

COVID-19 AND STRESS ON FUNDAMENTAL RIGHTS IN PORTUGAL: AN *INTERMEZZO* BETWEEN THE STATE OF EXCEPTION AND CONSTITUTIONAL NORMALITY*

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1 Measures implemented to address the COVID-19 crisis: From constitutional emergency to administrative exception

1.1 Measures before the state of exception

Before the declaration of constitutional emergency, and to prevent the national health system from collapsing, the Portuguese Government enforced several measures under the existent legislative order (addressed in further detail at 2). Based on the Framework Law of Civil Protection and the order Health Law, on March 12th, the Government enacted Decree-Law 10-A/2020, which approved the closure of schools, permitted future restrictions on accessing shopping malls, restaurants and bars, established teleworking as mandatory, and allowed a prompt public procurement regime for public health services.

Reinforcing these measures, the Government issued several administrative orders: on March 15th, it limited access to shopping malls, restaurants and bars¹ and suspended the activity of dental practices;² on March 16th, it reintroduced border control, exceptionally and for a limited timeframe;³ on March 17th, it ordered the civil requisition of port workers, which limited their right to strike;⁴ and on March 18th, it moved further to suspending air-traffic with non-EU countries.⁵

1.2 Constitutional emergency

1.2.1 Constitutional emergency design in the Portuguese Constitution

States of exception are constitutional self-protective mechanisms aimed at restoring constitutional normality. Having absorbed harsh constitutional history lessons, modern European constitutional texts enshrine several obstacles to the suspension of the exercise of fundamental rights (Botelho, 2020a). In Portugal, in the same way the Constitution consecrates its amendment rules, it also establishes the substantial and procedural rules of constitutional exception. The domestication of exception therefore joins the domestication of amendment rules (Botelho, 2020a; Ribeiro, 2020). The rules on constitutional exception are dispersed throughout the constitutional text (Articles 19, 138, 172, 275, § 7, 289, amongst others). As it is impossible to anticipate all scenarios of constitutional exception, Law no 44/86 regulates the state of exception.⁶

Constitutional exception is divided into ‘state of siege’ and ‘state of emergency’. While the state of siege is designed for situations of insurrection with physical aggression, the state of emergency is less severe. Portugal has opted for a refined constitutional design: the constitution limits the rights that can be suspended, as well as imposes a time limit and the obligation to respect proportionality. During constitutional exception, Parliament cannot be dissolved (Article 172) and constitutional amendments are prohibited (Article 289), as well as referenda.

The declaration of emergency and the concomitant suspension of fundamental rights is not a blank check (Botelho, 2020a). Unlike the German Basic law, which does not establish which rights can be suspended,⁷ or the Spanish and Brazilian constitutions that specify which rights can be suspended,⁸ the Portuguese Consti-

1. Administrative Rule no. 71/2020, of March 15th, *Diário da República*, 1st Series, no. 52-A.

2. Administrative Order no. 3301-A/2020, of March 15th, *Diário da República*, 2nd Series, no. 52-B.

3. Resolution no. 10-B/2020 of the Council of Ministers, of March 16th, *Diário da República*, 1st Series, no. 53.

4. Resolution no. 10-C/2020 of the Council of Ministers, of March 17th, *Diário da República*, 1st Series, no. 54.

5. Administrative Order no. 3427-A/2020, of March 18th, *Diário da República*, 2nd Series, no. 55. With the relevant exceptions of the Schengen area, Portuguese-speaking countries, and countries with significant diaspora (United Kingdom, United States of America, Venezuela, Canada, and South Africa).

6. Law no. 44/1986, of September 30th, *Diário da República*, 1st Series, no. 225.

7. Articles 115-A and ff. of the *Grundgesetz*.

8. Article 136, § 1 of the Brazilian Constitution and Articles 17, 18, § 2 e 3, 19, 20, § 1, a) and § 5, 21, 28, § 2, and 37, § 2 of the Spanish Constitution.

tution has adopted a negative design: the constitution expressly mentions which rights cannot be suspended (Botelho, 2020b: 61–65).

As stated in Article 19, § 6, of the Constitution, the rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of criminal law, and freedom of religion can never be suspended, in any situation. Furthermore, in a state of emergency, rights susceptible to suspension (all others that are not constitutionally protected) can only be partially suspended.

