
Criminal Law and the Covid-19 Pandemic in Portugal

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ABSTRACT

This text outlines the main challenges posed by the COVID-19 pandemic to the Portuguese criminal justice system, notably the difficulty in establishing liability for spreading the disease. It concludes that an

offence protecting public health is lacking, in consequence of which excessive use was made of – inter alia – the offence of disobedience.

KEYWORDS

criminal law, covid-19, pandemic, public health, disobedience, state of emergency

1. Introduction¹

1.1. Institutional framework

In Portugal, the institutions with competence to address the Covid-19 crisis through criminal law are, in essence, the same that bear that competence in normal times. However, in a crisis of this character, the role of the President at the legislative level is more impactful than normally,² as the President plays a key role in *declaring* the state of emergency.³

The relevant constitutional provisions to that effect are concretised by Law no. 44/86, of 30 September (Legal Regime of the States of Siege and of Emergency: LRSSE), which prescribes that the Government is the competent body for executing or implementing the state of siege and the of emergency.⁴

¹ This analysis focuses on legislative and jurisprudential developments that took place during the peak of the pandemic crisis, yet on specific points it addresses ulterior events.

² Portugal has a semi-presidential political system.

³ Art. 134 of the Constitution.

⁴ Art. 17.

The fact that this *implementation* is entrusted to the Government arguably stems from efficacy concerns: as it is charged with carrying out the general policy of the country and is the supreme body of the whole public administration, it is trusted to be the most adequate for exerting executive functions also in times of constitutional exception, given its privileged access to information and its particular organisational powers. The fact that it must regularly report to the President and the Parliament should ensure that the equilibria among the different powers of the State are not entirely disrupted.⁵

The procedure for declaring a state of siege or of emergency is a “complex mechanism of interdependence” that involves “all sovereignty bodies with political competences”.⁶ While it is the President that declares the state of emergency, prior consultation of the Government and prior authorisation by the Parliament are required;⁷ ministerial countersignature of the decree (*referenda ministerial*) is yet necessary.⁸ This intricate, multilateral procedure is illustrative of the tendency in modern constitutionalism to “proceduralise the practise of the most important acts of State”.⁹

1.2. State of emergency

The question as to whether the declaration of the state of emergency was indeed necessary to address the difficulties brought by the pandemic depends on a previous question, namely that as to which fundamental rights would be affected by the measures intended to be enacted. While some claimed that a measure such as mandatory confinement would essentially restrict the right to movement enshrined in Art. 44 of the Constitution, the prevailing view was (and in our view rightly so) that it would restrict the right to liberty enshrined in Art. 27 – as the Constitutional Court eventually upheld in respect of mandatory quarantine decisions taken in the Autonomous Region of Azores.¹⁰ The variance is relevant because the latter

⁵ See Ombudsman (2021), 21.

⁶ Canotilho (2003), 1104.

⁷ Arts. 161 (l) and 179 (3) (f), and Arts. 138 (1) and 197 (1) (f) of the Constitution.

⁸ Certain acts undertaken by the President require the countersignature by the Government, or otherwise they will be deemed as inexistent or nugatory: Art. 140 of the Constitution.

⁹ Canotilho (2003), 1105.

¹⁰ See further *infra*, § 4.1.

right, unlike the former, can only be restricted in a set number of hypotheses listed in Art. 27 (2) and (3) of the Constitution, none of which encompasses sanitary crises, with the consequence that only under a state of constitutional exception could such a restriction be imposed. Thus, the road that was followed was that of declaring the state of emergency.¹¹

For the first time ever under the democratic Constitution of 1976, a state of emergency was declared in Portugal, by Presidential Decree no. 14-A/2020, of 18 March, based on Art. 19 of the Constitution, which sets out the circumstances in which the exercise of rights, freedoms or guarantees may be suspended. They unfold into two main modalities: state of siege and state of emergency. Any of them may be declared only in case of: (i) actual or imminent aggression by foreign forces; (ii) severe menace to, or disruption of the democratic constitutional order; or (iii) public calamity.

The difference between the states of siege and of emergency is essentially a difference of degree: the latter is declared in cases “of a lesser gravity”. However, the LRSSE sheds further light on this issue by drawing a distinction based in part on qualitative elements: the state of siege is declared when acts of force or insurrection are taking place or are imminent and they put in jeopardy the sovereignty, independence, territorial integrity or democratic constitutional order of the country; the state of emergency is declared *v.g.* when a situation of public calamity is taking place or is imminent.¹² In any case, the states of siege and of emergency share many traits in terms of their effects,¹³ notably that neither may affect such paramount rights as the right to life, the prohibition of retroactivity of criminal laws and procedural rights of defendants.

The hypothesis that served as the basis for the state of emergency declared by the President was that of ‘public calamity’. The Presidential Decree was shortly after implemented by the Government through Decree no. 2-A/2020, of 20 March. The core purpose of the former was to confer on the Government the legitimacy to approve the latter.

¹¹ Although, ironically, the Presidential Decree would then refer to Art. 44 (*inter alia*), but not to Art. 27: in critical analysis, see Novais (2020a), 85 et seqq.

¹² Arts. 8 and 9 LRSSE.

¹³ Although there are also significant differences, as expounded in Ombudsman (2021), 20 et seqq.

1.3. Decree no. 2-A/2020 and subsequent legislative developments

The Decree no. 2-A/2020 established a duty of mandatory confinement at home or at a health facility, applicable to individuals ill with Covid-19 or infected with SARS-Cov2 and individuals whose active vigilance was declared by a health authority or other health professionals. It also established the shutting of certain infrastructures and establishments, namely recreational (v.g. discos and bars), cultural (v.g. cinemas and theatres), sports-related (v.g. football courts and swimming pools), open-space activities (v.g. parades and folk exhibitions), gambling-related, restaurants or similar, and spas or similar. In addition, with some exceptions and under certain conditions, it suspended operations of retail traders such as supermarkets, bakeries and kiosks, *inter alia*, as well as activities of services provision in establishments open to the public.

