within this accelerated procedure as Art. 76 para. 2 5th sent. and para. 3 5th sent. GG provide. Such legislative acts are considered too significant and sensitive requiring an

⁴³ *Klaus Stern* (fn. 9), p. 1329 et seq.

⁴⁴ See on the necessity argument in the times of terrorism, *Rainer Grote* (fn. 1), p. 174 et seq.

⁴⁵ *Klaus Stern* (fn. 9), p. 1340 et seq. For a critique *András Jakab* (fn. 40), p. 323 et seq.

⁴⁶ A further and more in-depth discussion of this point does not appear feasible in light of the objective of this *Questionnaire*.

⁴⁷ See Report of the Legal Committee (*Rechtsausschuss*), BT-Drucksache V/2873.

⁴⁸ *Geschäftsordnung des Bundestages* of 25 June 1990 (BGBl. I p. 1237).

⁴⁹ *Geschäftsordnung des Bundesrates* of 26 November 1993 (BGBl. I p. 2007).

⁵⁰ Generally *Hans Hofmann/ Georg Kleemann*, *Eilgesetzgebung*, 26 *Zeitschrift für Gesetzgebung* 2011, p. 313 et seq.

⁵¹ *Volker Epping*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115d, para. 7.

extended deliberation hence being unsuitable for the accelerated procedure. This procedural rigor functions as a safeguard for the integrity of the Basic Law. Art. 76 para. 2 4th sent. GG aims at protecting the rights of the *Bundesrat* within the “accelerated ordinary legislative procedure” as far as possible. The *Bundesrat* retains its right to comment on a bill submitted by the Federal Government although the *Bundestag* is already allowed to debate the bill. The Federal Government is obliged to transmit the comments to the *Bundestag* “without delay” even after it has already submitted the bill proposal to the *Bundestag* (see Art. 76 para. 2 4th sent. GG). Due consideration is hence given to the competences of organs and a considerate solution is sought.

The main principles governing the special law-making procedure of Art. 115d GG and Art. 115e GG can be derived from the objectives shaping the *Notstandsverfassung*. They partly correspond with the rationales behind Art. 80a GG and also Art. 81 GG.

The main normative sentiment crystallizing within the various provisions forming part of the *Notstandsverfassung* is that the state does not act in a legal vacuum or *extra constitutionem* in times of crisis or emergency.⁵² The regulatory emergency framework rejects the *Schmittian* view of a suspension of the legal order in times of emergency,⁵³ takes a “legalistic” approach towards regulating states of emergency and is designed to uphold the rule of law as well as democratic legitimacy in times of the extraordinary.⁵⁴ In order to prevent the abuse of “emergency powers” and “emergency mechanisms” the Basic Law intends to separate the “state of emergency” from the “state of normalcy”,⁵⁵ hence the exception from the rule.⁵⁶ The relevant constitutional provisions are to be seen as a “procedural formalization” of an adequate crisis management.⁵⁷ Terminological and conceptual ambiguities inherent to emergency concepts and provisions and the danger of their arbitrary and self-serving interpretations are tamed by procedural safeguards.⁵⁸

Turning now more specifically to Art. 115d, Art. 115e GG their objective is to induce a “parlamentarization of emergency”⁵⁹ which appears to be a unique feature of the “emergency constitution” enshrined in the Basic Law. Rather than shifting the regulatory and legislative power to the executive, the German constitution adapts the process of parliamentary law-making to accommodate the necessities of “external emergencies”. The

⁵² Eckart Klein (fn. 17), p. 64.

⁵³ See Carl Schmitt (fn. 41), p. 18 et seq.

⁵⁴ Rainer Grote (fn. 1), p. 154.

⁵⁵ This is particularly the objective behind Art. 80a GG, see Otto Depenheuer, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 10.

⁵⁶ Eckart Klein (fn. 9), p. 937, para. 4.

⁵⁷ Otto Depenheuer, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 11.

⁵⁸ Recent Emergency Legislation in West Germany (fn. 1), p. 1715.

⁵⁹ Volker Epping, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 2.

objective is to preserve the parliamentary prerogatives as long and as fully as possible.⁶⁰ Even if the *Bundestag* is incapable to act, a substitute organ – the “Joint Committee”⁶¹ – is activated which reflects the composition of the *Bundestag* and the *Bundesrat*. This highlights also another basic principle on which Art. 115d, 115e GG and the whole *Notstandsverfassung* rest: proportionality. Not only is the exercise of emergency powers constrained by the principle of proportionality⁶² in the sense that any measures adopted to address emergencies shall be appropriate, necessary and adequate. “Proportionality” – understood in the widest sense and not “doctrinally” – also requires that procedural deviations from “constitutional normalcy” are to be limited as far as possible and allowed only so far as it is absolutely necessary to respond to an extraordinary situation effectively.⁶³ From this rationale follows naturally that the Basic Law provides for a quick return to the “state of the ordinary”⁶⁴ of which Art. 115d GG is particularly reflective. Another consequence inferable from this principle is that exceptional regulations adopted by the “Joint Committee” are limited in their duration (Art. 115k para. 2, para. 3 GG) and subject to repeal by the *Bundestag* with the consent of the *Bundesrat* (Art. 115l para. 1 GG).

Connected with the idea of proportionality is also the concept of “subsidiarity” – understood in an untechnical sense – of extraordinary means: The abridged legislative procedures for urgent bills⁶⁵ as provided for by Art. 115d GG is non-obligatory⁶⁶ in nature. The Federal Government is given a choice to pursue this exceptional legislative path.

A further leading principle is the preservation of the constitution’s integrity in times of crisis especially when special law-making procedures are triggered. The requirements for constitutional amendments established by Art. 79 GG remain unaffected by Art. 115d⁶⁷ and bills modifying of constitutional provisions cannot be adopted within this special legislative procedure.⁶⁸ The “Joint Committee” has no power to amend, abrogate or to suspend the constitution, see Art. 115e para. 2 GG.

⁶⁰ See BT-Drucksache V/2873, p. 16; *Roman Schmidt-Radefeldt*, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 115d, Introduction; *Volker Epping*, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 1; *Rainer Grote* (fn. 1), p. 166.

⁶¹ For further details, see [2/3/1/3].

⁶² *Knut Ipsen* (fn. 24), p. 157.

⁶³ See also *Rainer Grote* (fn. 1), p. 157.

⁶⁴ Generally on this point *Konrad Hesse*, Grundzüge des Verfassungsrechts der BRD, 20th ed. 1999, p. 303; *Rainer Grote* (fn. 1), p. 157; *András Jakab* (fn. 40), p. 324.

⁶⁵ No abridged legislative procedure for laws amending the *Grundgesetz*.

⁶⁶ *Roman Herzog*, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 1970, Art. 115d GG, Rn. 3.

⁶⁷ *Volker Epping*, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 4. According to a prevalent view the adoption of budgetary statutes is possible within the Art. 115d GG procedure, *id.*, para. 5.

⁶⁸ *Eckart Klein* (fn. 17), p. 75.

The rationale behind Art. 80a GG is to allow the legislator to take carefully tailored “legislative precautions” within the ordinary procedure of law-making in a situation of “normalcy” for situations shaped by “exceptionality” and “urgency”⁶⁹ since “[p]eacetime enactment of emergency statutes permits a more intelligent exercise of the emergency-declaring power”.⁷⁰ Hence, Art. 80a GG – being an example of “law-making for the exceptional” – follows the general objective of the *Notstandsverfassung* which is to deal with the “extraordinary” with “ordinary” procedural means as long as possible.

Although Art. 81 GG addresses a distinct kind of “emergency” – a gridlock between the *Bundestag* and the Federal Government⁷¹ which is not comparable to emergencies addressed by the *Notstandsverfassung* – it is shaped by similar principles: Since it allows the *Bundesrat* under very restrictive conditions to act as the sole legislator whilst ultimately “disempowering” the *Bundestag* – as will be explained in more detail in a moment in Section 2/3/4 –, it opts against granting the executive regulatory powers. Furthermore, since it is required that the *Bundestag* is given the opportunity to adopt a bill before the legislative power shifts onto the *Bundesrat* Art. 81 GG aims at finding a solution which is considerate of the parliamentary prerogative as far as this is possible. The state of “legislative emergency” with its specific normative effects is limited in time requiring a quick return to the “ordinary”, see Art. 81 para. 3 GG. Constitutional amendments – once again – cannot be pursued within the Art. 81 GG procedure, see Art. 81 para. 4 GG.

2/3 Concrete Procedure of Law-Making

The following paragraphs will, first of all, sketch the specifics of the “accelerated ordinary legislative procedure” [2/3/1] before addressing the special law-making procedures available within a “state of defence” [2/3/2], Art. 80a GG [2/3/3] and finally Art. 81 GG and the case of “legislative emergencies” [2/3/4].

2/3/1 Art. 76 GG: “Accelerated Ordinary Legislative Procedure”

Art. 76 para. 2 1st GG requires that Federal Government bills are first submitted to the *Bundesrat* and the *Bundesrat* is given the opportunity to comment on such bills within six weeks (2nd sent.), except when the *Bundesrat* demands an extension. In this case the period is nine weeks (3rd sent.). Art. 76 para. 2 4th sent. GG provides an important modification: “If in exceptional circumstances the Federal Government on submitting a bill to the *Bundesrat* declares it to be particularly urgent, it may submit the bill to the *Bundestag* after three weeks or, if the *Bundesrat* has demanded an extension pursuant to the third sentence of this paragraph, after six weeks, even if it has not yet received the *Bundesrat*’s comments upon receiving such comments, it shall transmit them to the

⁶⁹ Otto Depenheuer, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 7.

⁷⁰ Recent Emergency Legislation in West Germany (fn. 1), p. 1726.

⁷¹ BVerfGE 6, 104 (118).

Bundestag without delay.”⁷² This does not apply in “case of bills to amend this Basic Law or to transfer sovereign powers pursuant to Article 23 or 24”, Art. 76 para. 2 5th sent. GG. Art. 76 para. 2 4th sent. makes it hence possible for the *Bundestag* to discuss a bill before the *Bundesrat* has submitted its comments, it does, however, not shorten the time period in which the *Bundesrat* can submit its comments.⁷³

Art. 76 para. 3 GG mirrors Art. 76 para. 2 GG, whilst not being identical. It requires, first of all, that *Bundesrat* bills – the *Bundesrat* is also endowed with the right of initiative – “shall be submitted to the *Bundestag* by the Federal Government within six weeks” (1st sent.). According to the 2nd sent. GG “the Federal Government shall state its own views”. It may demand an extension of the regularly applicable time period for its statement “for important reasons, especially with respect to the scope of the bill” (3rd sent.). If – however – “in exceptional circumstances the *Bundesrat* declares a bill to be particularly urgent, the period shall be three weeks or, if the Federal Government has demanded an extension pursuant to the third sentence of this paragraph, six weeks” (4th sent.).⁷⁴ In this case the period in which the Federal Government can comment is effectively shortened.⁷⁵ Art. 76 para. 3 5th sent. GG installs a corresponding safeguard with regard to the amendment of the Basic Law and the transfer of sovereign powers.

2/3/2 Special Law-making in a “State of Defence”

The precondition of the special law-making procedures pursuant to Art. 115d GG and Art. 115e GG is the declaration of a “state of defence” whose basic contours shall be sketched first [2/3/1/1],⁷⁶ before depicting the specific characteristics of the Art. 115d GG procedure [2/3/1/2] and the organizational reconfiguration induced by Art. 115e GG [2/3/1/3] in more detail.

