

A world map in a light blue color, centered on the Atlantic Ocean, serving as a background for the top half of the cover.

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2020 Global Review of Constitutional Law

Richard Albert, David Landau,
Pietro Faraguna and Simon Drugda
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Portugal

Ana Teresa Ribeiro, Professor of Law, Universidade Católica Portuguesa,

Catarina Santos Botelho, Professor of Law, Universidade Católica Portuguesa

I. INTRODUCTION

Globally, 2020 was a challenging year and Portugal was not an exception to this trend. In the most recent years, the economy had been greatly improved following the severe crisis of 2011. The COVID-19 pandemic and the restrictive measures that were subsequently implemented not only hindered this growth, but also created an unprecedented social and sanitary crisis.

The pandemic led, for the first time since the transition to democracy, to a declaration of a state of emergency (followed by many others). Meanwhile, as we will see below, an administrative state of exception was also declared whereby the restriction of fundamental rights was allowed, but without the associated guarantees of a state of constitutional emergency.

Some of the measures implemented during this period have already been reviewed by the courts, which led the way to rulings of unconstitutionality due to the lack of the necessary powers. Furthermore, and for the first time, the Portuguese Constitutional Court (PCC) took a stand concerning the relation between Portuguese law (more specifically, the norms enshrined in the Portuguese Constitution) and European Union law. This landmark decision will, no doubt, elicit the interest of Portuguese and foreign doctrine and will, certainly, be considered in new judgements delivered by other Portuguese courts. Other rulings, regarding the right of pre-emption of tenants

and the right of appeal in the case of a criminal conviction, are also noted.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The design of the constitutional exception

In the same way the Portuguese Constitution enshrines its amendment rules, it also establishes the substantial and procedural guidelines of the state of constitutional exception. Accordingly, the domestication of the state of exception joins the domestication of amendment rules.¹

To prevent a unilateral suspension of rights, the Constitution provides a checks and balances mechanism through which the state of emergency is agreed between the three main political institutions: the President declares, the Parliament authorizes, and the Government executes the state of emergency. Furthermore, the Constitution puts a cap on the rights that may be suspended, besides imposing a time-limit of fifteen days (which can be renewed), and the obligation to respect proportionality. During a constitutional emergency, the Parliament cannot be dissolved (article 172 of the Constitution) and constitutional amendments (article 289 of the Constitution) and referenda² are prohibited.

Unlike the Spanish and the Brazilian Constitutions, that identify which rights can be suspended,³ or the German *Grundgesetz*, that does not make such determination,⁴ the Por-

¹ The rules on constitutional exception are distributed throughout the constitutional text (articles 19, 138, 172, 275, no. 7, 289).

² Article 9 of the Act on Referendum (Act no. 15-A/98, of April 3rd, amended by Act no. 3/2017, of June 18th).

³ 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.

⁴ Articles 115-A and ff. of the *Grundgesetz*.

tuguese Constitution has adopted a negative design: the Constitution explicitly mentions which rights cannot be suspended.⁵ As stated in article 19, no. 6, 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.

2. Ordinary emergency law

The state of emergency is regulated in the ordinary legal arena, namely in the Civil Protection Framework Act,⁶ in the Health Framework Act,⁷ and in the Act on Public Vigilance of Health Risks.⁸ The Civil Protection Framework Act authorizes some restrictions on fundamental rights such as temporary requisition of products and services and limitations to the freedom of movement of persons and vehicles. The Health Framework Act allocates powers to health authorities to address public health hazards, including the determination of confinement of individuals, the requisition of health facilities and professionals, and the decision to close public and private facilities. The Act on Public Vigilance of Health Risks focuses on public health emergencies and allows the suspension of activities.

3. Alternating between constitutional emergency and administrative exception

On March 18th, 2020, just two weeks after the first confirmed cases of COVID-19 in Portugal, the President of the Republic declared the

state of emergency. The presidential decree enacted the partial suspension of certain fundamental rights such as cross-border circulation, the right to strike, and the rights to assemble and protest.⁹ Notwithstanding the several declarations of emergency that took place during the following months, this was, in our view, the only situation in which the declaration of emergency did not consubstantiate a *constitutional obligation*. From a political standpoint, however, as Portugal was experiencing a disruptive moment of uncertainty and widespread panic – since, at that time, the pandemic was out of control in Spain and in Italy – this step forward was, almost certainly, the best option.

