Coping with Covid-19 in Portugal: From Constitutional Normality to the State of Emergency

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As we write this report, it is unclear how the Covid-19 outbreak will unfold in Portugal. The country reacted quickly to adopt measures aimed at reducing social contact, including the closure of schools and a general ban on non-essential movement. Whether that will prove efficient to avoid the collapse of the national health system and prevent thousands of deaths, only time will tell. In this contribution, we describe and reflect on the action taken by public powers to address the Covid-19 pandemic, considering the situation as of April 9.

Stage I: Coping with Covid-19 under the Existing Legal Framework

Health services are centralized in the mainland territory allowing for swift and uniformized action in situations of pandemics. The initial legislation and administrative orders were mainly based on three already existing legal instruments. First, theFramework Law of Civil Protection, which allows for nuanced centralization of powers and substantial restrictions of fundamental rights, namely imposing limits to the circulation of persons and vehicles, fixation of *cordons sanitaires*, access to private property, and temporary requisition of products and services. This act was framed as a middle option between the constitutional normality and the state of constitutional exception. Second, the Framework Health Law that assigns powers to health authorities in case of serious risk to public health. Such powers include suspending or closing public and private facilities, confinement of individuals, and requisition of health facilities and workers. Third, the Law on Public Vigilance of Health Risks, which allows executive adoption of exceptional and necessary measures in cases of public health emergencies, such as the suspension or closure of activities or the separation of sick and non-sick persons. Drawing on lessons from neighboring countries hit earlier by the crisis, the Government enforced restrictions on flights and cruise disembarkations, based on, respectively, Art. 21 of Regulation (EC) Nº 1008/2008 and the Framework Law of Civil Protection.

The most significant measures were introduced by Decree-Law 10-A/2020 enacted by the Government on March 12 (at the national level, both the Parliament and the Government enjoy legislative power). Under the tagline of promoting social distance, it approved the closure of all schools and enabled future partial or total restrictions of access to restaurants and bars. It also framed access to teleworking as mandatory and established an exceptional and speedy public procurement regime for hospitals and public health services.

However, since the competence for restrictions of fundamental rights lies in the hands of the Parliament, this act raises concerns because there was no prior delegation, and the abovementioned acts do not provide an adequate legal basis. The Decree-Law was "ratified" *ex post* by an act of Parliament that resembles an indemnity bill. As the Constitution forbids retroactive restrictions of fundamental rights (Art. 18(3)), it is challenging to accept the constitutionality of the "ratification".

The Government also continued to act based on the Framework Law of Civil Protection and the Framework Health Law, issuing administrative orders that required the suspension of some economic activities and limitations of access to restaurants and bars. On March 16, control at internal borders was reintroduced, and, two days later, air traffic with non-EU countries was suspended (except for Schengen, Portuguese speaking, and other countries with relevant diaspora). The right to strike of port workers was

also affected as the Government ordered a civil requisition.

During this first stage, the executive reaction can generally be framed as falling under the existing legislative framework. The use of administrative orders to restrict fundamental rights as well as the approval of governmental legislation without proper delegation (as only parliamentary or delegated legislation can enforce restrictions on fundamental rights) raise issues of legality and constitutionality.

Stage II: Declaration of State of Emergency

Despite the political divide about the need to declare a state of emergency, that was intensified by the disagreement among constitutionalists as to whether the existing laws allow quarantines without a judicial order, the President of the Republic initiated the relevant proceedings to declare a state of emergency on March 18, for the first time under the democratic Constitution.

The Constitutional Stage of Emergency

The Portuguese Constitution (1976) entails a specific framework governing situations of constitutional exception (Art. 19). It distinguishes between a state of siege and a state of emergency whereby the former applies in case of physical aggression or insurrection. Situations of public calamity fall under the state of emergency and only allow for partial suspensions of fundamental rights. The rights to life, personal integrity, personal identity, civil capacity and citizenship, the non-retroactivity of the criminal law, and freedom of religion are off-limits and can never be suspended (Art. 19(6)).

