

WORDS BEYOND THE PANDEMIC: A HUNDRED-SIDED CRISIS

Coord.: José Reis
A collective work by CES

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Centro de Estudos Sociais
Universidade de Coimbra



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COURTS, AN (ALMOST) ABSENT SOVEREIGNTY POWER

João Pedroso

The “constitutional state of exception” is subject to political supervision by the Assembly of the Republic (AR) and to judicial control. The Constitutional Court (CC) is responsible for verifying the constitutionality “of acts of decree and execution of the state of exception that have a normative nature, and the other courts shall be responsible for verifying the legality of acts, as well as the application of the criminal and civil liability arising from their practice”. Thus, in a democratic rule of law, fundamental rights cannot be limited without the courts being able to control the constitutionality or legality of the exception.

Article 5 (1) (e) of the European Convention on Human Rights and Article 27 of the Constitution of the Portuguese Republic (CPR) prohibit the compulsory internment of “suspects”, only allowing it for persons positively infected. However, the governments of the Madeira and Azores regions imposed arriving passengers – even in situations where the laboratory test was negative for COVID-19 – the obligation of prophylactic isolation for 14 days, in a hotel guarded by the police.

However, the CC was not called upon to decide in abstract control of constitutionality about these measures restricting fundamental rights. And as far as the courts are concerned, although the impact of the state of constitutional exception has not yet been studied, it can be said, given the information available,

that they were “almost absent”, even in terms of fundamental rights protection. The courts operated in a logic of “minimum services”, with the judicial deadlines suspended, ensuring only the urgent acts related to the validation of police detention but not always proceeding with the other urgent cases, namely those related to family and children’s rights. Only the case of the Ponta Delgada Judicial Court is known, which granted a request for the immediate release of a citizen placed in compulsory quarantine in a hotel, having tested negative to COVID-19, because it constituted an “unconstitutional and illegal deprivation of freedom”.

The declaration – with general mandatory force – of unconstitutionality can only be requested from the CC by the Presidents of the Republic and the AR, the Ombudsman, the Attorney General of the Republic, a tenth of the Deputies of the AR, and the Prime Minister. Therefore, as an alternative, and with respect for our society’s plurality, it is imperative, on the one hand, that the initiative to control constitutionality, in the abstract, be extended to citizens organised in associations or through petition. On the other hand, it is necessary to broaden the concept and the legal and practical interpretation of “urgent act”, so that, in situations of judicial deadline and judicial activity suspension, a greater number of rights violations are resolved by the courts.