TRANSLATION

Original: Portuguese

THE ACTION OF THE SECURITY FORCES AND SERVICES IN THE EXISTING PANDEMIC CONTEXT

(Position of the Inspectorate General of Home Affairs)

SUMMARY: There is regulatory coverage in the law in force for the action of the Security Forces and Services that, in the face of someone coming from a territory seriously affected by the pandemic or who shows signs of the disease associated to it, impose, if necessary using coercive means, that person to be subjected to screening tests or, if that is the case, to civil confinement.

To be noted that, in a situation such as this one, and always complying with the principles of necessity, proportionality, subsidiarity and suitability, the use of the force may, as a last resource, be used to impose the conduct required by the circumstances.

1 – It is currently in force the declaration of pandemic, issued by the World Health Organization (WHO), deriving from the spread of the virus called Covid-19 [sic].

The moment is thus of urgency, recognised by the Portuguese State, to begin with by the declaration of the state of alert.

2 – And that urgency gathers the efforts of all of us in a combat for the good of all.

All: of the public and private sectors.

All: in the professional and private remit.

All: at home, in places we must go, wherever we are.

In brief, all, in the broadest sense of the word.

In this context, the Security Forces and Services have a functional role, we may even say, without the fear of overindulgence (and, no doubt, together with other actors), truly heroic.

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Heroic, because they are in the frontline against a dangerous reality and dangerously unknown.

Heroic, because it entails an exposure that only an abnegated courage can accept.

Heroic, because it gives to others what they may be denying to themselves.

Heroic, because it requires the most unselfish sense of mission that is untrusted to those persons: to give everything, if necessary.

Heroic, finally, because it is performed with the spirit that the mission demands: awareness of the dangers and moving forward without hesitation through a path that has not a large space for the natural instinct of self-protection (for the natural instinct of self-preservation, we may say).

The challenges are several.

Let us consider the situation of someone, either because he/she comes from a country seriously affected by the pandemic or because he/she shows signs of the disease associated to it, who refuses to adopt the preventive measures widely publicized and well known by all, of which the most important is the need to be submitted to a sanitarian screening test and even to civil confinement measures.

Then, what to do? What measures may the Security Forces and Services adopt?

It is to the answer to this question [sic] that will be dedicated the next lines.

3 – The Law has a specific purpose: to create the conditions for the maintenance and subsistence of the model of society that a given human community intends to give life to.

The social contract includes a corpus of conditions that is incumbent upon the State to promote, create, implement and put into force exactly through that fundamental instrument that translates into a set of rules, principles and values that reflect the kind of social organization that is desired in a certain historic moment and which, precisely for that reason, is coercively imposed if necessary.

This is a subject on which the lines of this text cannot elaborate. But we cannot keep from making a brief note to make clear that the Law comprises the essential

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instruments to provide an answer to situations, whenever the reality imposes unexpected challenges such as that we face today.

We do not deny the space for discussion of a legal and constitutional nature or even of legislative policy on what may or may not be changed or what legal measures may be adopted in the future to face the realities we encounter today.

Furthermore, we consider that the on-going experience is a legitimate pretext for such a consideration *de jure constituendo*.

However, that assertion cannot be an obstacle to the search for solutions to the problems that society faces.

And the Law, *de jure constituto*, has those solutions – so we think and so we will try to illustrate.

As a matter of fact, the mutation of the reality claims from the Law answers that cannot be denied, under penalty of creating a crises regarding the very social model that the Law intends to promote, and that in the name of that same social model.

Reality changes. The Law must look at the change and answer adequately in order to make possible the system to subsist.

It is thus a symbiosis of reciprocity between the Law and the reality that is represented in this manner of understanding things.

However, we must since now note, in a register of anticipation, that the analysis to be undertaken will be no more than the realisation of traditional rules and institutes, known by all and that right now give the answer that is possible, necessary, and, for now, appropriate to the demands that the situation requires.

So, let's continue the analysis.

4 – The situation is of danger. Widespread danger. Danger to public health. Danger to life. And always a real danger.

The danger is the possibility of harm.

It is in this environment of danger that the solution must be built. This is the essential factor that commands the search that must be made.

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In this case, the danger is the main character in what objectively represents the exercise of a fundamental freedom: the freedom of movement.

An infected person carries a general danger which has an effective and serious potential to become real. That danger is neutralized, in a first but necessary (even indispensable) approach, by a diagnosis and civil confinement.

If the confinement is voluntary (the sole solution ethically acceptable), there is no issue.

Quid juris, what if the person intends to walk freely in public areas?

The freedom of movements of a person infected with Covid-19 necessarily (we may say, certainly) comprises the spread of a highly contagious and dangerous disease. Besides, this is one of the characteristics of this disease: the easy spread. So, the mere fact of walking in the streets near other persons or through places where other persons will pass constitutes an action adequate to the spread of the disease that is extremely contagious.

In the face of these elements, we cannot pass without mentioning the provisions of Article 283, par. 1, subpar. (a), of the Criminal Code: a criminal offence of spread of disease.

