TRIBUNAL CONSTITUCIONAL

Rulings of the Constitutional Court of Portugal related to the Covid-19 pandemic

I) Distribution of powers between the Parliament and the Government in the definition of criminal offences during the state of emergency and the state of calamity

1) Rulings nos. 352/2021 (3rd Chamber) and 193/2022 (3rd Chamber):

Following the *declaration* of a state of emergency by the President of the Republic, initially instituted by Decree 14-A/2020, of 18 March, and later renewed by Decree no. 17-A/2020, of 2 April, the Portuguese Government approved Decree no. 2-B/2020, of 2 April, of the Presidency of the Council of Ministers, in order to *implement* that declaration. Article 43(6) of Decree no. 2-B/2020 determined the aggravation by one third of the minimum and maximum limits of the criminal penalty of the crime of disobedience provided in Article 348(1) of the Criminal Code, regarding the conduct of disobedience and resistance to the legitimate orders of the competent authorities carried out in breach of the provisions of that decree.

In Ruling no. 352/2021, the Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a decision handed down by the Judicial Court of the District of North Lisbon that had refused, on the grounds of organic unconstitutionality, the application of the aggravation provided for in Article 43 (6) of Decree no. 2-B/2020, of 2 April, to a case of disobedience to an order of home confinement. The fundamental question of the appeal was that of determining whether the Executive branch has the constitutional power, under a regularly declared state of emergency, to issue norms in matters concerning crime and punishment, an area normally reserved to parliamentary statute, as provided for in Article 165(1)(c) of the Constitution of the Republic of Portugal – notably, the power to increase the minimum and maximum punishment for the crime of disobedience to injunctions aimed at enforcing emergency measures dictated by the ongoing sanitary crisis, such as lockdowns and curfews.

In the assessment of the case, the Court considered that the execution of the declaration of a state of emergency consists of a competence directly based on Article 19(8) of the Constitution, encompassing all manner of measures suitable and necessary to restore constitutional normalcy. It was pointed out that, once a state of emergency or a state of siege is declared, the executive starts to act within the framework of an exceptional organization of the public power, being able not only to edit rules in the matter of rights, freedom and guarantees covered by the presidential decree, but also to intervene in matters of crimes and penalties closely related to its function of defending the constitutional order. It was understood that this was not a question of any affectation of the constitutional rules regarding the competence and functioning of constitutional bodies, prohibited by Article 19(7) of the Constitution, since this normative power is absolutely exceptional and does not inhibit the regular use of normal legislative power. Its exercise is based on an extraordinary title (the declaration of the state of exception), it has a temporary nature (the validity of the presidential decree) and it is oriented

to a specific purpose (the restoration of constitutional normality). Thus, it was considered that the executive operates, in this very special constitutional framework, as an extraordinary legislator *ex ratione necessitatis*.

The Court stressed that the emergency power of the Executive under a regularly declared state of exception is far from arbitrary or untrammelled. On a material level, it is bound by the principle of proportionality, fully operative at the time of the execution of the state of exception and subject to judicial control. At the institutional level, the Executive is politically accountable to the President and to the Parliament (Article 190 of the Constitution), 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(b) of the Constitution).

Therefore, the Court decided, by majority, that the provision under review was not unconstitutional. This position was subsequently reiterated, in full, in Ruling no. 193/2022, which focused on the same provision.

2) Rulings nos. 921/2021 (1st Chamber) and 617/2022 (2nd Chamber):

In Ruling no. 921/2021, the Constitutional Court was called to assess, in the context of a specific review of constitutionality, an appeal filed against a decision handed down by the Criminal Local Court of Oeiras that had refused to apply the rule contained in Article 348(1)(a) of the Criminal Code, by reference to the provisions of Article 3(1)(b) and 3(2) of Decree no. 2-B/2020, of April 2, of the Presidency of the Council of Ministers. While Article 3(1)(b) of this Decree established that "*mandatory confinement in a health establishment, at home or in another place defined by the health authorities shall be imposed: (…) to citizens in relation to whom the health authority or other health professionals have determined active surveillance*", paragraph 2 of the same article added that "*the breach of the obligation of confinement, in the cases provided for in the previous paragraph, constitutes a crime of disobedience*". In turn, Article 348(1)(a) of the Criminal Code establishes one of the general modalities of the crime of disobedience, providing for the criminal liability of "*whoever fails to obey a legitimate order or warrant, regularly communicated and issued by a competent authority or official, (…) if: a) a legal provision determines, in that case, the punishment of simple disobedience*".

The Court started by emphasizing that the central issue to be assessed in this case was to ascertain the possible innovative nature of the provision for the crime of disobedience. Since Article 7 of the State of Siege and State of Emergency Law (approved by Law 44/86 of September 30), provided for a crime of disobedience for "*violating the provisions of the declaration of a state of siege or a state of emergency or this law, particularly with regard to its execution*", it was argued that the Government would only have exceeded its powers if it had acted beyond what was already provided for in the provision. The Court considered that the legislator did not intend to restrict the crime under the State of Siege and State of Emergency Law to disobedience of the regime provided for in this law or in the presidential decree declaring a state of emergency. It stated, therefore, that the crime of disobedience under the State of Siege and

State of Emergency Law could be committed by anyone, including disobeying rules approved by the Government to execute the state of emergency.

Here the Court analysed the compatibility of the rule with the principle of determinability of criminal law enshrined in Article 29(1) of the Constitution and emphasized that although the scope of the crime under the State of Siege and State of Emergency Law was broad and encompassing, it was not indeterminate or indeterminable from the outset. It was understood that there was a line of logical and legal continuity between that law, the act of parliamentary authorization, the declaration of the state of emergency by the President of the Republic and the decree of the Government implementing it. Thus, it was relevant to determine whether this continuity allowed any citizen to establish, without deviation, a link between the prohibited conduct and the restrictive legislative acts which, in the framework of the state of emergency, led to the prohibition. The Court added that this link was especially important for the purposes of the crime of disobedience, which, by its very nature, depends on the existence of other normative acts. In fact, this is a crime that always takes place in different moments following the typical provision of Article 348 of the Criminal Code: a normative moment (the legal provision of disobedience, by reference to a certain due behaviour if omitted) and another moment in which the action materializes (failure to properly obey an order or command corresponding to that legal provision).

The Court then stated that any citizen who, faced with the content of Article 7 of the State of Siege and State of Emergency Law, was aware of the suspension of the right of movement authorized by the Parliament and declared by the President of the Republic, would easily relate these rules to the duty of confinement provided for in the Government decree. Therefore, it was considered that the provision under review was not undetermined, since the sequence of relevant acts allowed any person to understand the connection between the declaration of the State of Emergency and its execution. The Court concluded that the Government, by determining that the breach of the obligation of confinement would constitute a crime of disobedience, had not created a new criminal offence in relation to what was already provided for by the legislator in the State of Siege and State of Emergency Law, and thus had not exceeded its powers. Consequently, the Court ruled that the provision under review was not unconstitutional.

This position was later reiterated in full in Ruling no. 617/2022, which dealt with a provision with similar content to the one described (Article 3(2) of Decree no. 2-A/2020, of 20 March, in conjunction with the provisions of paragraph 1(b) of this article).

3) Ruling no. 350/2022 (3rd Chamber):

After an initial period where the *state of emergency* was in force, originally declared by the President of the Republic through Decree no. 14-A/2020, of 18 March, and subsequently renewed by Decree no. 17-A/2020, of 2 April, and Decree no. 20-A/2020, of 17 April, a *situation of calamity* was declared by the Government. This was initially decreed by Resolution no. 33-

A/2020, of 30 April, of the Council of Ministers, approved under Article 19 of the Civil Protection Law, and subsequently renewed by Resolutions no. 38/2020, of 15 May, and no. 40-A/2020, of 29 May. At the same time, the Council of Ministers approved Resolution no. 45-B/2020, of 22 June, establishing special rules for the Metropolitan Area of Lisbon within the scope of the situation of calamity declared by Resolution no. 40-A/2020. In particular, this Resolution imposed the obligation for all retail and service establishments to close at 8 p.m. (Article 5-B(2), added to the latter Resolution) and went on to "*determine that the publication of the present resolution constitutes for all legal purposes a sufficient forewarning, namely to fulfil the type of crime of disobedience*" (clause 4 of Resolution no. 45-B/2020, of 22 June).