2/3/2/1 Precondition: Declaration and Termination of a “State of Defence”

The GG provides for three variants of determining a “state of defence”. The relevant provisions aim at preserving the checks and balances between state organs and particularly the authority of the *Bundestag* regarding questions affecting the nation’s life whilst simultaneously processing the possibility that external circumstances might deteriorate quickly leading to an incapacity to act on part of some organs and rendering certain procedural steps unfeasible.⁷⁷

In the standard case, the initiative for determining a “state of defence” lies with the Federal Government (see Art. 115 para. 1 2nd sent. GG), the competence for a determination is vested in the *Bundestag* and *Bundesrat*. A successful determination

⁷² Emphasis by the author.

⁷³ Jens Kersten, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 76, para. 77.

⁷⁴ Emphasis by the author.

⁷⁵ Jens Kersten, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 76, para. 101.

⁷⁶ See generally Heinrich-Eckart Röttger, Gesetzgebung im Verteidigungsfall, 1973, p. 21 et seq.

⁷⁷ See Rainer Grote (fn. 1), p. 164.

requires a two-thirds majority of the votes cast of the *Bundestag* which shall include at least a majority of the Members of the *Bundestag* (see Art. 115a para. 1 GG). The *Bundestag* renders merely a plenary decision, the determination of a “state of defence” does not take the shape of a statute or law.⁷⁸ The qualified majority requirement gives the opposition as well as members of the government who dissent in the specific case potentially a veto power.⁷⁹ A successful determination of a “state of defence” requires that the *Bundesrat* consents to the relevant motion for determining a “state of defence” with a simple majority (Art. 52 para. 3 1st sent. GG). The declaration of a “state of defence” is promulgated by the Federal President (subject to countersignature by the Federal Chancellor, see Art. 58 GG) in the *Federal Law Gazette* pursuant to Article 82 GG or in another manner if the formal promulgation cannot be done in time (radio, television), see Art. 115a para. 3 GG.

In a second variant, in cases “imperatively” calling for an immediate action – hence imminent dangers – and if the *Bundestag* is prevented by insurmountable obstacles from convening in time or is not able to constitute a quorum (Art. 115a para. 2 GG) a “Joint Committee” – an “emergency constitutional organ” which will be analysed more closely further below [2/3/2/3] – is competent to determine a “state of defence” with a two-thirds majority of the votes cast and at least the majority of its members, Art. 115a para. 2 GG. The promulgation procedure in this case conforms to the first variant.

The third variant of a determination of a “state of defence” is addressed by Art. 115a para. 4 GG. This provision encompasses a legal fiction of determining of a “state of self-defence” in cases in which the “federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination”. It is effectively triggered when the “Joint Committee” is unable to act (e.g. due to a nuclear attack). The determination is deemed to have been accomplished and promulgated in the very moment that the “armed attack” occurs. As soon as it is possible the Federal President shall announce the exact time of the beginning of a “state of defence”, Art. 115a para. 3 GG.

As already insinuated, the Basic Law aims at paving the way towards a quick return to the state of “constitutional normalcy”. Hence, Art. 115l para. 2 GG requires a termination of the state of defense “without delay,” as soon as the conditions for its determination cease to exist. A “state of defence” may be also terminated although an armed attack continues (which reflects the subsidiarity and optional nature of the mechanisms offered by Art. 115a et seq. GG).⁸⁰ As a complementary act to the initial determination of a “state of defence” the *Bundestag* acting with the consent of the *Bundesrat* is responsible for its termination.⁸¹ A simple majority quorum applies in both cases which shall facili-

⁷⁸ Axel Hopfau, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115a, para. 20.

⁷⁹ Recent Emergency Legislation in West Germany (fn. 1), p. 1718.

⁸⁰ Roman Herzog, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115l GG, para. 26; Rainer Grote (fn. 1), p. 172.

⁸¹ Rainer Grote (fn. 1), p. 172.

tate a return to the “ordinary” as soon as possible. The *Bundesrat* may demand that the *Bundestag* reaches a decision on the question of termination, see Art. 115l para. 2 2nd sent. GG. The terminating resolution is to be promulgated by the President, Art. 115l para. 2 1st sent. GG. Should the *Bundestag* be unable to act or to constitute the proper forum, the decision to terminate is to be taken by the “Joint Committee” [for further details see 2/3/2/3].

2/3/2/2 Art. 115d GG – Close-up on the Special Law-making Procedure in Cases of a “State of Defence”

The determination and declaration of a “state of defence” paves the way towards the special law-making procedure of Art. 115d GG.⁸²

The initiative for a bill to be enacted in this special legislative procedure is vested in the Federal Government, see Art. 115d para. 1 GG. The power to declare a bill as “urgent” – which triggers the accelerated legislative procedure – likewise rests with the Federal Government which shall decide upon this question duly in the exercise of its political discretion.⁸³ The government decides on the “urgency” of a bill collegially (Art. 62 GG) by majority vote of its members.⁸⁴ It is generally assumed that neither the *Bundestag* nor the *Bundesrat* may reject the adoption of a bill within this special procedure should they not share the government’s urgency assessment.⁸⁵ They can, however, initiate a judicial review procedure at the Federal Constitutional Court (see more for more details Section 5/3). Bills initiated by the *Bundesrat* or the *Bundestag* are not subject to the special procedure of Art. 115d GG.⁸⁶

As long as the “Joint Committee” has not taken action pursuant to Art. 115e GG,⁸⁷ bills which are not declared to be “urgent” are adopted in the ordinary legislative procedure. The government is given a choice to pursue the ordinary legislative path even if a “state of defence” has been already declared.⁸⁸

⁸² For procedural details see the procedural rules *Geschäftsordnung für das Verfahren nach Artikel 115 d des Grundgesetzes* of 2 July 1969 (BGBl. I p. 1100). Art. 115d is based on a proposal by the FDP fraction of 2 October 1967, BT-Drucksache V/2130.

⁸³ Roman Schmidt-Radefeldt, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 115d, para. 1.

⁸⁴ § 15 para. 1 lit. e, § 20 Procedural Rules of the Federal Government (*Geschäftsordnung der Bundesregierung*).

⁸⁵ Axel Hopfau, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115d, para. 10; Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 9.

⁸⁶ Eckart Klein (fn. 17), p. 75.

⁸⁷ Volker Epping, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 1.

⁸⁸ Roman Schmidt-Radefeldt, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 115d, para. 1; Volker Epping, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 8, 3.

According to Art. 115d para. 2 1st, 2nd GG “urgent bills” shall be forwarded to the *Bundesrat* at the same time as they are submitted to the *Bundestag*. A debate of the bills takes place within a joint session of both chambers without delay (see Art. 115d para. 2 1st, 2nd sent. GG). “Without delay” means according to § 1 para. 3 1st sent. of the “Procedural Rules for the Procedure according to Art. 115d”⁸⁹ that the debate of the *Bundestag* and *Bundesrat* shall take place no later than three days after the invitation has been dispatched, the Federal Government is entitled to shorten this period (see § 1 para. 3 2nd sent. of the “Procedural Rules for the Procedure according to Art. 115d”).⁹⁰

The *Bundesrat* is not given a separate and individual opportunity to comment as usually required before a plenary consultation of a bill in the *Bundestag*. The members of both chambers stand on equal footing within the respective debate. Committees of the *Bundestag* and the *Bundesrat* convene in joint meetings.⁹¹ These joint meetings and considerations⁹² bypass the rather intricate procedurally implemented balance of power between those organs.⁹³

Bills cannot be transferred to the Mediations Committee (*Vermittlungsausschuss*) of *Bundestag* und *Bundesrat*.⁹⁴ If a bill requires the consent of the *Bundesrat* according to other rules of the constitution (*Zustimmungsgesetze*), the consent prerequisite also applies in the constellation of the “urgent legislative procedure”. A successful adoption of such bills requires the majority of the votes of the *Bundesrat*. Art. 115d para. 2 3rd sent. GG has merely a declaratory function in this respect.

The constitution lacks precision on the voting procedure. A joint deliberation does not necessarily require a joint voting. In that regard, it appears sensible to distinguish between bills that require the consent of the *Bundesrat* (*Zustimmungsgesetze*) and bills to which the *Bundesrat* would only have the right to object (*Einspruchsgesetze*). In cases of consent bills votes of the *Bundesrat* and the *Bundestag* are to be casted separately (*itio in partes*), otherwise it could not be determined whether the *Bundesrat* has actually consented.

Assuming that the *Bundesrat* has no right to object within the urgent legislative procedure in cases of “objectionable bills” (*Einspruchsgesetze*) – so it is argued by some voices – a separate voting is not required.⁹⁵ Others assume – guided by the aim to preserve the

⁸⁹ *Geschäftsordnung für das Verfahren nach Artikel 115 d des Grundgesetzes* of 2 July 1969 (BGBl. I p. 1100).

⁹⁰ On the constitutionality of this provision *Volker Epping*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115d, para. 15.

⁹¹ *Volker Epping*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115d, para. 16.

⁹² For more details see *Rules for the Procedure according to Art. 115d GG* and *Volker Epping*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115d, para. 17.

⁹³ See similarly Recent Emergency Legislation in West Germany (fn. 1), p. 1730.

⁹⁴ *Heinrich-Eckart Röttger* (fn. 76), p. 57 et seq.; *Klaus Stern* (fn. 9), p. 1427.

⁹⁵ This position is also taken by *Roman Schmidt-Radefeldt*, in: *Epping/Hillgruber* (eds.), *BeckOK Grundgesetz*, 34th ed. August 2017, Art. 115d, para. 3.

powers of the *Bundesrat* also within the urgent law-making procedure as much as possible – that a “objectionable bill” that has been rejected by the *Bundesrat* is adopted if confirmed by the *Bundestag* with a simple majority.⁹⁶ This view upholds the right of the *Bundesrat* to object.⁹⁷ It is confirmed in § 5 para. 5 of the Rules of Procedure for the Procedure according to Art. 115d GG⁹⁸ which do, however, not necessarily reflect what is constitutionally commanded.

In the case that the promulgation by the Federal President in the Federal Law Gazette pursuant to Art. 82 cannot be done in time, it shall be effected in another manner (see Art. 115d para. 3 GG in conjunction with Art. 115a para. 3, 2nd sent. GG) which allows an “emergency promulgation” (after countersignature of the Chancellor according to Art. 58 GG⁹⁹).¹⁰⁰ The promulgation “shall be printed in the Federal Law Gazette as soon as circumstances permit” (see Art. 115d para. 3 GG in conjunction with Art. 115a para. 3, 2nd sent. GG). The “emergency promulgation procedure” applies to all statutes regardless of whether they have been adopted within the ordinary or special legislative procedure as long as they have been adopted during a “state of defence”.¹⁰¹

According to the prevalent view even the budget (see Art. 110 GG) can be adopted applying the Art. 115d GG procedure.¹⁰² The only subject matter limitation seem to be constitutional amendments: Art. 115d GG does not allow any deviations from the procedural requirements for constitutional amendments.¹⁰³

Bills enacted within the urgent legislative procedure enjoy the status of ordinary laws and remain valid even after the “state of defence” has been terminated.

