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Commentary on Professor Anna-Bettina Kaiser's talk The State of Exception Under German Law and the Current Pandemic: Comparative Models and Constitutional Rights

Comentário sobre a palestra da Professora Anna-Bettina Kaiser O Estado de Exceção no Direito Alemão e a Atual Pandemia: Modelos Comparativos e Direitos Constitucionais

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COMMENTARY ON PROFESSOR ANNA-BETTINA KAISER'S TALK THE STATE OF EXCEPTION UNDER GERMAN LAW AND THE CURRENT PANDEMIC: COMPARATIVE MODELS AND CONSTITUTIONAL RIGHTS[1]

COMENTÁRIO SOBRE A PALESTRA DA PROFESSORA ANNA-BETTINA KAISER O ESTADO DE EXCEÇÃO NO DIREITO ALEMÃO E A ATUAL PANDEMIA: MODELOS COMPARATIVOS E DIREITOS CONSTITUCIONAIS

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Abstract: On the background of the dogmatic reconstruction of the German constitutional law of exception carried out by Anna-Bettina Kaiser, three aspects are briefly addressed here: *(i)* as demonstrated by the current pandemic, there is a real risk that resorting to the suspension of fundamental rights in an emergency as an exclusive or even main instrument of the constitutional regulation of the state of exception is to be considered obsolete; *(ii)* moreover, one must question whether it is really inevitable to resort to the suspension of rights or rules as the main instrument for regulating states of exception; *(iii)* lastly, it is important to highlight one of the main virtues of the "model of restriction of rights" proposed by Anna-Bettina Kaiser and which consists, not only in the preservation of fundamental rights in the greatest possible degree, but also in the preservation of the quality of contemporary democracy.

Keywords: States of exception; German law of emergency; Constitutional law; COVID-19.

Summary: **1.** Introduction; **2.** The obsolete character of a regulation of the constitutional state of emergency exclusively based on the suspension of rights; **3.** The possibility of the total exclusion of the suspension of constitutional rights in emergencies; **4.** Along the preservation of rights, the preservation of democratic life.

Resumo: Tendo como pano de fundo a reconstrução dogmática levada a cabo por Anna-Bettina Kaiser do direito constitucional de exceção à luz da Lei Fundamental alemã, são aqui brevemente abordados três aspetos: *(i)* como demonstrado pela atual pandemia, existe o risco de ser hoje considerado obsoleto

1. This text corresponds to the extended written version of the commentary presented at the webinar held on December 17, 2020. All translations, unless otherwise indicated, are my own.

ou desatualizado o recurso à suspensão de direitos fundamentais no âmbito do estado de emergência como instrumento exclusivo ou mesmo principal de uma regulamentação constitucional do estado de exceção; *(ii)* pode, além disso, questionar-se se é realmente inevitável o recurso à suspensão de direitos ou normas como principal instrumento de regulação dos estados de exceção; *(iii)* por último, importa salientar uma das principais virtudes do "modelo de restrição de direitos" proposto por Anna-Bettina Kaiser e que consiste, não apenas na preservação dos direitos fundamentais no maior grau possível, mas também na preservação da qualidade da vida democrática contemporânea.

Palavras-chave: Estados de exceção, direito alemão da emergência, direito constitucional, COVID-19.

1. Introduction

There is a lot to learned from the German constitutional law on the state of exception and the way it deals with situations such as the current coronavirus pandemic. The main reason for this is that, for historical reasons we are all very much aware, it is possible to distinguish the German constitutional law on the state of exception from the emergency laws of almost every other European constitutional order.

The basic terms of this distinction are the following ones: whereas in most European countries the constitutional law of emergency involves the momentary suspension of fundamental rights (this is also the case with the state of siege and the state of emergency as foreseen in article 19 of the Portuguese Constitution), in Germany a state of exception only admits a restriction of fundamental rights, more or less as it happens in normal times.

Professor Anna-Bettina Kaiser is certainly well prepared to deal with this subject. In January of this year, just before the coronavirus pandemic began to take its dramatic toll all across Europe, she published an excellent book that deals with the state of exception in a systematic and innovative way in the European constitutional context[2]. The motto of the book is the inversion of the classic sentence: *Necessitas legem non habet*, "*Not kennt kein Gebot*" or necessity knows no law[3]. Instead of this, Professor Kaiser proposes to reconstruct German's constitutional law of exception under the opposite motto, *Necessitas habet legem*, "*Not kennt Gebot*" or necessity has a law, and this is the law of fundamental rights.

