

State of exception and Covid-19 - Commentary on the speech The State of Exception under German Law and the Current Pandemic: Comparative Models and Constitutional Rights, by Professor Anna-Bettina Kaiser¹
Estado de exceção e Covid-19 - Comentário ao discurso O Estado de Exceção no Direito Alemão e a Atual Pandemia: Modelos Comparativos e Direitos Constitucionais, pela Professora Anna-Bettina Kaiser

Ana Raquel Gonçalves Monizⁱ

ⁱFaculdade de Direito, Universidade de Coimbra, Portugal

Abstract:

The Portuguese Constitution encompasses both the suspension of basic rights and the restriction thereof as instruments to deal with states of exception. However, and in contrast with German law, the absence of a systematic normative framework to face the current pandemic crisis and the legal reaction to its consequences demonstrate the importance of preparedness also in the world of law and rights, and lead to reflections which go straight to the very core of constitutionalism.

Keywords: State of exception, Constitutional law, COVID-19

Resumo:

A Constituição Portuguesa abrange tanto a suspensão dos direitos básicos como a sua restrição como instrumentos para lidar com os estados de exceção. No entanto, e em contraste com a lei alemã, a ausência de uma estrutura normativa sistemática para lidar com a atual crise pandémica e o modo como se reagiu juridicamente às suas consequências demonstram a importância da *preparedness* também no plano do(s) direito(s) e implicam reflexões que nos colocam, de novo, perante o núcleo do constitucionalismo.

¹ This text corresponds, with some corrections, to the oral presentation in the webinar on the subject held on December 17, 2020.

Palavras-chave: Estados de exceção, Direito Constitucional, COVID-19.

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Introduction

The protection of public health according to its constitutional understanding as a task of the State (articles 9 and 64 of the Portuguese Constitution) shows that we are faced with a topic shared by many areas of law. However, perhaps no other legal branch has been affected by the current pandemics as Public Law and especially Constitutional Law. This perception is a combined result of two phenomena: on the one hand, the concerns of public powers are now focused on the implementation of the right to health; on the other hand, the mechanisms adopted to fight Covid-19 involved exceptional provisions that affected significantly other fundamental rights. As in Germany, Portugal is currently under a Constitutional (and administrative) law of exception.

Rule of law, *Rechtsstaat* and *Etat de droit* are key concepts of our constitutionalism, based on the protection of fundamental rights. The main problem that the theories of the law of the exception must solve is the balance or the dialectics between the safeguard of fundamental rights and guarantees, and the government's urgency to act.

A quick overview on Professor Kaiser's speech demonstrates that the Constitutional Law as applied in normal times is disabled in dealing with emergencies and severe crisis like pandemics, but this doesn't mean that normal Constitutional Law has not have the resources to deal with these situations. The praxis (and the Portuguese experience) reveals, on its turn, that perhaps a specific Constitutional Law of the exception is not skilled enough to tackle with the consequences of a long-term crisis.

For instance, the seven traditional topoi Professor Kaiser identifies as main theses in the constitutional law of exception reveal the deep consequences that crises bring to the core of "constitutionalism as mindset" (if we want to invoke Koskenniemi and a particular Kantian vision of constitutionalism): separation and interdependency of powers,

protection of fundamental rights and, in general, juridicity (*Rechtmässigkeit*) of public action.

Commentary

I will not be able (I would not dare) to commentate all the topics chosen by Professor Kaiser, so I will focus on five ideas.

1. First of all, and with the purpose of stressing the differences between the Portuguese and the German systems already pointed out by Professor Kaiser, I will emphasize that the experience of the Weimar Republic (based on Carl Schmitt's doctrine) and especially the experience of the Nazi abuse of article 48 of the Constitution highlights the dangers of a constitutional or legal framework that promotes the empowerment of the President, allowing him to temporarily suspend fundamental rights, without a real concurrence of the other constitutional organs. This is why the Portuguese system actively involves the Parliament in this process. In fact, the state of emergency supposes not only an agreement between the three main constitutional political institutions - the President, the Government, and Parliament, within a system of checks and balances -, but also the parliamentary control over its execution.