The incriminating type is the following: whoever spreads a contagious disease and thereby endangers the life or physical integrity of others (is punished with a penalty of imprisonment from 1 to 8 years).

It is a general or common criminal offence since it can be committed by anyone.

There must be a spread of a contagious disease, but the way to commit that spread is not defined and so, accordingly and in what concerns the way of execution or concretization of the spread, it is a criminal offence committed in a free manner since there is no requirement regarding the specific mode to make that spread.

This is a criminal offence of actual danger because the type requires a certain event, which is the danger itself in relation to concrete juridical assets (in concrete, life and physical integrity, in this case with qualified reference in what concerns the danger).

Having in mind the previous paragraph, we quickly qualify the criminal offence as of the result: the characteristic result is the danger itself.

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And, finally, in subjective terms, it is a wilful criminal offence.

Being a wilful criminal offence of actual danger, there is the question that the doctrine has been debating of the dogmatic construction of the criminal intent of danger.

We will not elaborate on the subject, by lack of space. But we cannot go without mentioning that it follows the construction that characterises the criminal intent of danger in parallel with the figure of necessary criminal intent, with the intellectual element distinctive of this type of criminal intent (that is, there is an actual configuration of the possibility of harm that characterises the danger), together with two negative elements: no self-acceptance of the danger, because if there is a self-acceptance of the danger then we will be dealing with self-acceptance of the very harm and then the criminal intent will be that of harm and not of danger; and no self-reassurance with the non-production of danger, because then there will be no criminal intent, the situation being reduced to the figure of conscientious negligence (the construction described follows closely the understanding developed by Rui Pereira in his master's degree dissertation precisely on "The criminal intent of danger").

If another is the psychological attitude of the agent towards the fact, then we may be talking about other types, namely the types of physical harm or even homicide.

Above, we have entered into the dogmatic specificity of the construction of the public figure of the criminal intent of danger precisely because it translates, in a clear way, the psychological attitude, so we think, of who, being ill, decides to walk freely in the street: that person cannot, in truth, be excluded from the fact that he/she characterizes the type of danger of spread of a contagious disease.

So, whoever walks in the streets infected with Covid-19 commits a criminal offence of spread of a contagious disease.

At this point, a new kind of considerations must be elaborated.

The special part of the criminal law (it is intentional not mentioning only the Criminal Code) foresees the incriminating types when the criminal offence is consummated.

However, given the dangerous character of the foreseen conducts and the serious manner they harm or threat to harm the juridical assets whose protection is intended,

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the law foresees the possibility of intervention of the criminal law in previous phases to the effective perpetration of the incriminations.

We will now refer to the figure of the attempt.

In accordance with the provisions of Article 22, par. 1, of the Criminal Code, there is an attempt whenever the agent commits acts of performance of a criminal offence that he/she decided to commit.

We will leave aside, for the moment, the development of the elements of the attempt in these lines that, in the face of the core intended, are already extensive. We cannot, however, restrain from highlighting that, in order to have an attempt, it is necessary the performance of acts of execution of a criminal offence that the agent decided to commit.

The three subparagraphs of paragraph 2 of Article 22 of the Criminal Code establish the several modes of the attempt, in what concerns the degree of execution, namely the accomplished attempt and the non-accomplished attempt.

We note that the attempt is necessarily wilful (we know of some argumentation on the extent of this assessment, because it is passible of defence the exclusion of the possible criminal intent from this remit – cf. Faria Costa in his dissertation *Tentativa e dolo eventual* – we opt however for the perspective that allows all kinds of criminal intent in the figure of the attempt).

It is important, in what concerns this text, to pay some attention to subparagraph (c): the acts of execution are those that, according to common knowledge and excepting unforeseen circumstances, are of such nature as to make expect the development of acts of the types mentioned in the previous subparagraphs.

Now, a person infected with Covid-19 who decides to walk freely within the community commits acts that will lead to others, now capable of producing the characteristic result, that is to say the spread of the contagious disease, a spread that will cause a serious danger to the health of third parties and even to life itself.

The exponential spread of the danger (which seems to approach the situation to that of the abstract danger) does not prevent us from considering the concrete danger. It is,

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in effect, a concrete danger that is undeterminably multiplied. Thus, the singular seriousness of the situation.

We are, therefore, in the remit of the unaccomplished attempt of a criminal offence of spread of a contagious disease. An attempt that is, we note, foreseen by paragraph 1 of Article 23 of the Criminal Code.

In view of such situation, there is a space for the procedural action legally foreseen for this kind of situations that may even be classified as wilful criminal offence (Article 255 of the Criminal Code).

And, considering the incrimination, please note the possibility of the remand in custody (Article 202 of the Code of Criminal Procedure).

On the other hand, it is admissible that the compliance by the agent with the necessary measures to mitigate the danger that he/she carries in himself/herself may be considered in the remit of the rules of relinquishment (Article 24 of the Criminal Code).

Thus, this is an answer that seems fit to the situation above typified.

5 – Other answers, having in mind the specific characteristics of the situation that reality, always prodigal, offers, may even be found by the intervention of other dogmatic figures, such as the case of self-defence (Article 32 of the Criminal Code).