The Constitutional Court was called to assess, on the basis of a specific review of constitutionality, an appeal filed against a decision handed down by the Judicial Court of the District of Lisbon West which had refused, on the grounds of organic and formal unconstitutionality, the application of Article 5-B of the regime attached to Council of Ministers Resolution no. 40-A/2020, of 29 May, and clauses 4 and 5 of Council of Ministers Resolution no. 45-B/2020, of 22 June. This decision had acquitted the defendant of a crime of disobedience for breach of the obligation to close the commercial establishment she owned after 8 p.m.

In assessing the case, the Court began by noting that the central question was also in this case to determine the possible innovative nature of the provision for the crime of disobedience. To this extent, and as it had done in Ruling no. 921/2021, the Court focused its analysis on determining whether the provisions subject to assessment, contained in Resolution no. 45-B/2020, of 22 June, of the Council of Ministers, had a truly constitutive nature for the purposes of applying the crime of disobedience enshrined in Article 348(1)(a) of the Criminal Code (where it makes the punishment dependent on the circumstance that "a *legal provision punishes a simple disobedience*"), or if, on the contrary, these provisions consisted in a mere replication or non-innovative concretization of another norm already in force in the legal system. The terms of this analysis would turn out to be different when compared to the assessment made in Ruling no. 921/2021, since in the case under analysis, the provisions under review had not been approved while the state of emergency was in force, but during a (less serious) calamity situation.

In this sense, the Court assessed whether Article 6(4) of the Civil Protection Law could possibly be considered as the legal basis for the criminalization of the above-mentioned conduct, since it provides the following: "*disobedience and resistance to legitimate orders by the competent authorities, when committed during a situation of alert, contingency or* [as was the case here] *calamity, are sanctioned in the terms provided for in the criminal law and their penalties are always elevated in one third in their minimum and maximum limits*". However, the Court gave a negative answer. This was because this provision merely established an aggravation of one third in the minimum and maximum limits of the penalty applicable to facts that integrate a crime of disobedience, not presenting itself as a truly incriminating provision. In particular, this norm did not contain a provision that would have punished disobedience for the conduct, committed in a situation of calamity, of disobeying an order or command that required the closure of a certain establishment after a certain time. On the contrary, such a provision had

been made by the norms under review contained in the Resolution no. 45-B/2020, of 22 June, of the Council of Ministers, which had introduced elements which were truly central to the definition of the criminally prohibited conduct.

Taking into account that, in the context of a situation of calamity, it is unequivocal that the Government does not have the competence to legislate on the definition of crimes and penalties, as this is a matter included in the relative reserve of the competence of the Parliament (Article 165(1)(c) of the Constitution), the Court concluded that the norms subject to review were unconstitutional from an organic standpoint. Therefore, the Court decided to "*deem unconstitutional, for breach of Article 165(1)(c) of the Constitution, the provision resulting from Article 5-B(2), of the regime attached to the Resolution no. 40-A/2020, of 29 May, of the Council of Ministers, introduced by Resolution no. 45-B/2020, of 22 June, of the Council of Ministers, in conjunction with clause 4 of this Resolution and with Article 348(1)(a) of the Criminal Code, in the part that determines that the publication of Resolution no. 45-B/2020 of the Council of Ministers constitutes a sufficient forewarning for the purposes of the crime of disobedience envisaged in this provision of the Criminal Code, whereby it is stipulated that in the Metropolitan Area of Lisbon retail and service establishments, as well as those located in commercial complexes, will close at 8 p.m.”*

4) Ruling no. 477/2022 (1st Chamber):

The Constitutional Court was called to assess, in the context of a specific review of constitutionality, an appeal filed against a decision handed down by the Local Criminal Court of Amadora that had refused the application of the aggravation provided for in Article 43(6) of Decree no. 2-B/2020, of 2 April, to a case of disobedience to an order of home confinement. As previously stated, this rule determined the aggravation by one third of the minimum and maximum limits of the criminal penalty of the crime of disobedience provided in Article 348(1)(b) of the Criminal Code regarding the conduct of disobedience and resistance to the legitimate orders of the competent authorities carried out in breach of the provisions of Decree no. 2-B/2020, of 2 April.

In the assessment of the case, the Court began by clarifying, in line with its previous case law, that the fundamental question to be decided was whether the Government had invaded the sphere of competence of the Parliament, by establishing an aggravation of the penalty for the crime of disobedience regarding acts of disobedience and resistance against legitimate orders issued by a competent authority in accordance with the provisions of the governmental decree.

The Court then analysed the legal framework provided for the state of emergency and underlined that this framework is based on the separation between two different acts: its declaration, by the President of the Republic, and its execution, by the Government. It was noted that the dichotomous relationship between the two acts is based on a conception of the presidential decree as a normative act of authorization of the suspension of fundamental rights,

which must be expressly specified (Article 19(5) of the Constitution). In this regard, the Court referred to its previous case law where it was pointed out that the presidential decree has the important function of delimiting the executive competence of the Government. Therefore, there must be a normative continuity between the discipline enshrined in the declaration of the state of emergency and the regulation issued by the Government in execution of the state of emergency. It was observed that, in this specific case, the presidential decree only authorized the Government to apply the crime of disobedience to non-compliance with or resistance against orders that would be provided in the governmental decree of execution of the state of emergency, without making any reference to the possibility of aggravating the penalty provided in the Criminal Code for this offence. The Court further clarified that, even if the presidential decree would have authorized the Government to do so, that authorization would not be valid, because the declaration of a state of emergency cannot affect the constitutional rules of competence and functioning of constitutional bodies (Article 19(7) of the Constitution).

Having said this, the Court then went on to analyse the role of the principle of separation of powers in the framework of the constitutional state of exception and argued that Article 19(8) of the Constitution should be interpreted in the light of Article 19(7). In this respect, it distanced itself from the orientation previously taken by the 3rd Chamber of the Court in Ruling no. 352/2021 (see above, I-1) and stated that the separation of powers and the delimitation of the competences of the constitutional bodies constitute negative limits to the regime of states of constitutional exception, which remain intact during their validity. This status quo can only be altered through the Constitution. It was argued that a different interpretation of Article 19(8) of the Constitution, which would recognize the legitimacy of the Government to legislate on matters constitutionally reserved to another constitutional body, would distort the objective and purpose for which the reserve of competences of the constitutional bodies was enshrined, both by the constitutional legislator in Article 19(7) of the Constitution and by the ordinary legislator in Article 3(2) of the State of Siege and State of Emergency Law - as a negative and insurmountable limit of the state of constitutional exception.

Therefore, the 1st Chamber of the Court concluded in the opposite direction to the position previously followed by the 3rd Chamber in Ruling no. 352/2021, and declared that "*Article 43(6) of Decree no. 2-B/2020, is organically unconstitutional, for breach of the relative reserve of competence of the Assembly of the Republic (Article 165(1) (c) of the Constitution)".* Consequently, the Court decided "*to deem unconstitutional Article 43(6) of Decree no. 2-B/2020, of 2 April*".

5) Ruling no. 557/2022 (1st Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a decision handed down by the General Court of Póvoa de Lanhoso which had refused to apply Article 348(1) (a)(b) of the Criminal Code, combined with the provisions of Articles 3(2) and 32(2)(b) of Decree no. 2-A/2020, of 20 March, of the Presidency of the Council of Ministers.

In the assessment of the case, the Court began by noting that the provision under review was similar to the one that had been controlled in Ruling no. 921/2021, as the literal content of Article 3 of Decree no. 2-A/2020, of 20 March was, in essence, identical in relation to the literal content of Article 3 of Decree no. 2-B/2020, of 2 April (controlled in that decision). However, it was stressed that the circumstances underlying both cases were not entirely identical. In fact, in Ruling no. 921/2021, it was at issue a breach of the obligation of confinement that occurred on 11.04.2020 (thus while the first *renewal* of the State of Emergency was in force, in the terms of Resolution no. 22-A/2020, of 2 April, of the Parliament and of Decree no. 17-A/2020, of 2 April, of the President of the Republic, regulated by Decree no. 2-B/2020, of 2 April, of the Council of Ministers). In turn, in the case under consideration, it was at issue a breach of the obligation of confinement that occurred on 01.04.2020 and 02.04.2020 (thus while the first *declaration* of the State of Emergency was in force, in the terms of Resolution no. 15-A/2020, of 18 March, of the Parliament, and Decree no. 14-A/2020, of 18 March, of the President of the Republic, regulated by Decree no. 2-A/2020, of 20 March, of the Council of Ministers).