Professor Kaiser's reconstruction of the constitutional law of exception is built, from a dogmatic point of view, on the distinction between a classical suspension model of emergencies and a new restriction model, which was introduced as a novelty by the German Basic Law of 1949. The basic characteristic of the suspension model is the "constitutional possibility of overriding fundamental rights in a state of emergency"[4]. Differently – in fact, in terms that are diametrically opposite – the restriction model implies that "in the exceptional situation, the legislature and executive are referred under the Basic Law to the leeway that the restriction rules to basic rights leave to them"[5]. As these rules do not distinguish between normal and exceptional times (except, perhaps, in what regards some of the presuppositions of their enforcement) it follows that the aforementioned restrictions are equally applicable for both situations.

In this commentary, I shall briefly deal with three aspects: *(i)* in the first place, I will try to explain why, apart for historical reasons that may be especially strong in Germany (but surely are not unique to Germany), the suspension of constitutional rights runs the risk of being considered today obsolete or outdated

2. Cf. A.-B. Kaiser, *Ausnahmeverfassungsrecht*, Tübingen, Mohr Siebeck, 2020.
3. Cf. Kaiser, *Ausnahmeverfassungsrecht*, p. 27.
4. Cf. Kaiser, *Ausnahmeverfassungsrecht*, pp. 210-211.
5. Cf. Kaiser, *Ausnahmeverfassungsrecht*, p. 227.

as the exclusive or even main instrument of a constitutional regulation of the state of exception; *(ii)* secondly, I'll question whether it is really inevitable to resort to the suspension of rights or norms as the main instrument pertaining to the regulation of states of exception; *(iii)* thirdly, I will try to point out what seems to me one of the main virtues of the "model of restriction of rights" proposed by Professor Kaiser and which consists, not only in the preservation of fundamental rights to the greatest possible degree, but also in the preservation of the quality of contemporary democratic life.

2. The obsolete character of a regulation of the constitutional state of emergency exclusively based on the suspension of rights

To speak of a model of the state of exception based on the suspension of rights means accepting that in an emergency rights are no longer subject to restrictions, as is the case in normal situations, but are simply temporarily overridden, albeit with some limitations.

In other words, according to this model, during an emergency rights "apply no more", and public authorities can act without the constraints that usually result from them.

In the Portuguese constitutional regulation of the state of exception the suspension of fundamental rights has two main substantive limitations. In the first place, according to article 19 (6) of the Portuguese Constitution "in no case may a declaration of a state of siege or a state of emergency affect the rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of the criminal law, accused persons' right to a defense, or the freedom of conscience and religion". In the second place, according to article 19 (4) the declaration and implementation of a state of siege or state of emergency "must respect the principle of proportionality and limit themselves, particularly as regards their extent and duration and the means employed, to that which is strictly necessary for the prompt restoration of constitutional normality".

The special intensity with which fundamental rights are hit within the suspension model justifies that such a suspension can only be in force for short periods of time. According to article 19 (5) of the Portuguese Constitution, neither the state of siege nor the state of emergency may last for more than fifteen days, notwithstanding the possibility of renewals subject to the same limits. And, in fact, historically, the "suspension model" has been associated with exceptional and typically more or less brief situations that are clearly separated from normal times, such as wars and natural cataclysms.

The Portuguese model is, in fact, what could be called an "enhanced suspension model", which generally complies with the requirements once stated by the German constitutional lawyer Ernst-Wolfgang Böckenförde. According to Böckenförde, an explicit regulation of the constitutional state of emergency should incorporate the following aspects: *(i)* firstly, it is important to establish