2. Second, and whenever the legal systems recognize the essentiality of the opposition between the so-called law of normality and the law of the exception, I will underline the importance of codifying this law of the exception or this kind of constitutional state of necessity - instead of leaving the problem to interpretative solutions mainly reached outside de Constitution, as it is traditional, for instance, in Switzerland. However, the Portuguese constitutional design of the state of emergency does raise serious doubts: for instance, it is conceived for a short period time (15 days), but it may from time to time be renewed subject to the same time limits. Experience has already demonstrated that the pandemics is here to stay and currently we are assisting to successive renewals of the state of emergency - clearly revealing its disability to deal with pandemic crises. Nevertheless, the counter-argumentation remains equally strong: the limited validity of the state of emergency offers the possibility of a strong political and constitutional monitoring, since there is always a parliamentary control over the subsequent renewals of the state of emergency. In addition, the Presidential decree of declaration of the state of emergency is itself an act whose constitutionality can be reviewed by the Constitutional Court.

3. My third remark will underline a common topic: the absence of a healthy emergency clause both in the Portuguese and in the German constitutional texts (both in the Constitution of the Portuguese Republic and in the *Grundgesetz*). However, differently from Germany, we have a general provision to deal with a “public disaster” and this has been the constitutional basis of the President’s decrees among us. But the question remains: what can or shall be addressed as a public disaster? That is a topic that will demand a subsequent reflection, in order to interpretatively densify this wide concept.

4. Professor Kaiser told us about the introduction of a new state of emergency into German law: the “epidemic emergency of national concern” and its relevance concerning the Federal Ministry of Health’s competence to issue executive rules. Portugal faces an analogous problem, but the framework (even the constitutional framework) is rather different from the German one. In Portugal, under normal conditions, Government has already competence to enact independent executive rules. Those independent regulations may even be issued under Article 199, section g), of the Portuguese Constitution. According to this disposition, the Government is competent to perform all the activities and make all the arrangements necessary to promote economic and social development and to meet community needs. Nevertheless, this power has limits - one of them concerns precisely the matters related to rights, freedoms and guarantees.

But this topic attests the important role played by the Government (acting within its administrative powers) under normal circumstances, a role traditionally increased in times of exceptionality. Not only the Government has the responsibility to execute the decree of the President that declares the state of emergency, but also the insufficiencies revealed by the state of emergency were tackled by administrative legal instruments: states of alert and contingency and the (special) administrative state of exception consisting of the “state of calamity” - all provisions that strengthen the central role of the Government. In addition, in the event of public health crises, the Portuguese law on Public Health Monitoring attributes to the Ministry of Health a competence to enact executive rules, as well as any exception measures involving the restriction, suspension or closure of economic activities, the separation from healthy people, means of transportation or merchandises, in order to deal the dissemination of the infection or contamination.

Type I	Type II	Basis	Foundations	Duration	Impact on fundamental rights	Was it invoked during the pandemic crisis?
Constitutional states of exception	State of siege	Constitution (Art. 19)	Actual or imminent aggression by foreign forces, serious threat to, or disturbance of the democratic constitutional order <u>or public</u> disaster	15 days (but it may be renewed subject to the same time limits)	Suspension of rights (it shall in no case affect the rights to life, personal integrity and identity, civil capacity, and citizenship, of the person, nor the non-retroactivity of criminal law, the rights of defense of accused persons and the freedom of conscience and religion)	No
	State of emergency		<i>Idem</i> , when the circumstances mentioned above are of a less serious nature			Yes
(Special) administrative states of exception	State of calamity ("state of necessity" according to Art. 23, section 2)	Framework Law of Civil Protection (Arts. 8 ff., 19 ff.)	To mitigate collective risks and to limit their effects in case of severe accident or disaster	Unspecified	Restriction of rights (namely private property, private economic enterprise, right to movement, freedom of assembly)	Yes
	(The measures taken under these statutes do not need a specific declaration of a state of exception; these statutory provisions are considered the legal bases for the measures, whenever their statutory is accomplished).	Law of Health (Basis 34)	Defence of public health	Unspecified	Restriction of rights (namely freedom and private economic enterprise)	X
		Law on Public Health Monitoring (Art. 17)	Public health emergency	Unspecified	Restriction of rights (namely freedom, right to movement, freedom of assembly, private economic enterprise)	X