After this preventive state of emergency, the next two renewals of the constitutional state of emergency on April 2nd and 17th, took place in a more aggravated pandemic context. The emergency became reactive and consisted of further restrictions to fundamental rights and freedoms.

On May 3rd, the constitutional emergency ended and restrictions were relaxed to reopen the economy. While Portugal adjusted to constitutional normality, a degree of administrative exception was held via administrative states of alert, contingency, and calamity.¹⁰ Between April and November, several COVID-19 related measures were implemented by Resolutions of the Council of Ministers, therefore escaping parliamentary appreciation (article 169 of the Constitution) and the possibility of veto or initiation of an anticipatory constitutional review of legislation by the President of the Republic

(article 136 of the Constitution). In fact, since the restriction of fundamental rights belongs to the Parliament, it should have been previously authorized.¹¹ To sum up, administrative exception somehow masked a *de facto* constitutional emergency. The irony was that people still endured the disadvantages of a quasi-constitutional emergency (serious restrictions on fundamental rights) without having obtained its benefits (the mutual controls of checks and balances granted by the constitutional exception's design).

On November 6th, as the pandemic situation aggravated, Portugal returned to a state of constitutional emergency. The emergency decree was quite surgical, as the severity of the measures depended on the number of infected people per municipality. The state of constitutional emergency remains in force as we are writing this report.

4. Concerns

4.1. Checks and balances

Amid constitutional emergencies, the reinforcement of governmental powers is justified by the fact that executive powers are better equipped to immediately address the societal struggles of a situation of exception. Unsurprisingly, judicial power is passive and legislative power depends on the amount of time required for proper reflection and deliberation.¹²

The head of state also plays a relevant role in enforcing checks and balances. Unlike the veto

⁵ Catarina Santos Botelho, "COVID-19 and stress on fundamental rights in Portugal: An intermezzo between the state of exception and constitutional normality" (2020) 3 *Revista Catalana de Dret Públic* 183 at 184-185.

⁶ Act no. 27/2006, of July 3rd, *Diário da República*, 1st Series, no. 126.

⁷ Act no. 48/90, of August 24th, *Diário da República*, 1st Series, no. 195.

⁸ Act no. 81/2009, of August 21st, *Diário da República*, 1st Series, no. 162.

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

¹⁰ According to the Civil Protection Framework Act, the administrative escalator of exception consists of three degrees of restrictiveness of measures taken by the Government. The state of alert is the less restrictive one (articles 13 to 15), while the state of contingency is an intermediate state (articles 16 to 18) and, finally, the state of calamity is the most limitative of the three (articles 19 to 31).

¹¹ Article 165, no. 1, b), states that: "Unless it also authorises the Government to do so, the Assembly of the Republic has exclusive competence to legislate on rights, freedoms, and guarantees".

¹² Gonçalo Almeida Ribeiro, "O estado de exceção constitucional", *Observador*, March 25th, 2020, available at: <https://observador.pt/especiais/o-estado-de-excecao-constitucional/>

¹³ According to article 136, no. 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".

regarding parliamentary legislation, which can be surpassed,¹³ the veto concerning governmental legislation is definitive (article 136, no. 4).¹⁴ Significantly, the President vetoed two diplomas related to changes in parliamentary activities: (i) the reduction of parliamentary debates with the Prime-Minister concerning European matters; (ii) and the raise in the number of signatures required for petitions from citizens to be debated in the Parliament's plenary (from 4,000 to 10,000). The President, Marcelo Rebelo de Sousa, considered that these amendments would be detrimental to the public perception of the national embeddedness in the European Union and to the vitality of democracy through the participation of citizens.

4.2. *The length of the constitutional emergency*

Empirical studies reveal that extended constitutional emergencies increase the risk of democratic erosion and autocratization by decree.¹⁵ What could be done to prevent this situation? At a more fundamental level, a pandemic legislation must be approved, as the existing legislation is not able to adequately address the current pandemic. Nevertheless, pandemic legislation will not magically substitute states of constitutional emergency. In fact, some measures are so severe that they can only be addressed by constitutional emergency.¹⁶

How can the protection of human rights be combined with the strict constraints of managing the COVID-19 pandemic? In most respects, the key to this paramount task can be found in the delicate balance of ensuring pub-

lic health without falling into the extreme of a “fascistoid-hysterical hygienic state” (*fascistoid-hysterischen Hygienestaat*).¹⁷

III. CONSTITUTIONAL CASES

1. *COVID-19 Jurisprudence*¹⁸

After the expiry of the constitutional state of emergency, a Portuguese citizen travelled to the archipelago of the Azores¹⁹ and was compulsorily confined (following a measure approved by the regional government of Azores) for a period of fourteen days, at his own expense. It should be stressed that measures implemented to address the COVID-19 pandemic were stricter in the archipelagos of the Azores and Madeira than in continental Portugal.