At the same time, to avoid a unilateral suspension of rights, the Constitution provides a mechanism of mutual control. Hence, the state of emergency is agreed between the three main political institutions: The President, the Government, and Parliament. Checks and balances are enforced by the following formula: The President declares, Parliament authorizes, and the Government executes the state of emergency. It is thus a case of presidential prominence mitigated by the interdependence of the Parliament and the Government (Botelho, 2020b: 68–71).

1.2.2 Three presidential decrees of emergency and their execution by the Government

On 18th March 2020, just two weeks after the first confirmed case of COVID-19 in Portugal, the President of the Republic declared the state of emergency. This was the first declaration of emergency since the transition to democracy, forty-six years before. The presidential decree enacted the partial suspension of certain fundamental rights, such as cross-border circulation, the right to strike, and the rights of assembly and demonstration.⁹ Subsequent to the presidential declaration, the Government approved a decree that placed different groups of citizens under the duties of *compulsory confinement*, *special protection* and *sheltering at home*.¹⁰ Moreover, the decision to grant migrants and asylum-seekers with pending applications the rights to healthcare, housing and social support until June 30th was internationally praised.

As the declaration of emergency is constitutionally limited to fifteen days,¹¹ on April 2nd the President decided to renew the state of emergency,¹² maintaining that the emergency declaration proved to be the wisest choice, as it was able to flatten the coronavirus curve. In addition to extending the previous declaration of emergency, the President also authorized the suspension of the freedom to learn and teach, and the right to data protection, and reinforced the restrictions on freedom of movement during the Easter period. From my perspective, if the presidential declaration was mainly *preventive* with regards to the first period of the state of emergency, its renewal was clearly *reactive*.

On April 17th, the President renewed the state of emergency for the second and last time (until the 2nd May), justifying the extension with the need to give the Government time to define criteria for a trustful reopening of society and the economy.¹³ Probably, the political powers took into consideration the incertitude of the state of emergency's deadline, which could trigger societal anxiety and result in an insurmountable impact on the economy.

The terms of the new extension of the declaration of emergency were quite similar to the previous one. However, this decree enabled the possibility of reactivating services, businesses, and establishments in a “*gradual, phased, alternate and differentiated manner*”. Furthermore, the decree reconsidered the application of the restrictions on the right to travel.¹⁴

9. Presidential Decree no. 14-A/2020, of March 18th, *Diário da República*, 1st Series, no. 55.

10. Decree-Law no. 2-A/2020, of March 20th, *Diário da República*, 1st Series, no. 57.

11. Article 19, § 5, of the Portuguese Constitution.

12. Presidential Decree no. 17-A/2020, of April 2nd, *Diário da República*, 1st Series, no. 66. See also Decree-Law no. 2-B/2020, of April 2nd, *Diário da República*, 1st Series, no. 66, which regulates the first extension of the constitutional emergency.

13. Presidential Decree no. 20-A/2020, of April 17th, *Diário da República*, 1st Series, no. 76.

14. Decree-Law no. 2-C/2020, of April 17th, *Diário da República*, 1st Series, no. 76, which regulates the second and last extension of the constitutional emergency.

1.3 Administrative escalator of exception: states of alert, contingency and calamity

On May 3rd, the Council of Ministers declared a national state of calamity for a period of fifteen days, allowing a slow economic reopening and the relaxation of some of the previous restrictions.¹⁵ As the President and the Government were unwilling to extend the state of emergency, therefore avoiding its trivialization, Portugal transitioned to an administrative state of calamity. In other words, Portugal adjusted to constitutional normality, while maintaining a degree of administrative exception through the administrative state of calamity.

In short and according to the Civil Protection Framework Law, the administrative escalator of exception consists of three degrees of restrictiveness of measures taken by the Government. The state of alert is the least restrictive state (Articles 13 to 15), while the state of contingency is an intermediate state (Articles 16 to 18) and the state of calamity the most limiting of the three (Articles 19 to 31).

Under the state of calamity, the main measures taken were the following: sheltering at home was downgraded from a legal obligation to a non-compulsory civic duty; teleworking was encouraged; exercise and outdoor activities were allowed; local shops could open; public services reopened; and funerals with the presence of all family members were allowed. Border control remained in place.