a clear distinction between the conditions that define a normal situation and those that must underlie a state of exception, which implies "refraining from the attempt to constantly 'juridify' [*vergesetzlichen*] concrete emergency situations that are experienced or imagined" and avoiding "to normalize potential states of emergency by means of a substantive normatization [*Normierung*][6]"; *(ii)* the previous distinction involves, in turn, the ability to draw a clear qualitative differentiation between laws and measures, since the latter, unlike the former, must be determined by specific objectives in view of a concrete situation, must be subject to a period of limited duration (this involves the adoption of a sunset clause), and, consequently, cannot make changes to the laws in force regarding fundamental rights, but only aim at their temporary suspension; *(iii)* thirdly, there must be a clear distinction between the authority that declares the state of emergency and the authority that holds the emergency powers resulting from that declaration; *(iv)* fourthly, emergency powers should be entrusted to a political body with executive functions, that is, the government, and neither to an administrative body, as a result of its lack of political responsibility, nor to a body of parliamentary extraction, for example a permanent committee of the legislative body, as a result of the risks of this body losing its parliamentary character in terms of size and method of action; *(v)* the legal limitation of the executive's performance must not be achieved, as mentioned, through a substantive normatization [*Normierung*], in view of the unpredictability of the concrete emergency situation, but by authorizing the adoption of the measures necessary to achieve the restoration of the normal situation, accompanied by submission to a principle of strict proportionality, subjection to time limits unsusceptible of tacit renewal and subjection to limits on the kind of fundamental rights that admit suspension; *(vi)* the responsibility and accountability of the members of the bodies that act in a state of emergency must be increased; *(vii)* a differentiation should be made between different degrees of intensity of the state of emergency according to the severity of the crises to be faced[7].

For the reader who is familiar with the state of emergency regime contained in article 19 of the Portuguese Constitution and regulated by Law no. 44/86, of September 30, it is clear that the main traits pointed out by Böckenförde are contemplated in our Constitution, at least in theory. The crux of the matter is, however, the ability to draw a clear distinction between normal and emergency situations. This ability has been undermined by the "continued acceleration of technology" and the appearance of a novel kind of risks, the "anthropogenic risks" and the "existential risks". According to Toby Ord, "there has been a robust trend toward increases in the power of humanity which has reached a point where we pose a serious risk to our own existence"[8]. Once this point has been reached the mere possibility of clearly distinguishing between "normal"

6. Cf. E.-W. Böckenförde, "The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances", in M. Künkler and T. Stein (eds.), *Constitutional and Political Theory: Selected Writings*, Vol. I, Oxford, Oxford University Press, 2017, pp. 125-126.

7. Cf. Böckenförde, "*Constitutional and Political Theory*", pp. 119-121, 125-131.

8. Cf. T. Ord, *The Precipice: Existential Risk and the Future of Humanity*, New York, Hachette, 2020, p. 29.

and "exception" begins to lose sense. It is still true that the justification for the admissible restrictions on fundamental rights varies according to the objective gravity of their normative presuppositions, but the difference between these becomes a difference in degree, not in nature.

In fact, the situations that justify the use of states of exception have been submitted to structural changes. Instead of war, we have global terrorism, considered as a police matter, certainly with international dimensions, as well as the possibility of a nuclear winter which could potentially mean the end of humanity itself. Instead of isolated and rare cataclysms, we have extreme natural phenomena that occur more and more frequently.

Perhaps the most important thing today is not to distinguish between normal times and exception times, but between different types of emergencies. In this regard, it should be noted that the suspension of rights in times of emergency does not only mean an undifferentiated consequence of declaring the emergency situation, but also presupposes, in some way, an undifferentiation between the different types of emergencies, such as disasters, epidemics, pandemics, terrorist attacks, civil wars, etc. On the contrary, the restriction model certainly implies a greater consideration of the types of restriction to which the different basic rights should be subject in an emergency, which naturally leads to develop an "elaborate taxonomy of types and subtypes of very severe emergencies"[9].

If only for these reasons it is, therefore, doubtful whether the suspension of constitutional rights is the most appropriate way to deal with extreme cases. This does not mean the acceptance that we now live in a permanent state of exception, only to be countered by the ceaselessly attempts "to interrupt the working of the machine that is leading the West toward global civil war"[10]. But it surely means that the suspension of constitutional rights cannot be the only way – not even perhaps the main way – to deal with extreme situations in the modern world, for the very simple reason that the distinction it presupposes between "normal" and "exceptional" can no longer be taken for granted[11].

9. Cf. J. W. Nickel, "Two Models of Normative Frameworks for Human Rights During Emergencies", in E. H. Criddle (ed.), *Human Rights in Emergencies*, Cambridge, Cambridge University Press, 2016, p. 57. Arguably there is a certain proximity between Anna-Bettina Kaiser's distinction between the suspension and the restriction models for dealing with emergencies and the two models of emergency frameworks within human rights explored by James Nickel. According to Nickel one of these models, which he calls the "type-oriented model", insists on the importance of naming and using types of emergencies in determining the compatibility with human rights of measures to manage and recover from them; a second model, which Nickel calls the "undifferentiated model", does not distinguish types of emergencies and avoid giving general rules or principles for emergency management.