Most importantly for these purposes, the Decree established an offence of disobedience that will be addressed further below, with a view to reducing the risk of contagion and giving effect to the measures preventing and reacting against the pandemic. This was deemed necessary due to the absence of a criminal offence protecting public health.

Over the subsequent months and for over a year, the country alternated between the state of emergency and administrative states of exception (of calamity, contingency and alert), enacted through an endless array of legislative acts. Their analysis would over-complicate, to no meaningful advantage, the analysis to be provided here. The basic notions to bear in mind are that: (i) under the different periods of constitutional exception, the types of problems of relevance for criminal law were essentially similar; (ii) the same applies, *mutatis mutandis*, to the different periods of administrative exception; (iii) the terms of the problems under (i) and (ii) differ fundamentally, as the level of individual rights' restriction admitted under the former is much higher than under the latter.

2. Criminal liability for spreading of the disease

2.1. Offences against life and limb

Offences such as homicide and bodily harm – where liability consists of actually causing a damage – could theoretically apply in the context of a pandemic crisis like this, but they could apply *only* where the intention of the person causing the infection was all along to cause death, bodily harm,¹⁴ etc. Bodily harm is punished with imprisonment for up to 3 years or a fine, or with imprisonment from 2 to 10 years if committed in an aggravated form, *e.g.* when it causes a particularly painful or a permanent disease, or a danger to life.¹⁵

Although *attempt* to commit some of these offences is punishable,¹⁶ this would still require the conduct to be directed against a concretely identified person, which excludes cases in which a person who knows to be infected wanders willingly across a public space, even if this person acknowledges that this may cause others to be infected and accepts that such an event befalls.

All these offences are also punished when committed with mere *negligence*, when the breach of a duty of care materialises into the prohibited result.¹⁷ However, it would be very difficult to establish a connection between the breach of such duty (stemming from an order of prophylactic isolation in case of a suspicious contact or of confinement in case of actual infection) and the occurrence of the prohibited result.

Thus, the relevance of these offences was highly limited or indeed non-existent.

2.2. Propagation of disease

During the pandemic the legislator did not enact any new offence designed to protect public health. An offence of propagation of disease was

¹⁴ Even though it is not necessary that the person actually develops symptoms, but rather it suffices that he/she develops a 'state of disease' (whether through an infection or through contagion): see Faria (2012), 298 et seq.

¹⁵ Arts. 143 and 144 (b), (c) and (d) of the Penal Code (PC).

¹⁶ Art. 23 (1) PC.

¹⁷ Arts. 137 and 148 PC.

already in place (Art. 283 PC), punished (in its standard form) with imprisonment from 1 to 8 years. It is conceived for situations where an actual propagation of a contagious disease occurs *and* such propagation causes a hazard to the life or a serious hazard to the physical integrity of another person. This *result* (*viz.*, the creation of a concrete danger) is therefore an integral element of the offence, although it is not necessary that it translates into an actual *harm* to life or limb, which are the protected legal interests. Indeed, this offence is generally deemed to protect life and physical integrity as individual legal interests, and only in a reflex manner public health as a supra-individual legal interest.¹⁸

It constitutes an offence of common danger, as it requires that the propagation of the disease creates a real and actual danger to the life or physical integrity of a concrete person, even if in this legal structure that person stands not simply as a victim of the crime but as a representative of the community as a whole.¹⁹

In view of the above it was clear all along that this offence would be of very limited relevance in cases where individuals subject to mandatory confinement would evade it. From a procedural standpoint, it would be obviously difficult to prove the chain of propagation, as the disease at issue here is exceptionally contagious, transmissible by multiple means, has a large incubation period and is often symptomless.²⁰ At the substantive level difficulties were even higher: firstly, it is not even clear that the theory of objective imputation should apply in the realm of offences of danger; and at any rate the causal nexus between the conduct and the result of danger is quite difficult to establish.

Since the offence of propagation of disease consists not of a *danger of contagion* but rather of a *danger to life or limb caused by a contagion*, very hardly could it be of any avail in these circumstances. To this day, no public offence was enacted in the Portuguese legal system which shows adequate to a pandemic of this sort. The pandemic shed light on this punitive gap, but during the crisis the legislator took instead the road of punishing disobedience.²¹

¹⁸ See Antunes et al. (2020), 15; Sousa (2020), 154.

¹⁹ See Cunha (1999), 1007 et seq.

²⁰ See Silva (2020), 201.

²¹ Data indicates an increase of c. 58% in the number of crimes of disobedience recorded by the police in 2020 (4.106 cases in total) compared to the previous year (Direção-Geral da Política de

2.3. Disobedience

Decree no. 2-A/2020 and subsequent Decrees established rules on disobedience, triggering wide public debate and constitutionality questions, namely of an organic character, as they were approved by the Government rather than by the Parliament and without its authorisation.

Art. 3 (2) established that a person would be committing an offence of disobedience if he/she breaches the duty of confinement, and Art. 32 (1) (b) enabled authorities to issue orders and to prescribe that, for the purposes of Art. 348 PC, the breach of that duty or of rules on the shutting down or suspension of certain establishments and activities would constitute disobedience.

Art. 32 (1) (b) was not particularly problematic,²² as it did not apparently introduce any new offence, but only recalled a pre-existing one,²³ namely that of Art. 348 (1) (b) PC (disobedience prescribed by a public agent – pure disobedience), whereby an authority or a civil servant issues an order and formally warns the addressee that they will be committing a crime of disobedience should they fail to act in the indicated manner.²⁴

The fundamental problems concerned Art. 3 (2), in which the prohibited behaviour is instead fully described in a legal norm, or in which a public agent issues an order but the punishment of the disobedience to such an order follows from a legal norm rather than from a prescription by the agent him/herself (see also Art. 348 (1) (a) PC). In this modality (disobedience prescribed by law – impure disobedience), the concept of disobedience is mobilised by the legislator to punish a behaviour that it has itself defined in a relatively self-standing manner: in the case, the breach of the duty of confinement. It follows that, while pure disobedience envisages to secure the respect for public orders as such, impure disobedience is more closely linked to the very legal interest that is affronted by the behaviour prohibited by law: in the case, the interests put at risk by the pandemic.

