

## SAFEGUARDING CONSTITUTIONAL PRINCIPLES IN THE STATE OF EMERGENCY

I am going to try to give you an account of the way in which the Constitutional Court of Portugal has done its job of safeguarding constitutional principles within the state of emergency. I shall look specifically at our pandemic-related jurisprudence.

The Constitutional Court of Portugal has handed down just under 40 Covid19-related judgments. Only 3 of those judgments (n° 334/2022, n° 196/2023 and n° 326/2023) have been handed down by the Court sitting *en banc*, in abstract review proceedings. Most were produced, in incidental review proceedings, by one of the 3 chambers of the court.

The judgments can be divided into four broad categories:

- a) Those which address issues concerning the allocation of powers to introduce or amend criminal offences in response to emergencies between Parliament and the Executive;
- b) Those which assess the conformity with the Constitution of measures which made confinement or prophylactic isolation compulsory for passengers flying into Portugal aboard certain flights;
- c) Those which control the conformity with the Constitution of measures establishing a mandatory confinement period for individuals under active surveillance by the health authorities;
- d) Those which focused on the procedural effects of various Covid19 pandemic-related measures

### **1. Judgments which address issues concerning the allocation of powers to introduce or amend criminal offences in response to emergencies (state of emergency and state of calamity) between Parliament and the Executive.**

The Court has handed down 8 judgments which fall under this heading between 2021 and 2022. The bulk of these cases deals with the offence of disobedience.

The gist of this set of judgments is that, for reasons of necessity (in situations in which a state of exception has been declared), the executive acted as an extraordinary legislator.

The exercise of emergency powers by the executive is, in such instances, both judicially reviewable (on proportionality grounds) and subject to political control by both the President and Parliament.

#### **1.1.**

In Judgments n. **352/21 and 193/2022**, the Court decided that a legal provision which increased the severity of a sanction attached to the offence of disobedience in cases of breach of an order of home confinement (which an ordinary court in Lisbon had refused to apply on unconstitutionality grounds) was **not unconstitutional**.

In another set of judgments (Judgments n. **921/2021 and 617/2022**), the Court assessed the conformity with the Constitution of a seemingly new disobedience offence introduced by the executive, in light of the rule of law requirement of the foreseeability of criminal offences (art. 29, n° 1 of the Constitution). The Court declared that the executive had not introduced a new offence when it established that breaching the duty of confinement amounted to disobedience. By implication, the Court said, the executive had not acted *ultra vires*.

In abstract review proceeding (Judgment n° **196/2023**), the Court confirmed that the normative provision at stake is **not unconstitutional**.

## 1.2.

In another judgment (Judgment n° **350/2022**), the Court specifically addressed the question whether the provisions (created by the executive in the context of a declared state of calamity – which is less severe than a declaration of a state of emergency) imposing on all retail and other service businesses the duty to close at 8:00 pm (the breach of which was an instance of the offence of disobedience) were partly or wholly innovative or whether they were (in the Court’s own terminology) “a mere replication or non-innovative concretisation of another norm already in force in the legal system”. In this case, the Court declared the **unconstitutionality** of the relevant provision stating that the executive had acted *ultra vires* when it introduced to the legal system “elements which were central to the definition of the” offence.

## 1.3.

The Court later revisited the question whether the executive had invaded Parliament’s sphere of exclusive competence when it established a more severe sanction attached to acts of disobedience against legitimate legal directives.

In Judgment n° **477/2022**, the Court noted that “the declaration of a state of emergency cannot affect the constitutional rules of competence and functioning of constitutional bodies” (art. 19, n° 7, CRP). The Court concluded that it was faced with a case of **unconstitutionality** for breach, by the executive, of the domain of exclusive competence of Parliament. The more general conclusion was that “the separation of powers and the delimitation of competences of the constitutional bodies constitute negative limits to the constitutional exception regime. Such negative limits remain intact throughout the officially determined period of constitutional exception.”

In this judgment, the first chamber ruled in a different direction to the one the Court (sitting as the third chamber) had followed in Judgment n° 352/2021.

Subsequently, in Judgment n° **619/2022**, the second chamber of the Court noted that “in situations of constitutional exception, the executive is invested in the role of a true executor of prior normative choices imposed on it by primary decision-making bodies.” The Court stressed that Parliament’s domain of exclusive competence remains intact within a state of constitutional exception and concluded that the executive has, in the exercise of its powers of execution of a declared state of emergency, no legislative power

to introduce or expand criminal offences and attached sanctions. The provision under scrutiny was declared **unconstitutional** for breaching art.19º, nº 7, of the Constitution.

In this judgment, too, the second chamber of the Court distanced itself from the ruling of the 3<sup>rd</sup> Chamber in Judgment nº **352/2021**.

#### 1.4.

Faced with conflicting judgments on the constitutionality of the same normative provisions, the Court has sat *en banc* to judge a request for abstract review lodged by the Public Prosecutor. The ensuing judgment (nº **326/2023**) was one of **unconstitutionality** for breach of article 19º, nº7 ('suspension of the exercise of rights'), and article 165º, nº1, c) (on the scope of Parliament's exclusive legislative power) of the Constitution.

