2021 Global Review of Constitutional Law

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Editors

UNIVERSITÀ DEGLI STUDI DI TRIESTE

Supported by the Constitutional Studies Program at the University of Texas at Austin

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Under the Patronage of the Department of Legal, Language, Interpreting and Translation Studies

ISBN: 978-0-692-15916-3
ISBN: 978-88-5511-361-8

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Portugal

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I. INTRODUCTION

Following the events that occurred in 2020, 2021 was, once again, impacted by the effects of the COVID-19 pandemic. All the more so that the year began with the imposition, in January, of a new confinement, that lasted until mid-March, due to a spike in the number of new cases[1].

In addition, the year ended in political crisis since, due to the Government's inability to gain parliamentary support to approve the States' Budget, the President of the Republic determined the dissolution of the Assembly of the Republic and called for legislative elections.

For its part, the Portuguese Constitutional Court (PCC) dealt with sensitive issues, providing rulings on the admissibility of medically assisted death, the enforcement of the COVID-19 regulation, the right to property, cybercrime, and the criminalization of the mistreatment of animals.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Similar to what happened in 2020, in 2021, the Covid-19 pandemic and the subsequently implemented restrictive measures hindered a promising economic growth, creating an unprecedented social and sanitary crisis[2] and amplifying the Portuguese democratic system's structural fragilities.[3] Consequently, Portugal, ranked as a "full democracy" by the Democracy Index in 2019, and downgraded to a "flawed democracy" both in 2020 and in 2021.[4] In 2020, there were some democratic concerns over the replacement of the fortnightly parliamentary debates with the Prime-Minister by monthly debates and the restrictions to fundamental rights and liberties outside of a constitutional state of emergency framework. This situation remained unchanged in 2021. Hence, it is not surprising that the outcome should be the same: the Portuguese democracy displays some flaws that require correction.

As the EU recovery funds spending programme became a national priority, the political debate intensified and the support from the Government's leftist allies gradually deteriorated.[5] In December 2021, the Parliament rejected the proposal for the 2022 State's budget. Subsequently, the President of the Republic, Marcelo Rebelo de Sousa, decided to dissolve the Parliament and to schedule general elections. From a constitutional perspective, the Parliament's dissolution was not a necessary consequence following the rejection of the aforementioned proposal. Still, the Portuguese Constitution allows the President a wide margin of discretion in this domain. In fact, while the Government's removal by the President has a substantive constitutional limitation – it may only occur "when it becomes necessary (…) in order to ensure the normal operation of the democratic institutions" (Article 195, par. 2, of the Portuguese Constitution) –, for the dissolution of the Parliament there are only the following constitutional limitations: "The Assembly of the Republic may not be dissolved during the six months following its election, during the last six months of the President of the Republic's term of office, or while a state of siege or a state of emergency is in force" (Article 172, par. 2, of the Constitution).

Nevertheless, the Parliament's dissolution did not come as a surprise, since the President had warned that he would resort to this mechanism if the proposal for the State's Budget was rejected. Still, despite that and the wide margin of presidential discretion, dissolutions come with a political cost.[6] In this recent case, some argued that scheduling elections would not solve the political impasse.

Since the transition to democracy, the Portuguese Parliament has been dissolved seven times. The former President António Ramalho Eanes dissolved the Parliament three times, in 1979, 1983, and 1985. Former President Mário Soares dissolved the Parliament in 1987, while former President Jorge Sampaio resort to it in 2002 and 2004. And former President Aníbal Cavaco Silva dissolved the Parliament in 2011. Not all these dissolutions carried the same political weight. While some reflected an explicit political crisis within the Parliament (such as in 2011), others (such as in 2004) were more delicate, as they derived from the President's belief that the parliamentary majority did not offer enough political stability.

III. CONSTITUTIONAL CASES

1. Medically assisted death[7]

The President of the Republic requested the anticipatory review of constitutionality of several rules of Decree no. 109/XIV of the Assembly of the Republic, that enshrined the conditions in which the anticipation of medically assisted death shall not be punished.[8] According to article 2, paragraph 1, of this decree, one may only resort to the anticipation of medically assisted death if the requirements contained in this provision are observed. Thus, the recipient should be "in a situation of intolerable suffering, with definitive injury of extreme severity according to scientific consensus or incurable and fatal disease". The President raised the question of the excessively indeterminate character of the concept of "intolerable suffering" and of the notion of "definitive injury of extreme severity according to scientific consensus".