10. Cf. G. Agamben, *Stato di Eccezione*, Torino, Bollati Boringhieri, 2003, p. 111.

11. This is not incompatible with a view of a "permanent state of emergency" that accepts the impossibility of separating normalcy from emergency as a matter of empirical objective fact and claims nonetheless that such impossibility does not exclude "the fundamental importance of the role that decision-makers have in identifying and drawing these lines of demarcation" (cf. A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford, Hart, 2018, p. 48).

3. The possibility of the total exclusion of the suspension of constitutional rights in emergencies

The possibility of completely excluding the suspension of fundamental rights in emergency situations is the real assumption behind the so-called restriction of rights model as the basis for the constitutional regulation of such situations. But is this assumption realistic? In this connection three main questions should be discussed: *(i)* is it really necessary to resort to the suspension of fundamental rights as a way to deal with exceptions? *(ii)* once we accept that all admissible measures to be adopted in an emergency must comply with the requirements of proportionality, does is it really matter whether we opt for a suspension or a restriction model? *(iii)* it is it not the case that the Constitution itself may directly require in certain cases the suspension of fundamental rights and norms as the only way to effectively protect its values?

i) From the occasional appeal to suspension as an instrument to deal with emergencies to suspension as a model

In order that a state of emergency is declared according to the suspension model as it has been configured in the Portuguese Constitution some extreme demanding requirements must be met. On the one hand, neither the state of siege nor the state of emergency may last for more than fifteen days, without prejudice to the possibility of renewals (article 19 (5)); furthermore, the President of the Republic declares the state of siege or the state of emergency, but this declaration requires prior consultation of the Government and authorization by Parliament, or, if Parliament is not sitting and it is not possible to arrange for it to sit immediately, by its Standing Committee (articles 134 and 138 of the Constitution). On the other hand, even when these requirements are fully met, the suspension of fundamental rights is not to be easily endured in a constitutional democracy.

It is therefore necessary that a constitutional order that deals with states of exception mainly by means of the suspension of fundamental rights provides other instruments for dealing with less serious emergencies or ones that may extend over long periods of time, as is the case with the current pandemic.

This means that, in practice, the suspension model tends to be one part of what is in fact a dualist model of states of exception: alongside the states of exception that allow for the suspension of fundamental rights, there must be states of exception that admit only the restriction of fundamental rights under the general terms that are provided for in the Constitution. In this context, the suspension of rights occurs only for (relatively) short periods of time, and crisis of longer duration must be dealt with in other ways.

However, this dualism is not without dangers. There is, in fact, a tendency to conceive of the longer cases in the same terms as the shorter ones. In other words, there is a real danger that the suspension model will expand and start to be used as the only model to deal with all states of exception.

If we look at the Portuguese case, which is a typical example of the suspension model and the dualistic system above mentioned, we see a situation that is cause for some worry at least in two dimensions. First of all, instead of the risk identified by Böckenförde of normalizing potential states of emergency by means of a "substantive normatization", we are faced with the real danger that normative restrictions of fundamental rights in emergencies are regulated by law in excessively vague terms[12]. In this way, such norms are conceived as a kind of surrogate of measures adopted under the declaration of the state emergency, that is, measures that presuppose the suspension of fundamental rights. There is nothing to prevent that in the suspension model, the powers attributed to the executive in emergency situations do not become valid also outside those situations, as happened in France following the terrorist attacks of 13 November 2015[13].

Secondly, there is also the danger of confusion or juxtaposition between suspension and restriction regimes ruling the same emergency situation. Since the beginning of the pandemic crisis, back in March 2020, Portugal has experienced a cycle in which states of emergency, conceived according to the suspension model, alternate with the less hard situations of contingency, alert and calamity, foreseen in the Portuguese Law of Civil Protection, and which should comply with the more demanding requirements of the restriction model[14].

However, as time went by, something different happened: an overlapping of the constitutional state of emergency and the administrative situation of calamity began to be admitted[15].