On May 17th, the state of calamity was renewed, with less strict measures.¹⁶ For example, visits to elderly in care homes, and museums, monuments, and cultural spaces were allowed. Also, an exceptional and temporary regime was established regarding the use of beaches. On May 29th, the state of calamity was renewed once again, until June 14th, and special measures were introduced for the Lisbon metropolitan area (which was, by then, more greatly affected by new COVID-19 cases), such as limiting gatherings to a maximum of 10 persons, and no consumption of alcohol in public spaces.¹⁷

On July 14th, the Government declared all three possibilities of administrative exception, according to the severity of the pandemic situation¹⁸. With this in mind and until July 31st, the following was stated: a state of alert for the entire country (except the Lisbon metropolitan area); a state of contingency in the majority of the Lisbon metropolitan area; and a state of calamity in 19 parishes of the Lisbon metropolitan area.¹⁹ As mentioned, the state of alert is the least severe, with measures such as mandatory confinement for patients and persons under active surveillance, and gatherings limited to 20 people. In the middle, the state of contingency added the measures of closing most commercial establishments at 8 p.m. and reducing gatherings to 10 people. The most severe state of calamity, in addition to the previous measures, restricted gatherings to 5 people, and fairs and markets were prohibited. On July 15th, a Decree-Law was approved that imposed new air traffic rules for Portugal, with fines of up to €3,000.²⁰

On July 17th, the Government granted a 1,200 million euro rescue loan to the Portuguese national airline TAP to tackle its liquidity requirements during the COVID-19 pandemic²¹ and, on July 30th, approved support for distressed companies with a severe downturn in revenue.²²

15. Resolution no. 33-A/2020 of the Council of Ministers, of April 30th, *Diário da República*, 1st Series, no. 85.

16. Resolution no. 38-A/2020 of the Council of Ministers, of May 17th, *Diário da República*, 1st Series, no. 95-B.

17. Resolution no. 40-A/2020 of the Council of Ministers, of May 29th, *Diário da República*, 1st Series, no. 105.

18. Resolution no. 53-A/2020 of the Council of Ministers, of July 14th, *Diário da República*, 1st Series, no. 135.

19. In all parishes of Amadora and Odivelas, and in some of Sintra, Loures and Lisbon.

20. Decree-Law no. 37-A/2020, of July 15th, *Diário da República*, 1st Series, no. 136.

21. Resolution no. 53-C/2020 of the Council of Ministers, of July 17th, *Diário da República*, 1st Series, no. 138.

22. Decree-Law no. 46-A/2020, of July 30th, *Diário da República*, 1st Series, no. 147.

On July 31st, the Government maintained the state of alert for the entire country while the state of contingency was extended to the entire Lisbon metropolitan area.²³ On August 14th, this scenario was prolonged until August 31st.²⁴

On August 14th, the Government approved the “StayAway COVID” app, an application for mobile phones that allows swift and anonymous tracking of the spread of contagion by COVID-19.²⁵ Download is voluntary, but there was some degree of governmental pressure for COVID-19 positive individuals to install it as a “civic duty”. Pertinently, the Portuguese Data Protection Commission raised some privacy concerns about “StayAway COVID”, given the use of the Google and Apple interface.²⁶ On August 20th, the Government authorized the investment of 20 million euros in contracts to acquire vaccines against COVID-19 under the centralized European procedure.²⁷

On August 28th, the Government renewed the state of alert for the entire country, with the exception of the Lisbon metropolitan area, which remained in a state of contingency.²⁸ After a meeting of the Council of Ministers, on September 10th, the Government announced that, from September 15th onwards, and as a result of the reopening of schools, it would declare a state of contingency for the entire continental territory.²⁹ Overall, it would impose additional restrictive measures to avoid concentrations of people, in particular near schools, restaurants, and shopping areas.

2 COVID-19 regulation in Portugal

Emergency law is not exclusive to the constitutional framework. Rather, the ordinary legal arena also regulates emergency in the form of the Civil Protection Framework Law, the Health Framework Law, and the Law on Public Vigilance of Health Risks. Even a cursory glance at the Portuguese legislation reveals the presence of an ordinary emergency law. The Civil Protection Framework Law permits some restrictions on fundamental rights, such as limiting the circulation of persons and vehicles, and temporary requisition of products and services. The Health Framework Law, in turn, allocates powers to health authorities to address public health hazards, including requisition of health facilities and professionals, determination of confinement of individuals, and decisions on closing public and private facilities. Finally, the Law on Public Vigilance of Health Risks addresses public health emergencies and allows the suspension of activities.