Justiça, 2021, 250).

²² See Brandão (2020b), para 2, para 5.

²³ On the classic offence of disobedience, see Monteiro (2001), 349 et seqq.; Borges (2011).

²⁴ This may also help to explain the ample use that was made of this provision at a certain point of the crisis, with several criminal proceedings having reportedly been initiated on this basis, namely in cases of wide gatherings in establishments such as restaurants and cafés.

Considering that Art. 32 (1) (b) (disobedience prescribed by a public agent) also refers to the duty of confinement established in Art. 3 (and not only to the other rules concerning the shutting or the suspension of certain establishments and activities), it is unclear that the intention of the legislator was indeed for Art. 3 to constitute an instance of ‘disobedience prescribed by law’. Be that as it may, the fact is that, in practice, such an interpretation was taken in some cases, leading to criminal procedures based on Art. 3 alone (rather than in conjunction with Art. 32 (1) (b) and with Art. 348 (1) (b) PC).

Even within the mindset of that interpretation, it may still be argued that such an offence of improper disobedience merely concretised an already existing offence: Art. 7 of the LRSSE (the already mentioned legal regime of the states of siege and of emergency). In its original wording, this provision established that the breach of the declaration of the state of siege / emergency, namely concerning its execution, entailed committing a responsibility offence. This offence was amended by Organic Law no. 1/2012, of 11 May, which instead of ‘responsibility offences’ now referred to an ‘offence of disobedience’. Therefore, it converted it into a common offence, which any citizen is liable to commit.

However, the offence of disobedience at issue here was not (nor could it have been) provided for in the presidential decree that declared the state of emergency, but rather in a governmental decree that implemented it. This, in our view, lies beyond the range of possible meanings borne by Art. 7 LRSSE, and therefore an interpretation according to which this provision encompasses the breach of such governmental decree could hardly comply with the principle of legality in its dimension of determinability (*lex certa*).²⁵ If Art. 3 Decree no. 2-A/2020 did not simply concretise Art. 7 LRSSE, then its organic legitimacy was doubtful, because it was enacted by the Government without authorisation by the Parliament. Case law was delivered by judicial courts upholding this very understanding,²⁶ but that was not the view taken by the Constitutional Court in ruling no. 921/2021, of 7 December, which held that such legitimacy is ensured by the “normative continuity” between the LRSEE, the Parliament’s authorisation for the President to declare the

²⁵ On this discussion, see e.g. Oliveira (2020), 501 et seqq., with further references; Andrade (2021), 318 et seq.

²⁶ See e.g. the ruling of the Court of First Instance of Oeiras, 25 September 2020, process 23/20.3PJOER, and the ruling of the High Court of Guimarães, 9 November 2020, process 119/20.1PBCHV.G1.

state of emergency, the President's declaration of the state of emergency and the Government's Decree implementing it. The ruling no. 557/2022, later delivered by a different composition of 5 judges, ran in a different direction, but the jurisprudential conflict was solved by the Plenary of the Court in favour of the former approach (albeit with 5 dissenting opinions), through the ruling no. 196/2023.

Judicial courts also held unconstitutional, on organic grounds, Art. 43 (6) of the Decree no. 2-B/2020, according to which disobedience / resistance to legitimate orders, when committed in breach of that Decree, are sanctioned in the terms prescribed in the criminal law and their penalties elevated in 1/3 in their minimum and maximum limits.²⁷ However, the Constitutional Court, in the ruling no. 352/2021, of 27 May, concluded again for *non-unconstitutionality*. The issue here was not whether the Decree merely concretised a pre-existing offence (it did, as this was a case of disobedience prescribed by a public agent, covered by Art. 348 (1) (b) PC)), but whether the Government could, absent authorisation of the Parliament, *elevate the applicable sanctions*. The Court held that: the declaration of a state of emergency allows not only (in its 'substantial dimension') for an abnormal compression of fundamental rights, but also (in its 'organic dimension') for an abnormal expansion of the competences of the executive power; and while fundamental rights restrictions fall within the reserved competence of the Parliament, it is the executive that holds the competence to enact the emergency measures required by the circumstances; thus, under a state of emergency, not only are basic rights affected to enable a defence of the constitutional order, but also State powers are reorganised to that end.²⁸

3. Criminal liability of medical staff in *triage* situations

In Portugal, no parliamentary law is in force that explicitly regulates medical decisions in *triage* situations, nor was any such special law enacted in the context of the Covid-19 crisis. As far as it was possible to determine,

²⁷ See e.g. the ruling of High Court of Guimarães, 9 November 2020, process 119/20.1PBCHV.G1 *cit.*, and the ruling of the High Court of Lisbon, 24 March 2021, process 308/20.9PLLR.L1-3.

²⁸ For a critical analysis of this ruling, see Sánchez (2021), 103 et seqq.

no case has reached the courts concerning wrongful medical decisions taken in triage situations.

Nevertheless, the National Council of Ethics and Medical Deontology (*Conselho Nacional de Ética e Deontologia Médicas* – CNED) – a consultative body of the Doctors’ Association – acknowledged the need to issue ethical recommendations for ‘situations of medical practice in a catastrophe’. In November 2020 it published Opinion no. 58 providing “ethical considerations and recommendations regarding the situations caused by the Covid-19 pandemic”²⁹.