2/3/2/3 Art. 115e GG – The “Joint Committee”

⁹⁶ Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 21 et seq. Critically Heinrich-Eckart Röttger (fn. 76), p. 80.

⁹⁷ Axel Hopfauf, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115d, para. 14.

⁹⁸ *Geschäftsordnung für das Verfahren nach Artikel 115 d des Grundgesetzes* of 2 July 1969 (BGBl. I p. 1100).

⁹⁹ Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 24.

¹⁰⁰ See *Gesetz über vereinfachte Verkündungen und Bekanntgaben* as of 18 July 1975 (BGBl. I p. 1919).

¹⁰¹ Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 25. Hence Art. 115d para. 3 GG in conjunction with Art. 115a para. 3, 2nd sent. GG establish effectively another “special-law making procedure”.

¹⁰² Roman Schmidt-Radefeldt, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 115d, para. 1; Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 5.

¹⁰³ Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 4.

Art. 115e GG – which has been the most controversial provision of the *Notstandsverfassung*¹⁰⁴ – entails another modification of the ordinary law-making procedure by allowing the activation of the “Joint Committee” as a “substitute legislator” – which – as has already been explained above – also potentially plays a role in determining a “state of defence” [see Section 2/3/2/1].

The idea behind the “Joint Committee”¹⁰⁵ is to create an organ which reconciles “the values of a representative control of the access to emergency powers and the need for speedy response to certain crises.”¹⁰⁶ This is mirrored by its composition: It consists of 16 members of the *Bundesrat*¹⁰⁷ – each representing one *Land* – and 32 members of the *Bundestag* – which may not be members of the government (Art. 53a para. 1 1st sent, 2nd clause GG)¹⁰⁸ – reflecting its political composition, meaning the size of the different parliamentary groups. It is constituted already during peace times. The “Joint Committee” is presided by the President of the *Bundestag* (see § 7 para. 1 of the “Bylaws or Procedural Rules of the ‘Joint Committee’” – *Geschäftsordnung des Gemeinsamen Ausschusses*¹⁰⁹). In a “state of defence” the “Joint Committee” may determine according to Art. 115e GG “by a two-thirds majority of the votes cast, which shall include at least a majority of its members [...] that insurmountable obstacles prevent the timely convening of the *Bundestag* or that the *Bundestag* cannot muster a quorum”. In such as case the “Joint Committee shall occupy the position of both the *Bundestag* and the *Bundesrat* and shall exercise their powers as a single body.” Upon its formal determination it exercises the full range of powers that are assigned to the *Bundestag* and *Bundesrat*¹¹⁰ effectively replacing the two-chamber system¹¹¹ whilst these organs continue to exist.¹¹² It acts as a kind of “trustee” for the ordinary legislative bodies. Since the incapacity of the *Bundestag* to act is to be determined by the “Joint Committee”, it has the power to “activate” itself as a legislative body. This competence-competence has

¹⁰⁴ Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 1.

¹⁰⁵ For details see the bylaws of the “Joint Committee” *Geschäftsordnung für den Gemeinsamen Ausschuss* of 23 July 1969 (BGBl. I p. 1102).

¹⁰⁶ Recent Emergency Legislation in West Germany (fn. 1), p. 1719.

¹⁰⁷ The members of the *Bundesrat* are contrary to the normal rule not bound by the instructions of their *Land* government when acting as members of the “Joint Committee”, see Rainer Grote (fn. 1), p. 165.

¹⁰⁸ Wolfgang März, Äußerer Staatsnotstand (§ 281), in: Josef Isensee/ Paul Kirchhof (eds.), 7 Handbuch des Staatsrechts (2014), p. 973, 1018 (para. 71).

¹⁰⁹ *Geschäftsordnung für den Gemeinsamen Ausschuss* of 2 July 1969 (BGBl. I p. 1102).

¹¹⁰ Rainer Grote (fn. 1), p. 153 (168).

¹¹¹ For a critique Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 8.

¹¹² Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 4.

been criticized.¹¹³ The “Joint Committee” is obliged to determine the (continued) incapacity of the *Bundestag* to act each time it convenes.¹¹⁴ The interplay of Art. 115a and Art. 115e GG makes it possible that the “Joint Committee” decides upon the “state of defence” in the sense of Art. 115a para. 2 GG and simultaneously empowers itself according to Art. 115e GG since the prerequisites for both actions are identical.¹¹⁵ Although not expressly stipulated by Art. 115e GG, it is assumed that the “self-empowerment” of the “Joint Committee” has to be promulgated by the Federal President.¹¹⁶ This makes at least some sort of preventive control possible, since it is the general view that the Federal President may reject a promulgation if a legal act is formally defective or evidently contradicts the constitution in the material sense.¹¹⁷

The legislative power of the “Joint Committee” is limited: Statutes enacted by the “Joint Committee” may not amend nor abrogate nor suspend the Basic Law in whole or in part, see Art. 115e para. 2 1st sent. GG. Furthermore, the “Committee” does neither have the power to reorganize the federal territory nor to transfer sovereign powers on international organizations, Art. 115e para. 2 2nd sent. GG. According to Art. 115l para. 1 GG the *Bundestag* and *Bundesrat* may convene at any time to repeal the acts passed by the “Joint Committee” should the Committee’s assessment of the *Bundestag*’s incapacity to act be inaccurate.¹¹⁸ The Federal President is furthermore obliged to promulgate acts enacted by the “Joint Committee” but is – again – entitled to review them for formal and evidently substantive unconstitutionality.¹¹⁹

In order to facilitate a quick return to a state of “constitutional normalcy” both laws adopted by the “Joint Committee” as well as statutory instruments issued on the basis of such laws shall cease to have effect no later than six months after the termination of a state of defence,” Art. 115k para. 2 GG.

2/3/3 Art. 80a GG: A Special Technique of “Legislative Emergency Containment”

¹¹³ See Eckart Klein (fn. 17), The States of Emergency according to the Basic Law of the Federal Republic of Germany, in: Bernhardt/Beyerlein (eds.), Reports on German Public Law, p. 63 (75). For a nuanced view Wolfgang März (fn. 108), p. 1019 para. 74; Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 9.

¹¹⁴ Axel Hopfauf, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115e, para. 13.

¹¹⁵ Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 16 et seq.

¹¹⁶ Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 19.

¹¹⁷ See generally Hermann Butzer, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 82, para. 115 et seq.

¹¹⁸ Eckart Klein (fn. 17), p. 76; Rainer Grote (fn. 1), p. 168.

¹¹⁹ Eckart Klein (fn. 17), p. 76.

Art. 80a GG allows the “prophylactical” enactment and peacetime promulgation of statutes which – whilst being valid in the sense of Art. 78 GG upon their promulgation¹²⁰ – become effective and enforceable with the determination of a “state of tension” or “state of defence”, upon special approval by the *Bundestag* or a decision of an international body made with the approval of the Federal Government.¹²¹

A “state of tension” – whose substantive core has been sketched above [1/2] – is determined by the *Bundestag* with a majority of two-thirds of the votes cast. The initiative for an application is vested both in the Federal Government and arguably also the *Bundestag* (however not the *Bundesrat*¹²²). The determination and declaration is to be publicly announced,¹²³ a requirement which is in the end an emanation of the rule of law. The GG does not prescribe a specific form for the announcement.¹²⁴ The “Joint Committee” does not have the power to determine a “state of tension”. Its powers are limited to the “state of defence”.

As Art. 80a para. 1 GG provides statutes enacted for “state of tension” are likewise rendered effective by the determination of a “state of defence” [on this see Section 2/3/2/1].

The *Bundestag* can also decide to render certain “precautionary” statutes effective without determining a “state of defence” or a “state of tension”. The objective of this variant is to pave the way towards the applicability of the relevant statutes and an enhanced “defence preparedness” without the escalating effect that the determination of a “state of tension” (and even more “state of defence”) might have internationally¹²⁵ and

¹²⁰ *Otto Depenheuer*, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 80a, para. 7.

¹²¹ Article 80a [State of tension] (1) If this Basic Law or a federal law regarding defence, including protection of the civilian population, provides that legal provisions may be applied only in accordance with this Article, their application, except when a state of defence has been declared, shall be permissible only after the *Bundestag* has determined that a state of tension exists or has specifically approved such application. The determination of a state of tension and specific approval in the cases mentioned in the first sentence of paragraph (5) and the second sentence of paragraph (6) of Article 12a shall require a two-thirds majority of the votes cast. (2) Any measures taken pursuant to legal provisions by virtue of paragraph (1) of this Article shall be rescinded whenever the *Bundestag* so demands. (3) Notwithstanding paragraph (1) of this Article, the application of such legal provisions shall also be permissible on the basis of and in accordance with a decision made by an international body within the framework of a treaty of alliance with the approval of the Federal Government. Any measures taken pursuant to this paragraph shall be rescinded whenever the *Bundestag*, by the vote of a majority of its Members, so demands.

¹²² See critically *Knut Ipsen* (fn. 24), p. 143.

¹²³ *Roman Schmidt-Radefeldt*, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 80a, para. 5.

¹²⁴ *Knut Ipsen* (fn. 24), p. 145.

¹²⁵ *Rainer Grote* (fn. 1), p. 163.

to postpone such declarations strategically as long as this is possible.¹²⁶ This is sometimes denoted as the “state of approval”.¹²⁷

Within the approval decision the statutes that are to be activated are to be enlisted explicitly.¹²⁸ Individual authorization is made by majority vote (the declaration of a “state of tension” requires a two-thirds majority), except when the restrictions on individual freedoms as permitted by the Labor Security Law are to be triggered. In that case a two-thirds majority is required, see Art. 80a para. 1 2nd sent. GG.

Art. 80a para. 3 GG does furthermore entail a “state of alliance”.¹²⁹ *Spannungsfall* powers may also be exercised upon the resolution of an international treaty organ – NATO (see Art. 5 of the North-Atlantic Treaty) – that has been passed with approval of the Federal Government.¹³⁰ As a safeguard the *Bundestag* may suspend the measures by a majority vote of its members.

The constitution does not provide for a termination of the “state of tension” explicitly. However, since the Federal Government is required to rescind measures taken in accordance with Art. 80a para. 1 GG if the *Bundestag* requests so by majority vote (see Art. 80a para. 2 GG), it can be argued that the *Bundestag* has also the power to terminate the “state of tension”.¹³¹ Although not explicitly stated in the GG it seems more than plausible in light of the proportionality principle to assume even that the *Bundestag* has a constitutional duty to terminate a “state of tension” if its material prerequisites are not met any longer.¹³² In the worst case a “state of tension” will be superseded by a “state of defence”.

2/3/4 Art. 81 GG: “Legislative Emergency”

Art. 81 GG is triggered when a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the *Bundestag* (see Art. 68 para. 1 GG). Art. 68 para. 1 GG grants the Federal President upon proposal of the Chancellor the power to dissolve the *Bundestag*. In cases in which the *Bundestag* is not dissolved, the President may according to Art. 81 para. 1 1st sent. GG at the request of the Federal Government and with the consent of the *Bundesrat* “declare a state of legislative

¹²⁶ Knut Ipsen (fn. 24), p. 140.

¹²⁷ Harald Erkens (fn. 5), p. 15.

¹²⁸ Knut Ipsen (fn. 24), p. 139.