Furthermore, the Court noted another important difference in the circumstances underlying both cases. While Resolution no. 15-A/2020 of the Parliament and Decree no. 14-A/2020 of the President of the Republic, which were in force on the date of the facts relevant in the present proceedings, made no reference to the crime of disobedience, Article 5 of Resolution no. 22-A/2020 of the Parliament and Article 5 of Decree no. 17-A/2020 of the President of the Republic, that were in force on the date of the facts underlying Ruling no. 921/2021, provided that "[a]*ny act of active or passive resistance exclusively directed against legitimate orders issued by the competent public authorities in execution of the present state of emergency is prevented, and its authors may commit, under the law, the crime of disobedience*". Thus, contrary to the latter mentioned Ruling, at the time of the facts that had given rise to the proceedings under assessment, Decree no. 2-A/2020 provided for the punishment of the breach of the obligation of confinement as a crime of disobedience, regardless of the fact that Resolution no. 15-A/2020 of the Parliament and Decree no. 14-A/2020 of the President of the Republic did not make any mention to this offence.

The Court then went on to assess whether the reference contained in Article 7 of the State of Siege and State of Emergency Law to the crime of disobedience was sufficient to provide legal coverage for the reference contained in the provisions under review, and gave a negative answer. In effect, taking into account that neither the parliamentary resolution nor the presidential decree made any reference to the crime of disobedience, it was not possible to affirm, in the case under assessment, the existence of a "normative continuity" (similar to what had been affirmed in Ruling no. 921/2021) linking Article 7 of the State of Siege and State of Emergency Law to the action of the executive through or with the intermediation of emergency legal instruments (in this case, Resolution no. 15-A/2020 of the Parliament and Decree no. 14-A/2020 of the President of the Republic). Since there was no such continuity, insofar as the Government had not acted within the framework of the execution of the parliamentary resolution and the presidential decree from which the declaration of the state of emergency had

resulted, this had the consequence that its action had been entirely innovative and without any legal backing.

Therefore, the Court concluded that the controlled provision was unconstitutional from an organic standpoint, which led it to "*deem unconstitutional the provision contained in Article 3(2) of Decree no. 2-A/2020, of 18 March, in the segment that punishes as a crime of disobedience the breach of the obligation of confinement*".

6) Ruling no. 619/2022 (2nd Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a decision handed down by the Criminal Court of Loures which had refused the application of Article 46(7) of Decree no. 2-C/2020, of 17 April, of the Presidency of the Council of Ministers. This provision determined that "*disobedience and resistance to legitimate orders from competent entities, when committed in breach of the provisions in the present decree, are sanctioned in terms of the criminal law and the respective penalties are always aggravated by one third, in their minimum and maximum limits, in terms of Article 6(4) of Law no. 27/2006, of 3 July*".

After recalling the existing case-law and the divergent positions expressed, on the one hand, by the 3rd Chamber of the Court in Rulings no. 352/2021 and no. 193/2022, and, on the other hand, by the 1st Chamber of the Court in Ruling no. 477/2022, the 2nd Chamber of the Court took a position on the issue, following the understanding of the 1st Chamber and deciding that the provision under review was unconstitutional from an organic standpoint.

It was noted that the Constitution provides strong guarantees in order to ensure the maintenance, as far as possible, of the sphere of constitutional normality in a situation of state of exception. In terms of the powers of the constitutional bodies, the legislator sought to provide safeguards against the risks of unilateral initiatives of any of the constituted powers by drawing a tripartite division of powers that promotes their interdependence: the power to *declare* the state of emergency belongs to the President of the Republic (Article 134(d) of the Constitution), after hearing (non-binding) the Government, and the power to *authorize* it belongs to the Parliament (Article 138(1) of the Constitution). Thus, in situations of constitutional exceptionality, the Executive is invested in the role of a true executor of prior normative options imposed on it by primary decision-making bodies. The Court then argued that this interpretation of the constitutional regime of the state of exception appeared to be the most consistent with the content of Article 19(7) of the Constitution, as it was unequivocal that the Fundamental Law had intended to keep intact the rules of attribution of powers to the constitutional bodies defined for constitutional normality. Therefore, the executive could only approve rules included in the scope of the reserve of the Parliament in normal conditions when they strictly corresponded to the execution of the presidential decree of state of exception and adopt measures to combat the crisis that originated it. It was also pointed out that the boundaries of the scope of action of the Government without parliamentary credentials are thus delimited by

the specification of rights, freedoms and guarantees whose exercise is suspended, under Article 19(5) of the Constitution.

Subsequently, the Court held that the reserve of powers of the Parliament provided for in Article 165(1)(c) of the Constitution remains intact even during a state of constitutional exception. It was stressed that the attribution of criminal relevance to certain behaviours, as well as the imposition of sanctions for non-compliance with duties imposed within the scope of the execution of the declaration of a state of emergency, inevitably brought into the respective constitutional parametric framework more fundamental rights than those that could be suspended in each concrete situation (namely those that derive from the principle of non-retroactivity of criminal law and the rights of defence of defendants, safeguarded, in any event, from the possibility of suspension, under the terms of Article 19(6) of the Constitution. It was then pointed out that the division of powers assumes, at the criminal level, a reinforced importance, from which it follows that the change in the distribution of legislative powers resulting from the declaration of a state of emergency could hardly be translated into the attribution of powers to the executive in matters of defining crimes and respective penalties.

Departing from these premises, the Court underlined that Decree no. 20-A/2020, of 17 April, of the President of the Republic partially suspended the rights to move and to settle anywhere in the national territory; the rights to property and to private economic initiative; the rights of workers; the right to move abroad; the rights to assemble and to demonstrate; the freedom to worship, in its collective dimension; the freedom to learn and teach; and, finally, the right to the protection of personal data. However, it was added that nowhere had this decree suspended the guarantees on criminal proceedings, namely the right not to be criminally sentenced except by virtue of a previous law declaring the action or omission punishable, contained in Article 29(1) of the Constitution, or mentioned the attribution of sanctioning powers to the Government. On the contrary, the decree itself referred to the law the disregard for the rules issued under the powers of execution of the state of emergency, which already provided the application and the requirements of the crime of disobedience (in particular Article 7 of the State of Siege and State of Emergency Law, provided for in Law no. 44/86 of 30 September, which in turn contained an implicit reference to the criminal law provisions in force).

Following the above, the Court then concluded that the Government does not have, in the exercise of its powers to execute the decree of state of emergency, legislative powers in relation to crimes and penalties, and therefore, as the constitutional rules on the division of powers and competences of constitutional bodies remained fully in force, the provision under review was unconstitutional from an organic standpoint. Therefore the Court decided "*to deem unconstitutional, for breach of Article 19(7) and Article 165(1)(c) of the Constitution of the Portuguese Republic, the provision of Article 46(7) of Decree no. 2-C/2020, of 17 April, of the Presidency of the Council of Ministers, according to which disobedience and resistance to legitimate orders from the competent bodies, when carried out in breach of the provisions of that decree, are sanctioned in terms of the criminal law and the respective penalties are always aggravated by one third, in their minimum and maximum limits, under the terms of Article 6(4) of Law no. 27/2006, of 3 July*".

II) Constitutionality of the provisions that determined a period of compulsory confinement or prophylactic isolation in respect of passengers arriving on certain flights

1) Ruling no. 424/2020 (1st Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a decision handed down by the Criminal Investigation Court of Ponta Delgada that had refused the application of Articles 9, 10, 11 and 12 of the Legal Regime of the Civil Protection System of the Autonomous Region of the Azores, approved by Regional Legislative Decree no. 26/2019/A, and the application of clauses 3(e), and 11 of the Resolution no. 123/2020 of the Government Council, in the part in which it referred to the Resolution no. 77/2020 of the Government Council. These provisions imposed a mandatory confinement of 14 days to any passenger landing in the Autonomous Region of the Azores.

