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ANNA-BETTINA KAISER

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THE STATE OF EXCEPTION UNDER GERMAN LAW AND THE CURRENT PANDEMIC: COMPARATIVE MODELS AND CONSTITUTIONAL RIGHTS[1]

O ESTADO DE EXCEÇÃO NO DIREITO ALEMÃO E A ATUAL PANDEMIA: MODELOS COMPARATIVOS E DIREITOS CONSTITUCIONAIS

ANNA-BETTINA KAISER
Humboldt-Universität zu Berlin
Juristische Fakultät, Professorin für Öffentliches Recht und Grundlagen des Rechts, Unter den Linden 6, D-10099 Berlin
kaiser@rewi.hu-berlin.de

Abstract: The Federal Republic of Germany is experiencing its first *de facto* state of exception. This article first addresses what actually constitutes a state of exception under German law, by comparing the German model to models followed in other jurisdictions, especially with regard to constitutional rights (1.). It then considers the constitutionality of the most important German measures taken so far against the COVID-pandemic (2.).

Keywords: State of Exception; Constitutional Rights; German Law; COVID-pandemic.

Resumo: A República Federal da Alemanha está a passar pelo seu primeiro estado de exceção. Este artigo aborda primeiro o que realmente constitui um estado de exceção no Direito alemão, comparando o modelo alemão aos modelos seguidos por outras jurisdições, especialmente no que diz respeito aos direitos constitucionais (1.). Em seguida, considera-se a constitucionalidade das mais importantes medidas alemãs tomadas até agora contra a pandemia-COVID (2.).

Palavras-chave: Estado de Excepção; Direitos Constitucionais; Direito Alemão; Pandemia COVID.

1. This text is based on a presentation held during the webinar session of December 17, 2020 (see https://icjp.pt/content/webinar-state-exception-under-german-law-and-current-pandemic-comparative-models-and?page=1).

Sumário: **1.** O Quadro Legal; **1.1.** O Quadro Constitucional; **1.2.** Lei Estatutária – Mudanças na Lei Federal de Proteção contra Infeções; **1.3.** As Regulamentações do Covid nos *Länder*; **2.** Alguns Problemas Atuais de Direito Constitucional e Administrativo; **2.1.** Direitos Constitucionais durante a Crise Covid; **2.2.** Introdução de uma Delegação Inconstitucional no Executivo por meio da Seção 5 da Lei de Proteção contra Infeções?; **2.3** O Problema da Prerrogativa Parlamentar; **3.** Síntese.

1. The Legal Framework

1.1. The Constitutional Framework

The German Basic Law contains a number of provisions that apply to existential situations of crisis – they make up what I call Germany's "Emergency Constitution" (*Ausnahmeverfassungsrecht*)[2]. In contrast to the Constitution of the Weimar Republic and its – now infamous – Article 48, which handed broad powers to the President in states of exception, the Basic Law does not contain a general provision that covers all emergencies. When introducing the amendments on the state of emergency in 1968 (the so-called "Notstandsverfassung"), the constitutional legislator instead opted for a model that regulates the various states of emergency and their respective regimes with great specificity. Chiefly, the Basic Law provides for the "classical" emergencies, that is, internal insurgency (Article 91) and war (the "state of tension" and the "state of defense") in Article 115 lit. a-l. Finally, Article 35(2) and (3) add provisions for natural disasters.

Most notably, the Basic Law rules out any suspension of constitutional rights during emergencies. Instead, it allows for the *restriction* of constitutional rights only (restriction model). In contrast, the traditional model of the state of exception, what was called the "state of siege", always included the suspension of constitutional rights. This model of suspension was invented in France in the 1840s and disseminated from there throughout Europe. It was adopted in Prussia, too, and later was introduced into the aforementioned Article 48 of the Constitution of the Weimar Republic. The Basic Law, Germany's current constitution, ended this tradition, whereas Portugal's constitution, in its Article 19, opts – like many other constitutions – for the suspension model.