Disagreeing with such confinement, the citizen lodged a writ of *habeas corpus* against his (perceived) arbitrary detention. The Court of Ponta Delgada (Azores) ruled that the order of compulsory confinement violated freedom of movement and was organically unconstitutional. In fact, since the confinement order took place in the aftermath of the state of emergency, the restriction of this fundamental right could only have been legislated by the Parliament or the Government (with prior authorization from the Parliament).²⁰ Furthermore, the court held that imposing a confinement of a citizen that had not tested positive for COVID-19 disrespected the principle of proportionality.

Although this decision lacked any direct

effect concerning people that were not involved in this action (it only had an *inter partes* effect), the President of the Government of Azores immediately announced new measures to contain the spread of COVID-19. As a result, compulsory confinement was replaced by voluntary confinement.

Later on, this case was brought to the PCC, becoming its first COVID-19 related decision, and the Court ruled unanimously that the regional norms which imposed the mandatory confinement were organically unconstitutional.

2. *The principle of the precedence of European Union law*²¹

In this judgement, issued under a constitutional review applied to a concrete case, the PCC addressed for the first time the issue of the principle of the precedence of European Union law vis-à-vis constitutional norms.²²

In this case, a Portuguese firm was contesting the interpretation given by the Court of Justice of the European Union (CJEU) to article 19, no. 1, a), of the Commission regulation (EEC) no. 2220/85.

The norm in question determined that, when applying to export subsidies (to third countries), companies that wish an advance payment of such amounts must provide a bank guarantee. And, when asked, in a preliminary ruling, how long should this bank guarantee stand for, the CJEU stated that it could still be triggered when, after the prod-

¹⁴ Although a Government with a parliamentary majority can always surpass the presidential veto, through article 197, no. 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”. Therefore, the Government can “copy-paste” its law-decree into a draft resolution to the Parliament. If the Parliament approve the draft and the subsequent act, the President can veto that act, but the Parliament is able to surpass the veto by an absolute majority (article 136, no. 2).

¹⁵ Anna Lührmann and Bryan Rooney, “Autocratization by Decree: States of Emergency and Democratic Decline”, (2020) *Comparative Politics* 1.

¹⁶ It is relevant to emphasise that fundamental rights' suspensions can only occur within constitutional emergencies.

¹⁷ Hans Michael Heinig, “Gottesdienstverbot auf Grundlage des Infektionsschutzgesetzes”, *Verfassungsblog*, March 17th, 2020, available at: [Gottesdienstverbot auf Grundlage des Infektionsschutzgesetzes – Verfassungsblog](https://www.verfassungsblog.de/gottesdienstverbot-auf-grundlage-des-infektionsschutzgesetzes/).

¹⁸ Ruling of the PCC no. 424/2020, of July 31st (Justice José António Teles Pereira).

¹⁹ Portugal is a partial and homogeneous regional unitary state. The archipelagos of Azores and Madeira enjoy limited legislative, executive, and international powers.

²⁰ See articles 18, 27, no. 3, 44, and 165, no. 1, b), of the Portuguese Constitution.

²¹ Ruling of the PCC no. 422/2020, of July 15th (Justice José António Teles Pereira).

²² Stressing the unprecedented nature of this decision, within the Portuguese jurisprudence, and the particular context surrounding its emanation – see Rui Tavares Lanceiro, “The Portuguese Constitutional Court judgment 422/2020 – a ‘Solange’ moment?”, available at: <https://eulawlive.com/op-ed-the-portuguese-constitutional-court-judgment-422-2020-a-solange-moment-by-rui-tavares-lanceiro/>.

ucts are exported and customs are cleared, the non-compliance of other conditions (imposed for such payment) is verified, namely the lack of sound, fair, and marketable quality of the products.

However, the Portuguese undertaking considered that the CJEU's opinion was in violation of the principle of equal treatment (constitutionally enshrined in article 13) since it led to a different treatment of exporters, depending on whether they choose to receive such benefit before or after exporting, given that the provision of a bank guarantee (with all its associated costs) it is not required of the latter.