The Court began by noting that the object of the appeal was only limited to the provisions contained in clauses 1 to 4 and 7 of Resolution no. 77/2020 of the Government Council and in clauses 3(e), and 11 of Resolution no. 123/2020 of the Government Council, which imposed a mandatory confinement of 14 days to any passenger landing in the Autonomous Region of the Azores. This was so because the appealed judgment did not directly concern the (formal, jurisdictional and material) rules related to the declaration of contingency and the declaration of regional public calamity, within the regional system of civil protection, but only the rules that had resulted in a restriction of the applicant's right to personal freedom. In the case at hand, the applicant for the provision of *habeas corpus* had been subjected to mandatory confinement at a time when the declaration of a state of emergency was no longer in force, so the rules relating to this state of constitutional exception were not applicable in this case. On the other hand, it was noted that the "*situation of calamity*" was not constitutionally relevant for the purposes of suspending rights, freedoms and guarantees.

The Court then found that the provisions under examination had a significant impact on the freedom of citizens, corresponding, as a whole, unequivocally, to a total deprivation of freedom, as their application implied that the person concerned was confined to a closed space, completely prevented from moving freely. Therefore, this measure affected the right to liberty enshrined in Article 27(1) of the Constitution, in its aspect of personal freedom. To this extent, the respective subject matter was covered by the reserve of parliamentary competence provided for in Article 165(1)(b) of the Constitution - a competence that had not been specifically delegated and, in any event, could only have been delegated to the Government of the Republic and not to the Regional Government. Consequently, the Court concluded that the provisions under review were unconstitutional from an organic standpoint.

It was added that this conclusion was not shaken depending on the stance adopted regarding the wider discussion of determining the nature of the confinement measures. On the one hand, whoever understood that the imposition of quarantine, namely through confinement, did not affect the right to person freedom provided for in Article 27 of the Constitution, but

rather the freedom of movement provided for in Article 44 of the Constitution, would likewise conclude that it was at stake the regulation of a right covered by the reserve of parliamentary competence provided for in Article 165(1)(b) of the Constitution. On the other hand, it also did not interfere with this conclusion the discussion on the constitutional viability of the measures of internment in a health unit in light of the provisions of Article 27 of the Constitution, not only because the regulation of a right would be, here again, covered by the reserve of parliamentary competence provided for in Article 165(1)(b) of the Constitution, but also because it was not, *in casu*, a question of interning citizens in a health unit.

Consequently, the Court decided "(...) *to deem unconstitutional the provisions contained in clauses 1 to 4 and 7 of Resolution no. 77/2020, of 27 March, of the Government Council, and in clauses 3(e), and 11 of Resolution no. 123/2020, of 4 May, of the Government Council, under the terms of which compulsory confinement for 14 days is imposed on passengers who land in the Autonomous Region of the Azores".*

2) Rulings nos. 687/2020 (2nd Chamber), 729/2020 (3rd Chamber), 769/2020 (3rd Chamber) and 173/2021 (1st Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, four appeals filed against court decisions that had refused the application of paragraph 6 of Resolution no. 207/2020, of 31 July 2020, issued by the Regional Government of the Autonomous Region of the Azores. This provision established a procedure for judicial validation of the mandatory quarantine or prophylactic isolation decreed by the regional health authority in relation to passengers disembarking at airports on the islands of Santa Maria, São Miguel, Terceira, Pico and Faial from airports located in areas considered by the World Health Organization to be areas of active community transmission or with active transmission chains of the SARSCoV-2 virus.

It was uniform the line of reasoning developed by the Court in the four mentioned rulings. Firstly, it was underlined that the compulsory confinement measures - quarantine and prophylactic isolation - decreed by the regional health authority constitute, in themselves, a restriction to the right to personal freedom provided for in Article 27 of the Constitution, due to the constraints they imply for the targeted persons (the confinement to a circumscribed space, with the consequent restriction to the freedom of movement). Therefore, although the provision under review did not establish any deprivation of liberty, the fact that it subjected to judicial validation the compulsory confinement measures decreed by the regional health authority (which are administrative measures that harm the right to personal freedom of the persons in question), resulted in the regulation of a matter pertaining to the regime of rights, freedoms and guarantees, more specifically, a matter pertaining to the right to personal freedom enshrined in the aforementioned Article 27 of the Constitution.

It was also added that this procedure for judicial validation had been instituted because a fundamental personal freedom was at stake, and was intended to guarantee that the

limitation of this freedom would only occur in cases provided for in the law, thus being a measure to control the legality of administrative measures that harm the right to personal freedom. To that extent, the respective matter fell within the legislative competence of the Parliament - a competence which had not been specifically delegated and, in any event, could only be delegated to the Government of the Republic, and not to the Regional Government. Consequently, the Court concluded that the provision under review was unconstitutional from an organic standpoint, due to a breach of Article 165(1)(b) of the Constitution.

Secondly, it was added that, by creating a procedure for the judicial validation of confinement measures ordered by the regional health authority, the provision under review established innovatively a judicial procedure to validate the measure ordered by the administrative health authorities. However, that procedure had been established outside the existing adjectival regimes, as well as the laws relating to judicial organization and the definition of the competences of the courts. In fact, although the provision under review merely stated that the validation of the compulsory quarantine measure was the responsibility of the competent court, that rule attributed a new competence to the courts under a procedure created *ex novo* and with a specific purpose: the judicial validation of certain measures adopted by regional health authorities. Since that rule had been issued by the Regional Government, without legislative authorization for that purpose, and also taking into account that the competence to legislate on such a matter could only be the subject of authorization of the Government of the Republic and not of the Regional Government, the Court concluded, also for that reason, that that rule was unconstitutional from an organic standpoint, due to a breach of Article 165(1)(p) of the Constitution.

Consequently, the Court decided, in the four mentioned rulings, "(...) *to deem unconstitutional, for breach of the provisions of paragraphs b) and p) of Article 165(1) of the Constitution of the Portuguese Republic, the provision contained in paragraph 6 of Resolution no. 207/2020, of 31 July 2020, of the Government Council, issued by the Regional Government of the Autonomous Region of the Azores, which creates a procedure for judicial validation of the mandatory quarantine or prophylactic isolation decreed by the regional health authority for passengers disembarking at airports on the islands of Santa Maria, São Miguel, Terceira, Pico and Faial, from airports located in areas considered by the World Health Organization to be areas of active community transmission or with active chains of transmission of the SARS-CoV-2 virus*".

3) Rulings nos. 90/2022 (1st Chamber), 352/2022 (3rd Chamber) and 510/2022 (3rd Chamber):

In Ruling no. 90/2022, the Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal against a decision handed down by the Criminal Investigation Court of Sintra that had refused the application of Article 25(1)(4) of the regime annexed to the Resolution no. 45-C/2021, of 30 April, of the Council of Ministers. These provisions determined, respectively, that "*Passengers on flights from countries on the list to be defined pursuant to paragraph 4, after entering mainland Portugal must comply with a*

prophylactic isolation period of 14 days, at home or at a place indicated by the health authorities" (Article 25(1)); and that "*the members of the Government responsible for the areas of foreign affairs, national defence, internal administration, health and civil aviation shall determine, by order, the list of countries referred to in paragraph 1 and the list of sports competitions to which the provisions of subparagraph c) of the preceding paragraph shall apply*" (Article 25(4)). These provisions had been disapplied by the appealed court in the context of an application for *habeas corpus* brought by the passenger on a flight from Brazil who had been subjected by the Border and Immigration Service to the obligation of prophylactic isolation following entry into Portuguese territory.

After recalling that the situation under analysis had several points of contact with the one assessed in Ruling no. 424/2020 (see above, II-1), the Court pointed out that the reasoning developed there could be transposed to this case. Thus, the Court stressed that, here too, the provisions under review established measures of deprivation of liberty that were contrary to the right to liberty enshrined in Article 27(1) of the Constitution, in its aspect of personal freedom, so that the respective regulation fell within the legislative competence of the Parliament provided for in Article 165(1)(b) of the Constitution. Moreover, these measures of deprivation of liberty had also been applied at a time when the declaration of a state of emergency was no longer in force (unlike, in this respect, what had happened in the situation assessed in Ruling no. 87/2022 - see below, III-1).