¹²⁹ Art. 80a para. 3 GG: “Notwithstanding paragraph (1) of this Article, the application of such legal provisions shall also be permissible on the basis of and in accordance with a decision made by an international body within the framework of a treaty of alliance with the approval of the Federal Government. Any measures taken pursuant to this paragraph shall be rescinded whenever the *Bundestag*, by the vote of a majority of its Members, so demands.”

¹³⁰ Roman Schmidt-Radefeldt, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, para. 6, 7.

¹³¹ Knut Ipsen (fn. 24), p. 147, Rainer Grote (fn. 1), p. 163.

¹³² Rainer Grote (fn. 1), p. 163.

emergency with respect to a bill, if the *Bundestag* rejects the bill although the Federal Government has declared it to be urgent.”¹³³

Should after this declaration of a “state of legislative emergency” the *Bundestag* again reject “the bill or adopt[s] it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the *Bundesrat*. The same shall apply if the *Bundestag* does not pass the bill within four weeks after it is reintroduced”, see Art. 81 para. 2 GG. Hence the *Bundesrat* becomes the sole legislator. Art. 81 para. 3 GG sets time limits to such an enactment of bills: In the course of the “term of office of a Federal Chancellor, any other bill rejected by the *Bundestag* may become law” in accordance with Art. 81 para. 1 and 2 “within a period of six months after the first declaration of a state of legislative emergency. After the expiration of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor.” Art. 81 para. 4 GG safeguards the preservation of the constitution by ruling out its amendment, abrogation or suspension in whole or in part within the procedure pursuant to Art. 81 para. 1, 2 GG.

3/ What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances? Do the Head of the State, the Parliament and the Government retain a particular role?

The intricate system of the Basic Law with regard to addressing “exceptionality” and “containing emergencies” does induce a modification of the separation and balance of powers in distinct ways. The degree and quality of the respective modifications depend on the specific instances of exceptionality and categories of emergency. It is of particular importance that not only the horizontal separation of powers but also the vertical level – meaning the federal distribution of competences – is affected (especially in the case of “internal emergencies”).

In general, it can be asserted that the emergency framework of the Basic Law is steered by the idea to preserve the powers of the legislature as far as possible – what has been denoted as the “parliamentarization of emergencies”. As far as the vertical separation of powers is concerned a considerable concentration of regulatory competence can be detected on the federal level in cases of “internal” and “external emergencies”. Still the GG installs certain mechanisms to protect an abuse of competences on the part of the Federation.

In the following paragraphs the roles of the different actors in cases of “internal emergencies” [3/2], “external emergencies” [3/3] as well as “legislative emergencies” [3/4] shall be sketched. Since the principles guiding the relationship between the *Länder* and the Federation regarding internal emergencies promise to generate interesting insights for a possible general EU framework of containing emergencies on the primary level, they shall be briefly presented here. In particular, they might be interesting for identifying categories of “exceptional circumstances” that could possibly trigger a special legislative mechanism on the EU level. However, first of all, the role played by the

¹³³ The special variant of Art. 81 para. 1 2nd sent. GG will not be covered here.

legislative bodies and the executive within the “accelerated ordinary legislative procedure” shall be sketched briefly [3/1].

3/1 “Accelerated Ordinary Legislative Procedure”

Art. 76 para. 2 4th sent. GG makes it possible for the Federal Government to submit a proposal to the *Bundestag*, although it has not received the comments of the *Bundesrat* yet if “in exceptional circumstances” the Federal Government declares the bill to be “particularly urgent”. Art. 76 para. 3 4th GG obliges the Federal Government to submit its comments on bills of the *Bundesrat* within a period of three weeks to the *Bundestag* “if in exceptional circumstances” the *Bundesrat* declares the bill to be “particularly urgent”. Comparing these variants, the *Bundesrat* is treated advantageously since it can shorten the time period within which the Federal Government would have the chance to comment effectively, while Art. 76 para. 2 4th GG does not have a similar effect on the right of the *Bundesrat* to comment.¹³⁴ Both state organs are, however, given the power to accelerate some steps of the ordinary legislative procedure in its initial phase in order to safeguard a more expedient adoption process for “particularly urgent” bills “in exceptional circumstances” and hence to adapt the procedure to the necessities of exceptional situations.

3/2 Internal Emergencies

In principle, the GG leaves it up to the individual *Länder* – the bearers of police powers – how to react to internal emergencies. Art. 35 para. 2 1st sent. GG entitles the government of a *Land* to request the Federal Border Police – which in this case is bound by the law of the *Land* and subject to *Land* instructions – to intervene if the *Land*’s own police power is insufficient to maintain or restore public safety or order. In cases of a natural disaster or a grave accident the *Land* may request the assistance of the police forces of other *Länder*, of other administrative authorities, the Federal Border Police or the Armed Forces (Art. 35 para. 2 2nd sent. GG). With this power corresponds a duty to assist on part of the *Land/Länder* and federal authorities.¹³⁵ The requested forces are subject to instructions of the *Land*. However, under limited circumstances the federal level may intervene on its own initiative according to Art. 35 para. 3 1st sent. GG if “the natural disaster or accident endangers the territory of more than one *Land*, the Federal Government”. In such a case, the Federal Government may – “insofar as is necessary to combat the danger” – “instruct the *Land* governments to place police forces at the disposal of other *Länder*, and may deploy units of the Federal Border Police or the Armed Forces to support the police.”¹³⁶ The GG requires that any measures adopted by the Federal Gov-

¹³⁴ *Johannes Masing*, in: v. Mangoldt/Klein/Starck (eds.), *Kommentar zum Grundgesetz*, 6th ed. 2010, Art. 76, para. 135; *Jens Kersten*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 76, para. 13.

¹³⁵ *Theodor Maunz*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 35, para. 17.

¹³⁶ The federal deployed forces and authorities are subject to the instructions of the Federal Government, whereas the Federal Government and *Länder* governments are jointly responsible for forces of the *Länder*, see *Rainer Grote* (fn. 1), p. 159. See also *Theodor Maunz*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 35, para. 21.

ernment are “rescinded at any time at the demand of the” *Bundesrat* regardless of whether the internal emergency persists or not “and in any event as soon as the danger is removed” (Art. 35 para. 3 2nd sent. GG).

Obviously, an “internal emergency” which is constituted by “an imminent danger to the existence or the free democratic basic order” of the German state corresponds with more intrusive and extensive powers of the Federation (see Art. 91 GG). A federal intervention requires that a *Land* is not willing or not able to effectively react to an emergency (Art. 91 para. 2 GG). To assume inability requires that all possible modes of reaction by the *Land* itself – including requests for assistance of police forces of other *Länder* or the Federal Border Police – have been exhausted or appear fruitless which reflects the subsidiarity of the mechanism provided for by Art. 91 GG.¹³⁷ In this case the Federal Government may “place the police in that *Land* and the police forces of other *Länder* under its own orders and deploy units of the Federal Border Police,” Art. 91 para. 2 1st sent. GG. Such a measure “shall be rescinded once the danger is removed, or at any time on the demand of the *Bundesrat*,” Art. 91 para. 2 2nd sent. GG. “If the danger extends beyond the territory of a single *Land*, the Federal Government, insofar as is necessary to combat such danger, may issue instructions to the *Land* governments”, Art. 91 para. 2 3rd sent. GG.

As an *ultima ratio* – meaning if the prerequisites of Art. 91 para. 2 GG are given and “the police forces and the Federal Border Police prove inadequate” – the Federal Government “may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organised armed insurgents”, Art. 87a para. 4 1st sent. GG. Particularly in this case the GG paves the way for a quick return to the state of the “ordinary” constitutional order: “Any such employment of the Armed Forces shall be discontinued” if demanded by the *Bundestag* or the *Bundesrat*, see Art. 87a para. 4 2nd sent. GG.

It is important to note that the competence to assume an “internal emergency” lies with the Federal or *Länder* governments, a parliamentary approval is not required. This appears to be acceptable since “internal emergencies” modify the ordinary constitutional order only to a limited extent.¹³⁸

To sum up: The determination of an “internal emergency” is up to the affected *Land* or the Federal Government¹³⁹ and is not subject to parliamentary approval. A modification of the allocation of powers between the federal legislature and the executive does not take place. There exists no right to issue “emergency decrees” (*Notverordnungsrecht*) in case of “internal emergencies.” The Federal Government may intervene under strict conditions. The *Bundesrat* and in a special case also the *Bundestag* may force the Federal

¹³⁷ *Theodor Maunz*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*. 81st ed. September 2017, Art. 91, para. 30; *Rainer Grote* (fn. 1), p. 160.

¹³⁸ *Eckart Klein* (fn. 17), p. 65.

¹³⁹ The Federal Government is not authorized to derogate from or to suspend Basic Rights as enshrined in the GG, which includes particularly the right to strike as reflected in the special safeguarding provision of Art. 9 para. 3 GG, *David Dyzenhaus* (fn. 2), p. 449.

Government to put an end to its intervention. The competences of the Federation are extended leading to a centralization of powers, but simultaneously protective measures against an abuse of power installed.

3/3 External Emergencies

Regarding the horizontal separation of powers the constitutional design of the GG opts against a shift of regulatory power towards the executive in times of “external emergencies”.¹⁴⁰ Just to reiterate the basic competences and roles of the main state organs regarding emergency measures and procedures: It is the responsibility of the *Bundestag* to determine whether a situation is to be qualified as a “state of tension” in the sense of Art. 80a GG. It is within the responsibility of the Federal Government to request the determination of a “state of defence” (see Art. 115a para. 1 GG). Still, it lies within the competences of the *Bundestag* (with consent of the *Bundesrat*) to determine whether exceptional circumstances amount to a “state of defence” in the sense of Art. 115a para. 1 GG. In the case of an immediate threat a determination can be made by the “Joint Committee” (Art. 115a para. 1, para. 2 GG). The Federal President is responsible for promulgating the determination (after countersignature of the Chancellor according to Art. 58 GG) (Art. 115a para. 3 GG).¹⁴¹ The Federal President can – according to accepted doctrine – reject the promulgation in cases of formal or evident material unconstitutionality of the determination¹⁴² – this applies to all acts requiring a promulgation. The Federal Government may initiate the legislative procedure pursuant to Art. 115d GG in a “state of defence” by denoting a bill as urgent. The *Bundesrat* and *Bundestag* may not reject adopting a bill according to the Art. 115d GG procedure, they may, however, initiate a constitutional review procedure (see Section 5/1, 5/3). In cases calling for an immediate action and insurmountable obstacles towards the timely convening of the *Bundestag* the “Joint Committee” shall act in place of the *Bundestag* and the *Bundesrat* (Art. 115e GG). The *Bundestag* has the right to repeal any legislation enacted by the “Joint Committee” if the *Bundesrat* consents (Art. 115l para. 1 GG).

The “external emergency” regime does also affect the vertical separation of powers. It induces a concentration of legislative as well as administrative and police powers:

The Federation has the competence to legislate concurrently on matters which are in the realm of *Länder* competences if this is necessary for defence purposes, Art. 115c para. 1 GG.¹⁴³ Art. 115c GG conveys the Federation the power to enact laws “for a state of

¹⁴⁰ Obviously, the power of command over the Armed Forces passes to the Federal Chancellor (Art. 115b GG).

¹⁴¹ It is also the right of the Federal President to issue declarations under international law regarding the existence of the “state of defence” with the consent of the *Bundestag* (Art. 115a para. 5 GG).