It noted that the pandemic could carry scarcity of beds, ventilators and human resources (due either to illness or to quarantine) in intensive care units. In the event of a scarcity of resources, it recommended that they be reserved to those regarding whom the probability of survival after treatment is higher, drawing on an idea of “saving more lives and more years of life”. It also recommended certain criteria *not* to be followed, such as the order of admission or arrival of hospital emergency services. While acknowledging that illness befalls often upon the elderly, the Council upheld that age alone should not serve as a triage criterion, but should only be taken into account in conjunction with other factors such as existing comorbidities and the functioning levels of multiple organs. Moreover, drawing on what is already a well-established rule for non-emergency situations, it recommended intensive therapy not to be performed where it would bring minimal advantages for patients and be unlikely to succeed due to an advanced or terminal illness.

However, at a strictly legal level, in a democratic State grounded on the equal dignity of all persons and on the equal value of all lives regardless of the person’s condition,³⁰ the decision to deploy or withhold resources should arguably not differ fundamentally from an ordinary setting to a pandemic one.³¹ Furthermore, the declaration of a state of siege or emergency cannot in any circumstances affect the rights to life and to physical integrity.³²

From the above recommendations, it is possible to conclude that, in the Council’s view: (1) in balancing multiple lives, preference should be given

²⁹ In <https://ordemdosmedicos.pt/files/pdfs/gvAX-Parecer-CNEDM58vf-paginas-1-4.pdf> (accessed 27 May 2025).

³⁰ See notably Arts. 1, 2 and 24 of the Constitution.

³¹ See de Brito (2021).

³² Art. 19 (5) of the Constitution.

to the *larger number of lives*; and (2) in balancing one life against another, preference should be given to that where the prospect of *enduring further years* is higher.

The recommendations contained in Opinion no. 58 sparked debate, and some authors argued that by following them doctors could incur criminal liability.³³ The recommendations do raise several questions: in balancing multiple lives, should the number of lives indeed be relevant?; in balancing one life against another, should the prospect of *enduring further years* indeed be given preference?; can life be weighed?; should ongoing therapeutic processes be possible to interrupt in favour of subsequent patients?

These questions call into consideration the causes of justification and exculpation regulated in the PC, particularly that of conflict of duties: according to Art. 36, wrongfulness is excluded if, in the event of a conflict of multiple legal obligations, the person undertakes to fulfil a duty of at least the same strength as that which is thereby sacrificed. Portuguese legal literature tends to defend that one such conflict will only in fact exist where there are multiple obligations to *act* and only one of them can be complied with.³⁴ According to this view, and for those who consider that ‘turning off the machine’ is an *action*, interrupting the therapeutic means securing the life of a patient whose prospects of survival are still reasonable in favour of another patient, even if the latter has better prospects of survival, does not meet the requirements of Art. 36 and will therefore constitute a homicide. In these cases, the duty to refrain from acting prevails over the duty to act.³⁵ As for those who uphold that ‘turning off the machine’ is a discontinuation of the treatment and, therefore, an *omission*,³⁶ the above case will amount to a situation of conflict of duties: between the duty to continue the treatment of the first patient and the duty to initiate the treatment of the second patient. In these cases, the position has generally been followed that the duty to continue a treatment supersedes the duty to initiate a new treatment. ‘Turning off the machine’ will, from this perspective, constitute a homicide by omission. In any event, ascertaining the relative weight of the conflicting duties requires taking into consideration all the circumstances

³³ See Palma (2020).

³⁴ Dias (2019), 548.

³⁵ See Palma (2020).

³⁶ See Dias (2008), 208.

of the case.³⁷ In this light, one may, in the abstract, rule out the possibility to justify the option to grant – from the outset – treatment to a patient with a less severe illness and greater prospects of survival rather than to a patient with a more serious illness and narrower prospects of survival.³⁸

If an act is wrongful, the doctor may nevertheless be exculpated due to it being unreasonable to require him/her, in the circumstances of the case, to have acted in accordance with the law (Art. 35 PC – *estado de necessidade desculpante*).³⁹ These are, however, very complex and dubious situations the solution to which can be found only in view of the case globally considered.

4. Further challenges in Portugal

4.1. Abusive vaccination

Certain ‘offences of responsibility’ (provided for in the Law no. 34/87 of 16 July) by holders of political office or of high public office were applied in the context of the pandemic in cases of abusive vaccination, notably in situations where a person would take undue priority in the set order for being vaccinated. However, this situation has triggered problems also in relation to persons other than holders of political or high public office, *i.e.* other civil servants and even ordinary citizens. The offences at stake include abuse of power, abuse of trust, receiving of an undue advantage, embezzlement or withholding of assistance, *inter alia*; also false declarations, by providing wrongful information to health authorities so as to gain priority in the vaccination order.⁴⁰

By June 2021, it was reported that 216 such criminal proceedings had been initiated and over 50 individuals formally designated as defendants.⁴¹ In February 2021 a Draft Law had already been introduced with a view to establishing a new offence that would not fall in the category of the

³⁷ Dias (2019), 549.

³⁸ See Palma (2020).

³⁹ See Dias (2019), 710 et seq.

⁴⁰ See <https://pgd-coimbra.ministeriopublico.pt/pagina/covid-19-falsas-declaracoes-acusacao-mp-diap-regional-de-coimbra> (accessed 27 May 2025).