The Court held then that the measures of deprivation of liberty contained in the Resolution of the Council of Ministers under review were not supported by any of the legislation invoked as alleged legal basis for their provision. On the one hand, Articles 12 and 13 of Decree-Law no. 10-A/2020, of 13 March, could not be relevant as a basis for the Government to act, as they only concerned restrictions of access to establishments and public services and buildings. On the other hand, the provisions of the Law of the Bases of Civil Protection (Law no. 27/2006, of 3 July) could not confer adequate legal coverage to the Government's action, since these were essentially related to competence, and not specifically directed to the deprivation of liberty and even less to the deprivation of liberty through confinement. Finally, the Public Health Law (Law no. 81/2009, of 21 August) could not be invoked as a legal basis for the adoption of a measure of this nature, as it did not directly address the matter. It was therefore concluded that the provisions under review were unconstitutional from an organic standpoint, insofar as they dealt with a matter that fell within the legislative competence of the Parliament, as set out in Article 165(1)(b) of the Constitution, a competence that the Government had not been authorized to exercise.

Following the above, the Court decided then "(...) *to deem unconstitutional, for breach of Article 165(1)(b), by reference to Article 27, of the Constitution of the Portuguese Republic, the provision contained in Article 25(1)(4) of the regime annexed to the Resolution of the Council of Ministers n. 45-C/2021, in the interpretation according to which the Border and Immigration Service can order the deprivation of liberty for a period of 14 days and without judicial control, of any national or foreign citizen who, whether or not they are resident in national territory, enters Portugal on a flight from a country on a list determined by the members of the*

Government responsible for the areas of foreign affairs, national defence, internal administration, health and civil aviation".

This reasoning was subsequently reiterated, in full, in Rulings nos. 352/2022 and 510/2022. In the first case, the Court, once again, *"(...) deemed unconstitutional, for breach of Article 165(1)(b) of the Constitution of the Portuguese Republic, the provision of Article 25(1) of the regime annexed to Resolution no. 45-C/2021 of the Council of Ministers, as amended by Resolution no. 59-B/2021 of the Council of Ministers, which establishes that passengers on flights departing from countries on the list to be defined under paragraph 4 must comply, after entering mainland Portugal, with a prophylactic isolation period of 14 days, at home or at a place indicated by the health authorities (…)".* In the second case, the Court decided (...) *"to deem unconstitutional, for breach of the provisions of subparagraph b) of paragraph 1 of Article 165 of the Constitution, the provision contained in Article 21(1) of the regime attached to the Resolution no. 74-A/2021, of 9 June, of the Council of Ministers, which provides that passengers on flights departing from countries on the list to be defined under paragraph 4 must comply, after entering mainland Portugal, with a prophylactic isolation period of 14 days, at home or at a place indicated by the health authorities".*

4) Rulings nos. 464/2022 (2nd Chamber) and 465/2022 (2nd Chamber):

In Rulings nos. 464/2022 and 465/2022, the Constitutional Court was called to decide, within the scope of specific constitutional review, two appeals filed against court decisions that had denied the application of the provisions of Article 25(1) and (4) of the regime attached to Resolution no. 45-C/2021, of 30 April, of the Council of Ministers, on the grounds of their organic and substantive unconstitutionality. In these cases, the appealed courts had also refused to apply the provisions within the scope of a *habeas corpus* request filed by passengers of flights from Brazil who had been subjected by the Portuguese Immigration and Borders Service to mandatory precautionary isolation following their arrival in Portuguese territory.

When deciding the case, the Court again began by approaching the question of defining the constitutional parameters of the isolation obligations, debating whether they should be deemed as an encroachment on the right to personal freedom enshrined in Article 27(1) of the Constitution, or rather as interferences in the right to move within national territory provided for in Article 44(1) of the Constitution. The majority was of the opinion that circumscribing a person to a physical space, which goes beyond the mere prohibition to enter a certain territorial space, contends with the personal freedom of Article 27(1) of the Constitution. The view that this article merely provided constitutional protection against forms of intrusion entailing commitment to a public establishment or legal measures of a criminal (or criminal procedural) nature with that practical effect was rejected, and broader perspective was adopted.

The main novel point in these decisions when compared to previous jurisprudence was the fact that the Court pronounced for the first time on the *substantive constitutionality* of the provisions under review, and not merely on their organic constitutionality. In this regard, the

Court resorted to German-inspired doctrine, which had previously been adopted by Portuguese constitutional jurisprudence (Ruling no. 494/94), to define deprivation of liberty as any form of confinement of the human person to a given physical space, without the measure in question having to be equivalent or sufficiently similar to prison. This led the Court to conclude that the precautionary isolation measures under analysis entailed an actual *deprivation* of liberty and not a mere *restriction* to this right. Thus, based on the understanding that measures that entail a deprivation of the personal freedom protected by Article 27 of the Constitution must be specifically provided for in the Constitution (contrary to measures which are merely restrictive), the Court concluded that the measures contained in the provisions under review can be qualified as forms of deprivation of liberty that are not authorized by the list contained in Article 27(2) and (3) of the Constitution, and are thus substantively unconstitutional. The possibility of assessing the level of deprivation of the right to liberty was also rejected as grounds to deny the applicability of the principle that requires measures that entail a deprivation of liberty to be specifically provided for in the Constitution, since the wording of Article 27(1), (2) and (3) of the Constitution treats in a similar manner measures that entail a partial deprivation of liberty and measures that entail a complete deprivation of liberty.

The Court also pondered the possibility of regarding instances of deprivation of liberty of carriers of infectious and contagious diseases as admissible in light of the exhaustive list in Article 27 of the Constitution based on: (i) a form of extensive interpretation of Article 27(3)(h) (involuntary commitment of carriers of mental illness); (ii) the qualification of the commitment/confinement as a “security measure of a non-punitive nature” (Article 27(2)); or (iii) resorting to the theory of intrinsic limits of ponderation, views which are common in Portuguese jurisprudence and doctrine. Without taking a clear stand on the viability of any one of these three positions, the Court remarked that, even if any of the three were accepted, deeming a provision constitutional would always depend on the existence of an extremely delicate balance when modulating intrusive measures, considering the particular legal weight of the protection of the right to personal freedom provided for in Article 27 of the Constitution. The Court also highlighted the need, in any case, for the measure entailing a deprivation of liberty to be ordered (or later confirmed) by a court of law.

Having arrived at this point, the Court concluded that the provisions under review did not reveal a secure connection between the legitimizing referent (public order dangers associated with the dissemination of the SarsCov-2 virus) and the encroachment on the right to personal freedom. The absence of legal criteria for subjecting the person to isolation, the fact that the person was not allowed a minimum reasonable space to move, the fact that a judge was not called to apply (and/or confirm) the measures and the fact that there was no time limit for the confinement period were given particular relevance. For this reason, the Court concluded, by majority, that the provisions under review not only were organically unconstitutional, for breach of Article 165(1)(b) of the Constitution, but also substantively unconstitutional, for breach of Article 27(1)(2)(3) of the Constitution.

As a result, the Court decided, in Ruling no. 464/2022, to “*(…) deem unconstitutional the provision of Article 25(1) and (4) of the regime attached to Council of Ministers Resolution no.*

45-C/2021, of 30 April, in the wording of Council of Ministers Resolution no 59-B/2021, of 13 May, for breach of Article 27(1), (2) and (3) of the Constitution of the Portuguese Republic” [and also] “(…) *for breach of Article 165(1)(b), by reference to Article 27(1), both of the Constitution of the Portuguese Republic*”. Likewise, the Court decided in Ruling no. 465/2022 *“(…) to deem unconstitutional Article 25(1) and (4) of the regime attached to Council of Ministers Resolution no. 45-C/2021, of 30 April, interpreted to mean that any person, national or foreign, resident or not in national territory, may be deprived of his freedom for a 14-day period, based on an administrative order and without judicial control, for breach of Article 27(1), (2) and (3) of the Constitution of the Portuguese Republic”* [and also] *“(…) for breach of Article 165(1)(b), by reference to Article 27(1), both of the Constitution of the Portuguese Republic”.*

III) Constitutionality of provisions determining a mandatory confinement period for citizens subject to active surveillance by the health authorities

1) Ruling no. 87/2022 (1st Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a decision handed down by the Criminal Investigation Court of Sintra which, granting the request for *habeas corpus* presented by the applicant, had refused to apply Article 3(1)(b) of Decree no. 9/2020, of 21 November, of the Presidency of the Council of Ministers. The provision in question had the following content: "*Mandatory confinement in a health establishment, at home or, if that is not possible, in another place defined by the competent authorities is imposed on: (…) (b) Citizens that were subject to active surveillance by the health authorities or by other health professionals*". This provision was deemed unconstitutional by the abovementioned Court when assessing a request for *habeas corpus* presented by a person who was in precautionary isolation at his home by imposition of the health authorities, due to contact with a person infected with Covid-19.