After exposing the state of the art concerning the principle of the precedence of European Union law, not only in the CJEU's jurisprudence, but also in the jurisprudence of other Member States' courts, the PCC recognized the need for this kind of principle, since, in its absence, the process of European construction would have been jeopardized due the assertion of regional idiosyncrasies and particularisms. The Court also stressed that this principle does not reflect a higher hierarchical position of European Union law. In fact, such precedence is recognized on matters where legislative powers belong to the European Union and contradictory national law is not void, but rather inapplicable. Furthermore, even though the CJEU has stated this principle in an absolute fashion, on several occasions its decisions have been built in a conciliatory manner, allowing the accommodation of national sensibilities and autonomy.

The Court then recalled article 7, nos. 5 and 6, and article 8, no. 4, of the Portuguese Constitution. In fact, while the first set of norms allows for the European integration, article 8, no 4, details its consequences. And according to the latter, European Union treaties and norms are applicable in the Portuguese legal order as defined by European Union law. Nevertheless, and inspired in the *controlimiti* doctrine, this acceptance of the precedence principle was made under the condition that EU law norms respect the fundamental prin-

ciples of a democratic state based on the rule of law.

The PCC also recognized that the European project generally upholds and promotes such fundamental principles and values, namely through the CJEU, whose jurisdictional control is similar to the one provided by the PCC. Therefore, the PCC's jurisdiction will only apply to cases where European Union law is incompatible with a fundamental principle of a democratic state based on the rule of law that does not enjoy, within European Union Law, the same protection it is accorded in the Portuguese Constitution, namely because it stems from the Portuguese constitutional identity.

When such a scenario does not occur, European Union law enjoys immunity from the Portuguese constitutionality review system and the CJEU holds exclusive jurisdiction concerning its interpretation and validity control.

The Court also added that a mere reference to these principles is insufficient since the claim should have enough axiological density to elevate such references to a fundamental and national identity specificity level.

And considering that in this case the applicant's claim was based on a violation of the principle of equal treatment (a principle present both in the constitutional and European Union law levels, and similarly safeguarded by the PCC's and CJEU's jurisprudence), the PCC decided to abstain from deciding on the matter.

3. *The right of pre-emption of tenants*²³

The PCC analyzed the constitutional compliance of article 1091, no. 8, of the Civil Code, under a subsequent abstract review of constitutionality, demanded by a group of members of Parliament.

According to this norm, lease contracts for housing purposes, concerning merely part of a building (e.g., part of a house or of an apartment) not set up in horizontal property, granted a pre-emption right on behalf of the tenant, should the owner decide to sell said building.

The claimants noted that the buyer of a building (an apartment or a house) is, generally, interested in acquiring it in whole. Therefore, the existence of a pre-emption right concerning merely a share of such building will most likely prevent the owner from selling it to a third party, leading to a disproportionate restriction of the fundamental right of ownership.

The PCC started by stressing that the pre-emption right, particularly regarding lease contracts for housing purposes, aims to protect the fundamental right to housing (article 65 of the Portuguese Constitution), facilitating tenants' access to owner-occupied housing. This right also provides protection from the loss of accommodation frequently provoked by real estate speculation.

However, the pre-emption right enshrined in article 1091, no. 8, did not equalize the tenant to the prospective buyer, since the latter aims at buying the whole building (and not just a share of it). A circumstance which is not in line with the typical characteristics of pre-emption rights.

And although the PCC admitted that the right to ownership may be restricted to accommodate other social values, the right to transfer one's ownership demands, in principle, contractual freedom and private autonomy. Therefore, the limitation of such right will only be acceptable when a space for self-determination is ensured.

And while pre-emption rights do limit contractual freedom, they do not interfere with the right to transfer one's ownership given that, from the owner's perspective, selling to the tenant or to a third party is economically indifferent. Yet, this was not the case of the pre-emption right analyzed in this instance, since it effectively prevented the owner from selling the whole building, forcing the creation of a co-ownership scheme.