On may certainly question whether a similar danger does not also exist in a constitutional order that deals with emergencies by means of the restriction of rights. Professor Kaiser mentions section 5 of the German Protection Against Infections Act, according to whose paragraph 2 once an "epidemic emergency of national concern" is declared the Federal Minister of Health has the power to issue regulations that may deviate from a number of federal statutes. In this case it appears that an element of suspension resurfaces in a system that is mainly

12. See for example Article 17, under the heading "Exceptional regulatory power", of Law no. 81/2009, of 21 August, which states, in its paragraph 1, the following: "According to what is stipulated in base xx of Law no. 48/90, of 24 August, the member of the Government responsible for the area of health can take exceptional measures essential in the event of a public health emergency, including the restriction, suspension or closure of activities or the separation of people who are not sick, means of transport or goods, who have been exposed, in order to avoid the possible spread of infection or contamination".

13. Cf. Kaiser, *Ausnahmeverfassungsrecht*, pp. 254-256. Oren Gross aptly describes the French legal evolution in this respect after the terrorist attacks of 2015 as one in which "the exception becomes the new legal rule": see O. Gross, "The Normal Exception", in M. A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis*, Oxford, Oxford University Press, 2018, pp. 602-604.

14. See articles 8 and 9 of Law no. 27/2006, of July 3, as amended by Organic Law no. 1/2011, of November 30, and Law no. 80/2015, of August 3.

15. The last declaration of a situation of calamity was extended to last until 23 November by Resolution of the Council of Ministers no. 96-B / 2020, of 12 November, "in order to align with the period of application of the state of emergency".

conformed along the lines of the model of restriction of rights. What must be asked is if this is really a Trojan horse.

The real question is whether fundamental rights are more protected in a system that conforms in general with the stricter demands of the restriction of rights in emergencies, even if it contemplates some manifestations of the method of suspension of rules in times of emergency, or in a system that resorts to suspension of fundamental rights as the basis of the constitutional regulation of states of exception, as it happens in Portugal.

A brief comparison between the legal instruments on the basis of which Germany and Portugal dealt with the pandemic is certainly illustrative.

In Germany, the most important instrument to fight the coronavirus pandemic is the Protection Against Infections Act, from 2000, and amended in March, May, and November this year.

In Portugal, if we want to understand the multiple instruments that have been adopted to the same effect, we must distinguish three levels:

a) At the first level, we have the declarations of the state of emergency issued by the President of the Republic (to this moment we have already had at least eight such declarations[16]), first between March and May, and then since November to the present date, as well as the corresponding Government's decrees that develop such declarations and adopt the corresponding executive measures.

b) At the second level, we have a legislative act approved by the Government and then confirmed by Parliament (in terms that give cause to some doubts from a constitutional point of view), the Law-Decree no. 10-A/2020, from March 13, which has been amended at least 10 times up to this moment.

c) Finally, we have the multiple declarations of the situations of calamity (some applying in all the Portuguese territory, and some applying only in part of it) issued by the Government in conformity with the Civil Protection Act.

This chaotic situation and all the uncertainty to which it gives cause is one of main problems with the regulation of emergencies mainly based on the suspension of rights as adopted in our Constitution.

ii) The levelling effect of the proportionality principle

An equally important issue is whether by applying the principle of proportionality in situations of crisis there is not the risk that the regulation of emergencies based

16. The last one being contained in the Decree of the President of the Republic no. 9A/2021, from January 28.

on the restriction of constitutional rights or on the suspension thereof becomes relatively indifferent[17]. It can be argued, in fact, that since both models resort to the principle of proportionality any differences between them will tend to dissipate. Whatever the differences in the presuppositions of the two models, and even in the main instruments they resort to (suspension versus restriction of basic rights), their practical consequences will tend to be levelled around the same results.

A better understanding of this problem requires we have in mind a complete version of the classic sentence: not only "*necessitas non habet legem…*", but also, decisively, "*…sed ipsa sibi facit legem*"[18]. Not only "necessity does not recognize any law", but also "necessity creates its own law"[19]. And this law, it can be argued, is always the same, i.e., the law that results from the principle of proportionality, whatever the theoretical models we may choose to create to understand the different constitutional systems. In emergencies, at least, rights always recede, and a utilitarian approach proves stronger and holds out[20].