The Constitutional Court began by assessing the claim of organic unconstitutionality raised by the court *a quo*. The claim was based on the premise that the state of emergency cannot affect the constitutional distribution of powers between the different constitutional bodies (Article 19(7) of the Constitution), which led the court *a quo* to conclude that the measure restricting the right to individual liberty provided for in the provision at stake had violated the legislative competence of the Portuguese Parliament (Article 165(1)(b) of the Constitution). In evaluating this argument, the Constitutional Court stressed that the situation under analysis was different from the one in Ruling no. 424/2020 (*vide* II-1 above), therefore the arguments in that ruling could not be transposed to this case. In fact, that decision had focused on provisions that imposed the measure of mandatory confinement when no state of emergency was in force. Instead, at the time, only a "situation of disaster" was in force, which is a framework that has no specific constitutional relevance in terms of the suspension of rights, freedoms and guarantees, contrary to what happens with the state of emergency, which is a state of exception. The Constitutional Court underlined that, in the present case, the decree under review had not only been approved following a decree issued by the President of the Republic to renew the state of emergency, but was also aimed at regulating it. Bearing in mind that the decree issued by the President of the Republic had expressly established the partial suspension of the right to individual liberty, it was considered that the reviewed provision still fell within the normative scope of the suspension of rights established by the President of the Republic. In the Court's view, that provision simply aimed to clarify the alternative location of the confinement and that the competence to designate the group of citizens subject to active surveillance pertained to health authorities or other health professionals. Consequently, the Court concluded that the provision under review was still within the limits outlined in the presidential decree that had instituted the state of emergency, and therefore could not be deemed unconstitutional from an organic standpoint.

The Constitutional Court then proceeded to assess the claim of formal unconstitutionality presented by the abovementioned Court, which was based on the premise that the provision under review should be part of a legislative act of the Government (decree-law) and not of a simple decree of the Presidency of the Council of Ministers. Again, the Court disagreed with this reasoning. After comparing the reviewed decree with the presidential decree that had instituted the state of emergency, the Court concluded that the provision under review did not have an innovative scope, but rather sought to clarify that the situation of active surveillance was defined by the health authorities and other professionals. In the Court's view, such specification did not introduce any substantive and original requirements regarding the content of the suspension of the fundamental right, and therefore did not have a substantively innovative nature. In fact, the requirements in that provision did not have an impact on the suspension regime established in the presidential decree, since it did not affect the intensity of the measure or on the possibility of limitation or deprivation of physical freedom already allowed by it. Instead, by relegating to the "*competent* authorities" the selection of the citizens that were to remain under active surveillance for the purposes of determining their confinement, the reviewed provision simply aimed to regulate and execute the content of the primary regulation contained in the presidential decree, which was within the scope of the powers of execution granted to the Government in a state of emergency. Therefore, the Constitutional Court ruled that the provision was not unconstitutional.

2) Rulings nos. 88/2022 (1st Chamber), 89/2022 (1st Chamber), 334/2022 (Plenary), 336/2022 (1st Chamber), 351/2022 (3rd Chamber) and 353/2022 (3rd Chamber):

In Rulings nos. 88/2002 and 89/2022, the Court was called to decide, within the scope of specific constitutional review, two appeals filed against court decisions which, granting the requests for *habeas corpus* presented by the applicants, had refused to apply Article 3(1)(b) of the regime attached to Resolution no. 45-C/2021, of 30 April, of the Council of Ministers, when interpreted to mean that it allowed the deprivation of liberty of any citizen (Ruling no. 89/2022) or the deprivation of liberty of an indeterminate group of people for a period of 13 days (Ruling no. 88/2022), based on an administrative order and without judicial control. The provision in question stated as follows: "*Mandatory confinement in a health establishment, at home or, if that is not possible, in another place defined by the competent authorities is imposed on: (…) (b) Citizens that were subject to active surveillance by the health authorities or by other health professionals"*. In both cases, the court *a quo* had refused to apply the provision when assessing the *habeas corpus* requests concerning upper secondary school students who had been subjected by the local health authorities to mandatory precautionary isolation as a result of a Covid-19 case in their class.

These decisions were similar to Ruling no. 90/2022 (*vide* II-3 above). In fact, after remarking that the situations had various points of contact with the one analysed in Ruling no. 424/2020 (*vide* II-1 above), the Court highlighted that the reasons behind that decision could be transposed to these cases. Thus, the Court stressed that, also in these cases, the provisions

under review established measures entailing a deprivation of liberty which are contrary to the right to liberty enshrined in Article 27(1) of the Constitution, in particular personal freedom which is an aspect of the right to liberty. For this reason, its regulation was comprised within the exclusive legislative competence of the Parliament provided for in Article 165(1)(b) of the Constitution. On the other hand, these measures entailing a deprivation of liberty had also been applied at a time when the state of emergency was no longer in force (contrary to what had been the case in Ruling no. 87/2022).

The Court then argued that the measure entailing a deprivation of liberty contained in the resolution of the Council of Ministers under review could not be justified by any of the legislation invoked for such purpose. On one hand, Article 12 and 13 of Decree-Law no. 10-A/2020, of 13 March, could not ground the actions of the Government, since they concerned only restrictions on access to public establishments, services and buildings. On the other hand, the provisions of the Civil Protection Law (Law no. 27/2006, of 3rd July) could not legally ground the actions of the Government, since they were essentially rules of competence, not specifically concerned with the deprivation of liberty and, least of all, the deprivation of liberty by means of confinement. Lastly, the Public Health Law also could not serve as a legal basis for the adoption of a measure of the kind, since it did not directly provide for the matter. It was therefore concluded that the provisions under review were organically unconstitutional to the extent that they provided for matters within the exclusive legislative competence of the Parliament laid down in Article 165(1)(b) of the Constitution, and the Government had not been authorized to exercise such competence.

As a result, the Court decided, in Ruling no. 88/2022, to "(…) *deem unconstitutional Article 3(19(b) of the regime attached to Resolution of the Council of Ministers no. 45-C/2021, when interpreted to mean that it allows the deprivation of liberty of an indeterminate group of people for a period of 13 days, based on an administrative order and without judicial control, for breach of Article 165(1)(b), by reference to Article 27 of the Constitution of the Portuguese Republic*".

This line of argument was later reaffirmed in various subsequent rulings concerning that same provision or similar provisions. In effect, in Ruling no. 334/2022, the Court again "(…) *deemed unconstitutional a provision resulting from the joint interpretation of Article 3(1)(b) and Article 3(2) of Resolution of the Council of Ministers no. 45-C/2021, according to which it is possible for the health authorities to order the mandatory confinement of any citizen, without previously defining objective and uniform criteria that will ground the decision and without judicial control, for breach of Article 165(1)(b) of the Constitution*". In almost identical terms, it was decided in Ruling no. 351/2022 to "(…) *deem unconstitutional Article 3(1)(b) of the regime attached to Resolution of the Council of Ministers no. 45-C/2021, according to which mandatory confinement at home is imposed on citizens that were subject to active surveillance by the health authorities or another health professional, for breach of Article 165(1)(b) of the Constitution".* In Ruling no. 336/2022, the Court "(…) *deemed unconstitutional Article 3(1)(b) of the regime attached to Resolution of the Council of Ministers no. 157/2021, when interpreted to mean that any citizen may be deprived of liberty based on an administrative order and without judicial*

control, for breach of Article 165(1)(b), by reference to Article 27 of the Constitution". Lastly, in Ruling no. 353/2022, the Court "(…) *deemed unconstitutional Article 3(1)(b) of the regime attached to Resolution of the Council of Ministers no. 74A/2021, interpreted to mean that it allows the administrative deprivation of liberty of an indeterminate group of people for a period of 14 days, based on an administrative order and without judicial control, for breach of Article 165(1)(b) of the Constitution*".