COVID-19 regulation prior to, during, and after the state of emergency is immense.³⁰ A non-exhaustive list of legislation is available in 5. a).

3 Legislation-making and enforcement

3.1 *A sui generis* system of government

After several decades of parliamentary instability (during the First Republic, 1910–1926) and dictatorship (1926–1933 and 1933–1974), the Portuguese Constitution of 1976 sought to establish a system of government that would emphasize checks and balances between the main political organs: The President, the Govern-

23. Resolution no. 55-A/2020 of the Council of Ministers, of July 31st, *Diário da República*, 1st Series, no. 148.

24. Resolution no. 63-A/2020 of the Council of Ministers, of August 14th, *Diário da República*, 1st Series, no. 148.

25. Decree-Law no. 52/2020, of August 11th, *Diário da República*, 1st Series, no. 155.

26. Deliberation no. 2020/277, of June 29th, available at: https://www.cnpd.pt/home/decisooes/Delib/DEL_2020_277.pdf

27. Resolution no. 64-A/2020 of the Council of Ministers, of August 20th, *Diário da República*, 1st Series, no. 162.

28. Resolution no. 68-A/2020 of the Council of Ministers, of August 28th, *Diário da República*, 1st Series, no. 168.

29. Resolution no. 70-A/2020 of the Council of Ministers, of September 11th, *Diário da República*, 1st Series, no. 178.

30. See the very useful link: <https://dre.pt/legislacao-covid-19-upo>

ment and Parliament. The Portuguese political system is mostly characterized as *semi-presidential*, since the President of the Republic is directly elected, and both the Government and Prime Minister are politically responsible to the legislature.

The Portuguese system was influenced by French semi-presidentialism, and the rationalized parliamentarism of the Weimar Republic. Yet, the Portuguese Constitution reveals some unique traits. In continuity with the previous Constitution of 1933, the current Constitution grants the Government a wide range of legislative powers: (i) *exclusive powers* “to legislate on matters that concern its own organization and *modus operandi*” (Article 198, § 2); (ii) *independent powers* to legislate “on matters that do not fall within the exclusive competence of the Assembly of the Republic” (Article 198, § 1, *a*)), and therefore law (parliament’s legislation) and decree-law (government’s legislation) share the exact same legal status; (iii) and *dependent powers* to legislate on matters of the competence of Parliament (Article 165), “subject to authorization” (Article 198, § 1, *b*)), and to “make executive laws that develop the principles or the general bases of the legal regimes contained in laws that limit themselves to those principles or general bases” (Article 198, § 1, *c*)).

In Europe, parliaments are decreasing their political and legislative strength in favour of governments, which possess indirect democratic legitimacy. The extent of the Portuguese government’s independent/concurring powers is unique in a comparative constitutional law perspective. Although the parliament is the most important legislative organ—since *qualitatively* the most relevant subjects belong to its area of legislative competence (Articles 161, 164 and 165) and it has primacy even above governmental legislation (Article 169)³¹—*quantitatively*, the government legislates much more. In fact, the government produces 80% of the legislation.

The strengthening of governmental powers during constitutional exception is justified by the fact that executive powers are able to respond immediately to exceptional societal struggles, whereas judicial power is passive and legislative power depends on the amount of time required for proper reflection and deliberation (Ribeiro, 2020). The current national state of administrative exception, regulated in infra-constitutional legislation, does not entail checks and balances from the President and Parliament. The question, then, is the following: Has the transition from a constitutional state of emergency to an administrative state of exception increased the powers allocated to the Portuguese Government?

The answer, though, is not straightforward. If, on the one hand, the exercise of fundamental rights is not partially suspended (as such a suspension can only happen through the trio of the Presidential declaration of emergency, Parliamentary approval, and Governmental countersignature and execution), on the other hand, the Civil Protection Framework Law allows limitations to the circulation of persons and vehicles, access to private property, and temporary requisition of products and services. Besides, fundamental rights can still be restricted, within the requirements of Article 18 of the Constitution.