¹⁴² See generally *Hermann Butzer*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 82, para. 115 et seq.

¹⁴³ *Wolfgang März* (fn. 108), p. 1011 para. 63; *Volker Epping*, Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115c, para. 17.

defence” already in times of peace, hence such a competence is already given before a “state of defence” is determined.¹⁴⁴ According to Art. 115c para. 4 GG enacted federal laws “may, for the purpose of preparing for their enforcement, be applied even before a state of defence arises.” According to Art. 115c para. 3 to “the extent necessary to repel an existing or imminently threatened attack, a federal law for a state of defence may, with the consent of the *Bundesrat*, regulate the administration and finances of the Federation and the *Länder*” in deviation of normally applicable rules. The procedural requirement of a *Bundesrat* consent for the successful adoption of respective legislation (Art. 115c para. 1 1st sent. GG) serves as a safeguard against the usurpation of competences of the *Länder*. According to Art. 115f para. 1 GG “the Federal Government, to the extent circumstances require, may [...] employ the Federal Border Police throughout the federal territory” and “issue instructions not only to federal administrative authorities but also to *Land* governments and, if it deems the matter urgent, to *Land* authorities, and may delegate this power to members of *Land* governments designated by it.” Art. 115f para. 2 GG requires that the “*Bundestag*, the *Bundesrat* and the Joint Committee” are “informed without delay of the measures taken”.

The GG does also assume the possibility that the Federal Government and its administrative capacities are paralyzed. Its normative response to such a constellation inserts a decentralizing element into the vertical emergency regime: Should the competent federal bodies be “incapable of taking the measures necessary to avert the danger, and if the situation imperatively calls for immediate independent action in particular areas of the federal territory, the *Land* governments or the authorities or representatives they designate shall be authorised, within their respective spheres of competence, to take the measures” pursuant to Art. 115f para. 1 GG according to Art. 115i para. 1 GG. Measures taken “may be rescinded at any time by the Federal Government, or, with respect to *Land* authorities and subordinate federal authorities, by Minister-Presidents of the *Länder*”, see Art. 115i para. 1 GG.

3/4 Legislative Emergencies

As already presented above Art. 81 GG allows in limited circumstances to bypass the *Bundestag* in order to adopt an urgent bill. Whilst the Federal President and the Federal Government are assigned a significant role in that regard, their powers are restrained by the essential participation of the *Bundesrat* for the adoption of a bill. Art. 81 GG (in conjunction with Art. 68 GG) constitutes one rare case in which the Federal President – whose powers are in light of the experiences in the Weimar Republic fairly limited within the constitutional order of Germany¹⁴⁵ – plays an essential role: He is given full discretionary powers on declaring a state of “legislative emergency” if the other prerequisites of Art. 81 para. 1 GG are met.¹⁴⁶

¹⁴⁴ Rainer Grote (fn. 1), p. 167.

¹⁴⁵ See generally only Torsten Stein, Der Bundespräsident als „*pouvoir neutre*“, 69 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2009, p. 249 et seq.

¹⁴⁶ Roman Herzog, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 81, para. 51. The Federal Constitutional Court may review his decision only for an abuse of

4/ On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order? Have they been activated in abusive ways and has there been a political criticism against their application?

It cannot be stated with sufficient certainty how frequently Art. 76 para. 2 4th and para. 3 4th sent. GG have been employed in parliamentary practice. However, Art. 76 para. 2 4th sent. GG is only of limited importance since the Federal Government regularly circumvents the right of the *Bundesrat* to comment on its proposals by submitting its bill “from the floor of the *Bundestag*” in the sense of Art. 76 para. 1 GG via parliamentary fractions. The legality of this strategy has remained controversial,¹⁴⁷ although the prevalent view seems to accept its constitutionality.¹⁴⁸ Furthermore, parliamentary practice takes advantage of the procedural flexibility that Art. 76 GG and the relevant procedural bylaws entail: Several controversial statutes have been adopted as “*Eilgesetze*” – “urgent statutes” (untechnically speaking) – recently. In these cases state organs engaged in the legislative procedure have agreed on shortening the relevant maximum deadlines for obligatory procedural steps (“*Fristverkürzungsbitten*”).¹⁴⁹ One example for such an “*Eilgesetz*” is the *Finanzmarktstabilisierungsgesetz* (“Financial Market Stabilization Statute”)¹⁵⁰ which has been considered formally within the legislative procedure for a period of merely four days.¹⁵¹ Other examples include the *Stabilisierungsmechanismusgesetz*¹⁵² concerning the European Financial Stability Facility and the 13. *Atomgesetznovelle* (“13th Amendment of the Statute on Nuclear Energy”).¹⁵³ The Federal Constitutional Court does not assume that the mere acceleration of the legislative procedure might render an enacted statute *per se* formally defective. It argues that the relevant bodies are free to reject a bill should they feel that they have not been given sufficient time for its consideration.¹⁵⁴ Scholarship has been rather critical towards the strategy of “*Eilgesetze*” fearing that a massive acceleration of the legislative

his discretionary powers, see *Thomas Mann*, in: Sachs (ed.), *Grundgesetz-Kommentar*, Art. 81, para. 4.

¹⁴⁷ See only *Johannes Dietlein*, in: BeckOK, 34th ed., Art. 76, para. 29 et seq.

¹⁴⁸ See only *Henry Hahn*, *Die umwelt- und zukunftsverträgliche Entscheidungsfindung des Staates*, 2017, p. 109. Critically *Hans Hofmann/ Georg Kleemann* (fn. 50), p. 322, 324. Generally *Johannes Masing*, in: von Mangoldt/Klein/Starck (eds.), *Kommentar zum Grundgesetz*, 6th ed. 2010, Art. 76, para. 97 et seq.

¹⁴⁹ *Thomas Mann*, *Gesetzgebungsverfahren* (§ 33), in: 1 *Leitgedanken des Rechts*, 2013, p. 361 (369 para. 20).

¹⁵⁰ *Finanzmarktstabilisierungsgesetz* of 17th October 2008 (BGBl. I p. 1982).

¹⁵¹ *Hans Hofmann/Georg Kleemann* (fn. 50), p. 314.

¹⁵² *Stabilisierungsmechanismusgesetz* of 22nd May 2010 (BGBl. I p. 627).

¹⁵³ *Dreizehnte Gesetz zur Änderung des Atomgesetzes* of 31 July 2011 (BGBl. I p. 1704) On this see *Christoph Degenhart*, *Grundlagen und Direktiven legislativer Abwägungsentscheidungen – Verfassungsfragen der 13. AtG-Novelle*, DVBl. 2013, p. 207 (214).

¹⁵⁴ On the constitutionality of accelerating practices with regard to legislative procedure see BVerfGE 29, 221 (233 et seq.).

procedure when fundamental issues are at stake could be particularly detrimental to the idea of democratic legitimacy.

With regard to “emergency legislative procedures” it can be asserted that neither Art. 115d nor 115e GG has been activated so far.¹⁵⁵ The same applies to Art. 81 GG. The effectiveness of these mechanisms in practice is hence yet to be demonstrated and assertions as to the practical implications that these procedures would render when activated remain speculative.

In light of their “practical unimportance” these specific norms have not been in the spotlight of contemporary political debates although the *Notstandsverfassung* and its fitness to produce adequate responses with regard to contemporary security dangers have been discussed lately with greater intensity.¹⁵⁶ In that regard debates focussed *inter alia* on certain aspects of the regime governing “internal emergencies” and here especially the deployment of the Armed Forces domestically.¹⁵⁷ Some voices still question the sensibility of “regulating the extraordinary” at all. It is purported that all rules and schemes will be rather fruitless if the “exceptional” manifests which is part of its very nature.¹⁵⁸ In any case it is obvious that the *Notstandsverfassung* is based on the premise that the “exceptional” should be addressed by legal means. Hence, this critique is – at least *de lege lata* – beside the point.

5/ Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?

In general, both the “accelerated ordinary legislative procedure” as well as the special legislative procedures for different categories of “emergency” are subject to judicial review.

5/1 In particular, is this review the task of a constitutional court?

The Federal Constitutional Court is competent to review the conformity of law-making procedures “in action” with the constitution.¹⁵⁹ Hence its competence extends obviously to the employment of the options offered by Art. 76 para. 2 4th sent., para. 3 4th sent. GG. Its competences are, however, not only limited to the “state of normalcy”: The Basic Law restricts the role of the Federal Constitutional Court neither in times of “internal”, “external emergencies” nor “legislative emergencies”. The specific constitutional review

¹⁵⁵ Axel Hopfau, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Vorbemerkungen Art. 115a, para. 68. An extensive use has been made of Art. 80a GG – as already explained above.

¹⁵⁶ On this see rather recently the decision by the Federal Constitutional Court on the Aviation Security Act, BVerfG, Decision of the 2nd Senate (20th March 2013) - 2 BvF 1/05 - Rn. (1-90), which paved the way towards subsuming a terrorist attack under the term of a “grave accident”.

¹⁵⁷ See only the proceedings and judgment regarding the Aviation Security Act (*Luftsicherheitsgesetz*), BVerfG, Judgment of the First Senate of 15 February 2006 - 1 BvR 357/05 - paras. (1-156) which focussed particularly on Art. 35 para. 2, para. 3 GG.

¹⁵⁸ See Eckart Klein (fn. 9), p. 937, para. 3.

¹⁵⁹ Johannes Dientlein, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 76, para. 27.

procedures according to Art. 93 GG remain available as control mechanisms.¹⁶⁰ Generally, the idea of non-justiciable spheres of sovereign power beyond the scope of constitutional jurisdiction is alien to the German constitutional order (even in cases of emergencies),¹⁶¹ although the Basic Law acknowledges that the extent of judicial review might be limited in certain cases [see Section 5/3].

Art. 115g GG¹⁶² provides explicitly that “[n]either the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its Judges may be impaired.” Hence, both the legality of the determination of a “state of defence” as well as the measures adopted during the “state of defence” can be subjected to judicial review.¹⁶³ The protective scope of this safeguard provision extends to the competences of the Federal Constitutional Court: The activation of the Art. 115d para. 2 GG procedure may be examined by the Federal Constitutional Court. The same applies to the self-empowerment of the “Joint Committee” pursuant to Art. 115e GG¹⁶⁴ and the Art. 81 GG procedure. Judicial review could in these cases be particularly initiated by a supreme federal body or by other parties vested with rights of their own by the Basic Law or by the rules of procedure of a supreme federal body, see Art. 93 para. 1 No. 1 GG.¹⁶⁵ Dispute persists as to the question which specific aspects of these procedures are reviewable and to which extent they are reviewable [see Section 5/3].

¹⁶⁰ Beyond that right of access to courts in the case of an alleged violation of rights remains unaffected, see Art. 19 para. 4 GG. Measures which have been adopted and implemented in the exercise of specific powers for dealing with “internal emergencies” are likewise subject to judicial review, *David Dyzenhaus* (fn. 2), p. 449; *Rainer Grote* (fn. 1), p. 171; *Eckart Klein* (fn. 9), p. 965, para. 90.

¹⁶¹ See *Axel Hopfauf*, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) *Kommentar zum Grundgesetz*, 13th ed. 2014, Art. 115g, para. 3.