### **2. Those which assess the conformity with the Constitution of measures which made confinement or prophylactic isolation compulsory for passengers flying into Portugal aboard certain flights.**

There are 10 judgments in this category, handed down between 2020 and 2022. A significant number of the cases concerned applications for *habeas corpus*.

#### 2.1.

The Court issued a seminal judgment under this heading (nº **424/2020**) when it declared **unconstitutional** a number of provisions issued by the Regional Government of the Azores islands (one of the two Autonomous Regions of Portugal) in light of the right to liberty (protected by art. 27º, n. 1, of the Constitution) and in light of art. 165º, n. 1, b) of the Constitution, which identifies areas of exclusive parliamentary competence (some of which can be delegated to the executive).

The scrutinised provisions imposed a mandatory confinement period of 14 days on passengers landing in the Azores. The Court concluded that such a compulsory confinement measure amounted to a deprivation of personal freedom by authorities acting outside a declared state of emergency fell under the domain of exclusive competence of Parliament, had not been delegated and could only have been delegated to the executive (not to the regional government of the Azores).

#### 2.2.

This reasoning formed the basis, with a few variations, for three further judgments (n. **90/2022, 352/2022 and 510/2022**), in which the Court established a clear line of reasoning that the issuing of the provision under scrutiny (which established a procedure for the judicial validation of the measures of compulsory quarantine or prophylactic

isolation for passengers travelling to Azores from countries identified by the WHO as areas of active community transmission or with active transmission chains of the SARS-Cov-2 virus) by the Azorean regional government amounted to regulation within an area of parliamentary exclusive competence which had not been delegated and, in any case, could not be delegated to the regional government. So, once again, the Court declared that the Regional Government of the Azores had acted *ultra vires*.

### 2.3.

The Court issued its first **material unconstitutionality** judgments shortly after (n. **464/2022 and 465/2022**). In both cases, two provisions issued by the Council of Ministers were refused by ordinary courts within habeas corpus proceedings started by passengers on flights from Brazil who had been subjected to compulsory isolation shortly after landing in Portugal. The Court declared that such forced confinement amounted to an actual deprivation of liberty, not merely a restriction of the personal freedom of those affected by it. The constitutional provision in point was, once again, art. 27 of the CRP. The Court added that any measure entailing the deprivation of liberty of an individual must either be put forward or confirmed by a court of law. In addition to the *ultra vires* judgment it had passed in previous cases, the Court also declares the provisions invalid for directly breaching the right to liberty protected by art. 27 of the Constitution.

### **3. Those which control the conformity with the Constitution of measures establishing a mandatory confinement period for individuals under active surveillance by the health authorities.**

A total of 10 judgments were handed down by the Court under this heading. All in 2022. One of the Court's judgments in this category was passed by the Court sitting *en banc* (n° 334/2022). It was decided that all 13 justices should sit in session due to the relevance and complexity of the issues at stake.

In one judgment (n° **87/2022**), the Court decided that a provision, adopted in the context of a declared state of emergency, which imposed mandatory confinement on individuals who were under the active surveillance of the health authorities was not unconstitutional. The provision at stake was not, the Court stated, "substantively innovative".

A subsequent string of judgments (including judgment n° **334/2022**, the one handed down by all 13 justices) confirms the line of argument followed in judgment n° **90/2022** (mentioned under the heading of category (ii)).

More substantive judgments of **unconstitutionality** followed, with the Court deeming particular provisions unconstitutional for breaching art. 27° of the Constitution. In judgments n° **489/2022 and 490/2022**, the Court established a framework for determining which fundamental rights are specifically affected by measures of precautionary confinement and highlighted two possible approaches:

1. The relevant constitutional criterion for assessing confinement measures is the *fundamental right to liberty* protected by art. 27 of the CRP. On this approach, the

relevant distinction is the one between ‘*restrictions to liberty*’ (allowed by para 1 of art. 27) and total (or partial) *deprivation of liberty* (exhaustively listed in paras 2 and 3).

2. An alternative approach is based on the possibility of distinguishing between different sorts of confinement measures. Those which directly affect personal freedom would fall under art. 27, whereas those specifically affecting individual freedom of movement would fall under art. 44 of the CRP.

**4. Those which focused on the procedural effects of various Covid19 pandemic-related measures.** These can, in turn, be divided into two categories:

- a) Constitutional scrutiny of provisions suspending the limitation periods of criminal and administrative offences - 3 judgments handed down in 2021.
- b) Constitutional control of provisions allowing the cross-examination of witnesses by videoconference in judicial proceedings - judgment n° 738/2021.

**In conclusion:**

Despite the occurrence of conflicting judgments in incidental review proceedings, the Court has been consistent in its approach to the various types of pandemic-related cases on which it has been asked to pass judgment.

There is a particular concern for the *ultra vires* nature of measures adopted by the executive or by regional governments (which suggests a broader concern with the separation and distribution of powers between Parliament and the executive).

Only a very few times the Court has ventured beyond considerations of competence and comity and has also advanced substantive criteria for assessing the conformity of particular measures with constitutionally protected rights.

The jurisprudential path followed by the Court in the sample of judgments is, for the most part, clear: the Court has been zealous in its shielding of the doctrines of separation of powers and comity within the Portuguese constitutional system in the face of the unprecedented challenges of the COVID pandemic.