To counterbalance a possible excess of the Government’s legislative powers, the President plays a relevant role. Unlike the veto of parliament legislation, which can be overcome,³² the veto of government legislation is definitive (Article 136, § 4).³³ Therefore, the Portuguese President is more than a mere “*pouvoir neutre*” (Benjamin Constant) who preserves national stability, guarantees checks and balances between the organs of the state, and guards the Constitution of 1976. In short, the President can willingly play a more interventive political role.

31. According to Article 169, no 1: “1. Save for those passed in the exercise of the Government’s exclusive legislative competence, executive laws may, upon a motion made by ten Members of the Assembly of the Republic within the thirty days following their publication (...) be subjected to consideration by the Assembly of the Republic with a view to causing them to cease to be in force or amending them.”

32. According to Article 136, § 2: “If the Assembly of the Republic confirms its vote by an absolute majority of all the Members of the Assembly of the Republic in full exercise of their office, the President of the Republic must enact the legislative act within a time limit of eight days counting from its receipt”.

33. Although a government with a parliamentary majority can always overcome the presidential veto, through Article 197, § 1, *d*): “In the exercise of its political functions the Government has the competences to present and submit government bills and draft resolutions to the Assembly of the Republic”. Then, the government can “copy-paste” its law-decree onto a draft resolution for Parliament. If Parliament approves the draft and the subsequent law, the President can veto that law, but Parliament is able to overcome the veto by an absolute majority (Article 136, § 2).

It seems undeniable that current President Marcelo Rebelo de Sousa is a dynamic and omnipresent President. Notwithstanding being very (pro)active, the President has scarcely exercised his veto power and his power to initiate constitutional review of legislation. There are some exceptions, though. In August, President Marcelo Rebelo de Sousa vetoed two diplomas related to changes in parliamentary activities: (i) the reduction of parliamentary debates on Europe with the Prime Minister; (ii) and the raise in the number of signatures required for citizens' petitions to be debated in the plenary of Parliament (from 4,000 to 10,000). The President considered that these changes would be detrimental to public perception of national involvement with the European Union, to the vitality of democracy and to the encouragement of citizens' participation.

3.2 Political and administrative decentralization

To assure the universal right to health, Portugal implemented a national health system, overseen by the Minister of Health (and its Directorate-General of Health). Several reforms took place aimed at decentralizing primary health care to address health needs at local, regional, and national levels. Nevertheless, despite administrative decentralization and reforms, health services are still overly centralized (Lomba, 2020a: 40–41).

According to Article 6 of the Constitution, Portugal is a partial and homogeneous regional unitary state. In fact, there is one single *Kompetenz-Kompetenz* power, but with two autonomous regions with limited legislative, executive and international powers. Along with continental Portugal, they form the whole of the Portuguese Republic. Contrary to other constitutional experiences (such as Spain), autonomy is not a right *per se*, but a “constitutional status”. It is the Constitution that defines the regions—in the Portuguese case, the archipelagos of Azores and Madeira—and the extent of their competences.

Notably, measures to address the pandemic were stricter in Madeira and in the Azores than in continental Portugal. In Madeira, the state of calamity was extended until September 30th, and the use of protective masks in all public spaces (indoors and outdoors) was imposed. In the remaining Portuguese territory, social distancing measures included mandatory use of protective masks in closed public spaces, for persons over 10 years old. In the Azores (and as I will report in 4.3.) there were several requests of *habeas corpus* on compulsory confinement, which resulted in a judgment of unconstitutionality by the Portuguese Constitutional Court (Freitas, 2020: 77).

4 Academic debate on fundamental rights' distress in Portugal

4.1 Debate on the measures approved before the state of exception

As the constitutional emergency legislation was adopted in a haste to address the crisis, there are some constitutional issues worth mentioning. In the Portuguese Constitution, the fundamental rights that are not specifically safeguarded in Article 19, § 6 can be suspended during constitutional emergencies. Apart from the emergency scenario, fundamental rights can be restricted as long as the six cumulative requirements of Article 18 are fulfilled (one of the requirements, as well as proportionality, is that the restriction is legislated by Parliament or by the Government with prior authorization by Parliament).³⁴

Despite having legislated mostly within the existing legislative framework, in Decree-Law 10-A/2020, of March 12th, the Government approved restrictive measures before the declaration of a constitutional emergency, which raised doctrinal critique. As a result, it endorsed measures not contemplated in the emergency legislation previously passed by Parliament. What is more intriguing is that such restrictions were ratified *a posteriori* by Parliament,³⁵ in what “resembles an indemnity bill” (Violante & Lanceiro, 2020), and in violation of the prohibition of retroactive restrictions granted by Article 18, § 3 of the Portuguese Constitution.

