

Limits on rights of assembly and protest

1. Social peace and calm is largely concomitant with the peaceful exercise of rights and freedoms, and many people even take the view that “public order” basically involves two elements: oversight of the specific elements of human dignity on the one hand, and the factors underlying normal social harmony and the functioning of public and private institutions on the other.

In seeking to ensure the safety of the community, all legislative systems cover the possibility of restricting fundamental rights that may conflict with that aim through the appropriate use of the preventive and punitive measures available to states.

It is well known, however, that the State must reconcile the defence of public safety and calm with a broad range of protective principles that seek not only to safeguard fundamental rights, but also to structure social relations in line with particular legal and constitutional values, or in other words, according to an idea of society based on the *dignity of the human person* rather than on *individual freedom*.

Only in this way will we preserve the essence of the democratic framework governing the way we live and interact with others, which is inextricably linked to the ethical and political demands of the rule of law.

If the rule of law must indeed be understood as an appropriate institutional architecture within which to ensure particular values, then it is of paramount importance to safeguard its underlying balances.

The rationale behind the conduct of a democratic State based on the rule of law – founded by definition on the Constitution and the Law – must therefore be guided by a constant effort to strike a balance between the traditional values of *security and freedom*, or more specifically, to call for a curb on excesses, the very core of the requirements applying to restrictions on fundamental rights.

The principle of curbing excesses or of proportionality in the broad sense, as a model informing and shaping all police activity, breaks down into the sub-principles of *(i)* adequacy, *(ii)* necessity (or enforceability) and *(iii)* proportionality (or reasonableness) strictly speaking, in that all these terms are very familiar and are enshrined in our legal system (see, *inter alia*, Articles 18(2) and 272(2) and (3) of the Portuguese Constitution and Decree Law No 457/99 of 5 November 1999 on the use of firearms in policing).

2. In parallel with Article 11 of the European Convention on Human Rights, the Portuguese Constitution enshrines the right to meet and to demonstrate.

Article 45 of the Constitution stipulates that all citizens have the right to meet peacefully without arms, even in places which are open to the public, without the need for any authorisation.

Other than in cases of emergency, however, the exercise of this right is likely to be limited, particularly when public order, the right to rest, free movement of people and other legally relevant interests have to be protected.

The exercise of this right is also subject to administrative constraints, such as obligatory authorisation for sporting events, festivals and public entertainments, or prior notification to the competent authorities of demonstrations so that measures can be taken to ensure that they occur

without incident, such as traffic control, the prevention of counter-demonstrations and guarantees regarding the safety of the gathering or demonstration itself.

It is debatable whether the authorities can order a demonstration (or gathering) that they have not been notified of to disperse or can disperse it, if it is developing peacefully.

In view of the reason for prior notification, such police measures appear to be illegitimate in these circumstances when weighed against the underlying principles of proportionality.

If authorisation is not forthcoming where it is mandatory, or if a gathering or demonstration is no longer peaceful, it must always be dispersed by the security forces in accordance with the same criteria.¹

3. From 2002 to 2004, I was privileged to serve as National Director of the *Polícia de Segurança Pública* (PSP) [public security police], when for the first time in its history this institution's most senior official was a civilian.

Besides countless demonstrations of the most varied kinds – mostly political and trade union protests – other high-profile events involving large crowds took place in Portugal during that time. These included in particular the European Football Championship (Euro 2004) between 12 June and 4 July, i.e. in a period of the year coinciding with a great influx of holidaymakers, with almost a million (largely foreign) tourists coming to Portugal for an estimated average stay of four days.

The country's small size and modern road and rail network meant that fans did not always seek accommodation in the places where their teams were playing, giving rise to heavy movements of supporters.

Due to the high media profile of the Championship – one of the world's largest events – politically or socially motivated demonstrations or other forms of protest, both domestic and international in nature, were foreseeable.

