

Multilevel Protection of Fundamental Social Rights



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Derogations in Time of War or Public Emergency

Article F – Part V ESCR - Reflection

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Fundamental Social Rights

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1. The matter at stake

The new Corona Virus (Covid-19), due to its epidemic characteristics, is forcing so long and so on, extraordinary measures which will mean several restrictions to the citizens' rights that are predicted in the European Social Charter Revised. This new virus it's highly contagious between humans, and the restriction of human interaction was considered as the best solution in order to prevent the propagation of this disease.

That way Governments around the globe took action and, among other measures, proceed in closing borders, shut down schools and restraint their citizens in their own houses, forbidding them to leave their homes or creating rules to control social interaction. This huge restriction on civil rights reveals possible only because of the article F, Part V of the European Social Chart Revised (ESCR) – Derogations in time of war or public emergency.

With this study we intend to dwell on Governments action, in particular the Portuguese Government, accordingly to their own Constitutional Emergency Law, Administrative principles, the teleology of article 11 of the Chart (ESCR) and the relevance of some of the measures accordingly to their purpose. As stated by TERRINHA, *“podemos tomar a constitucionalização dos estados de exceção como dispositivo imunitário do próprio sistema jurídico-constitucional, com o que assegura a sua adaptação autorreprodutiva a um devir incerto”*.¹

The Article 11 refers that the parties are obligated to take appropriate measures to prevent as far as possible epidemic diseases. In terms of prevention we can discuss about how fast Portugal leaders react, referring to one particular constitutional principle which is the Prohibition of Protection Deficit. This principle is in violation when leaders who had duty of action and protection take insufficient or late measures, in that case the criterion must be the level of probability in which the injury or the threat will become permanent.

As stated by DETLEF MERTEN, *“the excess and deficit prohibition are in the antipodes of each other and the last comes from the first one. The excess prohibition it is directed against the activity of the State and the deficit prohibition is directed against its passivity.”*² It reveals essential that governments, considering booth this principles, find a half term that allow them to act pertinently and not damage anything more than they as

¹ TERRINHA: 2020, p.3

² As quoted by MAC CROVIE: 2017, n.707

to. In this weighting we must consider the goods in stake and if the counterparts aren't overestimated, the protection must protect the nuclear demands regarding that particular interest.³

2. The (seeming) Violation of the Constitution

2.1. The Portuguese Government Away

That being said, we must look up on those principles as a back stage guidance when using emergency state regimes and when social rights are being restricted so the harm done be reduced to the minimal as possible.

Recently, COSTA GONÇALVES, has bring to our attention that the Portuguese Government has been elaborate administrative rules in order to restrict social rights.⁴ Besides that raises a constitutional problem, it also raises an important question regarding the obligations of Portugal to the chart, in which represents a risk of arbitrary and without control limitation or suspension of social rights. The constitutional problem is that considering the emergency state doesn't affect the application of constitutional rules regarding the operation of the sovereign bodies, in which the Portuguese constitution states on its article 19th n°7: “*A declaração do estado de sítio ou do estado de emergência (...) não podendo nomeadamente afetar a aplicação das regras constitucionais relativas à competência e ao funcionamento dos órgãos de soberania*”, which means that doesn't affect the application of article 164th of the constitution that refers to the exclusive jurisdiction of the parliament to produce law in state of emergency. The only way the Government is allowed to produce law in some matters as Rights Freedoms and Guarantees, Social System and the National Health Care Service, which involve social rights, is by having a formal authorization of the Parliament what did not happen.

That is a relevant question when confronted with the part of article F of ESCR that states “Any party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the secretary general of the council of Europe fully informed of the measures taken and of the reasons therefor”, and accordingly to the Portuguese constitution how represents the state in these matters is the parliament and not

³ CANARIS: 2006, P.123

⁴ GONÇALVES, 2020 in “Abdicação parlamentar na emergência e continuação da abdicação na calamidade”

the government. The raising question is if that composes a reason to refuse or prevent the decret of state of emergency? And if so should it be decreed it's nullity?

KONRAD HESSE, states that the normative strength of the Constitution prevents that it's supremacy be overtake by politic and economic interests.⁵ However, what is at issue it's not a politic or economic interest, but an interest of public health and protection of life, which is a fundamental value. So, in order of the ponderation we spoked, regarding the balance between a deficit or excessive protection, the conclusion we achieved is that, that last value of public health must prevail, as long as the measures reveals effective in protection of that core value. And another question must be asked, what if the normal and regular legislative way's weren't ineffective or to slow? That way the constitutional law itself would be in the way of protective measures to save its own constitutional order.

That's being said, there's only one possible conclusion: we must look at the government action as being always accountable towards the parliament and the president, because at the end of the day the responsibility of the government stands under the parliament and the president. If we didn't consider that way, than it would lack legitimacy to apply these measures restrictive of fundamental rights and Portugal would be in violation of the chart.