34. For a distinction between restriction and suspension of fundamental rights, see Botelho (2020b: 57–59).

35. Law no. 1-A/2020, of March 19th, *Diário da República*, 1st Series, no. 56.

4.2 Debate on the pertinence and on the design of the constitutional emergency

The question that follows can be stated thus: Was the declaration of constitutional emergency adequate or was it impulsive and overzealous? Maybe only time will tell the rightness of the constitutional and administrative measures of the last months. Still, from my perspective, the declaration of emergency was at that time inevitable and necessary to contain the spread of the virus and to overcome constitutional issues that would derive from implementing a wider range of restrictive measures (Botelho, 2020a).

More importantly, back then, constitutional law scholars strongly disagreed as to whether the existing emergency legislation allowed the imposition of quarantine and confinement without prior judicial order. Some argued that quarantine could be imposed based on an extensive reading of Article 64 of the Constitution (right to health) (Guedes, 2020). Yet, others claimed that *h)*, § 3 of Article 27 expressly rejected such a possibility, as it restricts the deprivation of freedom to situations in which a judicial authority orders the “committal of a person suffering from a psychic anomaly to an appropriate therapeutic establishment”. Therefore, and according to this last doctrinal stance, a constitutional amendment would be required to allow the imposition of quarantine due to infectious diseases (Novais, 2020a: 93–101).

Presidential decrees of emergency provide the normative framework under which the Government may intervene. Still, such decrees were too general in this case and did not sufficiently determine the conditions under which the Government could restrict some rights and freedoms (Botelho, 2020b: 75–76; Lomba, 2020b; Silva, 2020; Terrinha, 2020: 15–16). Moreover, they did not specify which articles of the Constitution were suspended, as required in Article 19, § 5. Consequently, Portuguese scholarship is at present debating the constitutional design of presidential decrees of emergency. Notwithstanding some critiques, it should be remembered that this was the first time since the transition to democracy that a constitutional emergency has been declared. Under these circumstances, and given that the President could not take inspiration from past drafts of constitutional emergency decrees, he had to actively engage with the constitution “in action” and explore unknown terrain (Botelho, 2020b: 76).

Be that as it may, it is relevant to stress that the decision to declare a constitutional emergency should not be left to the discretion of the President, Parliament, and Government triad. On the contrary, constitutional emergency can turn out to be a constitutional obligation when it becomes crucial to defend (and, in some situations, even save) the constitutional order.

4.3 Debate on the transition from constitutional emergency to administrative exception: a *de facto* constitutional emergency?

The normative framework of the administrative states of alarm, contingency and calamity is limited when compared with the normative framework of the constitutional state of emergency. Consistent with these general understandings, the Portuguese Government could not maintain the *legal* duty of sheltering at home and had to adjust it to a *civil* duty of sheltering at home. Either way, legal scholarship has argued for possible unconstitutionality in the COVID-19 legislation when imposing a state of calamity, such as the prohibition on more than ten people meeting (or participating in events and celebrations) in public places (Medeiros, 2020).

The administrative state of calamity can never become a *de facto* constitutional state of emergency or a “soft state of emergency” (Moreira, 2020). To surreptitiously extend the state of emergency under a different name—state of calamity—while imposing mainly the same restrictive measures would represent a constitutional “fraud” (Castro, 2020). To protect the rule of law, a state of emergency should always occur within a *de jure* framework and, as happens in Portuguese constitutional law, respect tight constitutional requirements.

What we have been witnessing in Portugal—unlike in our neighbours in Spain (Nogueira López & Doménech Pascual, 2020)—is a dutiful and well-intentioned parliamentary approval of most of the measures our Government deems to be appropriate. However, Portugal still struggles to implement policies based on evidence, and this lack of sufficient scientific expertise raises pertinent questions of political accountability.