In sum, the Court concluded that the legal norm under analysis strongly restricted the right to transfer ownership (and, therefore, the right of ownership). And it failed the pro-

²³ Ruling of the PCC no. 299/2020, of June 16th (Justice Lino Rodrigues Ribeiro).

portionality test since, in relation to its aimed goals, such restriction was not deemed to be adequate (since this pre-emption right did not ensure the access of the tenants to the full ownership of buildings, and, therefore, failed at ensuring housing stability), nor necessary (since less burdensome measures were available), nor, still, proportionate *stricto sensu* (since it did not strike a balance between the interests of the tenant and the owner, disproportionately hindering the latter).

Taking all these arguments into account, the PCC declared the unconstitutionality of article 1091, no. 8, of the Civil Code, with generally binding effect.

4. Right of appeal²⁴

In this ruling, issued under a constitutional review applied to a concrete case, the PCC analyzed the interpretation given to articles 400, no. 1, e), and 432, no. 1, of the Portuguese Code of Criminal Procedure, according to which there is no right of appeal to the Supreme Court of Justice regarding rulings of the Courts of Appeal when the defendant is sentenced to the payment of a fine, even if the Courts of first instance produced a judgment of acquittal.

The Court noted that this regime reflects the intention of reserving the access to the Supreme Court of Justice to cases with higher penal merit, to ensure that all cases are ruled in due time.

Quoting its previous jurisprudence, the PCC remembered that while it is possible to limit the right of appeal to promote the expediency and the efficacy of the administration of justice, such restrictions cannot compromise the essential contents of the right, particularly when facing the first conviction within the process at stake.

The Court also stressed that even though the conviction, to which the analyzed norms refer, concerns the payment of a fine, this circumstance may still put a heavy burden on the defendant (and the defendant's fun-

damental rights, such as the right to property, the right to freedom of personal development, or the right to personal integrity). And to prevent the defendant from appealing the first conviction, in the process at stake, would mean that an unprecedented decision would be immune to reappreciation. To allow this lack of scrutiny would be incompatible with the jurisdictional function.

In conclusion, according to the PCC, the imposition of absolute limits on the right of appeal in this particular situation constitutes an unsubstantiated restriction to the right of appeal, due to the absence of compelling grounds to hinder the reexamination of convictions. For this reason, the aforementioned interpretation of articles 400, no. 1, e), and 432, no. 1, of the Portuguese Code of Criminal Procedure was deemed unconstitutional.

IV. LOOKING AHEAD

By the end of 2020, the Parliament passed an Act approving euthanasia, with 136 votes in favor, 78 against, and 4 abstentions. Upon receiving this legislation, the President of the Republic had three options: to promulgate, to veto, or to initiate a prior review of constitutionality. The President chose the latter since, in his opinion, regarding some aspects, the diploma was “excessively imprecise” and could lead to “legal uncertainty.” The PCC’s ruling will be known by the end of February 2021.

This year, the Court will also analyze other important issues, under the abstract review of constitutionality, in a number of cases launched by parliamentary initiative. One of them concerns the teaching of gender identity issues in public schools. Another aims at the recent changes to the Labor Code that expanded the trial periods in contracts entered into with younger people and reduced the duration of fixed-term labor contracts.

The Ombudsperson, Maria Lúcia Amaral, having the power to initiate an abstract review of constitutionality, sent two diplomas to the PCC, one regarding the exemption

from rent payment established for tenants of shopping centers (during the confinement period) and another concerning data preservation in the communications sector.

V. FURTHER READING

Benedita Menezes Queiroz and Miguel Poiarses Maduro, “A Hard Law Approach to States Systemic Violations of Article 2 of the Treaty of the European Union: Reasons and Means,” in Elizabeth Fisher, Jeff King, and Alison Young (eds.), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig*, Oxford University Press, 2020, pp. 363-382.

Catarina Santos Botelho, “Covid-19 and fundamental rights’ distress in Portugal: An *intermezzo* between the state of exception and constitutional normalcy” (2020) *Revista Catalana de Dret Públic – Especial sobre el dret en temps d’emergència sanitària* 183.

Gonçalo Almeida Ribeiro, “Judicial Review of Legislation in Portugal: Genealogy and Critique,” *Comparative Constitutional History*, Brill, 2020, pp. 201-225.

Inês Espinheiro Gomes. “Affirmative Action,” *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press, 2020.

Marta Nunes Vicente, “Property rights and legitimate expectations under United States constitutional law and the European Convention on Human Rights: Some Comparative Remarks,” (2020) 26 *Comparative Law Review* 51.

²⁴ Ruling of the PCC no. 31/2020, of January 16th (Justice Mariana Canotilho).

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