What follows from this for the current Covid-19 pandemic? First, there is no "health emergency" in the constitution that could be relied upon in the current crisis. The existing categories – internal and external emergencies, and natural disasters –, do not fit our current situation. As there is no residual general provision, *the current crisis has to be dealt with through the ordinary provisions of the constitution*. The extensive restrictions of constitutional rights that have been introduced in Germany during the Covid-19 pandemic have to be measured against the catalogue of constitutional rights within Articles 1 to 19 of the Basic Law.

1.2. Statutory Law – Changes to the Federal Infection Protection Act

As none of the provisions in the Emergency Constitution apply to the Covid-19 pandemic, the central instrument for fighting the crisis is a statute, the Federal Infection Protection Act, which has been amended in March 2020 and several times since then to accommodate to the current situation[3].

2. See A.-B. Kaiser, *Ausnahmeverfassungsrecht*, Tübingen, Mohr Siebeck, 2020.
3. See for the latest version of the *Infektionsschutzgesetz*: https://www.gesetze-im-internet.

What was amended in particular was the Act's section 5. Its paragraph 1 has introduced – at the level of statutory law – a new state of emergency into German law: the "epidemic situation of national concern", a term closely mirroring WHO law. On March 25, 2020, the Bundestag has declared an epidemic emergency and has not yet lifted it. The most important legal consequence of its declaration lies in the fact that the Federal Ministry of Health is now allowed to issue in several areas. What is more, since November 2020, severe restrictions of regulations constitutional rights such as the closure of shops were arguably made dependent on such a declaration. I will return to that.

Even before these changes, sections 28 and 32 of the Act delegated to the *Länder* the power to issue regulations to combat the pandemic.

1.3. The Länder's "Covid Regulations"

Starting March 2020, the *Länder* have used these powers extensively[4]. Every *Land* has not only issued so-called *Covid Regulations*, but has also amended and updated these regulations repeatedly, adapting them to the changing situation. The first measure these rules introduced was the lockdown in March and April 2020. It included soft curfews, social distancing rules, bans on social events and demonstrations, as well as shutting down businesses, schools, and daycares. The executive rules also served as the vehicle for the subsequent easing of these restrictions. They set out the rules under which businesses could reopen and ordered the compulsory wearing of masks in shops and on public transport. In October 2020, a so-called lockdown light was ordered, closing, in particular, restaurants, night clubs, cinemas and theatres in all of the *Länder*. As of December 16, 2020, the Covid regulations have again ordered a hard lockdown, including the shutdown of all shops (with the exception of grocery stores), schools and daycares. These measures will remain in place until at least March 2021.

2. Some Current Constitutional and Administrative Law Problems

2.1. Constitutional Rights during the Covid Crisis

a) No suspension of constitutional rights under the Basic Law; the protection of constitutional rights by means of "negative constitutional law on emergencies"

The measures that have certainly demanded and still demand most from the general public are the massive restrictions of fundamental rights. They affected, and still affect, a considerable number of constitutional rights. This includes, notably, the right to move freely (Article 2(2)), 2nd sentence of the Basic Law),

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de/ifsg/BJNR104510000.html.

4. See for the German measures fighting the pandemic A.-B. Kaiser and R. Hensel, "Country Report Federal Republic of Germany", in J. King *et al*. (eds.), Lex-Atlas Covid 19, Oxford, OUP, forthcoming (will be available online).

restricted e.g. by quarantines; the right to free religious exercise (Article 4(1) and (2), restricted by the temporary ban (through March and April 2020) on all religious services, to the extent that they were held face-to-face; the right to academic freedom (Article 5(3) 1st sentence), restricted by the ban on classroom instruction at universities; the freedom of movement (Article 11), restricted, for instance, by the ban to travel to weekend homes; the right to a profession (Article 12), affected by the shutting down of stores and restaurants; and not least the right to assemble freely (Article 8).