3) Ruling no. 466/2022 (2nd Chamber):

In Ruling 466/2022, the Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a decision handed down by the Criminal Investigation Court of Santarém which, granting a request for *habeas corpus* presented by the applicant, had refused to apply Article 3(1)(b), (2) and (3) of the regime attached to Resolution no. 157/2021, of 27 November, of the Council of Ministers, by reference to clauses 2 and 10 of that resolution. Also in this case, these provisions established the mandatory confinement in a health establishment, at home or, if that was not possible, in another place defined by the competent health authorities, of "*citizens that were subject to active surveillance by the health authorities or by other health professionals*".

The Court began, once again, by discussing how to constitutionally frame mandatory isolation, debating whether it should be seen as an encroachment on the right to personal freedom enshrined in Article 27(1) of the Constitution or rather as a breach of the right to move within national territory provided for in Article 44(1) of the Constitution. The majority was of the opinion that confining a person to a physical space, beyond a mere interdiction from entering a territorial space, constitutes a breach of personal freedom on the terms of Article 27(1) of the Constitution. The understanding that this article merely entailed a constitutional protection against commitment to a public establishment or criminal law (or criminal procedure law) measures to that effect was rejected, and the Court embraced a more expansive view of the scope of application of this provision.

The most innovative aspect of these decisions when compared to previous jurisprudence was the fact that the Court ruled on the substantive constitutionality of the provisions under review, and not only on their organic constitutionality. In this respect, the Court fully adopted the view expressed in Rulings nos. 464/2022 and 465/2022 (*vide* II-4 above). Thus, after deeming mandatory isolation as an encroachment on the personal freedom guaranteed by Article 27(1) of the Constitution, the Court argued that these measures entailed an actual *deprivation* of liberty and not a mere *restriction* to that right. As a result, based on the understanding that measures entailing a deprivation of the personal freedom protected by Article 27 of the Constitution must be specifically provided for in the Constitution (contrary to measures who are merely restrictive of that freedom), the Court concluded, by majority, that the measures contained in the provisions under review were forms of deprivation of liberty not authorized by the exhaustive list of Article 27(2) and (3) of the Constitution, and therefore deemed them substantively unconstitutional.

As a result, the Court "(…) *deemed unconstitutional Article 3(1)(b), (2) and (3) of the regime attached to Resolution of the Council of Ministers no. 157/2021, of 27 November (by reference to clauses 2 and 10 of the resolution), for breach of Article 27(1), (2) and (3) of the Constitution*" [and also] "*for breach of Article 165(1)(b), by reference to Article 27(1), both of the Constitution*".

4) Rulings nos. 489/2022 (2nd Chamber) and 490/2022 (2nd Chamber):

In Rulings nos. 489/2022 and 490/2022, the Constitutional Court was called to decide, within the scope of specific constitutional review, two appeals filed against court decisions which, granting the requests for *habeas corpus* presented by the applicants, had refused to apply the provision resulting from the combination of Article 5(3)(c) of Decree-Law no. 82/2009, of 2 April, and clauses 12 and 26 of Rule no. 15/2021, of 24 July 2020, of the National Health Department (Ruling no. 489/2022), and the provision of Article 3(1)(b) of the regimes attached to Resolutions no. 135-A/2021, of 29 September, and no. 114-A/2021, of 20 August, of the Council of Ministers (Ruling no. 490/2022). While the first set of provisions under review allowed the ordering by the public health authorities of the precautionary isolation of students of a school and their households when a Covid-19 case was detected in that school, the second provision under review established, more generally, the mandatory confinement in a health establishment, at home or, if that was not possible, in another place defined by the competent authorities of citizens subject to active surveillance by the health authorities or by other health professionals.

The line of reasoning followed in both rulings was relatively uniform. After first reiterate, in line with previous jurisprudence, the organic and formal unconstitutionality of the provisions under review, for breach of Article 165(1)(b) of the Constitution, the Court again took a stand regarding the substantive unconstitutionality of the confinement measures provided for therein, though on grounds different from the ones in Ruling no. 466/2022.

The Court first provided the doctrinal and jurisprudential context in which to determine which fundamental rights are specifically affected by measures of precautionary confinement, and highlighted two possible ways of approaching the issue. According to the first methodological approach, the relevant constitutional criterion to analyse confinement measures is always the fundamental right to liberty enshrined in Article 27 of the Constitution, with the discussion focusing on the distinction between *restrictions* to liberty, allowed by paragraph 1 of that article, and the graver situations of (total or partial) *deprivation* of liberty, exhaustively listed in paragraphs 2 and 3 of that same Article. Conversely, a second methodological approach is based on the possibility of grading confinement measures, some being included in Article 27 of the Constitution due to affecting personal freedom, and others in Article 44 of the Constitution due to affecting only the freedom of movement. Leaning towards the second perspective, the Court remarked that it seemed that the constitutional text contained a distinction between freedom-restricting measures, which allowed them to be assigned to one or the other of the rights mentioned above.

Starting with the right to freedom, the Court stated that all situations defined in Article 27(3) as entailing a deprivation of liberty, allowed by the Constitution as restrictions to that fundamental right, concerned either prison or detention, with the exception of two: (1) the subjection of a minor to protection, assistance or education measures in an establishment fit for such purposes, ordered by the competent court of law (Article 27(3)(e) of the Constitution); and (2) the commitment of a person with a mental illness to a therapeutic establishment fit for such purpose, ordered or confirmed by a competent judicial authority (Article 27(3)(h) of the Constitution). It was then remarked that the common element in these situations is that the deprivation of liberty occurs in a context of *institutionalization*. Therefore, the restrictions to the right to freedom expressly authorized in Article 27(3) of the Constitution are circumstances in which the person is not merely prevented from moving around as he sees fit, but is placed against his will in an institution, which has profound implications in terms of his freedom that go well beyond the mere freedom of going in and out of that institution. In this regard, the Court highlighted that being committed to an institution raises various issues in terms of fundamental rights, since it entails a significant loss of the ability to make decisions about one's own life, which explains why the Constitution only allows it in a limited, exhaustive and well-grounded set of exceptional cases. The Court argued that the mandatory confinement to a health establishment is similar in nature to the exceptions provided for in Article 27(3) of the Constitution, since it entails a deprivation of liberty, in a context of institutionalization or similar circumstances, such as the confinement in a hotel (decided in Ruling no. 424/2020 and respective subsequent jurisprudence – *vide* II above). Consequently, taking into consideration that the restrictive measures of mandatory confinement in an institution (or equivalent) are not comprised in any of the exceptions provided for in Article 27(3), that would automatically indicate the substantive unconstitutionality of those measures, for breach of Article 27 of the Constitution.

However, the Court moderated the impact of this conclusion by adding that the most typical confinement measure – which consists of an *obligation to stay home, for a period pre-determined by the competent administrative authority* – could also be analysed from a different perspective. In fact, the restriction to fundamental rights imposed on someone who is at home in precautionary confinement is a much more limited compression of someone's individual freedom than the sacrificed imposed on citizens forced to comply with a similar measure in a context of involuntary commitment or equivalent. Considering that these situations are not comparable, either practically or substantially, to prison, detention or subjection to involuntary commitment or equivalent, the Court admitted that, depending on their specificities, measures of the kind could be deemed as a restriction on the freedom of movement, in light of Article 44(1) of the Constitution.

The Court then specifically addressed the provisions under review and concluded that the concrete confinement measures provided therein represented an *actual deprivation of personal freedom* that could be included within the scope of protection of Article 27(2) and (3) of the Constitution (and not of Article 44), and so were substantively unconstitutional for four different fundamental reasons. To begin with, the provisions did not establish a maximum

absolute limit for the duration of the confinement measure, nor did they regulate the possibility and conditions of its extension or renewal, which prevented citizens from predicting the restriction to liberty that could effectively be imposed on them. Secondly, the provisions did not provide for any specific mechanisms for guaranteeing the rights of citizens, nor any kind of judicial control, and they did not require that citizens be informed of the means of defence against such measures at their disposal. Thirdly, the competent legislative body had not established the legal framework for the monitoring of people subject to confinement, and therefore the competences and procedures intended to ensure compliance with the confinement obligation were unclear. Lastly, the Court stressed that the provisions under review were omissive on how the social and medical needs of citizens were to be met by the competent authorities, and on the exceptional cases where the obligation to remain at home should give way before the need to ensure respect for fundamental rights. On these grounds, the Court decided that the indeterminate nature and broadness of the provisions under review, together with the potentially protracted duration of the measure, as well as the possibility of the police being called to ensure compliance with it, inevitably entailed a deprivation of liberty, in breach of Article 27(2) and (3) of the Constitution.

