Fighting COVID 19 - Legal Powers and Risks: Spain

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A global health crisis, broadcasted almost instantly, arguably ensures that most citizens accept health recommendations responsibly, and no coercive measures are needed for them to take precautions. In fact, the first decisions made by the Spanish health authorities with respect to COVID-19 were passed through documents with no regulatory value. However, the rapid spread of the epidemic forced these authorities to increasingly restrict various fundamental rights and freedoms. Three major legal issues arose then: firstly, whether the ordinary provisions of the health legislation were sufficient to deal with this crisis or emergency powers should be triggered; secondly, whether the central government should have powers devolved to better manage the crisis; and, thirdly, under which conditions and to what extent the government may restrict constitutional rights by virtue of these emergency powers.

Regional health measures

In Spain, health services lie within the responsibility of regions (*Comunidades Autónomas*). Although the central government can pass basic regulations with minimum common standards and coordinate the health system, it only has executive powers over transborder health issues (e.g. airport entrance control).

The first measures to fight COVID-19 were adopted on the 9th of March 2020 by the Interterritorial Council of the National Health System, which the Ministry of Health and regions are part of. Such measures were limited to areas where community transmission was significant (region of Madrid, the city of Vitoria and the small town of Labastida). In these areas, school activities were suspended and social distancing was established in the educational and work environment.

Between the 8th and 13th of March, all regions took executive measures, as they were increasingly affected by the expansion of COVID-19. Large social gatherings and face-to-face educational activities were suspended. Sanitary recommendations on hygiene and social distancing were issued. In some cases, more invasive measures, such as forced medical controls, quarantines, requisition of sanitary supplies, takeover of private hospitals and regulations on the working conditions of health and emergency personnel, were also taken.

Under Spanish law, restrictions on constitutional rights need to be proportionate and provided for by parliamentary law. Moreover, when it comes to restrictions on the so-called fundamental rights (as freedom of movement), this law must be a state organic act (*ley orgánica*). Both central and regional law contain several provisions that meet those constitutional requirements and enable to take the abovementioned measures without great difficulty, including those interfering with the exercise of fundamental rights. Regional governments adopted them pursuant Organic Law 3/1986, of 14 April, on Special Measures in Public Health. This legislative act gives health authorities a very broad power with that regard, as it allows them to take any measure "deemed necessary in the event of a transmissible risk" (art. 3).

In addition, other central State laws (Act 14/1986, of 25 April, on General Health, Act 17/2015, of July 9, on the National Civil Protection System, Act 33/2011, of 4 October, on Public Health) allow health authorities to impose, for instance: personal obligations on retired and trainee health workers; requisitions of goods; duties on the population to collaborate with the police, etc. Regional health and emergency laws also contain similar provisions.

In short, current Spanish health law already gives broad extraordinary powers to the relevant (state and regional) authorities, which could be used to deal with pandemics like COVID-19.

Insofar as these actions provided for by the "old health law" might have an impact on fundamental rights, a judicial authorization or approval is required. Article 8.6 of the Contentious-Administrative Jurisdiction Law requires such a judicial intervention when "the measures that the health authorities consider urgent and necessary for public health and that involve the deprivation or restriction of liberty or another fundamental right". Canarias, Murcia and Catalonia, for instance, asked for it when establishing quarantines (just for a hotel in Canarias and for municipalities with approximately 70.000 inhabitants in Catalonia, and 376.000 in Murcia).

Emergency Central Powers

The growing spread of the epidemic provoked a legal and political debate on whether (i) those measures needed the activation of the emergency powers associated with the declaration of the state of alarm or the state of exception pursuant article 116 of the Spanish Constitution (ruled by Ley Orgánica 4/1981, de 1 de junio, de alarma, sitio y excepción), and on whether (ii) health authorities have the power to impose such restrictions on fundamental rights.

Both issues became particularly controversial after four regions (La Rioja, Catalonia, Extremadura and Murcia) confined entire populations to stop several uncontrolled outbreaks, which obviously implied a severe restriction on the fundamental right of freedom of movement. All of these regions invoked their necessity powers provided for in the aforementioned health and emergency legal provisions.