¹⁶² Article 115g [Federal Constitutional Court] “Neither the constitutional status nor the performance of the constitutional functions of the Federal Constitutional Court or its judges may be impaired. The law governing the Federal Constitutional Court may be amended by a law enacted by the Joint Committee only insofar as the Federal Constitutional Court agrees is necessary to ensure that it can continue to perform its functions. Pending the enactment of such a law, the Federal Constitutional Court may take such measures as are necessary to this end. Determinations by the Federal Constitutional Court pursuant to the second and third sentences of this Article shall be made by a majority of the judges present.”

¹⁶³ *Maunz*, in: *Maunz/Dürig* (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115g para. 39; *Rainer Grote* (fn. 1), p. 165; *Ernst Benda*, *Verteidigungsfall und Bundesverfassungsgericht*, in: *Festschrift für Friedrich August Freiherr von der Heydte*, 1977, p. 793 (798 et seq.); *Axel Hopfauf*, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) *Kommentar zum Grundgesetz*, 13th ed. 2014, Art. 115a, para. 38 et seq.

¹⁶⁴ *Axel Hopfauf*, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) *Kommentar zum Grundgesetz*, 13th ed. 2014, Art. 115e, para. 15; *Eckart Klein* (fn. 17), p. 77.

¹⁶⁵ Regarding the extended concurrent legislative competences of the federal level the *Länder* could submit an application for judicial review by the Federal Constitutional Court according to Art. 93 para. 1 No. 3 GG. Furthermore the individual complaint procedure will be relevant in cases in which emergency measures touch upon basic rights (Art. 93 para. 1 No. 4a GG).

5/2 Is the existence of the “urgent” and/or the “exceptional” situation a factual or a legal issue?

The question as to the “factual” nature of “exceptionality” in the sense of “emergency” is to be separated from both the “factual” nature of “exceptionality” and “urgency” as it underlies and is employed within Art. 115d, 81 GG as well as Art. 76 para. 2 4th sent., para. 3 4th sent. GG.

“Emergencies” as emanations of “exceptionality” are legal concepts which attach to real-world occurrences. Certain “states of emergency” are – beyond that – to be determined formally hence qualifying as “legal facts” or “legal issues” subsequent to their valid determination.

In detail: As has already been explained “internal emergencies” in the sense of the Basic Law are legal notions that attach to factual circumstances [see Section 1/2].¹⁶⁶ In contrast, “external emergencies” – more specifically the “state of tension” as well as “state of defence” – are legal notions which depend on a specific determination by competent state organs. They do, however, also attach to factual circumstances. The material prerequisites of a “state of defence” – Art. 115a para. 1 GG¹⁶⁷ – include an attack or imminent threat of an attack by armed force directed at the federal territory. An “armed attack” denotes a rather clearly perceivable factual occurrence, whilst the question of an imminent attack is to a much greater extent dependent on a prognosis. It necessitates a careful risk assessment by the competent organs regarding the most probable evolution of given circumstances.¹⁶⁸ The concrete danger of an “armed attack”

¹⁶⁶ The state of danger caused by a natural disaster or a particularly serious accident (Art. 35 para. 2, 3 GG), the emergency resulting from a threat to public safety or order (Art. 35 para. 2 GG) as well as the emergency caused by an imminent danger to the existence or to the free democratic basic order of the Federation or a *Land* (Art. 91 GG).

¹⁶⁷ Article 115a [Declaration of state of defence]: “(1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defence) shall be made by the *Bundestag* with the consent of the *Bundesrat*. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the *Bundestag*. (2) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the *Bundestag* or the *Bundestag* cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members. (3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit. (4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit. (5) If the determination of a state of defence has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the *Bundestag*, may issue declarations under international law regarding the existence of the state of defence. Under the conditions specified in paragraph (2) of this Article, the “Joint Committee” shall act in place of the *Bundestag*.”

¹⁶⁸ Rainer Grote, (fn. 1), p. 164; Knut Ipsen (fn. 24), p. 148.

is the factual situation that forms – according to the prevalent view which conceptualizes the “state of tension” as a pre-stage of a “state of defence” – the material condition under which the *Bundestag* is empowered to determine a “state of tension”.¹⁶⁹

Since a determined and promulgated “state of defence” marks the “exceptionality” that is a necessary (yet not sufficient) prerequisite for triggering Art. 115d and Art. 115e GG, exceptionality in these cases – being formally determined – is a legal issue (which is of course “factual” in its origin since the determination of a “state of defence” rests on factual grounds). The “exceptionality” possibly triggering Art. 81 GG appears to be a factual issue – the Federal Government has lost its majority in the *Bundestag* – which of course manifests in “legal facts” – a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the *Bundestag* and statute has not been adopted after it has been declared as urgent by the Federal Government [see 2/3/4].

“Urgency” is a further trigger for the respective special law-making procedure available in the case of a “state of defence” (Art. 115d GG) as well as the prerequisite for the special legislative procedure of Art. 81 GG.¹⁷⁰ With regard to Art. 115d GG and 81 GG “urgency” refers to a specific bill proposal. The Federal Government decides formally and collegially on this question (Art. 62 GG).¹⁷¹ Urgency hence has to become manifest in a decision by and a subsequent declaration of the Federal Government with regard to a bill. As such it is a “legal issue”. But also beyond this its “factual dimension” appears limited: In the case of Art. 81 GG scholarship assumes that every bill proposal may be denoted as “urgent” regardless of its importance.¹⁷² With regard to Art. 115d GG it is similarly stressed that the Federal Government is endowed with a wide political discretion concerning the “urgency declaration” [see Section 5/3] the only limitation being that triggering the special legislative procedure must be connected with the

¹⁶⁹ *Knut Ipsen* (fn. 24), p. 144. Some voices stress, however, that as a legal concept the “state of tension” would be subject to a certain interpretative dynamic which characterizes the constitution. Hence its reference point would not only be interstate armed conflict but also contemporary security dangers as posed by international terrorism or the proliferation of weapons of mass destruction, *Roman Schmidt-Radefeldt*, in: Epping/Hillgruber (eds.), *BeckOK Grundgesetz*, 34th ed. August 2017, para. 3. Arguing in favor of an extended use of Art. 80a GG in order to address new security dangers *Otto Depenheuer*, in: Maunz/Dürig (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 80a, para. 10; *Harald Erkens* (fn. 5), p. 1 et seq. However, since the constitution remains explicitly silent on a definition of a “state of tension”, procedural safeguards are essential to prevent an abuse of Art. 80a GG, *Wolfgang März* (fn. 108), p. 979, para. 11.

¹⁷⁰ In the broader “emergency context” it can also be identified in Art. 115f para. 1 No. 2 GG concerning the power of the Federal Government to instruct agencies of the *Länder* in a “state of defence”. Besides these instances the GG employs the term „urgent“/“urgency“ in Art. 84 para. 5, Art. 85 para. 4 (concerning the implementation of statutes by the *Länder*) and Art. 120a GG (equalization of burdens).

¹⁷¹ *Heinrich-Eckart Röttger* (fn. 76), p. 51; *Rüdiger Sannwald*, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) *Kommentar zum Grundgesetz*, 13th ed. 2014, Art. 81, para. 16.

¹⁷² *Michael Brenner*, in: v. Mangoldt/Klein/Starck (eds.), *Kommentar zum Grundgesetz*, 6th ed. 2010, Art. 81, para. 24.

necessities of the “state of defence”.¹⁷³ Therefore, in the case of Art. 115d GG and Art. 81 GG “urgency” seems to be a “legal” or – to put it differently – “formal” question merely with a “factual” residuum. The decisive point is whether the competent body *denoted* a bill as urgent not whether it is “truly” urgent (although there is a limited space for judicial review see [5/2]).

Art. 76 para. 2 4th sent. GG and para. 3 GG 4th sent. display following picture: Similarly, the reference point of the term “particularly urgent” are bills. This “urgency declaration” requires a decision by the Federal Government that is made collegially¹⁷⁴ or a plenary decision by the *Bundesrat*.¹⁷⁵ Whilst already the fact that “urgency” is an element of a legal provision and the fact that it has to be decided upon by the Federal Government or the *Bundesrat* formally renders it a “legal notion”, it is acknowledged that the assessment of the “(particular) urgency” of a bill by the respective bodies must be based on reasonable grounds.¹⁷⁶ These will necessarily rest on facts. In combination with the term “in exceptional circumstances” “particular urgency” hence means that the adoption of a bill within the ordinary procedure shall appear unfeasible for objective reasons.¹⁷⁷ Reference to the mere “importance” of the bill is insufficient.¹⁷⁸ In this context “urgency” and “exceptionality” display a hybrid nature displaying “factual” as well as “legal” elements with a greater emphasis on the “factual” if compared to Arts. 115d, 81 GG.

5/3 Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extent?

The Basic Law refrains from explicitly stipulating an obligation to state reasons for triggering a special legislative procedure on part of the competent bodies (this applies to Art. 76 para. 2 4th sent., para. 3 4th sent., Art. 115d, Art. 115e, Art. 81 GG). It remains also silent on the question of substantiating an initiative for declaring a “state of defence” which is the essential precondition for the availability of the Art. 115d, Art. 115e GG procedures. The key question therefore appears to be whether an obligation to state reasons could be derived from interpreting provisions which pave the way towards special legislative procedures in light of general constitutional principles like legal certainty, the democracy principle as well as the main rationales governing law-making

¹⁷³ Rainer Grote, in: v. Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, Art. 115d, para. 2.

¹⁷⁴ Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 76, para. 64 et seq.

¹⁷⁵ Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 76, para. 84.

¹⁷⁶ Johannes Dietlein, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 76, para. 27.

¹⁷⁷ Johannes Masing, in: v. Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, Art. 76, para. 133.

¹⁷⁸ Johannes Masing, in: v. Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, Art. 76, para. 133.

procedures. This issue has been rarely addressed by scholarship – especially since Art. 115d, Art. 115e and Art. 81 GG have vanished into oblivion –, hence the answer given here will necessarily be relative and tentative. In the end, a possible obligation to give reasons is tied to the question of the judicial reviewability of respective decisions and the scope of a possible judicial review. Those scholars denying the reviewability of e.g. “urgency declarations” will reject the view that reasons should be provided for such declarations. Furthermore, it is commanded to distinguish between the different normative contexts of the respective special law-making procedures. The necessity to state reasons might have to be treated differently in each case.

With regard to the “accelerated ordinary legislative procedure” pursuant to Art. 76 para. 2 4th sent. GG it is to be assumed that the declaration of the Federal Government concerning the “particular urgency” of a bill is to be made in writing in the moment that the *Bundestag* submits its proposal to the *Bundesrat*. Furthermore, it is contended that the Federal Government is required to state the reasons for its urgency assessment.¹⁷⁹ Similar formal requirements are said to apply to Art. 76 para. 3 GG concerning a proposal submitted by the *Bundesrat*. The *Bundesrat* is obliged to declare the “particular urgency” of the bill in the moment it submits it to the Federal Government and to substantiate it.¹⁸⁰ The “burden of substantiation” is rather high in the case of Art. 76 para. 2 and 3 GG: The combination of “exceptional circumstances” with the term “particularly urgent” indicates that the “particular urgency” has to remain the exception and not the standard.¹⁸¹

Art. 115d GG as a special law-making procedure is only available after a “state of defence” has been determined and validly promulgated pursuant to Art. 115a GG. The respective constitutional provisions do not state formal requirements for the motion for determining a “state of defence” by the Federal Government explicitly.¹⁸² While the “state of defence” is determined via a plenary decision and does not take the shape of a

¹⁷⁹ Jens Kersten, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 76, para. 77; Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 76, para. 64; Hans Hofmann/Georg Kleemann (fn. 50), p. 325.