However, we mustn't look at these restrictions from a narrow perspective, instead we must consider them as being a protection of social rights towards the future. If these measures were not to be taken on the right moment, then the social rights would be unattainable for a longer time. So we restrict social rights in order to assure them in the future.

2.2.The Portuguese Constitutional Emergency Regime

There's another subject to be take in account when referring to the legitimacy of government action in times of emergency, which is the structure of these constitutional regime itself. We're given the impression that the constitutional regime of the state of emergency or public calamity were predicted in an abstract comprehension of the matter, and the constitutional legislator itself didn't deepen this regime because the expectation of its utility was low. That way, when in need, a realistic and teleological interpretation must be made in order to understand what values and principles are in stake so that way the legislation and administrative acts that fill in the course of action doesn't violate the

⁵ As quoted by Gomes Canotilho, 2019, p. 246

roots of constitutional law. In a 2018 study, made by Christian BJØRNSKOV and Stefan VOIGT⁶ from Oxford University and New York University of Law, that leaned on the architecture of emergency constitutions by analysing the constitutional diplomas of several countries they reach two relevant conclusions:

“we observe a clear long-run trend to allocate more, rather than less, powers to the executive during times of emergency”;

And also that *“it is generally accepted that in many countries constitutional text widely diverges from constitutional reality. It is, therefore, unlikely that politicians always meticulously stick to the constraints laid down in the respective emergency provisions and it would be interesting to analyse differences between the de jure and the de facto emergency constitution more systematically”.*

3. Principles and Governance Fundamental Guidelines

Either way that's half solution, because if we accept that the executive exceed constitutional precepts, what's the political guidelines in order to respect that balance between a deficit and excess of protection? The answer lies on the principles, both administrative or constitutional. In spite the type of measures in stake, both administrative or legal, they need to respect the standard principles regarding the confidence of the citizens. The respect of that basic principle its only possible when looking towards some other basic constitutional principles which can be included with in this first one.

3.1 The Principle of Compensation of Losses

The principle of compensation of losses must operate in order to apply the responsibility of the state which is reflected in article 22nd of the constitution. It must be created conditions to insure a fair compensation in case of unlawful or illegitimate violation of rights, freedoms and guarantees. That principle it's inserted in the prohibition of excess principle, being that article a legal formalization of this. This matter conduct us to the limits of the government action, as its well known that *“os limites da margem da livre decisão decorrem também da exigência constitucional de uma tutela jurisdicional efetiva dos particulares perante a administração”*⁷, where this author remember that all of

⁶ BJØRNSKOV & VOIGT; 2018, p.126

⁷ SOUSA: 2008, p.201

us, as citizens have the right to demand responsibilities from the executive, and that constitutes a limit to its actuation.

3.2 The Principle of Universality – French Case

With regard to the effectiveness of principles in the term of emergency state, from France came to us a perfect example for violation of Universality principle, regarding the right of suffrage. When referring to that right, we understand that it must be general, equal, direct, secret and recurrent.⁸ The right of suffrage more than a right is an instrument of democratic achievement because it is through it, that the conversion of will into power is democratically legitimated, the legitimate organization of the distribution of powers is established, and the creation of political personnel is proceed. In France, before the declaration of the emergency state there was scheduled municipal elections and even with the emergency state declaration and the mandatory confinement of some citizens the French Government didn't postpone the electoral act.⁹

As consequence of that decision, not only because of the citizens how where forbidden to leave their homes but also because of the general public with fear of contagious, result in a negative record of abstention which went over the 55%. This French Government decision was against the general duty characteristic of the suffrage right, which hurts this election with lack of legitimacy.

3.3. Natural Rights – Jus Cogens

In spite of all the restrictions allowed by the declaration of the emergency state there's a bunch of rights which is considered natural rights, and for that effect they mustn't ever be touched. Several of this rights and principles arrive from the international law. As states GOMES CANOTILHO, “a vinculação do Estado ao direito internacional começa, logo, pela observância e cumprimento do chamado **jus cogens** internacional”¹⁰, in fact there are some principles that we understand as being cross-cut to all human beings. These rights are transplanted to internal law as human rights as basic core to all legislative acts.

⁸ CANOTILHO: 2019, p.301

⁹ <https://observador.pt/2020/03/15/primeira-volta-de-eleicoes-municipais-em-franca-marcada-por-abstencao-recorde/>

¹⁰ CANOTILHO: 2019, p.232

The justification to these immunity even in plane emergency state is due to, as this author refers, “A vinculação do Estado pelo direito internacional é, em alguns Estados, de tal forma Intesa que leva as próprias constituições internas a proclamarem o direito internacional como fonte de direito de valor superior à própria constituição”, therefore there is such a huge rooting of this rights in the society that they stand for themselves being truly unbreakable. That’s one of the international obligations referring by the end of the first number of article F, “provided that such measures are not inconsistent with its other obligations under international law”. With HANS JONAS, we refer regarding these unbreakable principles as protected by the Ethical Principal of Responsibility, in which the author advocate that governments and even people must act in a way that the effects of those actions be compatible with the preservation of genuine human life, which is the life that the effectuation of those rights wants to hold.¹¹

3.4. “Derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation”

This part from the article F, send us to a field of principles reporting to the administrative actuation. In fact, that statement isn’t more than what we know for, widely understood, proportionality principle which means that “the interference must be conducive to that end. It must be the least intrusive intervention. And it may not be overly intrusive.”¹² This principle it’s composed by three others: Prohibition of Excess (which we have already approached¹³), Adaptation of means and Enforcability.