At this point, the central government declared the state of alarm (Royal Decree 463/2020, of 14th of March). Restrictions on freedom of movement extended to the whole Spanish territory and to all types of activities, with a limited number of exceptions (health and social workers, food stores and food production, industry, construction, banking, media, energy, water and electricity supplies). This Royal Decree ratified all the previous regional measures insofar as they were compatible with it. The state of alarm has produced two main additional consequences: (i) executive powers have been centralized on the central government (namely on the President and four Ministers as delegated authorities: Health, Defense, Mobility and Interior), so that regional authorities need central approval to make some decisions; and (ii) the government may take over private hospitals.

In the following days, the central government has passed a large number of executive regulations in order to implement those sanitary measures and to ensure the proper functioning of certain services (transportation, essential supplies, centralization of public purchases, reorganization of public services, suspension of administrative terms).

At the same time, regions may continue to take measures subject to central approval as far as they do not collide with central decisions. In fact, there is still some regional diversity in approaches and regulations (e.g. on social distancing or prohibition of certain activities such as hairdressers, later extended to the whole Spanish territory). The centralization of public purchases of medical equipment has been criticized by many regions and even by the media, as it has slowed down supply due to the lack of management experience on the part of the Ministry of Health.

Likewise, there has been a clash between the central government and some regions (Catalonia, Murcia) that have called for more severe quarantines, involving the cessation of construction and all industrial activities not linked to essential needs. At first, the government totally rejected some of those additional precautionary measures (Murcia) or only approved very localized strict confinements such as those existing in some Catalan municipalities prior to the state of alarm. However, on the 28th of March, after the Parliament had voted a 15-day extension of the state of alarm and ruled out tightening the confinement measures, the government unexpectedly announced its decision to halt all "non-essential" economic activities (see Royal Decree-Law 10/2020, of 29 March). This measure raises relevant legal issues regarding the limits, extent and parliamentary control of the exceptional powers that the state of alarm confers to the government.

State of Alarm vs. State of Exception

Under Spanish law, the state of alarm allows the government to "limit" freedom of movement, whereas the state of exception enables it to "suspend" this and other fundamental rights in cases of serious disturbances of public order. The distinction between "limitation" and "suspension" is quite relevant, as the legal requirements to declare the former state are less strict than those established for the latter one. The declaration of state of alarm is subject to an *ex post* parliamentary control, whereas the declaration of state of exception requires a previous authorization by the Parliament.

Some scholars have argued that the quarantines imposed to deal with the COVID-19 crisis involve a suspension of that constitutional right and, therefore, the state of exception would be required. Rather than limiting freedom of movement, Royal Decree 463/2020 temporarily deprives entire populations from this right. Moreover, regional elections in Euskadi and Galicia were called off, without an electoral legal provision to back it up, because of the state of alarm affecting the right to elect and be elected.

The Judgment of the Constitutional Court No 83/2016, of 28 April, on the state of alarm declared as a result of an air traffic controllers strike, suggests that this state does not enable to impose such general restrictions, but only "to limit the movement or permanence of people or vehicles in certain places or to condition them to the fulfillment of certain requirements".

Summing up, this crisis shows how the emergency legislation passed in 1981 is not well designed to manage health crises and, in particular, major ones like that of COVID-19. Its provisions do not determine with sufficient precision the scope and limits of both parliamentary control and judicial review. They do not take into account that in 2020 Spain is a decentralized state, where health matters lie within the jurisdiction of regions. The centralization of emergency powers may produce poor results, as a consequence of the lack of experience on the part of the Minister of Health in the day-to-day management of health services. And the imposition of more and more severe quarantines, which temporarily deprive entire populations from their freedom of movement, despite the fact that the Parliament has not approved these measures, raises serious doubts from the point of view of the principle of democracy.

State Liability

COVID-19 pandemic has already caused thousands of deaths and huge economic losses in Spain. And this is just the beginning. Under Spanish tort law, the State would have to compensate some of these damages insofar as certain conditions were met, which does not seem obvious.