Table 1: States of exception in Portugal

5. At last, and as Professor Kaiser stressed already, under exceptional circumstances, it is important that the rule of law really functions. Despite believing that the rule of law is working as it should (also in Portugal), it cannot be concealed that there are few judicial actions on pandemic measures, as it can be concluded from the following table:

Court	Date 1	Date 2 (decision ID)	Action/ procedure	Plaintiff	Measures/fundamental rights	Decision	Comparative law	Dissenting opinions
Constitutional Court	29/05/2020	31-07-2020 (Ruling 424/2020; Proc. 403/20)	Judicial review of legislation; appeal to CC	Public Prosecutor's Office	Sections 3-e), and 11 of the resolution of the regional government council 123/2020; Sections 1-4, and 7, of the resolution of the regional government council 77/2020 (curfew, for 14 days, of the passengers that land on the Autonomous Region of Azores; liberty)	In constitutional, by offence of the partially exclusive legislative powers of the Parliament (Assembleia da República) [Art. 165, Section 1-b), in conjunction with Artigo 27, of the Portuguese Constitution]	No	No
Constitutional Court	22/09/2020	26-11-2020 (Ruling 687/2020; Proc. 726/20)	Judicial review of legislation; appeal to CC	Public Prosecutor's Office	Section 6 of the resolution of the regional government council 207/2020 (judicial validation of the administrative decision on the the curfew of the passengers that land on the Autonomous Region of Azores; liberty)	In constitutional, by offence of the partially exclusive legislative powers of the Parliament (Assembleia da República) [Art. 165, Section 1-b), in conjunction with Artigo 27, and Section 1-p), of the Portuguese Constitution]	No	No
Constitutional Court	23/11/2020	N/A	General review of constitutionality	Ombudsman	Art. 168-A, Section 5, of Law 2/2020, of March 31 (State Budget for 2020), as amended by Law 27-A/2020, of July 24 (Supplementary Budget) (rent exemption related to stores/shops in shopping centres ; property and freedom of private economic enterprise)	N/A		N/A
Supreme Administrative Court	12/08/2020	10-09-2020 (Ruling) (Proc. 088/20.8BA LSB)	Intimação para a proteção de direitos, liberdades e garantias (writ for the protection of rights, freedoms and guarantees)	Citizen	Resolution of the Council of Ministers 55-A/2020, Sections 1, 2 and 8, and Art. 14 of the framework of states of alert and contingency, attached to the Resolution (freedom of assembly)	Rejection of the request (legal basis; proportionality and equality)	Yes	No
Supreme Administrative Court	29/10/2020	31-10-2020 (Ruling) (Proc. 01958/20.9B ELSB)	Intimação para a proteção de direitos, liberdades e garantias (writ for the protection of rights, freedoms and guarantees)	Political party	Resolution of the Council of Ministers 89-A/2020 (right to travel/to movement, freedom of worship/right to free religious exercise, right to a family, moral and physical integrity)	Rejection of the application (locus standi)	No	Yes (dissenting from the grounds)
Supreme Administrative Court	29/10/2020	31-10-2020 (Ruling) (Proc. 0211/20.1B ALSB)	Intimação para a proteção de direitos, liberdades e garantias (writ for the protection of rights, freedoms and guarantees)	Citizen	Resolution of the Council of Ministers 89-A/2020 (right to travel/to movement, freedom of worship)	Rejection of the request (legal basis; proportionality and equality)	No	Yes (dissenting from the decision)
Supreme Administrative Court	17/11/2020	20-11-2020 (Judge's order) (P. 2090/20.0BE LSB)	Intimação para a proteção de direitos, liberdades e garantias (writ for the protection of rights, freedoms and guarantees)	Political party	Resolution of the Council of Ministers n.º 92-A/2020, modified by the Resolution of the Council of Ministers n.º 96-B/2020 (freedom of private economic enterprise , right to work)	Preliminary rejection of the application (locus standi)	No	N/A