¹⁸⁰ See Jens Kersten, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 76, para. 101; Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 76, para. 84 et seq. Cf. Johannes Masing, in: v. Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, Art. 76, para. 134.

¹⁸¹ Instances of a “particular urgency” of a bill are for example the expiration of deadlines that have been imposed by the Federal Constitutional Court with regard to a constitutionally required amendment of statutes or a very strong public opinion on a certain issue, Kersten, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 76, para. 77. See also Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.), Kommentar zum Grundgesetz, 13th ed. 2014, Art. 76, para. 65.

¹⁸² With regard to “internal emergencies” it should be noted that the Basic Law neither obliges the Federation nor the *Länder* to give reasons for their assertion that a specific “internal emergency” exists which would convey certain powers upon them explicitly. Such an obligation could, however, be possibly derived from the principle of federalism which entails the idea of cooperation and loyalty between the *Länder* and the federal level.

“statute” or “law”, it should be noted that the Basic Law does generally refrain from imposing a duty to state reasons even for statutory bills that are submitted to the ordinary law-making procedure.¹⁸³ The general bylaws/rules of procedure of the *Bundestag* and the Federal Government do, however, entail an obligation to state reasons for introduced bills.¹⁸⁴ Stating reasons serves an important function with regard to democratic legitimacy.¹⁸⁵ In light of the far-reaching consequences that a determination of a “state of defence” renders, it can well be argued that the governmental assessment in the case of Art. 115a GG would have to be substantiated.¹⁸⁶

Art. 115e para. 1 GG necessitates a determination by the “Joint Committee” – which requires a constitutive decision – that “insurmountable obstacles prevent the timely convening of the *Bundestag* or that the *Bundestag* cannot muster a quorum”, it does, however, also remain silent on the obligation to state specific reasons for its assertion beyond that.¹⁸⁷

Art. 115d para. 2 GG does not establish specific requirements for a formal substantiation of the Federal Government’s assessment as to the urgency of a bill. The “Procedural Rules for the Procedure according to Art. 115d”¹⁸⁸ likewise do not oblige the Federal Government to state any reasons (see § 1). Whilst Art. 81 GG requires a formal “urgency declaration” towards the *Bundestag*,¹⁸⁹ it does also not address a possible obligation to state reasons. It is acknowledged that the Federal Government may denote a bill as urgent also right before a final vote of the *Bundestag* (see also § 86 of the Procedural Rules of the *Bundestag*¹⁹⁰). As has been already stated, some scholars assume that the Government has the right to denote any bill as urgent regardless of its importance [see 5/2].¹⁹¹

¹⁸³ See Jens Kersten, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 76, para. 22.

¹⁸⁴ § 76 para. 2 GOBT; § 42 para. 1 1st sent., § 43 GGO (*Gemeinsame Geschäftsordnung der Bundesministerien* – “Joint Procedural Rules of the Federal Ministries”).

¹⁸⁵ See e.g. Christoph Degenhart (fn. 153), p. 211.

¹⁸⁶ Similar considerations might apply with regard to the determination of a “state of tension” in the meaning of Art. 80a GG.

¹⁸⁷ See, however, Axel Hopfau, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115e, para. 13. According to § 9 of the “Procedural Rules of the Joint Committee” (*Geschäftsordnung für den Gemeinsamen Ausschuss* of 2 July 1969 (BGBl. I p. 1102)) it shall make such a determination after the President of the *Bundestag* has stated “that insurmountable obstacles prevent the timely convening of the *Bundestag* or that the *Bundestag* cannot muster a quorum”. This is, however, not required by the Constitution.

¹⁸⁸ *Geschäftsordnung für das Verfahren nach Artikel 115 d des Grundgesetzes* of 2 July 1969 (BGBl. I p. 1100).

¹⁸⁹ Roman Herzog, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 81, para. 36.

¹⁹⁰ *Geschäftsordnung des Bundestages* of 25 June 1990 (BGBl. I p. 1237).

¹⁹¹ Michael Brenner, in: v. Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, Art. 81, para. 24.

In light of the considerable impact such “urgency declarations” render on the law-making process it could possibly be argued that the competent bodies are obliged to state reasons for their assessment.¹⁹² In the end, stating reasons is to be seen as an emanation of due respect towards those organs whose rights are curtailed in the special legislative procedures. Furthermore, an effective judicial review would be difficult to accomplish if it was assumed that the competent bodies are not obliged to provide reasons for their decisions or declarations. This argument has of course no merit if the judicial reviewability of e.g. “urgency declarations” is rejected *per se*.¹⁹³ This is, however, not tenable [see Section 5/1]. On the other hand, it has to be taken into account that the judicial reviewability of “urgency declarations” is very limited due to the wide sphere of political discretion of the Federal Government – as will be explained in a moment. A very limited judicial review might be possible even if no reasons for e. g. an “urgency declaration” have been provided. In light of the rationalities of Art. 115d GG and Art. 81 GG and the qualities of “urgency” as a formal concept (with a factual residuum) it appears not absolutely untenable to assume that there is no duty incumbent on the Federal Government to give substantive reasons for its declaration in these contexts. Art. 115e GG might merit a different treatment which shall not be elaborated here further. In any case it has to be kept in mind, however, that stating reasons for triggering special law-making mechanisms is important to enhance the effectiveness of mechanisms of political accountability.

Even if no duty to state reasons should exist in certain cases, the “trigger mechanisms” for special legislative procedures remain subject to judicial review [Section 5/1]. Whilst the exact extent of the judicial review depends on the content of the provision in question,¹⁹⁴ it is safe to say that its restraining effect will in most cases be limited which is due to several reasons:

First of all, the norms in question convey broad margins of appreciation and discretionary powers to the competent organs.¹⁹⁵ To give some examples: The determination of a “state of tension” by the *Bundestag* is a question of political discretion.¹⁹⁶ The same applies for the determination of a “state of defence”. The assessment of the “urgency” pursuant to Art. 115d or Art. 81 GG and denoting a bill proposal as “urgent” is within a very broad discretionary realm of the Federal

¹⁹² This is, however, disputed, see only *Heinrich-Eckart Röttger* (fn. 76), p. 52 et seq.

¹⁹³ With regard to Art. 81 *Klaus Stern*, *Gesetzgebungsnotstand – eine vergessene Verfassungsnorm*, in: *Festschrift für Schäfer*, 1980, p. 129 (135).

¹⁹⁴ See with regard to “emergency provisions” *Ernst Benda* (fn. 163), p. 799.

¹⁹⁵ *Klaus Stern* (fn. 9), p. 1365; *Wolfgang März* (fn. 108), p. 1024 para. 83; *Ernst Benda* (fn. 163), p. 799; *Roman Herzog*, in: *Maunz/Dürig* (eds.), *Grundgesetz-Kommentar*, 81st ed. September 2017, Art. 115g, para. 43.

¹⁹⁶ *Roman Schmidt-Radefeldt*, in: *Epping/Hillgruber* (eds.), *BeckOK Grundgesetz*, 34th ed. August 2017, Art. 80a, para. 4. The assessment that a certain internal emergency requires an intervention on part of the Federation is within the discretion of the Federal government (see Art. 35 para. 3 GG), *Volker Epping*, in: *Epping/Hillgruber* (eds.), *BeckOK Grundgesetz*, 34th ed. August 2017, Art. 35, para. 28.

Government.¹⁹⁷ The Federal Government is obliged to exercise its discretion duly.¹⁹⁸ These wide margins of appreciation and spheres of political discretion can only be judicially reviewed for evident and apparent abuses,¹⁹⁹ whilst the prerequisites for the exercise of discretion are subject to full judicial review (e. g. the existence of a validly promulgated “state of defence” in the case of Art. 115d GG). Regarding the declaration of “urgency” in the context of Art. 115d GG the case that the government has overstepped the limits of its (political) discretionary powers could possibly be made in a constellation in which the “urgency declaration” stood in no connection with the “state of defence” and was not substantively associated with the special necessities of the respective emergency.²⁰⁰ The declaration of a bill as “urgent” “in exceptional circumstances” by either the Federal Government or the *Bundesrat* pursuant to Art. 76 para. 2, 3 GG likewise conveys a margin of appreciation and *prima facie* prerogative of assessment on the acting bodies.²⁰¹ Whilst the sphere of political discretion is not absolutely unbound, the Federal Constitutional Court may not replace the assessment of the competent bodies concerning a factual situation with its own assessment if they remained within their margins of appreciation and discretion.²⁰² Its justiciability is hence limited (yet not excluded).²⁰³

Secondly, in emergency constellations judicial review will in most cases amount to an *ex post* control mechanism.²⁰⁴ The “damage” will be already done by then. Thirdly, it remains an open question whether the Federal Constitutional Court will be able to control the determination of certain “states of emergency” as well as emergency

¹⁹⁷ Heinrich-Eckart Röttger (fn. 76), p. 52; Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 81, para. 16; Michael Brenner, in: v. Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, Art. 81, para. 23.

¹⁹⁸ Gerhard Robbers, in: Sachs (ed.), Grundgesetz-Kommentar, Art. 115d, para. 7.

¹⁹⁹ Roman Herzog, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 81, para. 35; Volker Epping, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 9; Rainer Grote, in v. Mangoldt/Klein/Starck, Kommentar zum Grundgesetz, 6th ed. 2010, Art. 115d, para. 2; Roman Herzog in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 1970, Art. 115d, para. 10; Axel Hopfau, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115d, para. 10; Axel Hopfau, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115, para. 4. Critically Ernst Benda (fn. 163), p. 799.

²⁰⁰ Volker Epping, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 9. Assuming that such a declaration is not subject to judicial review Carl Otto Lenz, Notstandsverfassung des Grundgesetzes – Kommentar, 1971, Art. 115d, para. 7; Heinrich-Eckart Röttger (fn. 76), p. 54.

²⁰¹ Johannes Dientlein, in: Epping/Hillgruber (eds.), BeckOK Grundgesetz, 34th ed. August 2017, Art. 76, para. 27.

²⁰² Cf. regard to Art. 115e GG Theodor Maunz/Roman Herzog/Rupert Scholz, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115e, para. 125.

²⁰³ Rüdiger Sannwald, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 76, para. 64.

²⁰⁴ Klaus Stern (fn. 9), p. 1354; Wolfgang März (fn. 108), p. 1024, para. 83.

measures adopted in extreme circumstances and whether the acting state organs will be willing to comply with its orders:²⁰⁵ “But to a certain extent the Constitution has to be confident,”²⁰⁶ especially concerning the loyalty of state organs towards one another as well as the constitutional order.²⁰⁷

The effective limitations to judicial review are in many instances compensated by the political accountability of the main actors towards other institutions and the instalment of mechanisms that provide for a quick return to a “state of normalcy” [also see Section 2/2]. In the case of Art. 115d para. 2 and Art. 81 GG the *Bundestag* and *Bundesrat* or in the latter case solely the *Bundesrat* may reject to adopt a “urgency bill” should they not share the assessment of the Federal Government with regard to the urgency of a bill. They do not have the right, however, to reject the consideration of the “urgent bill” in the special procedure once it has been triggered.²⁰⁸ They are bound by the assessment of the Federal Government²⁰⁹ which does not exclude the possibility to initiate a proceeding at the Federal Constitutional Court. Similar considerations apply to Art. 76 para. 3 4th sent. and para. 3 4th sent. GG.