Even if one does not want to question this general tendency[21], it seems clear that the critical potential of the proportionality principle is substantially different in an environment where fundamental rights are suspended compared to one in which they still apply and are only subject to restrictions in general terms. In fact, if fundamental rights still apply in emergencies their essential core (article 19 of the German Basic Law) must be respected as a balance-free normative content against all legislative measures[22]. On the other hand, on the basis of a

17. Cf. Kaiser, *Ausnahmeverfassungsrecht*, pp. 238, 260.

18. Cf. K. Pennington, "Innocent III and the *Ius commune*", in R. Helmholz, P. Mikat, J. Müller, M. Stolleis (eds.), *Grundlagen des Rechts: Festschrift für Peter Landau zum 65. Geburtstag*, Paderborn, Verlag Ferdinand Schöningh, 2000, pp. 349-366; F. Roumy, "L'origine et la diffusion de l'adage canonique Necessitas non habet legem (viii-xiii)," in W. Müller e M. S. Medieval (eds.), *Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, Washington, Catholic University of America Press, 2006, p. 302, nota 11. For a complete version of the sentence, as contained in Gratian's *Decretum*, see https://geschichte.digitale-sammlungen.de/decretum-gratiani/kapitel/dc_chapter_1_1118, last accessed on February 3, 2021.

19. Contrary to what Agamben seems to imply these are not two opposing ways of interpreting the same sentence, but two parts of the same sentence (see, Agamben, *Stato di Eccezione*, p. 34).

20. One could discuss, of course, whether a more general point could not be made out of this observation: cf. M. Foucault, *Naissance de la Politique, Cours au Collège de France, 1978-1979*, Paris, Gallimard/Seuil, 2004, p. 45.

21. As Anna-Bettina Kaiser acknowledges, "for laws that are enacted in and for normal times, there are no (major) difficulties in checking the proportionality". But if "the principle of proportionality largely keeps its promises" in normal times, "the situation is different, however, in those cases in which the legislature intervenes in or for existential crisis situations in basic rights" (cf. Kaiser, *Ausnahmeverfassungsrecht*, p. 234).

22. Cf. Kaiser, *Ausnahmeverfassungsrecht*,, pp. 238-241, 279-282. The problem, as Professor Kaiser is well aware, is that the doctrine of the essential core of fundamental rights tends to be understood as simply another instantiation of the principle of proportionality. In this case one must ask if a more promising result would not be obtained by simply foreseeing in the Constitution all fundamental rights not to be affected by measures undertaken in emergencies. As mentioned, this is the case with article 19 (6) of the Portuguese Constitution which states that "in no case may a declaration of a state of siege or a state of emergency affect the rights to life,

"mobile model" of the principle of proportionality it can be argued that measures considered to be proportional at the beginning of the pandemic may be exposed as excessive with the course of the crisis[23]. In this respect what recommends the restriction model is the upholding of the high value of maintaining a constitutional dialog between the different branches of power even in times of crisis.

iii) Suspension of rights and the State's duty to protect fundamental rights

Josef Isensee identifies a tendency of German constitutional interpreters towards "steadily strengthening the state defense function of basic rights at the expense of their protective function" [24]. He criticizes this tendency from the perspective of an adequate understanding, in his view, of the constitutional law of exception. The carving out of a protective function of fundamental rights is a well-known development of the jurisprudence of the German Constitutional Court[25]. According to Isensee, "the fundamental duties to protection include an unwritten, nonetheless immanent constitutional emergency law to protect the citizen. These duties also exist if all the expressly provided means fail"[26]. The jurisprudential basis for such a duty to protect in situations of crisis would be the famous Schleyer Judgment, issued by the German Constitutional Court in 1977 in the context of the Red Army Faction terrorist kidnapping and subsequent killing of the industrialist Hanns Martin Schleyer[27]. In this Judgement, Isensee sees the constitutional legitimation for a state action outside the legal acts of parliament, as "in situations of emergency the duty to protect authorizes the state to adopt extra-legal measures"[28].

In the aforementioned judgement, the Constitutional Court was asked by the son of Hanns Schleyer to order the Federal Government to release eleven named terrorists from prison and guarantee their safe departure out of the country as a means to obtain the release of his kidnapped father. The Court denied the claim: although recognizing that the freedom of the State organs in the choice of the means to protect life can, in cases of particular circumstances, be narrowed down to one particular mean, when an effective protection of life cannot be achieved in another manner, the Court nonetheless found that such a case was not at hand

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personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of the criminal law, accused persons' right to a defence, or the freedom of conscience and religion".

23. Cf. J. Kersten e S. Rixen, *Der Verfassungsstaat in der Corona-Krise*, München, C. H. Beck, 2020, pp. 50-51.

24. Cf. J. Isensee, "Not kennt Gebot. Selbstbehauptung des Rechtsstaats gegenüber dem Terrorismus", in J. Isensee, *Recht als Grenze – Grenze des Rechts*, Bonn, Bouvier, 2009, p. 221.