Firstly, there must be a causal link between the State's actions or omissions and the damages at issue, which is excluded in cases of *force majeure*. Unfortunately, it is quite difficult to distinguish those additional damages that would not have been produced, had the State taken due precautions, from those that would have been caused anyway (unavoidable losses caused by *force majeure*).

Secondly, damages must be particular (*individualizados*), i.e. suffered by a single or specific person or group of people. General losses (caused to the general public, i.e. to a very large number of people) are not compensable, as compensation would make the victims (i.e. taxpayers) worse off. Indeed, they would then have to bear not only the costs of compensation, but also the costs of related administrative and judicial proceedings.

Thirdly, it is usually said that State liability is strict under Spanish law, but it is actually not. In fact, under the case-law of Spanish courts, the State is liable only if it caused the accident at issue negligently, by not taking due care. Subsequently, in order to be compensated, victims will need to show, on the one hand, that Spanish authorities could have reduced or mitigated the harmful effects of the pandemic by taking some precautionary measures. On the other hand, they will also have to prove that the Spanish government breached a duty of care, i.e. it was obliged to take those measures, as their expected benefits exceed their costs given the information available at

the time when the decision to not take them was made. However, it is arguably unclear whether, at that time, from an ex ante point of view, the benefits of preventing the uncertain risk posed by COVID-19 outweighed the extremely high costs of taking such drastic measures.

Compensation for Takings

Both the central government and the regions have taken a number of measures severely restricting constitutional rights, such as freedom of movement, freedom of enterprise, and the right to private property. They have imposed lockdowns and quarantines, banned commercial, educational and cultural activities, closed industrial facilities and retail premises, requisitioned medical devices, taken over private hospitals, etc.

Some of these measures should be considered as expropriations or regulatory takings and, therefore, compensated by virtue of article 33.3 of the Spanish Constitution, whereas others ought to be deemed non compensable regulations.

In order to distinguish between both types of measures, Spanish courts tend to use, albeit not always consistently, the "harmfulness" criterion. If the State prohibits or restricts the exercise of a right on the grounds that it is harmful or too dangerous for society, such a measure should be deemed a non-compensable regulation. Let us note that, in such a scenario, compensation would encourage a socially undesirable activity. If, by contrast, the exercise of the right at issue is not noxious nor excessively dangerous given the circumstances, its restriction should be considered an expropriation and, therefore, compensated. In this case, compensation incentivizes a socially beneficial activity.

According to this criterion, the abovementioned quarantines, lockdowns, closures and prohibitions would be non-compensable regulations, whereas requisitions of medical devices and takeovers of private hospitals would be regulatory takings.

State Aids and Economic Regulation

The central government and other public authorities have announced that they will provide financial assistance aimed at mitigating economic impact of the pandemic on households, professionals, firms and the whole economy. On the one hand, specific aid will be granted to those sectors on which the crisis has had a greater economic impact, such as the tourism sector. On the other hand, it is provided for the suspension, deferment or even reduction of some tax obligations and other payments for small and medium enterprises, as well as for self-employed workers (see Royal Decree-Law 7/2020, in Spanish).

Moreover, the government has passed some decree-laws that retroactively change the allocation of risks in several markets in order to protect the weakest parties (e.g. tenants, mortgage debtors, employees, energy consumers, etc.). For instance, in the rental market, it is provided that some tenants who are in a particularly vulnerable situation shall not be evicted over the next few years. Suppliers of electricity, natural gas and water may not suspend supplies to "vulnerable consumers". In the mortgage market, debtors experiencing extraordinary difficulties in meeting their payments are granted a moratorium, etc. (see Royal Decree-Law 8/2020, in Spanish).

The measures related to the labor market are particularly relevant and controversial. Broadly speaking, these measures seek to protect workers and prevent job destruction during and after the crisis. In order to do so, the Spanish Government has: made it more difficult and costly for firms to lay off their workers during the crisis; imposed a temporary paid leave on some companies, etc. (see Royal Decree-Laws 8/2020, 9/2020, and 10/2020, in Spanish). The costs of these measures are mostly borne by the State – through the social security system– and firms.

For further information, see "Coronavirus… y otros problemas", *El Cronista del Estado Social y Democrático de Derecho*, vol. 86-87, 2020.

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