This raises the question whether or not these restrictions are in line with the Basic Law. As mentioned, as it does not allow the suspension of constitutional rights, the Basic Law instead follows a *one size fits all* model, that is, its constitutional rights protections apply both in normal times and times of emergency. At the same time, however, all rights protections in the Basic Law can generally be restricted (with the notable exception of the right to Human Dignity in Article 1), as long as the measures that limit them do not violate the proportionality principle, nor a number of other protections (what we call "limits on limits", *Schranken-Schranken*). These include the so-called "Irremovable Essence" (Article 19(2)), or "Human Dignity core" (Article 1(1)), of the respective rights. These protections are what I call the "negative constitutional law on emergencies", because they set final limits to the state's power to restrict constitutional rights, especially in times of crisis.

b) The weaknesses of the proportionality principle in times of crisis

The proportionality principle holds a central position in German constitutional law. It states that a constitutional right can only be restricted if the restriction pursues a legitimate aim, is suitable and necessary to further that aim, and is not, in its means, disproportionate to the aim pursued. It is hard to overestimate the importance of the proportionality principle in the practice of the German Constitutional Court.

Against this backdrop, it comes as no surprise that during the pandemic the – at times very far-reaching – restrictions faced questions about their proportionality. For many, particularly for small businesses, the shutdown might mean bankruptcy, despite the fact that the state is spending enormous sums of money to compensate businesses for their losses.

And indeed, the courts have continuously been reviewing the proportionality of the Covid measures since March[5]. In a few eye-catching decisions, they have declared some of the measures disproportionate. Several higher administrative courts have struck down, for instance, bans on hotel stays. However, most cases in which the plaintiffs raised the issue of disproportionality remained unsuccessful.

5. See for an assessment of the administrative courts' jurisprudence A. Klafki, *Kontingenz des Rechts in der Krise. Rechtsempirische Analyse gerichtlicher Argumentationsmuster in der Corona-Pandemie*, Jahrbuch des öffentlichen Rechts 69 (2021), forthcoming.

This is particularly true for the measures taken in March and April 2020.

For what reason?

The main reason is that the proportionality principle remains a weak standard of control in existential situations of crisis[6]: when the good that the measures are meant to protect is of such overarching importance as hundreds of thousands of lives, most state measures will turn out to be proportionate. A second reason is the lack of knowledge that usually comes with times of emergency[7]. When reviewing the suitability and necessity of a measure such as temporarily closing down a daycare center, courts do not have more information at their disposal than the executive issuing the rule – they both have to rely on the same sources at any given time, typically – in Germany – the scientific reviews and summaries published by the Federal Robert Koch Institute (see section 4 of the Infection Protection Act). To stay with the example: Which role children play in the transmission of the disease remains unclear to this day. As a consequence, all a court can do when reviewing the suitability and necessity of a measure is to defer to the regulator's prerogative.

For these reasons, other standards of control have become important, such as the equality clause (Article 3(1) of the Basic Law). Consider some examples. When the *Länders'* Corona regulations began to ease restrictions after the first lockdown in March and April 2020, some of them allowed the re-opening of small stores and shops only. Big shops with a sales area of more than 800 m^2 had to remain closed. Plaintiffs quickly attacked the distinction[8]. A second example concerns the prohibition of prostitution during the lockdown. Plaintiffs again relied on the equality clause, arguing that there was no proper reason to prohibit prostitution but to allow hairdressers, nail studios etc. to reopen – and were successful[9].

In the future, even the balancing-free "essence" of constitutional rights (Article 19(2)), which states that the core of a fundamental right must not be touched under any circumstances, may prove an important backstop that sets final limits to the state's measures. Over the last decades, this rule had virtually been read out of the constitution; it was understood as just another instantiation of the proportionality principle. However, as the proportionality principle becomes a weaker standard of control in times of crisis, the essence clause could gain in importance – or so I have argued in my book *Ausnahmeverfassungsrecht*. But so far, the courts have not referred to it, probably because the rule has not played any role in the past, and maybe because the courts tend to support the measures taken to fight the pandemic.