⁴¹ See <https://www.policiajudiciaria.pt/inqueritos-relacionados-com-o-processo-de-vacinacao-contra-a-covid-19/> (accessed 27 May 2025).

so-called specific offences (*delicta propria*), where the perpetrator must hold a certain (in the case, public) status, but which would instead impend upon any citizen.⁴² The offence would be named ‘undue vaccination’ and the applicable penalty would be imprisonment up to 3 years or a fine (unless a more severe penalty should apply *ex vi* of other provisions, notably of the mentioned, already existing, *delicta propria*).⁴³ The prohibited conduct would consist of, “by oneself or by proxy, giving or accepting vaccination, for oneself or for another person, in breach of the criteria defined in a vaccination plan”. However, with the dissolution of the Parliament, this legislative initiative eventually fell through on 28 March 2022, which in our view was a salubrious outcome: this would have been a classic example of hasty and irrational criminal policy⁴⁴ and it would have resulted in over-criminalisation, considering the already existing offences mentioned above.⁴⁵

4.2. Decisions of mandatory quarantine and constitutionality issues

It is also worth mentioning the case law of the Constitutional Court on the issue of mandatory quarantine applied in the Autonomous Region of Azores: the Court held unconstitutional points (1) to (4) and (7) of the Resolution of the Council of the [Regional] Government no. 77/2020, of 27 March, and points 3 (e) and 11 of the Resolution no. 123/2020 of the same regional organ, which imposed mandatory confinement for 14 days on passengers landing in the Autonomous Region of Azores. In the case at issue in that ruling, the person had been confined in a hotel room, without access to any outside space or any other area of the hotel, including the corridors. The court of criminal instruction of Ponta Delgada refused to apply those provisions on grounds of unconstitutionality, and in consequence it granted the measure of *habeas corpus* that had been requested by the individual in question.

⁴² Draft Law no. 665/XIV/2, in www.parlamento.pt, 2, *et passim* (accessed 27 May 2025).

⁴³ And it would be inserted into Decree-Law no. 28/84 (on anti-economic infractions and infractions against public health), Art. 22-A.

⁴⁴ See, in general, Caeiro (2018), 267 *et seqq.*

⁴⁵ See also the Opinion of the Superior Council of Magistrates, the Superior Council of the Public Prosecution and the Bar Association, in <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=45727> (accessed 27 May 2025).

The public prosecution lodged an appeal of that decision to the Constitutional Court, which is mandatory in cases where a judicial court refuses the application of a norm on constitutional grounds. The Constitutional Court also held the norm to be unconstitutional, based on organic arguments.⁴⁶ The Court held this confinement measure to constitute a restriction of the right to liberty enshrined in Art. 27 (1) and (2) of the Constitution, as this is “evidently” a matter falling within the legislative competence reserved to Parliament (Art. 165 (1) (b) of the Constitution), which had not been delegated, and which could only have been delegated to the central – not to the Regional – Government (Arts. 227 (1) (b) and 228 (1) of the Constitution).

One discussion surrounding this issue is whether the imposition of a confinement measure of this character should be regarded as a restriction of the mentioned right to liberty, instead of the right to movement enshrined in Art. 44 of the Constitution. The Constitutional Court took the former approach, but it did assert that its conclusion would not have been different had it followed the latter approach. This discussion has very meaningful legal repercussions⁴⁷ – *v.g.* regarding restriction of the freedom of movement across the national territory⁴⁸ –, but they touch upon aspects other than the organic issue that was in discussion in this ruling, since restrictions of Art. 44 of the Constitution fall as well within the legislative competence reserved for Parliament in Art. 165 (1) (b) of the Constitution.⁴⁹

Subsequent rulings addressed similar or somehow approximate problems, and the verdict was in all cases of unconstitutionality – and in all cases the voting was unanimous: rulings no. 687/2020, of 26 November, no. 729/2020, of 10 December, and no. 173/2021, of 24 March.⁵⁰

⁴⁶ Constitutional Court, 31 July 2020, 424/2020.

⁴⁷ See Antunes et al. (2020), 15.

⁴⁸ See Antunes (2023b), 166 et seq.

⁴⁹ On the discussion, do however see, e.g. Novais (2020a), 95 et seqq., and Novais (2020b); Alexandrino (2020); and other references mentioned in Constitutional Court, 31 July 2020, 424/2020, para 2.2.4.; see also Pereira & Caires (2020), 716 et seqq.

⁵⁰ All rulings available in www.tribunalconstitucional.pt. Accessed 27 April 2023.

4.3. Duration of criminal proceedings and time-bars

Even before the state of emergency was declared for the first time, exceptional measures had been enacted in reaction to the pandemic through the Decree-Law no. 10-A/2020 of 13 March, which included provisions on deadlines for procedural acts. However, the most relevant and impactful legal instrument was Law no 1-A/2020, of 19 March, enacted one day after the Presidential Decree no. 14-A/2020, which declared the state of emergency.

a) Procedural issues

Law no 1-A/2020, of 19 March (later amended multiple times) enacted a set of exceptional and temporary measures in reaction to the Covid-19 crisis, among which measures concerning criminal procedural deadlines.⁵¹

Based on Art. 7 (1) and (2), all deadlines for the practice of procedural acts of a non-urgent character were suspended until the exceptional situation would cease, with two exceptions: the case where all subjects involved agreed that conditions were met for the act to be practiced through informatic or otherwise remote means; and the issuing of a final decision in relation to criminal procedures regarding which the court and other authorities deemed unnecessary that further procedural measures be conducted.

As for proceedings of an urgent character, here too were deadlines as a rule suspended. The exceptions were the cases where the practice of the act through remote means was impossible. As for acts to be practised with the physical presence of the subjects, these would only include acts involving fundamental individual rights – *v.g.* involving minors in a situation of risk or acts and trials of defendants deprived of liberty –, and only insofar as the number of individuals to be present would not exceed the one recommended by health authorities. The rule was later inverted: urgent acts would be practised unless some exceptions were met, but, considering the scope of these exceptions, the differences to the original regime were in practice minor.⁵²

⁵¹ In further detail on these measures, see Cardoso (2020), 585 et seqq.