Thus, the Court decided, by majority, in Ruling no. 489/2022, "(…) *to deem unconstitutional the provision resulting from the joint interpretation of Article 5(3)(c) of Decree-Law no. 82/2009, of 2 April, amended by Decree-Law no. 135/2013, of 4 October 2020, and clauses 12 and 26 of Rule no. 15/2020 of the National Health Department, of 24 July 2020, updated on 19 February 2021, when interpreted to mean that the public health authorities may order the precautionary isolation of students of a school and their households when a positive Covid-19 case has been detected in that school, for breach of Article 27(2) and (3) of the Constitution"* [and also] *"(…) for breach of Article 165(1)(b), by reference to Article 27(1), both of the Constitution of the Portuguese Republic".* In an almost identical manner, the Court decided, also by majority, in Ruling no. 490/2022, "(…) *to deem unconstitutional the provision contained in Article 3(1)(b) of the regimes attached to Resolutions of the Council of Ministers nos. 135-A/2021, of 29 September, and 114-A/2021, of 20 August, when interpreted to mean that "mandatory confinement in a health establishment, at home or, if that is not possible, in another place defined by the competent authorities is imposed on citizens that were subject to active surveillance by the health authorities or by other health professionals", for breach of Article 27(2) and (3) of the Constitution"* [and also] *"(…) for breach of Article 165(1)(b), by reference to Article 27(1), both of the Constitution of the Portuguese Republic".*

IV) Procedural effects of legal measures adopted within the context of Covid-19

1) Constitutionality of the provisions ordering the suspension of the limitation periods for criminal and administrative offences as a response to Covid-19

Rulings nos. 500/2021 (3rd Chamber), 660/2021 (1st Chamber) and 798/2021 (1st Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, three appeals filed against court decisions which, applying Article 7(3) and (4) of Law no. 1-A/2020, of 19 March, considered that the administrative offence proceedings brought against the respective appellants by the competent administrative authority (in the first case, the Bank of Portugal, and, in the second and third cases, the Portuguese Securities and Exchange Commission) were not time-barred. Those provisions allowed the suspension of the limitation periods for criminal and administrative offences as a response to Covid-19.

In the first appeal (Ruling no. 500/2021), as for the most part in the two subsequent rulings, the Court first remarked that the provision under review had not been enacted in the use of a constitutional emergency power, and thus its validity could be assessed in light of Article 19(6) of the Constitution, which is exclusively related to the power of declaration of the state of siege or of the state of emergency attributed to the President of the Republic. Conversely, the fundamental question raised in the appeal was whether Article 29 of the Constitution, by stating that "*no one can be criminally sentenced unless by virtue of a previous law that declares the action or omission punishable"* (1), or suffer "*a sentence not expressly provided for in a previous law*" (3) or "*more serious than those provided for at the time of the corresponding conduct or the meeting of the respective requirements*" (4), prevents the immediate application to pending proceedings of the suspension of limitation periods provided for in Article 7(3) and (4) of Law no. 1-A/2000.

The Court underlined that the provisions that establish the causes of suspension of limitation periods, although not directly contemplated by the letter of Article 29 of the Constitution, are covered, in principle, by the prohibition of retroactive application of the law *in malem partem*, in light of the fundamentals of the principle of legality in criminal law. This conclusion resulted from two essential ideas. First, that the guarantees inherent in the prohibition of retroactivity *in malem partem* are intended to protect the individual against the abuse of power, and may be fully invoked whenever the State seeks to mitigate, through the retroactive expansion of the list of causes of suspension of limitation periods, the effect of its inertia in the administration of justice. Secondly, that these guarantees seek to ensure a reasonable predictability of the consequences that the person affected by the provision will face when violating the criminal precept, and that predictability is usually affected when the conditions under which an offense can be punished are altered.

However, having said this, the Court considered that the suspension of limitation periods for criminal proceedings provided for in Article 7(3) and (4) of Law 1-A/2020, given its uniqueness, totally escaped the reasons on which the prohibition of retroactivity to limitation

periods is grounded. Indeed, this was a transitory measure, intended to be in force only during the period in which the activity of the courts was conditioned by the exceptional health emergency situation. The constraints to this activity were essential in order for the State to fulfil its duty to protect the life and physical integrity of all citizens involved in the administration of justice, including the defendants themselves. The Court then concluded that the same reasoning was valid, *a fortiori*, for pending proceedings regarding administrative offences, considering that the requirements arising from the principle of legality in criminal law are not imposed with the same degree of intensity in this domain. In the light of this, the appeal was denied.

2) Constitutionality of the provisions allowing the cross-examination of a witness or declarant by videoconference

Ruling no. 738/2021 (1st Chamber):

The Constitutional Court was called to decide, within the scope of specific constitutional review, an appeal filed against a court decision by the Lisbon Court of Appeal which had applied Article 7(7) of Law no. 1-A/2020, of 19 March, with the wording of Law no. 4-A/2020, of 6 April, interpreted to mean that the cross-examination of a witness or declarant in a court hearing is valid when carried out through a system of distance communication, when that witness or declarant has been examined by the opposite party in person at a previous hearing.

The Court first discussed Article 20 of the Constitution (right of access to a court of law), which entails the need for an equality of arms and respect for the adversarial system, as requirements of a fair trial. The Court then characterized a fair trial, highlighting that the Constitution demands a balance between the parties as regards the procedural means at their disposal and, though that does not entail an absolute formal identity of means, it does require that the plaintiff and the defendant have identical procedural rights, whenever their position in the proceedings is comparable.

The arguments used by the appellants were not accepted in the Ruling. First, it was stressed that the appellants had based their position on the assumption that the difference between in person examination and examination through means of distance communication is so stark and with such significant consequences in terms of evidence that the mere allusion to that difference would suffice to prove the inequality between the parties. The Court did not accept this position, and emphasized that there are few non-verbal indicators of deceit scientifically validated and that those that indeed existed had only a faint connection with that detection. It was also added that the judges did not have specific training allowing them to explore, with the necessary effectiveness and reliability, the detection of those indicators of deceit. To that extent, the Court argued that qualities that the psychology of testimony does not recognize cannot be ascribed to the direct and in-person contact between the judge and the witness. The Court further highlighted that conviction concerning the truthfulness of the testimony was founded first and foremost on the verbal aspect of the communication, with the non-verbal aspect having a residual and unreliable relevance. It therefore concluded that the

physical presence of the witness before the judge was not, in itself and in every instance, essential when assessing evidence.

At this point, the Court stated that accepting that the in-person examination of a witness is not, in absolute formal terms, equal to the examination through means of distance communication does nor imply accepting that such difference necessarily affects the position of a party in so relevant a manner that one could claim that such party would no longer be on an equal footing with the other party. It was recalled that distance examination maintains its oral aspect and, though some advantages of an in-person examination may be lost they do not completely disappear. Thus, guarantees are not impaired for this reason alone, since in itself those means of distance communication do not, in themselves, compromise the accuracy and reliability of the testimony. The Court also added that, although the conclusion is valid in general, it is even more so in moments, such as this one, where the State, faced with exceptional difficulties in terms of access to the courts, had been forced to balance the rights of the parties with other constitutional demands to which it was bound, notably the quality of justice, and the public interest in the operational efficiency of the judicial system and the speedy resolution of court cases (Ruling no. 176/2021).

The Court concluded by admitting that the difference between in-person examination and examination through means of distance communication may entail an imbalance between the relative positions of the parties so great that it should be rejected in light of the Constitution and the idea of a fair trial. However, such imbalance would have to be shown to exist in the concrete case, which had not been done. As a result, the Court ruled that the provision under review was not unconstitutional.

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