The PCC began by analyzing whether the admissibility of the anticipation of medically assisted death, under certain conditions, encroaches on the inviolability of human life, enshrined in Article 24, par. 1, of the Portuguese Constitution.[9] In this regard, the Court (with the support of 8 out of 13 Justices) held that the right to live cannot be transformed into a duty to live under any circumstances. And, in a secular, plural, and democratic society, the tension between the duty to protect life and the respect for personal autonomy should be resolved through political-legislative options made by democratically elected representatives of the people.

To this effect, the anticipation of medically assisted death requires the creation of a legal system that safeguards both in material and procedural terms the fundamental rights here at stake, namely the right to life and the personal autonomy of those who ask for the anticipation of their death and of those who collaborate towards it. Consequently, the requirements for the admissibility of the anticipation of medically assisted death should be *clear, precise, predictable, and controllable*.[10] Therefore, and concerning the concept of "intolerable suffering", the PCC found that although indeterminate, it is determinable following the rules of the medical profession. Hence, it was not considered excessively indeterminate and, to that extent, incompatible with any constitutional norm.[11]

However, the Court considered that the concept of "definitive injury of extreme severity in accordance with scientific consensus", due to its imprecision, does not allow – even considering the normative context in which it is inserted – the delimitation, with the indispensable rigor, of the situations in which it can be applied.[12] Due to this insufficient normative density, the PCC found this rule to be inconsistent with the principle of determinability of the law.[13] Therefore, paragraph 1 of Article 2 of the aforementioned Decree was found to be unconstitutional (and, consequently, so was the rest of the legal text). Still, the door has been left open for future parliamentary initiatives that meet the normative density requirements it demands.[14]

2. Covid-19 jurisprudence

2.1. Crime and punishment[15]

To begin, it is worth mentioning that the Portuguese constitutional review model is hybrid, as it shares characteristics of the monist/Kelsenian model, as well as 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 features, since ordinary courts are also given powers of judicial review. Accordingly, when ordinary judges find the norm(s) applicable to a case to be unconstitutional, they do not suspend the process and address that question to the PCC. Instead, they shall immediately dismiss the application of such norm(s) in the judicial process (Article 204 of the Portuguese Constitution). Nevertheless, matters before the ordinary courts can still be referred to a court outside the ordinary jurisdiction – the PCC – following an appeal.[16]

In 2020, during the constitutional state of emergency, the Portuguese Government issued Decree no. 2-B/2020, aimed at executing Presidential Decree no. 17-A/2020, which renewed the state of emergency.[17] In order to enforce emergency measures dictated by the ongoing sanitary crisis, such as lockdowns, curfews, and others, Article 43, par. 6, of Decree no. 2-B/2020 increased in one third the minimum and maximum punishment for the crime of disobedience.[18]

Later on, a court of first instance in Lisbon (*Tribunal Judicial da Comarca de Lisboa Norte*), in a case where the defendant refused to comply with a police injunction to return home and observe the undergoing lockdown, stroke down Article 43, par. 6, of Decree no. 2-B/2020, on the grounds of unconstitutionality.

As required by the Portuguese Constitution, the Public Prosecution Office (*Ministério Público*) appealed to the PCC[19], who then analyzed whether the Executive has the constitutional power, under a state of emergency, to issue norms in matters concerning crime and punishment (an area that is constitutionally reserved to parliamentary statute).[20] The Court (with the support of 3 out of 5 Justices) held that the power to execute the declaration of a state of emergency, encompassing all the measures suitable and necessary to restore constitutional normalcy, is directly based on Article 19, par. 8, of the Constitution. The Executive is thus empowered to issue secondary norms in matters of crime and punishment. To the PCC, such power is based on an extraordinary title (the

declaration of a state of exception); is temporary and precarious (not lasting beyond the declaration itself); and is aimed at a specific goal (to restore constitutional normalcy).[21] Furthermore, if one were to draw the opposite conclusion, that would render the entire constitutional regime of states of exception virtually inoperative and nonsensical. Still, the emergency power of the Executive "is far from arbitrary or untrammelled: on the one hand, its exercise is bound to the principle of proportionality and subject to judicial review; on the other hand, the Executive is politically accountable to the President and to the Parliament (article 190), the latter having the specific constitutional duty to monitor the execution of the declaration of a state of emergency or state of siege (article 162)."[22]