6. Kaiser, *Ausnahmeverfassungsrecht*, p. 234 ff.

7. H.-H. Trute, *Ungewissheit in der Pandemie als Herausforderung*, Zeitschrift für das Gesamte Sicherheitsrecht (GSZ) 2020, p. 93 ff.

8. See, e.g., Higher Administrative Court (*Oberverwaltungsgericht*) Berlin-Brandenburg, court order of April 29, 2020, 11 S 30/20 –, juris.

9. Higher Administrative Court (*Oberverwaltungsgericht*) of the Saarland, court order of August 6, 2020 – 2 B 258/20 –, juris.

c) Freedom of assembly

In what follows I want to focus on the freedom of assembly, a right that was intensely restricted. Most Covid regulations that the *Länder* issued in March 2020 contained explicit or implicit bans on all demonstrations, and only some included – very limited – exceptions to that ban. As a consequence, most authorities prohibited any planned demonstrations.

These restrictions were highly problematic, because they effectively suspended the right to assembly altogether during the time they were in force, which was mostly during the months of March and April. To compare: The bans on religious service, especially during the Easter holidays, also limited the right to free religious exercise to a remarkable degree, but still left at least some of the right's protections, such as the right to congregate at home, in place. The same cannot be said for the freedom of assembly during the first lockdown. *In fact*, if not in law, the freedom of assembly was suspended by most of the Covid regulations (with the exception of the Land Bremen) – which is something the Basic Law does not allow. As mentioned, the Basic Law forbids that a constitutional right is touched in its "essence" or "core" (Article 19(2)). But that was the case here.

For these reasons, one should welcome that the Federal Constitutional Court, in an injunction, interpreted a Covid regulation from the *Land* of Hessen in a way that turned the tide on how the freedom of assembly was addressed in the courts: The Karlsruhe Court refused to read a blanket ban on all assemblies into the Hessen regulation[10]. The city of Gießen, where the case had arisen, subsequently had to revisit the question whether an assembly of 30 participants could not take place. Indeed, it subsequently allowed the assembly under very strict safety requirements.

As a side note: the opposite problem came up during the summer, when there were several huge demonstrations (e.g. 40,000 protesters in Berlin alone) taking place in several big cities like Stuttgart, Berlin or Munich. During these demonstrations, protesters very often did not adhere to the standards of hygiene, e.g. refused to wear masks or to keep the necessary distance. Since the demonstrations were so huge, it was difficult for the police to enforce the necessary hygiene rules. Finally, many of these demonstrations had to be dissolved.

d) A final point: comparing models

Now that I have set out the German model how to protect constitutional rights during times of crises, it might be interesting to ask: What are the advantages and the disadvantages of the German *restriction* model (*Einschränkungsmodell*)

10. German Federal Constitutional Court (Chamber decision), court order of April 15, 2020 – 1 BvR 828/20 = Neue Juristische Wochenschrift 2020, p. 1426. See M. Hong, "Coronaresistenz der Versammlungsfreiheit? Das Bundesverfassungsgericht ermöglicht eine Versammlung in Gießen", https://verfassungsblog.de/coronaresistenz-der-versammlungsfreiheit/.

compared to a suspension model? This question is all the more urgent since Portugal combines both models.

First, it is a clear advantage of the restriction model that at least the essence of a constitutional right keeps being protected; if only to make sure that the restriction remains distinguishable from a suspension. *De jure*, this means that even in times of a pandemic, it has to be possible to demonstrate. Second, the fact that rights are not suspended has procedural advantages. Citizens can keep raising the constitutionality of the measures before the administrative courts (e.g. judicial review of the Covid regulations) as well as before the Federal Constitutional Court by finally submitting a constitutional complaint (*Verfassungsbeschwerde*) and relying on their constitutional rights. Think of the example on the freedom of assembly that I have mentioned before. Here, indeed, a constitutional complaint was lodged and turned out successful. In a suspension model, there would not be any constitutional rights left in force that citizens could claim in the courts. Third, the mere fact that constitutional rights can never be suspended, not even in the most severe of crises, may also have a psychological effect. Whatever happens, at least the core of your constitutional rights will have to remain untouched.