4.4 Debate on COVID-19 jurisprudence

The main deficiency in Portuguese constitutional justice is the absence of a constitutional complaint mechanism, similar to the Spanish “*recurso de amparo constitucional*” or the German “*Verfassungsbeschwerde*”. The Portuguese constitutional review model is hybrid, as it shares characteristics with the monist/Kelsenian model and traits of the diffused model of judicial review. In comparison with the Italian, German and Spanish systems of judicial review, the Portuguese system has some unique traits though. In addition to the Constitutional Court, it confers judicial review powers on ordinary courts as well. Accordingly, if an ordinary judge finds that the regulation applicable to a case is unconstitutional, the judge does not suspend the process and questions the Constitutional Court. Portuguese ordinary justices can dismiss the applicable regulation in that specific judicial process, since they are under a duty to not apply unconstitutional legislation (Article 204).

Yet, under the current adverse conditions, courts play a significant role in scrutinizing COVID-19 legislation. In Portugal, COVID-19 jurisprudence is still scarce. Still, a recent development is worth mentioning. After the constitutional state of emergency, a Portuguese citizen landed in the Azores archipelago and was compulsorily confined (a measure implemented by the regional government of the Azores) for a period of fourteen days, and at his own expenses. The citizen then filed a writ of *habeas corpus* against arbitrary detention. Remarkably, the Court of Ponta Delgada decided that the decision to compulsorily confine violated freedom of movement and was organically unconstitutional, as the confinement took place after the end of the state of emergency. The court held that such restrictions on fundamental rights could only be legislated by Parliament or the Government (with prior authorization from Parliament).³⁶ Additionally, the court ruled that imposing confinement on a citizen that was not COVID-19 positive disrespected the principle of proportionality.

Although this *decision had* no direct effect for parties who were not in court (*inter partes* effect only), the President of the Government of the Azores immediately announced new measures for containing the spread of COVID-19. As a result, compulsory confinement was replaced by voluntary confinement. As this case was brought to the Portuguese Constitutional Court, on its first COVID-19 decision, it ruled unanimously that regional regulations which imposed mandatory confinement were organically unconstitutional.³⁷

In times of emergency, whether constitutional or administrative, it is a cliché to claim that parliaments should be acutely vigilant. Notwithstanding their significance, one cannot downplay the relevance of the courts in scrutinizing violations of fundamental rights. The main dangers that could arise from muscular executives and diminished parliaments are well documented in academia. First, the Government might be tempted to extend its emergency powers beyond the emergency itself. Second, and quite ironically, if *de jure* constitutional emergency is designed in an extremely strict and foreseeable way, a *de facto* postponement would be unpredictable and beyond the boundaries of the constitutional framework (Botelho, 2020d).

How can the protection of fundamental rights be combined with the strict requirements of controlling the COVID-19 pandemic? I believe the answer will lie in the delicate balance of ensuring public health without falling into the extreme of a “fascistoid-hysterical hygienic state” (*faschistoid-hysterischen Hygienestaat*) (Heinig, 2020). Above all, we should not give in to the naivety of envisaging constitutional/administrative exception as merely transitory and magically vanishing with the resumption of constitutional normality (Botelho, 2020d).

36. See Articles 18, 27/3, 44, and 165/1, b), of the Portuguese Constitution.

37. Ruling of the Portuguese Constitutional Court no. 424/2020, of July 31st.

5 Portuguese legislation, jurisprudence and bibliography concerning COVID-19

5.1 Legislation³⁸

a) Before the constitutional state of emergency

Parliamentary legislation:

- Civil Protection Framework Law, Law no. 27/2006, of July 3rd, *Diário da República*, 1st Series, no. 126
- Health Framework Law, Law no. 48/90, of August 24th, *Diário da República*, 1st Series, no. 195
- Law on Public Vigilance of Health Risks, Law no. 81/2009, of August 21st, *Diário da República*, 1st Series, no. 162

Governmental legislative and normative acts:

- Decree-Law 10-A/2020, of March 13th, *Diário da República*, 1st Series, no. 52 (temporary and exceptional measures addressing the COVID-19 pandemic)
- Administrative Rule no. 71/2020, of March 15th, *Diário da República*, 1st Series, no. 52-A (access restrictions in shopping malls, restaurants, and bars)
- Resolution no. 10-B/2020 of the Council of Ministers, of March 16th, *Diário da República*, 1st Series, no. 53 (restoring border control)
- Resolution no. 10-C/2020 of the Council of Ministers, of March 17th, *Diário da República*, 1st Series, no. 54 (civil requisition of port workers)

b) During the constitutional state of emergency

Parliamentary legislation

- Law no. 44/1986, of September 30th, *Diário da República*, 1st Series, no. 225 (regime of the state of siege and of the state of emergency)

Governmental legislative and normative acts:

- Decree-Law no. 2-A/2020, of March 20th, *Diário da República*, 1st series, no. 57 (regulating the declaration of a constitutional emergency)
- Decree-Law no. 2-B/2020, of April 2nd, *Diário da República*, 1st series, no. 66 (regulating the first prorogation of the constitutional emergency)
- Decree-Law no. 2-C/2020, of April 17th, *Diário da República*, 1st series, no. 76 (regulating the second and last prorogation of the constitutional emergency)

c) After the constitutional state of emergency

Parliamentary legislation

- Law no. 31/2020, of August 11th, *Diário da República*, 1st series, no. 155 (amending Law-Decree no 20/2020, of May 1st)

38. The legislation is available at the institutional website: <https://dre.pt/web/en/home/-/contents/list?q=covid>

- Law no. 32/2020, of August 12th, *Diário da República*, 1st series, no. 156 (extraordinary tuition debt settlements)
- Law no. 34/2020, of August 13th, *Diário da República*, 1st series, no. 157 (approving support for street marketers)
- Law no. 35/2020, of August 13th, *Diário da República*, 1st series, no. 157 (suspending municipal debt limits)
- Law no. 38/2020, of August 18th, *Diário da República*, 1st series, no. 160 (exceptional and temporary measures to safeguard public faculty members and students' rights)

Governmental legislative and normative acts:

- Resolution no. 33-A/2020 of the Council of Ministers, of April 30th, *Diário da República*, 1st Series, no. 85 (declaring the administrative exception of calamity)
- Resolution no. 38-A/2020 of the Council of Ministers, of May 17th, *Diário da República*, 1st Series, no. 95-B (extending the administrative exception of calamity)
- Resolution no. 40-A/2020 of the Council of Ministers, of May 29th, *Diário da República*, 1st Series, no. 105 (second extension of the administrative exception of calamity)
- Resolution no. 53-A/2020 of the Council of Ministers, of July 14th, *Diário da República*, 1st Series, no. 135 (declaring the administrative exceptions of calamity, contingency, and alert)
- Decree-Law no. 37-A/2020, of July 15th, *Diário da República*, 1st Series, no. 136 (amending the punitive regime applicable to non-compliance with the administrative status of exception)
- Resolution no. 53-C/2020 of the Council of Ministers, of July 17th, *Diário da República*, 1st Series, no. 138 (granting a rescue loan to the Portuguese national airline TAP)
- Decree-Law no. 46-A/2020, of July 30th, *Diário da República*, 1st Series, no. 147 (support for companies in distress with severe revenue downfall)
- Resolution no. 55-A/2020 of the Council of Ministers, of July 31st, *Diário da República*, 1st Series, no. 148 (declaring a situation of contingency and alert)
- Resolution no. 63-A/2020 of the Council of Ministers, of August 14th, *Diário da República*, 1st Series, no. 148 (extending the situation of contingency and alert)
- Decree-Law no. 52/2020, of August 11th, *Diário da República*, 1st Series, no. 155 (approving the 'StayAway COVID' application for mobile phones)
- Resolution no. 64-A/2020 of the Council of Ministers, of August 20th, *Diário da República*, 1st Series, no. 162 (authorizing the investment of 20 million euros in contracts to acquire vaccines against COVID-19 under the centralized European procedure)
- Resolution no. 68-A/2020 of the Council of Ministers, of August 28th, *Diário da República*, 1st Series, no. 168 (extending the situation of contingency and alert)
- Resolution no. 70-A/2020 of the Council of Ministers, of September 11th, *Diário da República*, 1st Series, no. 178 (declaring a situation of contingency in the Portuguese continental territory)

5.2 Jurisprudence

- Ruling of the Portuguese Constitutional Court no. 424/2020, of July 31st.

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