Proportionality, *strictu sensu*, is the obligation when acting to compose the disadvantages with the benefits of the measure and that principle give us the limit we can look up on to see if the emergency measures that implies the restriction of social rights still are in order. We need to see if the benefits of the restriction are justifiable and largely superior to the disadvantages of their limitation.

The adaptation of means forbid de adoption of administrative or legal conducts incapable of reaching the result that they concretely intend.¹⁴ That way we understand that the demand for adaptation of means must be susceptible of prove that the act in question is fit to the purpose of its adaptation. It’s nothing more than a control in which must be taken in consideration the relationship between the way chosen and the end. This

¹¹ JONAS: 1985

¹² ENGEL: 2001, p.3

¹³ Vide chapter 1

¹⁴ SOUSA: 2008, p.214

principle must be conducted to social rights, and we can't forget that this rights implies a positive action of the state, so what is at stake is a suspension of certain executive activity in order to protect some grater good. When we talk about adaptation and proportionality regarding social rights the positive attitude of the state must not be eliminated but instead it should be only reduced to a minimum that satisfy the purpose of that restriction.

For last but not least, the enforceability principle conduct us to an understanding of least possible intervention, which means the less disadvantage achieved in the personal sphere of the citizen, the better. We talk about enforceability by dividing its effectuation in several elements such as material enforceability, the mean must be the less restrictive of rights possible, locally enforceability, the less the field of restriction the better, temporal enforceability, as minor the duration of the restrictions last the better, the restrictions must operate for the minimal time lapse possible, personal enforceability doesn't really apply to the emergency state because the restriction is general and covers all the citizens.

4. The reason of the limits during emergency state

As states the article 289th of the Portuguese Constitution, it is not possible to review the constitutional law during the validity of the emergency state. The teleology of the article it's the same that are behind all restrictions to government rules, which is, to forbid that during that exceptional circumstances the intuitional foundations are called into question by any deviation of power.¹⁵

As seen before the prevailing tendency in most states is to the executive in functions to accumulate powers in order to restore the normal and health constitutional reality. That increase of functions may appears as a paradox because the society fall back on the enemy of what intend to protect: democracy. And it's precisely by contain democracy, in respect of these principles, that democracy where able to prevail. It's in order to ensure the effectuation of social rights into the future that in the present they must be restrained.

However serious the circumstances reveal themselves, we insure that our political, democratic and social institutions prevail and Portugal will still be able to, in the future, but at the same time in the present, carry out the obligations ratified in the chart.

¹⁵ CANOTILHO: 2019 p.1063

Bibliography

BJØRNSKOV, Christian & VOIGT, Stefan

2018 – “The Architecture of Emergency Constitutions” in I.CON Vol.16 P.101-127

CANARIS, Claus-Wilhelm

2006 – “Direitos Fundamentais e Direito Privado”, 1ª Reprint (2003 edition). Coimbra – Almedina Editions S.A.

CANOTILHO, José Joaquim Gomes

2019 – “Direito Constitucional e Teoria da Constituição”, 7ªEd. Reprint 2019. Coimbra – Almedina Editions S.A.

ENGEL, Christof

2001 – “The Constitutional Court – applying the proportionality principle – as a subsidiary authority for the assessment of political outcomes” in *Gemeinschaftsgüter: Recht, Politik und Ökonomie* – October 2001

GONÇALVES, Pedro Costa

2020 – “Abdicação parlamentar na emergência e continuação da abdicação na calamidade”, Observatório Almedina, 21st May 2020.

<https://observatorio.almedina.net/index.php/2020/05/21/abdicacao-parlamentar-na-emergencia-e-continuacao-da-abdicacao-na-calamidade/> - consulted in 10th June 2020

JONAS, Hans

1985 - Imperative Of Responsibility In Search Of An Ethic For The Technological Age - The University of Chicago Press, October 1985

MAC CROVIE, Benedita Ferreira da Silva

2017 – “Os Limites da Renúncia a Direitos Fundamentais nas Relações entre Particulares”, 1ªEd. Coimbra – Almedina Editions S.A.

Multilevel Protection of Fundamental Social Rights

SOUSA, Marcelo Rebelo de

2008 – “Direito Administrativo Geral – Introdução e princípios fundamentais” Vol.I
3ª.Ed. Lisboa - Dom Quixote

TERRINHA, Luís Heleno

2020 – “Estado de Exceção Biopolítico e Suspensão de Direitos Fundamentais”
available at: <https://ssrn.com/abstract=3592726>