25. On this development and its ambivalence between a purely objective-normative dimension and a dimension that underlines a subjective right to protection as well as a State's duty to protect, see R. Alexy, *Theorie der Grundrechte*, Frankfurt-am-Main, Suhrkamp, 1994, pp. 411 ff.

26. Cf. J. Isensee, "Not kennt Gebot", p. 225.

27. Cf. 46 BVerfGE 160 (1977), available at http://www.bverfg.de/e/qs19771016_1bvq000577.html, last accessed on February 8, 2021.

28. Cf. J. Isensee, "Not kennt Gebot", p. 225.

in the matter brought before it. Furthermore, the Court found that an advance commitment to react in a certain way cannot be prescribed by the Constitution, because then the state's reaction would be predictable for terrorists.

In Josef Isensee's lapidary formulation, "the dominion of law [*Recht*] seizes even the border case, before which the legislative act [*Gesetz*] fails"[29]. Anna-Bettina Kaiser's asserts in equal strong terms that "in the case law of the Federal Constitutional Court, the duty to protect has not mutated into a component of exceptional constitutional law!"[30] The argument she develops consists in maintaining that even if the function of fundamental rights that consists in defending individuals against the state cannot exclude their protective function, to be provided for by the state, the opposite cannot also occur. This means that the only way to achieve a constitutionally correct compatibility between the two functions of fundamental rights lies in the executive's respect for the principle of legality. This seems to be an important warning to be taken into account in the treatment of the current pandemic.

4. Along the preservation of rights, the preservation of democratic life

The suspension model means that, once the situation of emergency has been declared by the constitutionally competent bodies, it is up to the executive branch to adopt the concrete measures that will make it possible to deal with the emergency.

In other words, the fate of rights is no longer a matter entrusted to the legislative branch but becomes a matter to be dealt with by the executive power without the usual constitutional and legal constraints. This aspect is, naturally, cause for concern. It is important that the measures that can be taken during a state of exception are discussed and deliberated by parliament, rather than just being decided by the executive.

One can even admit that the measures to be adopted by the executive are not so different in content from the ones that would be adopted by the legislative body. The main reason for this has already been mentioned: as stressed in Professor Kaiser's presentation, because we evaluate such measures mainly on the basis of the proportionality principle, we must be conscious that this principle reveals itself to be a weak standard in emergencies. When the good that the measures are meant to protect is of such importance as hundreds of thousands, perhaps millions, of human lives, most measures adopted by the executive will turn out to be proportionate.

But the fact remains that the measures adopted by parliament are discussed according to demands of publicity that are not met by the executive. Only the parliament embodies the value of democratic deliberation.

29. Cf. J. Isensee, "Not kennt Gebot", p. 225.
30. Cf. Kaiser, *Ausnahmeverfassungsrecht*, p. 305.

A good example of this is a recent decision by Supreme Administrative Court, which ruled that the measure (foreseen in the Resolution of the Council of Ministers no. 55-A / 2020, of July 30) to ban gatherings of more than 10 people in the context of the pandemic is not, under the circumstances, unconstitutional. From a substantial point of view, it is certainly possible to view in the measure of the Portuguese Government the willingness to respect at least the "essence" or "core" of the freedom to assemble (article 45 of the Portuguese Constitution)[31].

The above-mentioned decision of the Supreme Administrative Court also ruled that the measures adopted by the Government could find at least in part their legitimation basis in the norms of transnational administrative law, including the recommendations of the World Health Organization[32]. To my mind, this contradicts one of the main virtues of dealing with emergencies on the basis of restrictions of fundamental rights, which is precisely to enforce the exclusive legislative competence of parliament for both normal times and situations of extreme crisis, leaving to the executive only the leeway that the laws approved by Parliament may have established according to constitutional rules. The thrust of this unitary view of rights as equally enforceable in "normal" times and in times of crisis is not only the preservation of rights, but also the preservation of democratic life.

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31. In a way similar to article 19 of the German Basic Law, article 18 of the Portuguese Constitution states that restrictive laws cannot reduce the extent or scope of the essential content of the constitutional rights.

32. Cf. Judgment of the Supreme Administrative Court of September 10, 2020 (Proc. No. 088/20.8BALSB) available at http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003e-a931/6a509a0b01993cfb802585e600446990?OpenDocument , last access on February 8, 2021.