⁵² See *ibid.*, p. 595.

b) Substantive issues

However, the main points of contention regarding this exceptional regime arguably concern the substantive, rather than the procedural level, more specifically the provision according to which the pandemic situation would suspend statutory limitations of all types of procedures.⁵³

As in several other legal systems, the classification of statutory limitations of the criminal procedure or of the penalty as either substantive or procedural is controversial in Portugal.⁵⁴ Be that as it may, even those who assign mainly procedural nature on these norms tend to agree that they bear a particular axiological density, with the consequence that they are, to some extent at least, subject to the requirements of the *nullum crimen* principle. Most consequentially, the Constitutional Court itself acknowledges the relevance of this principle for norms of criminal procedure.⁵⁵

Therefore, some authors upheld that this suspension of time-bars, if applied to proceedings concerning acts committed prior to the entry into force of Law no. 1-A/2020, would be retroactive *in malam partem* and hence unconstitutional,⁵⁶ and this was the view taken by some judicial courts (although there is also case law in a different direction).⁵⁷ The issue was eventually addressed by the Constitutional Court, in ruling no. 500/2021 of 9 June,⁵⁸ concerning administrative punitive proceedings, where it was unanimously held that such an interpretation was *not* unconstitutional.

After dismissing the claim that such an interpretation would breach the constitutional limits of the state of emergency,⁵⁹ the Court held that the legality principle enshrined in Art. 29 of the Constitution – including the prohibition of *in malam partem* retroactivity, which according to the ruling is grounded in part on the intent to control the exercise of punitive power by the State and in part on the principle of trust – applies in line of principle to statutory limitations of the procedure. However – the Court noted –, the suspension of time-bars introduced by Art. 7 (3) of the Law no 1-A/2020

⁵³ In addition to other terms, as further detailed in Cardoso & Baptista (2020), 603–613.

⁵⁴ See Dias (1993), 698 et seqq.; Antunes (2023a), 14; Caeiro (2001), 231 et seqq.

⁵⁵ See e.g. Antunes (2023a), 32 et seq.

⁵⁶ See Cardoso & Baptista (2020), 608 et seq.; also, albeit in less definitive terms, Martins (2020), 7.

⁵⁷ See the several rulings indicated in paras 19–20 of the ruling of the Constitutional Court no. 500/2021.

⁵⁸ And later in the rulings nos. 660/2021 and 798/2021.

⁵⁹ Drawing, to this effect, on elements of the reasoning underpinning the ruling no. 352/2021, assessed above.

was so peculiar that it did not hamper upon any of the two rationales mentioned above: it was not arbitrary, nor did it breach the principle of trust, as it was enacted to address an absolutely abnormal and inevitable lockdown of the justice system which was by no means attributable to the State.

As noted, this ruling concerned punitive administrative proceedings, but in the light of the reasoning deployed by the Court it would plausibly extend to criminal proceedings as well⁶⁰ – which is our view would be highly problematic: in criminal proceedings the principle of legality should admit of no relativisation whatsoever, however abnormal supervening circumstances might be.

4.4. Special rules on custodial detention and imprisonment

A set of measures was enacted in view of the “specificities of the penitentiary environment, considering both the high incidence of health problems and the ageing of its population”, with the goal of “actively and strategically avoiding infection upsurges in prison facilities and their spreading”.⁶¹ The Ombudsman had recommended this approach,⁶² and the General-Direction of the Social Reintegration and Prison Services had also adopted measures aimed at reducing the risk of Covid-19 permeating the penitentiary system.⁶³ The legislator carried these views forward by enacting Law no. 9/2020, of 10 April, creating an exceptional regime rendering the enforcement of penalties and of acts of grace more flexible in the context of the pandemic.

This law established: a) a partial pardon of penalties of imprisonment; b) a special regime of indult; c) an extraordinary regime of leave licenses for inmates; and d) an extraordinary regime of anticipation of early release. These rules did not apply, in any circumstance, to individuals convicted

⁶⁰ In fact, in para 31 the Court comes close to actually asserting this. However, in the abovementioned ruling no. 660/2021, 1 of the 5 judges attached an Opinion underscoring that, in her view, the situation is different as far as criminal proceedings are concerned.

⁶¹ Motivation of the Draft Law no. 23/XIV, in www.parlamento.pt (accessed 27 May 2025).

⁶² Recommendation no. 4/B/2020, of 26 March, addressed to the Minister of Justice, in <https://www.provedor-jus.pt/en/documentos/sistema-prisional-prevencao-do-contagio-sars-cov2-4-b-2020/> (accessed 27 May 2025).

⁶³ See <https://justica.gov.pt/COVID-19-Medidas-adotadas-na-Justica#ServiosdeReinseroePrisionaisDGRSP> (accessed 27 May 2025).

of crimes committed against members of the police or security forces, members of the armed forces and servants or guards of prison services in the exercise of their functions. On the other hand, these measures applied only to inmates sentenced through a final decision (*res judicata*) before their entry into force (11 April) and who were already serving the sentence.

a) Pardon

Pardon was possible to grant only to inmates convicted to a penalty of imprisonment⁶⁴ for less than 2 years, or convicted to larger penalties if the period remaining to be served was inferior to 2 years, and at least 1/2 of the penalty had been served.⁶⁵ Pardon was granted on the condition that its beneficiary would not commit an intentional offence in the subsequent year, or otherwise the pardoned penalty would be added to that applied for the new offence.⁶⁶ There is a somewhat wide number of offences for which pardon could not be granted, v.g. homicide, domestic violence, crimes against personal freedom or crimes against sexual freedom and self-determination.⁶⁷

Nevertheless, this regime was still applicable in cases that may be said to involve meaningful preventative concerns. This raised some debate in legal literature, namely that further priority should have been given to granting leave licenses over the approach of pardoning the penalty.⁶⁸ The latter carries greater sacrifice to the preventative purposes of penal sanctions, as it entails the extinction of criminal liability (notwithstanding the possibility of revocation).⁶⁹

⁶⁴ This includes not only imprisonment *sensu proprio*, but also other cases of imprisonment resulting from non-compliance with a fine or with substitutive penalties: Art. 2 (3) Law no. 9/2020.

⁶⁵ Art. 2 (1) and (2).

⁶⁶ Art. 2 (7).

⁶⁷ Arts. 2 (6) and 3 (5).

⁶⁸ See e.g. Brandão (2020a), 11 et seqq. and 16.