As a matter of fact, it seems acceptable the intervention of the officer that intends to avoid that someone infected begins an action of spread of the contagious disease, in the circumstances and with the effects above mentioned.

6 – Another kind of considerations must now be added to these lines, even if in a necessarily brief way.

The constellation of cases that have been discussed involves the infected agent, clearly infected or, at least, apparently infected.

It goes without saying that if it is proved that, after all, the person was not infected with Covid-19, although he/she has in fact the “aspect” and the symptoms of the disease, then the rule concerning the error regarding a state of things that, if they

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existed, would exclude the illicitness of the fact, will be applied; that is the rule foreseen by paragraph 2 of Article 16 of the Criminal Code. The solution will be the exclusion of the criminal intent, maintaining in general the possibility of negligence, which will always be discarded since it does not typify any non-accomplishment of the duties of care (rather, on the contrary).

We must, however, face the situations in which people arrive at the national territory from places seriously affected by the pandemic or other situations that may constitute an especial seriousness (not necessarily based in objective evidence of effective contagiousness – cough, respiratory difficulties) in this context of widespread danger.

In these cases, there is a possibility of action under dogmatic figures that legalise a restrictive action of the rights. We are talking about the right of necessity, foreseen by Article 34 of the Criminal Code.

In effect, we do not cease to be in the face of a situation of danger that must be reduced or discard (by way of a test or temporary confinement).

It is an area of intervention perhaps more peripheral but one that still has dogmatic support, in terms that we will not analyse now, but that, given its relevance, we cannot pass without identifying with a summary proposal of solution (actually, in line with what has been proposed in the previous paragraphs).

The special difficulty of the concretisation of what is proposed derives from the degree of danger inherent to the situation, besides the fact that all action must be guided by the always present criteria of suitability, necessity, and proportionality, which can only be evaluated on a case-by-case basis.

7 – What we support is reinforced by the state of alert.

As mentioned in the beginning of this brief dissertation, the government declared the state of alert in accordance with the provisions of Articles 8 and 9 of the Base Law of the Civil Protection, approved by Law No. 27/2006 of 3 July 2006.

The state of alert, besides other requirements, imposes an obligation of collaboration from all citizens, according to the provisions of Article 11 of the Base Law of the Civil Protection.

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The refusal to obey the orders and recommendations issued by the authorities of civil protection in the remit of the fight against the pandemic leads to criminal responsibility for the criminal offence of disobedience (Article 11, par. 2, of the Base Law of the Civil Protection), with an aggravation in its minimum and maximum limits duly foreseen by law to the criminal offence of disobedience (Article 6, par. 4, of the Base Law of the Civil Protection).

The incriminating type that will be a referential in this context is that of Article 348 of the Criminal Code.

It is a solution that presumes a **legitimate** order, whose non-compliance with is criminally punished in accordance with the provisions of the criminal offence of disobedience.

Thus, the question that nevertheless we must answer is if the order of a member of the Security Forces and Services, once before a person coming from a territory that is seriously affected by the pandemic or someone who shows signs of the disease associated to it, is **legitimate** when imposing the necessity of the person be taken to be submitted to a sanitarian detection and, if needed, to civil confinement. Obviously, without prejudice that, after being taken, the sanitarian evaluation be performed by medical staff.

Based on the analysis made, the answer can only be positive.

8 – Let us explain, by other means, what we think is noticeably clear but which we want, nevertheless, to emphasize.

The analysis that is made is essentially based on the remit of the criminal law, since this is its basis.

The Inspectorate General of Home Affairs, with competencies, among others, in the disciplinary area, cannot keep from subscribing that same understanding, which shows that all that has been said before has naturally a repercussion, and *mutatis mutandis*, in the disciplinary field, with the corresponding consequences.

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9 – We leave here, in a brief way, a general framework of solutions that are no more than the answer the system gives to face this kind of situations.

The concrete cases will be the object of a solution that, among the foreseen legal hypothesis, proves to be the most suitable.

It is also certain that the solutions herein explained derive from the reading that are the most adequate to the circumstances under the Constitution of the Portuguese Republic, namely the provisions of Articles 9, subpar. (b), 18, par. 2, and 27 of that fundamental law.

And those solutions are the ones that are considered in the present moment.

In conclusion:

We may say, in a clear way, that the action of the Security Forces and Services is fully covered by the law in force when, in the face of someone coming from a territory seriously affected by the pandemic or who shows signs of the disease associated to it, those Forces impose, if necessary using coercive means, that person to be subjected to screening tests or, if that is the case, to civil confinement.

We must note that, in a situation like this, and always with respect for the principles of necessity, proportionality, subsidiarity and adequacy, it is possible to make use of the force to impose the conduct required by the circumstances.

The right of necessity (a figure foreseen by Article 34 of the Criminal Code) authorizes, so we consider, such a solution.

In this moment of urgency that gathers all of us for a global collaboration in the fight of a serious menace, the Inspectorate of Home Affairs clearly acknowledges its role, trying to contribute, in its scope of action, to the performance of difficult and dangerous tasks that are ascribed to the Security Forces and Services that, in the field, do their best to protect the community.

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