2.2. Crime of disobedience[23]

During the state of constitutional emergency, the health authorities determined the prophylactic isolation of a citizen, at his home, for 14 days. However, he decided to go outside during that period of isolation and, according to Article 348, paragraph 1, a), of the Criminal Code and to Article 3, paragraphs 1, b), and 2, of Decree no. 2-B/2020 of the Presidency of the Council of Ministers, such behavior was framed and punished as a crime of disobedience.
This person was charged and tried for disobedience, but the Criminal Court refused to apply the Government's decree, considering that a new crime was at stake, for which the latter lacked powers. Following the defendant's acquittal, the Public Prosecutor appealed against this decision to the PCC.
The Court started by questioning whether the inclusion of a disobedience crime in the Government's decree was truly innovative. In fact, the Law of the State of Siege and State of Emergency (LSSSE) already enshrined, in its Article 7, the crime of disobedience.[24] Thus, the Government would only have exceeded its powers if it had gone beyond that legal provision.
The PCC also assessed the compatibility of the decree with the principle of determinability of the law. It held that there is a legal and logical continuity between the LSSSE, the authorization by Parliament, the Declaration of State of Emergency by the President of the Republic, and the Government's decree that implements it. Thus, the main issue was to determine whether such a continuity (particularly important whenever a disobedience crime is at stake) allowed any average person to establish a connection between a prohibited conduct (leaving home) and the diplomas that contained such ban. In this case, the Court considered that the sequence of relevant acts allowed any person to understand the connection between the Declaration of the State of Emergency and its execution. For this reason, the PCC unanimously concluded that the Government had not created a new crime by criminalizing the violation of the duty of confinement and, consequently, had not exceeded its powers. Therefore, this rule was not unconstitutional and the decision of the Criminal Court was reversed.

3. Fundamental rights[25]

This judgment was issued on a concrete review of constitutionality, following a request presented by a landlord who had sought to oppose to the renewal of a rental contract, pertaining to a property where a commercial establishment of effective historical interest was installed. In fact, Civil Courts, invoking Acts nos. 6/2006 and 42/2017, had granted the tenant's request to renew the contract for another five years. Which, according to the landlord, led to the encroachment of his right to property, since it precluded the exercise of a contractual ability that ought to be seen as one of the powers to administer one's assets (which fall within the sphere of protection afforded by such right).
The PCC began by stressing that the right to property never takes on an absolute or preeminent value in relation to other opposing rights and values, such as the social-utility reasons associated to rental contracts. And, in this case, there were at stake not only the protection of a commercial activity, but also the protection of cultural heritage (one of the State's fundamental tasks), and the preservation of the identity-related characteristics of the urban fabric.
Taking these interests into account, the Court considered that the challenged norms restricted the right to property in an appropriate, necessary, and proportionate way. In fact, the continued presence of an establishment or entity can play an important role in preserving the value of the historical, cultural, and social interests associated with both the activity undertaken there and the characteristics of the rented place itself. Furthermore, the PCC pointed out that this measure was not excessive, since it was limited to a restricted universe and with a small impact on the owner's legal position. And, finally, the Court considered that it safeguarded the tenant's and the community's interests, without weighing disproportionately on the owner's right.
Furthermore, the application of the aforementioned diplomas was not considered to be retroactive (as argued by the appellant), since this situation was not fully consolidated at the time of their entry into force. And, finally, the PCC concluded that, contrary to the landlord's arguments, his legitimate expectations and legal security had not been affected, since he had tried to oppose to the continuity of the rental agreement only after the entry into force of the new regime.
For these reasons, the challenged norms (and the interpretation they were given by the courts) were not considered to be unconstitutional.

4. Cybersecurity[26]

In this ruling, issued under an anticipatory review of constitutionality, requested by the President of the Republic, the PCC analysed the Article 5 of Decree no. 167/XIV, of the Assembly of the Republic (which amended article 17 of Act no. 109/2009 – known as the Cybercrime Law).
In fact, while Article 17 of the Cybercrime Law determines that the seizure of electronic mail and records of communications of a similar nature shall be determined by a judge, Article 5 of Decree no. 167/XIV allowed for this measure to be decided by a "competent judicial authority".
Firstly, the Court assessed this rule considering the restriction it entailed on the fundamental right to secrecy of correspondence and other means of private communication and on the fundamental right to protection of personal data in the field of computerized systems (Articles 34 and 35 of the Portuguese Constitution). And it concluded that the rules in question allow an interference in electronic correspondence and may also

enable the access to personal data (since the operations necessary to seize electronic mail entail a considerable risk of access to protected personal data relating to the user's correspondence, traffic, and content data).