⁶⁹ Art. 4 (2).

b) Indult

Law no. 9/2020 established that the member of the Government responsible for the area of Justice could propose to the President a full or partial indult of imprisonment penalties applied to inmates who, at the entry into force of the exceptional regime, were 65 years old or more and suffered from a physical or mental illness or had a level of autonomy incompatible with staying in a penitentiary environment during such a pandemic crisis.⁷⁰ This possibility, however, did not apply to the offences for which pardon was also excluded, and it would yet have to comply with general rules on indult, namely insofar as concerns its revocation.⁷¹

c) Leave licences

Special leave licences would be fulfilled by placing the convict in house custody, subject to surveillance and certain obligations. This possibility depended on certain conditions – some of them equivalent to those required for ordinary leave licences –,⁷² and the leave would have a duration of 45 days, liable to renewal, with the period lapsed under the licence being computed as served time unless the licence were revoked.⁷³ This period of 45 days contrasts acutely with that of normal leave licences, which have a maximum limit ranging from 5 to 7 days, when granted by a court, and of 3 days, when granted by the director of the prison facility.⁷⁴

One of those special conditions was that the inmate was serving the sentence in the common regime or in the (more permissive) open regime,⁷⁵ and has already been granted one or two leave licences, respectively.⁷⁶

⁷⁰ Art. 3 (1).

⁷¹ Art. 3 (4) and (5) and Arts. 223, 227 (2) and (3) and 228 of the Code of Enforcement of Penalties and Measures Involving Deprivation of Liberty (Law no. 115/2009, of 12 October, as amended by Law no. 27/2019 of 28 March).

⁷² Art. 4 (1) (a).

⁷³ Art. 4 (1), (3) and (10); this computation as served time was in any event already the case in normal conditions: see Art. 77 (1) of the Code of Enforcement.

⁷⁴ Arts. 79 (4) and 80 (2) of the Code of Enforcement.

⁷⁵ During the leave licence, convicts who were serving the sentence under this open regime could be admitted to maintain the professional activity that they had already been admitted to carry out outside of the prison facility in normal circumstances: Art. 4 (4) of the Law no. 9/2020.

⁷⁶ See Art. 4 (1) (b) and (c) of the Law no. 9/2020.

Inmates serving the sentence in the stricter security regime were excluded from the possibility to be granted these special licences. The mentioned differentiation of regimes of execution of penalties of imprisonment or other measures involving deprivation of liberty (common, open, security) is tailored to better serve the rehabilitation of the convict, but it depends on such other factors as the risks faced by inmates themselves, the safety of the community, and order and security concerns.⁷⁷

Apart from inmates placed under the security regime and from the general exclusion effected in Art. 1 (2) of Law no. 9/2020,⁷⁸ these special leave licences were not limited in their scope by the same subjective and objective limitations as those mentioned above regarding pardon and indult, which is arguably consistent with the fact that they do not carry an extinction of criminal liability and are subject to control by the authorities.⁷⁹

d) Early release

Regarding early release, it could be anticipated – provided that a leave licence (as regulated in this exceptional regime, in the terms set out above) had been granted and successfully carried out – for a period equivalent to that which the inmate would have to serve in order to reach $\frac{2}{3}$ or $\frac{5}{6}$ of the penalty (depending, respectively, on whether the penalty was higher or lower than 6 years), to a limit of up to 6 months.⁸⁰

During the early release, adding to other conditions and without detriment to the application of more favourable rules stemming from the normal regime,⁸¹ the convict would have to stay in house custody, subject

⁷⁷ See Art. 12 (1) of the Code of Enforcement.

⁷⁸ Of individuals convicted of crimes committed against members of the police or security forces, members of the armed forces and servants or guards of prison services in the exercise of their functions.

⁷⁹ See Brandão (2020a), 15 et seq., who, however, expresses the concern that assigning to the penitentiary administration the competence to grant a leave licence for a period as large as 45 days (in contrast to the maximum of three days which it is normally admitted to grant), may amount, more than to a modification in the execution of the penalty, to an actual modification of the convicting sentence, thereby raising doubts issues vis-à-vis the constitutional provision that reserves certain decisions to the judicial branch (Art. 202 of the Constitution).

⁸⁰ Art. 5 (1) and (2).

⁸¹ Art. 4 (3), Art. 62 PC and Art. 188 of the Code of Enforcement.

to surveillance by social reintegration services and the police, in terms similar to those mentioned for leave licences.⁸²

Although Law no. 9/2020 was silent on the question of whether or not the time lapsed under early release should be computed as served time (in contrast with the explicit provisions on other measures addressed above), the correct interpretation is that it should, as it constitutes an incident of execution of the penalty of imprisonment,⁸³ and in any case it would be difficult to justify the differentiation vis-à-vis special leave licences.

e) Preventive custody

Finally, this exceptional regime did not address only penalties being served, but also brought forward some measures aimed at the flexibilisation of preventive custody, a coercive measure that may be applied during the course of criminal proceedings. It was established that the requirements that must be met in order for this coercive measure to be applied should be re-examined even if the ordinary mandatory term of 3 months set out in Art. 213 of the Code of Criminal Procedure had not been reached.⁸⁴

f) General assessment

Albeit well-intentioned in tackling the special hazards that the pandemic brought to inmates and other persons involved in the penitentiary system, the legislator did not ensure sufficiently egalitarian treatment to different types of convicts. One issue consisted of a differentiation made between convicts who had already begun to serve their sentences and convicts who had not.⁸⁵ While this differentiation was, at least at an early stage, largely

⁸² Art. 4 (3).

⁸³ See Antunes (2024), 119.

⁸⁴ Art. 7 (1).