A further controlling mechanism is the Federal President in cases in which the validity of an act depends on its promulgation. It is generally acknowledged that the Federal President has a right to reject an act if it is formally defective or evidently incompatible with the Basic Law in the material sense.²¹⁰ Admittedly his control function will be – as it also applies to the Federal Constitutional Court – limited to cases of evident abuses of the margins of appreciation and spheres of discretion that relevant norms convey upon the acting organs.²¹¹

6/ Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances? Which criteria could be apt to guide this transposition?

Whether principles that guide legislative mechanisms for exceptional and/or urgent cases in the German constitutional realm can be transposed onto the EU plane is a challenging question. Answering it requires a careful assessment of the peculiarities of

²⁰⁵ Rainer Grote (fn. 1), p. 171.

²⁰⁶ Eckart Klein (fn. 17), p. 77.

²⁰⁷ Wolfgang März (fn. 108), p. 1024, para. 83.

²⁰⁸ See e.g. Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115d, para. 9.

²⁰⁹ Axel Hopfauf, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115d, para. 10; Gerhard Robbers, in: Sachs (ed.), Grundgesetz-Kommentar, Art. 115d, para. 7.

²¹⁰ Axel Hopfauf, in: Schmidt-Bleibtreu/Hofmann/Henneke (eds.) Kommentar zum Grundgesetz, 13th ed. 2014, Art. 115e, para. 16; Volker Epping, in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115a GG, para. 104.

²¹¹ Volker Epping, in: Maunz/Dürig, Grundgesetz-Kommentar, 81st ed. September 2017, Art. 115a, para. 104. Once special case in that regard is, however, is Art. 81 GG which gives the Federal President discretion of declaring a state of “legislative emergency” [see Section 3/4].

the supranational legal order and its commonalities with the domestic sphere. This cannot be done in-depth within this *Questionnaire*. It is safe to say, however, that certain parallels do exist: Just as the German constitutional order the EU is committed to the principle of democracy (Art. 2, 10 para. 1, para. 2 TEU) and the rule of law (Art. 2 TEU) – both principles are potentially affected by the inclusion of special law-making procedures into the treaty framework. Both the EU and the German state are multi-layered entities in the vertical respect, the Federal Republic of Germany as a federal state and the EU as a supranational structure. Legislative procedures on the EU level involve several organs and actors, the same applies to the German system. Extraordinary circumstances challenge both the constitutional order established by the Basic Law as well as the EU legal order. Besides the question of “comparability” it would have to be examined whether the problems that should be addressed by a possible EU legislative procedure for exceptional and urgent circumstances from a policy perspective correspond to those addressed by special law-making procedures that the Basic Law entails. Obviously, national constitutional design will necessarily be an important source of inspiration, should the project special law-making procedures within the EU be indeed taken up. In that regard questions of political feasibility in light of the dynamics between the EU, its institutions, Member States and also the European *demos* have to be considered duly which cannot be done in this context with the necessary scrutiny.

Using the German framework of the *Notstandsverfassung* (and Art. 81 GG) as a template, however, will in any case suffer from one essential flaw: Its effectiveness and feasibility has not been tested so far in practice. This *caveat* must not be forgotten. Nevertheless – accepting it as a premise that it is sensible to create a “legislative procedure” for situations shaped by exceptionality and urgency on the European level – main principles guiding and shaping the *Notstandsverfassung* and to a certain extent also Art. 81 GG should (at least) be given due consideration in the drafting process of such a framework. This applies as a matter of course also to Art. 76 para. 2 and 3 GG.

The key objective of any legislative mechanism for the “exceptional” is to pave the way towards an effective response to the necessities of an extraordinary situation thereby protecting the functionality of the legal order itself, whilst limiting the abusive potential that an “emergency framework” inherently entails.²¹² This general rationale is obviously as apt to guide both any domestic special law-making procedure framework for the “extraordinary” as well as comparable endeavours on the EU level.

In particular following main principles – which do overlap in their substance in several respects – inherent to the German constitutional framework appear transposable onto the EU level or at least relevant for designing a special legislative procedure for the “exceptional” at the EU level:

- Measures and mechanisms reactive to exceptional circumstances should not remain within a legal vacuum but should be governed by law. This is ultimately

²¹² See Eckart Klein (fn. 9), p. 936, para. 2; András Jakab (fn. 40), p. 323 et seq.

an emanation rule of law that is also an inherent element of the EU constitutional order.

- Mechanisms designed for tackling exceptional circumstances should be distinguishable and distinguished from the “state of the ordinary”. It has to be clear what the exception is and what qualifies as the rule. In that regard the combination of the terms “particularly urgent” and “in exceptional circumstances” as to be found in Art. 76 para. 2, 3 GG appears sensible. It stresses that “urgency” cannot become the standard case.
- The fundamental normative guidelines for a special law-making procedure should be proportionality and subsidiarity: Any exceptional legislative mechanism should be subsidiary to legislative procedures applying in “ordinary” circumstances. Deviations from the ordinary procedure should be limited to what is absolutely necessary for an effective response to exceptional circumstances. Disturbances of the balance of power between organs induced by a special law-making mechanism should be reduced to the minimum. The competence of the bodies responsible for legislation in ordinary times should be preserved as far as an efficient reaction to an emergency situation allows. In this sense, a possible framework for a special law-making procedure should focus on modifying procedural rules shaping ordinary legislative procedures in order to make the adoption process more expedient and refrain from disempowering the organs endowed with legislative tasks in ordinary times (see Art. 115d GG). Shifting legislative powers to the executive in times of crisis is not necessarily commanded. That certain accelerating elements can be already included in the ordinary legislative procedure is exemplified in the German case by Art. 76 para. 2 and 3 GG.
- The framework should provide for a “quick” return to the “ordinary”. Those organs in which legislative competence is vested in “ordinary times” should be given the power to repeal measures adopted with the exceptional legislative procedures (see Art. 115l GG). Any measures adopted should be limited in their duration and period of validity (see Art. 115i, Art. 115k GG).
- Judicial control of the initiation of special legislative procedure as well as of the measures adopted therein should be safeguarded explicitly (see Art. 115g).
- Mechanisms of political accountability should complement the control induced by the possibilities of judicial review.
- One crucial point will be the definition of “exceptional” and “urgent” circumstances which could possibly trigger a special legislative procedure. While the German concept of “internal emergencies” is rather broad, the opposite is true for “external emergencies” (and in the context of “emergencies” in the strict sense the Basic Law – as has been explained – provides a special law-making mechanism only for “external emergencies”). It will have to be decided whether special law-making procedures on the European level should be available only in cases of specific “emergencies” or rather generally triggered in “exceptional” and/or “urgent” circumstances without establishing a narrower typology. Both models can be identified in the Basic Law (see Art. 76 para. 2 4th sent., para. 3 4th sent. GG on the hand and Art. 115d, Art. 115e, Art. 81 GGG on the other).

- In any case, the major challenge will be finding the right balance between sufficiently broad and flexible concepts that would trigger a special law-making procedure in order to secure an effective response to the “necessities of the exceptional” on the one hand and limiting its abusive potential by giving the relevant “trigger concepts” sufficient substantive contour on the other hand. That these “trigger concepts” will remain vague is inevitable as the German example shows. Furthermore, such “trigger concepts” will have to be subject to broad margins of political discretion on part of the competent bodies in order to secure the effectiveness of special law-making procedures. A viable option to tame the abusive potential of this vagueness is the instalment of effective procedural safeguards (qualified majorities, repeal competences): The broader the concepts, the more expansive procedural safeguards should be.
- Provisions regulating a possible special legislative procedure should be explicit on the obligation of the bodies which have the power to initiate them to give reasons for their employment. “Declarations of urgency” which might be possible triggers for such mechanisms should be substantiated. This substantiation would serve as a further safeguard against an abusive employment of special law-making procedures. In this respect it seems to be more advisable to follow the model of Art. 76 para. 2 4th sent., para. 3 4th sent. GG than Art. 115d, 81 GG. An obligation to state reasons is a prerequisite for an effective (yet limited) judicial review which should in any case complement political accountability mechanisms. Furthermore it seems sensible to regulate explicitly that the bodies engaged in a special legislative procedure are bound by the “urgency declaration” of the body endowed with the right of initiative should they disagree with its assessment. This should obviously leave their right to initiate a judicial review process on this question untouched.
- Furthermore, an interesting construct appears to be Art. 80a GG which allows the enactment of statutes *ex ante* that become effective when the emergency that they were tailored for materializes and is determined. Although no definite assertions and conclusions can be made at this stage on this point, giving the idea of precautionary legislation *ex ante* “constitutional status” within EU treaties might merit a closer look.

7/ Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

This question is impossible to answer with sufficient certainty not to the least because the German government is currently – since the September 2017 elections – undergoing a process of reconfiguration. At this point only some general thoughts can be shared on this issue:

Any form of “emergency powers” and procedures is a particularly delicate topic in light of the experience with Art. 48 CWR during the Weimar Republic. Before its adoption the *Notstandsverfassung* as it is to be found within the Basic Law faced immense opposition

from within the *Bundestag* and outside of it.²¹³ “Bending” the ordinary legal framework and deviations from the ordinary legal order in times of crisis have been and are still seen critically both by German political authorities as well as legal academia and usually perceived as suspect. As the President of the Federal Constitutional Court *Vosskuhle* stressed on the occasion of the proceedings for a preliminary injunction concerning the ESM Treaty, the constitutional order is also valid in times of crisis.²¹⁴

It appears evident that any legislative mechanism for the “extraordinary” will affect the EU legal order and the intricate balance of powers established at the EU level substantively. This is an aspect that German authorities will particularly pay attention to.

The case for a special legislative procedure triggered by exceptional circumstances on the EU level will – moreover – be exceptionally hard should it in any way be connected with an extension of substantive EU competences in light of the “sovereignty sensitivity” of the German authorities (which is not merely a political state of mind but rather a constitutional command). In this regard the words of *Schorkopf* appear particularly intriguing: “The concept of crisis is a viable analytical category of legal scholarship to analyse the conditions under which power shifts occur within federal orders.”²¹⁵ In cases in which a special legislative procedure will correlate with an extension of EU competences, questions of sovereignty will inevitably arise.

Additionally, the German authorities will most probably be particularly sensitive to any curtailment of the legislative powers of the European Parliament which is an important source of democratic legitimacy within the EU framework.

²¹³ See on the respective debates generally *Hans-Herbert Gather* (fn. 3), p. 117 et seq. Furthermore see *Rainer Grote* (fn. 1), p. 156.

²¹⁴ Statement of 10th July 2012, cited by the *Handelsblatt* (13.07.2012).

²¹⁵ *Frank Schorkopf*, Herausforderungen der Finanzkrise für internationale, europäische und nationale Rechtsetzung, 71 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 2012, p. 183 (220): “Der Krisenbegriff eignet sich für die Rechtswissenschaft als analytische Kategorie, um die Bedingungen zu untersuchen, unter denen sich Macht in föderalen Rechtsordnungen oder im Mehrebenensystem verschiebt.” (translation by the author).