Some groups of fans were also likely to be less peaceful or even violent, not only within and around stadiums but also on transport routes, at terminals and in leisure areas or other places where supporters gather.

Besides the organisational implications, it was also a time for deep reflection on the prevention and control of public order problems typically associated with the exercise of rights to assemble and protest.

I would therefore like to continue my speech in the light of the events experienced at that time.

4. On the basis of the frame of reference described, in the PSP we defined a philosophy of policing that would be valid for any situation in which large crowds gather, and in the specific case of Euro 2004 we are very pleased to say that there were no incidents of note.

This philosophy of action was underpinned by a combination of the following:

¹ See J. J. Gomes Canotilho, *Constituição da República Portuguesa Anotada*, Coimbra Editora, 3rd edition, pp. 253 – 254, and Jorge Miranda – Rui Medeiros, *Constituição da República Portuguesa Anotada*, Coimbra Editora, 2005, pp. 465 – 466.

- A preventive and proactive stance reflected in a friendly and conciliatory approach appropriate to and fostered by the initially festive and peaceful atmosphere, though it was firm and robust where necessary.
- The use of social media and leafletting publicising the existence of adequate police resources enabling firm action to be taken to ensure public order where necessary, and the intention to do so in the event of violent behaviour or breaches of established tolerance levels.
- Permanent vigilance and a readiness to react, monitoring and anticipating people's movements and behaviour.
- An immediate police presence to deter prohibited behaviour.
- A high police profile making it possible to give people information, respond to requests and resolve minor disputes while transmitting information to the police hierarchy at the same time.
- The striking of a balance in allowing public order resources and equipment to be visible, to be modulated according to needs.
- High mobility, enabling the security forces to move rapidly.
- A high capacity to react and intervene where necessary.
- Modulation of the means and levels of reaction or intervention according to the initial analysis and subsequent development of incidents.
- Significant numbers of plainclothes police, ensuring a constant presence, real-time information and a low-profile capacity to intervene, particularly in situations requiring selective or targeted action.
- On a supplementary basis, covering the possibility of serious or very serious public order problems, three types of situation were anticipated that were also informed by concerns of proportionality and reasonableness:
 - First: a change or potential change in public order in the form of aggressive incidents involving few people, though with a high probability of becoming more violent, to be resolved by the tactical intervention of small specialised teams of officers.
 - Second: a situation identical to that described, but involving more people, to be resolved by the tactical intervention of the "*Corpo de Intervenção*" [riot police], a police unit highly specialised in restoring public order.
 - In the extreme, tactical policing incidents calling for the use of extraordinary means, e.g. terrorist acts, bombings, explosions or hostage taking, involving coordinated action by the regular police force and special units additional to the already mentioned riot police, i.e. the "*special operations group*", "*bomb disposal squad*" and "*personal security corps*".

5. Meanwhile, enforcing the rules laid down in the law to facilitate, standardise and ensure its application to real-life situations, a regulation was drawn up on the limits to the use of coercion, covering the following aspects, among others:

- Definition of the degrees of threat and levels of force to be used in each situation, stipulating that in principle a higher level of force should only be used after lesser force has proved ineffective,

and, for example, that the use of means likely to impact upon the life or physical integrity of children, pregnant women, the elderly or the disabled are absolutely exceptional and acceptable only in the event of a threat to the life or physical integrity of other people.

- Classification of the human body into three zones (green, yellow and red), according to its physiology and the location of the vital organs.

- Classification of coercive means according to their lethal potential, with exhaustive regulation of the use of the various means, particularly firearms.

6. On that note, I would like to bring my presentation to a close.

Before I do, however, I would just like to add that these sometimes fragile balances ultimately boil down to a matter of attitude, values and democratic culture.

In essence, it is vital that we are equipped with a critical conscience that allows us to recognise a possible narrowing of principles and to take the necessary corrective measures when this occurs, in a constant effort to improve and seek balances which can never be fully achieved.

Thank you very much.

Mário Belo Morgado