⁸⁵ Some claims of inequality were dismissed by the courts: e.g. by the High Court of Coimbra, 07 October 2020, 719/16.4TXPRT-F.C1, in www.dgsi.pt, which overturned a ruling that had applied the special regime of pardon to a convict who had not yet started to serve the sentence; see also the ruling by the same Court, 07 April 2021, 380/12.5TXCBR-B.C1. This stance corresponds to the one defended by the Consultative Council of the General-Attorney's Office, Opinion no. 10/2020, in www.ministeriopublico.pt, pp 12 et seqq. and 32 et seqq. (accessed 27 May 2025).

offset by the protraction in the start of the execution of the sentence by convicts of the latter group,⁸⁶ other differentiations remain difficult to explain, notably between individuals who were pardoned on the basis of this exceptional regime and individuals who were serving a sentence of imprisonment through the regime of house custody.⁸⁷

The regime introduced by Law no. 9/2020 remained in force long beyond the constitutional state of emergency (and even the exceptional administrative state later adopted), due to an amendment carried out by the Law no. 17/2020, of 29 May. This law disconnected the being in force of this exceptional regime from the being in force of the state of emergency. Instead, it prescribed that the exceptional regime would persist until a future law would declare otherwise. Such a law was enacted only on 15 December (Law no. 86/2021).⁸⁸ It established the cessation of Law no. 9/2020, without detriment to its applicability to already pending cases.

The exceptional regime introduced by the Law no. 9/2020 produced tangible effects upon the numbers of prison population: in 2020, a decrease of 10,9% was recorded, which has largely (though not exclusively) been attributed to this exceptional regime,⁸⁹ although by 2021 the numbers seemed to have stabilised.⁹⁰ According to Draft Laws no. 885/XIV/2 and 886/XIV/2, the exceptional regime carried the ‘release’ of over 1.381 inmates, 119 of which between March and June 2021, when a state of emergency was no longer in force.

5. Conclusions

The Covid-19 pandemic brought many and weighty challenges to legal systems worldwide, notably at the constitutional and the criminal law levels,

⁸⁶ Opinion no. 10/2020, *cit.*, pp. 10 et seqq. and 32, recommended public prosecutors to follow this approach, based on Art. 7 (7) (c) of Law no. 1-A/2020.

⁸⁷ See Antunes et al. (2020), 15 et seqq. See Arts. 42 (1) and 43 (1) PC.

⁸⁸ The Draft Law that was at the origin of Law no. 86/2021 (as well as Draft Law no. 885/XIV/2) had already been introduced in June 2021, and the Superior Council of Magistrates and the Superior Council of the Public Prosecution, albeit with the caveat that this issue is essentially of a criminal policy character, had both noted that the reasons underpinning the exceptional regime were no longer met: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=120955> (accessed 27 May 2025).

⁸⁹ See Ishiy (2021), 153 et seqq.; see also Direção-Geral da Política de Justiça (2021), 261 et seqq.

⁹⁰ See Direção-Geral da Política de Justiça (2021), 263.

and the Portuguese legal system was no exception. The velocity of the propagation of the disease and the substantial loss of lives it brought, as well as the uncertainty as to how its effects would play out, prompted the different powers of the State to act swiftly with a view to controlling the damage as much as possible. If one adds to such factors the absence of a precedent that might have served as a reference to deal with these challenges, one must acknowledge that some of the questionable approaches taken by public authorities – or, in some cases, actual *mistakes* – are excusable. In part they resulted from gaps in national legislations that were unprepared to address public health crises with such characteristics.

An example is the absence of an offence specifically aimed at protecting public health in the event of a highly transmissible disease.⁹¹ Since designing such a criminal offence is an exercise that requires maturation, it is understandable that, as a more immediate solution, the Portuguese legislator should have looked for the offence of disobedience to ensure the efficacy of health authorities' orders of confinement and active vigilance. However, the offence of disobedience should as a principle be limited to exceptional cases, for what it ultimately protects is the State's authority as such, whereas criminal punishment should instead focus on the more substantial communitarian interests that the State is charged with protecting (in the case, public health).⁹² Another example where a hasty reaction to public concerns nearly led to over-criminalisation was 'abusive vaccination', which is already largely covered by pre-existing legislation.⁹³

In some cases, the legislator did identify the problems correctly and sought to address them, but failed in the design of the solutions thereto. For instance, albeit well-intentioned in tackling the hazards that the pandemic brought to inmates and other persons involved in the penitentiary system, it failed to treat with sufficient equality different types of convicts,⁹⁴ a goal that should not be relinquished even in times of constitutional exception. In the same vein, some approaches proposed to the issue of liability of medical staff in *triage* situations lacked in awareness of the fact that the principle of equal dignity of all persons and of equal value of all lives remain fully

⁹¹ See *supra*, § 2.2.

⁹² See *supra*, § 2.3.

⁹³ See *supra*, § 4.1.

⁹⁴ See *supra*, § 4.4.

applicable in exceptional circumstances, and, accordingly, so do the criteria by which decisions to deploy or withhold resources should abide.⁹⁵

In 8 July 2021, the Presidency of the Council of Ministers established a technical commission to study and prepare draft legislation amending the current legal framework in the light of the experience brought by the pandemic,⁹⁶ but at the time of writing no structural legislative reform was carried out – neither was a public health offence enacted.

But there are also causes for apprehension at the activity of judicial branch of the State during the pandemic. Arguably, Portuguese courts – including, and most relevantly, the Constitutional Court –, albeit with some important exceptions, were overly permissive of legislation restricting fundamental rights to an outstanding extent. At the organic level, the leeway that was granted on the Government to legislate in criminal matters without the authorisation of the Parliament was excessive.⁹⁷ At the substantive level, the principle of legality was jeopardised in both its dimension of determinability (*lex certa*) and of non-retroactivity (*lex praevia*).⁹⁸

History has shown repeatedly that exceptional political contexts fertilise the ground for overly punitive approaches and pave the way for permanent individual rights restrictions. Herein lies the importance of critical reflections on the impact of the Covid-19 pandemic upon criminal law.

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⁹⁵ See *supra*, § 3.

⁹⁶ Dispatch no. 6668/2021, of 8 July.

⁹⁷ See *supra*, § 2.3.

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