Since these rules clearly imply the restriction of fundamental rights, their effect shall be limited to what is strictly necessary. And, in this context, judicial intervention constitutes an additional guarantee in weighing the rights and freedoms affected by the course of a criminal investigation. Therefore, a legal solution that waives the need for a prior authorization from a judge concerning criminal investigation acts that involve the invasion of citizens' private sphere will only be constitutionally legitimate in exceptional cases and if there is a full, robust, and well-defined justification. These conditions were not met by the provision in question, which was, for this reason, considered to be unconstitutional, for violating the fundamental rights to the inviolability of correspondence and communications and the protection of personal data in the context of the use of information technology, as well as the principle of the reserve of the court, the specific competences of the investigating judges, and the constitutional guarantees of defence in criminal proceedings (contained in Article 32 of the Portuguese Constitution).

5. Mistreatment of companion animals[27]

This ruling was issued under a concrete review of constitutionality of Article 387 of the Penal Code (which punishes the death and mistreatment of companion animals with the penalty of imprisonment).

The PCC stressed that since the restriction of fundamental rights (deprivation of liberty, due to imprisonment) shall only take place under certain conditions, namely, to ensure the protection other constitutionally enshrined rights or interests, regardless of its ethical underpinnings, the criminalization of the maltreatment of animals shall only be acceptable assuming that the Constitution provides for the protection of animals.

This means that the legislative evolution (which allowed the acknowledgment of animals as more than mere objects), albeit well-founded and presumably irreversible, is not enough to justify this deprivation of liberty. This must stem from the Constitution itself, which, according to the Court, does not provide in that sense. In fact, even though the protection of nature and the environment is constitutionally enshrined (in Article 66), this only allows a collateral protection to animals (as part and in connection to the environment, and not due to their intrinsic value). While the norm under analysis protects animals as such, as individuals.

One could argue that the constitutional interest in criminalizing this offence lies not in the intrinsic import of animals, but in their importance for human beings, and is therefore based in the principle of human dignity. But due to its highly abstract nature, this principle is unsuited to provide the basis for the restriction of fundamental rights. Human dignity is at once somewhat more and somewhat less than a right. It confers unity and coherence on the whole constitutional system, providing guidance to the interpretation of constitutional norms. But, invoked in an isolated manner, it could be used arbitrarily, given its extreme subjectivity.

For this reason, the Court judged Article 387 of the Penal Code to be unconstitutional, although it noted that this does not signify that the Portuguese Constitution is opposed to the criminalization of this conduct. It merely means that, at the moment, the Constitution does not provide the necessary basis for this effect. Still, this decision only has *inter partes* effects, which means that the aforementioned norm is still in effect.

IV. LOOKING AHEAD

In January 2022, general elections might change the Portuguese political scenario. In 2019, after a second 'contraption' (a post-electoral alliance known as '*geringonça*') failed, the centre-left socialists from the Socialist Party (PS) decided that they would rule as a minority government and seek support from the communists (PCP), the Left-Block (BE), and the 'People, Animals and Nature Party' (PAN) when necessary.[28]

There is a lot of anticipation towards the imminent general elections. After a dissolution of the Parliament, alterations in the equilibrium of political powers are expected. Regarding the electoral processes, many have argued for an amendment to the legislation that could address several problems, such as the very low turnout rate and the distance between the electorate and the politicians.

The restriction of fundamental rights during the pandemic and the rulings of unconstitutionality by the PCC in 2020 and 2021 might perhaps incentive some changes: (*i*) as asked for by the majority of the Portuguese literature, a sanitary emergency law could be approved to circumvent a "chaotic body of law and administrative regulations";[29] (*ii*) in parallel, will 2022 bring a much-awaited constitutional amendment? The last amendment was in 2005 and, since then, the Parliament was unable to approve a constitutional amendment due to the high rigidity of the Portuguese amendment process;[30] (*iii*) furthermore, state liability cases over unconstitutional measures approved during the pandemic might arise.[31]

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