So much about the advantages. But what about the disadvantages? First, it came as a surprise to many citizens that constitutional rights under the Basic Law can be restricted in such a far-reaching manner. As a consequence, many citizens, including many academics and colleagues, experience the current measures as a *de facto* suspension of rights. Second, the courts, as I have mentioned before, are relying – and are used to relying – on the proportionality principle. They have much experience with it and it always served them well. Now, however, one problem seems to be that – at least – the administrative courts are having problems acknowledging that proportionality is a rather weak test in times of crisis. My proposal was and remains that the courts should have changed to "crisis mode" and should have strengthened the irremovable essence principle instead. Yet, as there is very little established doctrine on the essence principle, the courts go on as they always have. – Third, politics is first and foremost focused on fighting the pandemic. It is naturally less occupied with protecting, for instance, the right to assembly of those who refuse to see the danger of the pandemic or who might even adhere to conspiracy theories and who reject wearing face masks during demonstrations.

In sum, we can observe a certain convergence between the two models, even though important differences remain[11]. The essential difference is certainly that the legislative and executive branches always remain bound by fundamental rights and the principle of proportionality.

11. Confer Kaiser, *Ausnahmeverfassungsrecht*, p. 258 ff.

2.2. Introducing an Unconstitutional Delegation to the Executive through Section 5 of the Infection Protection Act?

The second highly contested question that I want to address is section 5 of the Infection Protection Act amended in March and again in November 2020. A central problem of the provision lies in the fact that once an "epidemic situation of national concern" is declared, its paragraph 2 gives to the Federal Minister of Health the power to issue regulations that may deviate from a number of federal statutes. While said paragraph 2 has been amended in November to somewhat limit those powers, the provision's core remains unchanged. Constitutional law scholars have described the March 2020 version of section 5(2) as an act of "opening the constitutional floodgates". The reason for such a sensitive reaction is partly historic. In the Weimar Republic, the President's practice of issuing emergency regulations pursuant to Article 48 of the Weimar constitution played a hugely important role, not least in its disintegration. One consequence of the practice was that at the end of the Weimar Republic the *Reichstag* had basically ceased passing laws.

The Founding Mothers and Fathers of the Basic Law drew important lessons from these events. For one, the Basic Law explicitly rules out *emergency decrees* ("Notverordnungen"). For another, its Article 80 limits the power to issue executive rules in important respects, specifically to protect the primacy of statutory law. Now, a number of voices among constitutional law scholars were reminded by section 5(2) of the Infection Protection Act of the practice surrounding Weimar's Article 48[12]: In the very first real state of emergency of the Federal Republic, the Bundestag was prepared, they felt, to abandon its legislative responsibility and authority. The legislature, they claim, did not only delegate important law-making functions to the Federal Minister of Health, but also – and that touches the core of the problem – granted him the power to decree exceptions from statutory law. What exacerbated the problem in their eyes is that the statutes from which the Minister may deviate were – and to an extent still are – only listed in a very general manner (for instance: the "Pharmaceutical Products Act"), instead of very precisely naming specific provisions within these statutes. And lastly, in their view it is highly problematic that the Federal Minister of Health, and not the Federal Cabinet, could issue these regulations unilaterally[13].

What should we make of these arguments? I want to plead for a modifying, sober line. Section 5 of the Infection Protection Act does indeed raise constitutional doubts. There are convincing reasons that the new provision is unconstitutional, due to the extent in which it allows executive rulemaking to deviate from

12. See in particular Thorsten Kingreen, "Interview", *Süddeutsche Zeitung*, March 26, 2020, "Hindenburg-Klausel" (Hindenburg-clause).