Table 2: Jurisprudence of the Constitutional Court and the Administrative Supreme Court updated to 17.12.2020

A preliminary analysis of this data allows some reflections:

- i) From a comparative law perspective (Professor Kaiser told us about the impressive number of over 1000 published administrative and constitutional court decisions on pandemic measures in Germany!), we do not have a great number of decisions. But this does not mean that the Portuguese measures are less problematic or do not raise constitutionality or legality questions - as we can attest by reading the dissenting opinions.
- ii) The Constitutional Court lacks powers to rule in proceedings specially designed to protect fundamental rights against public authorities (like *amparo* or *Verfassungsbeschwerde*). The Constitution remained not indifferent to this problem: Article 20, para. 5, added by the 1997 Amendment, established that in order to defend personal rights, liberties and guarantees, the law shall provide citizens with legal procedures that are characterized by swiftness and priority, so that there is effective and timely protection against threats or violations of these rights. In 2002 the requirement has been met by the creation of the writ for the protection of rights, freedoms and guarantees within the jurisdiction of administrative courts, a mechanism that aims at condemning administrative entities to adopt a conduct which is indispensable to the exercise, in good time, of a right, freedom and guarantee. Concerning the pandemic measures, the above-mentioned absence of powers of the Constitutional Court regarding the appreciation of concrete decisions of inferior courts has the effect that the power to protect fundamental rights is shared with the Supreme Administrative Court (the latter playing an outstanding role on this matter).
- iii) The decision of the proceedings was fast, and therefore fulfilled the swiftness and priority demanded by the Constitution and the substantive exigencies of the rule of law.
- iv) The principles of proportionality and equality were taken as standards of review, revealing, in some measure, the difficulties and the weaknesses of the traditional understandings of such principles.
- v) The Courts begin to appeal to Comparative Constitutional Law, which expands the horizons of the solutions to concrete problems and enables the enlargement of the testing ground of the plausibility of the argumentation underlying the rulings. However, if the dialogue between national, foreign and international jurisdictions may be considered fruitful, it shall not be an argument (or even a juridical basis) to modify the core of the fundamental principles that rule Public Administration - like the principle of legality. Although law is performative and argumentative, an abstract appeal to European or International law shall not replace the liaison between the rule of law (in the sense of *Rechtsstaat*) and the democratic principle - which is the *punctum crucis* of the exigency of an accurate and precise legal basis for the administrative action.

Conclusion

The Portuguese model reveals a combination between the restriction and the suspension models, trying to achieve the balance between emergency measures and the protection of fundamental rights, within a constitutional system shaped on the interdependency of powers. The important role played by the Government demands a severe control (hard-look review) on the existence of a legal (parliamentary) basis of the administrative measures (specifically, executive rules) on rights, freedoms and guarantees. The absence of a systematic framework to deal with a pandemic crisis and the problems related to the protection of fundamental rights clearly demonstrate that we are again back facing the very core of constitutionalism.

Biographical notes

Ana Raquel Gonçalves Moniz - Professor of the Faculty of Law of Coimbra University, Institute for Legal Research (UCILeR).

Morada:

Faculdade de Direito e Instituto Jurídico da Universidade de Coimbra

Pátio da Universidade

3004-528 Coimbra

anamoniz@fd.uc.pt