13. See K. F. Gärditz and F. Meinel, "Unbegrenzte Ermächtigung?", *Frankfurter Allgemeine Zeitung*, March 26, 2020, p. 6; K. F. Gärditz and M. Kamil Abdulsalam, *Rechtsverordnungen als Instrument der Epidemie-Bekämpfung*, Zeitschrift für das Gesamte Sicherheitsrecht (GSZ) 2020, p. 108 (114 f.); H. M. Heinig *et al*., "Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Corona-Krise", *Juristenzeitung* 2020, p. 861 (867 f.).

statutory law. Such regulations may be constitutional in exceptional cases, but section 5 seems to overstep these bounds when it names the statutes from which the executive can deviate in such an imprecise manner. (As a side note, the provision also raises federalism issues, at least in the version from March 2020.)

But notwithstanding the fact that the provision is arguably unconstitutional, the accusation that it "opens the floodgates" considerably overshoots the mark[14]. It takes careful constitutional analysis to assess whether the provision is unconstitutional or not – all the more so as the legislature included a sunset clause subsequent to which the delegation looses its force on April 1, 2021. The question whether the provision is unconstitutional is thus a normal question of constitutional law, one which will at some point be settled by the Federal Constitutional Court. Opening floodgates is quite a different affair. Finally, comparing the provision to Article 48 of the Weimar Constitution is absurd. As a final note, it should be mentioned that to the (limited) extent in which the Federal Minister of Health has made use of the delegation, the substance of his regulations was lauded even by critics, though some called for transferring them into statutory law.

2.3. The Problem of Parliamentary Prerogative

As a last point, I want to address the constitutionality of prominent individual measures in the *Länder's* Covid regulations. Many, such as locking down businesses, are hotly debated by constitutional law scholars and among the courts.

One of the legal problems that these measures posed is the following: As mentioned, the Infection Protection Act, in its sections 32 and 28, delegates to the *Länder* the power to pass executive rules combatting the pandemic. The *Länder* have used this delegation to adopt far-reaching measures. The problem was that section 28 of the Infection Protection Act does not specifically describe the measures the *Länder* are allowed to take and instead speaks very broadly of "necessary protective measures". Established constitutional doctrine, however, requires that parliament itself (as opposed to the executive rule-maker) settles those issues that raise "essential" fundamental constitutional rights concerns (the so-called parliamentary prerogative, itself a consequence of the *Wesentlichkeitslehre*, the "Essentiality Doctrine"). This means that the legislature itself ought to have decided whether it is admissible to shut down business, raising the question whether the *Länder* executives were competent to take these measures instead. As a matter of fact, the courts did occasionally voice doubts whether sections 32 and 28 of the Infection Protection Act could be considered a sufficiently specific basis especially for permanent, indiscriminate restrictions of the right to a profession. While the decisions of the first months of the pandemic generally upheld the Covid measures, including (soft) curfews and

14. But see for a convincing and nuanced analysis J. Kersten and S. Rixen, *Der Verfassungsstaat in der Corona-Krise,* Munich, 2020, p. 125 ff.

business lockdowns, the situation has gradually begun to change. In the autumn, the courts explicitly demanded a new legal basis from Parliament to clearly set out and describe the most restrictive individual measures in the Infection Protection Act. In November 18, Parliament finally reacted and passed the new section 28a of the Infection Protection Act that fulfills these requirements[15].

3. Summary

Both the Federal Level and the *Länder* have fared comparatively well with their strategies during the first lockdown in March and April 2020 (it is too early to tell if the current measures (winter 2020/2021) have been equally effective, though it increasingly appears unlikely). The measures did however at times strain the limits of what is constitutionally permissible. And still, the rule of law is functioning as it should: the sheer number of over 1000 published administrative and constitutional court decisions on the pandemic measures attests to that. What remains open, however, are the economic consequences of these measures.

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15. See for criticism, however, U. VOLKMANN, "Das Maßnahmegesetz": https://verfassungsblog.de/das-masnahmegesetz/.