Whereas the President holds power to declare the state of emergency, he must first consult the Government and seek binding parliamentary authorization. Once declared, it is for the Government to execute the state of emergency. However, it must keep the Parliament and the President informed of its actions as expressly required by the Law on the State of Emergency. Moreover, this Law expressly guarantees full access to courts to individuals that are harmed or threatened by any illegal or unconstitutional measure. Parliament oversight and judicial review of the state of emergency are envisaged, and the institutional design of the state of emergency promotes the use of all the branches of power.

Execution of the State of Emergency

The presidential Decree 14-A/2020 declaring the state of emergency suspended several rights for 15 days, starting at midnight March 19. It partially suspended, among other fundamental rights, the freedom to travel and settle within the national territory, freedom to cross the national borders, right to private property, and freedom of enterprise. According to the principle of proportionality, rights are only suspended in what is necessary to reduce the risk and combat the pandemic. The Decree allows the Government a wide margin of discretion, including the power to requisition of property, equipment, and facilities, to issue orders to the private sector, to restrict travel or gatherings, or to impose compulsory confinement.

The President's decision drew criticism for, among other aspects, suspending the freedom of worship and the right of resistance as freedom of religion is listed as non-suspendable. Similarly, the right of resistance is also generally considered off-limits because of its defensive and *ultima ratio* nature. Discussion on whether the right to personal freedom should have also been suspended is ongoing

The Presidential Decree was implemented by a Governmental Decree, which enforced a general confinement duty with stricter rules to infected people and risk groups, and listed the commercial establishments and cultural and sporting facilities that should close and those that could remain open.

State of Emergency II (First Prorogation)

The President of the Republic renewed the state of emergency on April 2. The new Decree 17-A/2020 builds upon the previous suspension of rights, adding powers to the executive to restrict dismissals, control prices, and hoarding, and to interfere in the operation of companies and production units. Moreover, the possibility of reducing or postponing property and financial income, including rents, is expressly allowed

(a legal regime proposed by the Government was approved by the Parliament and is awaiting presidential promulgation). The right to education and freedom to learn was suspended for the first time, even though schools were closed on March 16 (under Decree-Law 10-A/2020). On April 9, the Government announced they would not reopen in the third term for Grades 1 to 9.

The right of resistance is no longer formally suspended but regulated to prevent any act exclusively directed against lawful orders issued by public authorities in the execution of the state of emergency.

On the execution of the prorogated state of emergency, the Government added further restrictions to freedom to travel to prevent an increase in contamination during the Easter period.

Emergency and the Rule of Law, Democracy, and Human Rights

The state of emergency has proved a complex enabling framework allowing the effective centralization of power to the executive. Broad suspensions of human rights have been enforced, particularly concerning the right to travel, the right to private property, and the freedom of enterprise as entire sectors have been forced to shut down. Rents and other income can be frozen without penalty. Future restrictions are glooming further on the horizon. The crisis will be borne collectively, but, likely, its costs will not be shared equally. The most vulnerable are already taking the economic costs of a frozen economy, and independent workers claim that the measures do not safeguard them.

In a recent poll, 12% of the respondents indicated they would not be able to cover essential expenses if the confinement lasted until the end of April. Distance learning is problematic when a significant percentage of students do not have Internet access. To prevent further exclusion of economically vulnerable students, a solution of televised classes and educational programs is under development. Local authorities are providing support to homeless people and the elderly in nursing homes, but a national strategy is yet to be implemented. Some local authorities have called for a fairer distribution of medical supplies. Domestic violence and the situation of children at risk also raise serious concerns.

The suspension of rights is being enforced as the necessary means to protect other constitutional values, particularly the right to health and the instrumental goal of shielding the national health service from potential collapse. Moreover, the situation has triggered the immediate protection of vulnerable individuals, such as migrants and asylum-seekers, with pending applications (prompting the Italian writer Roberto Saviano to claim that "it is in Lisbon that a new Europe is born"). They are now considered in a regular situation until June 30, which grants them access to fundamental rights such as healthcare, housing, and social support. The recommendations of the UN High Commissioner for Human Rights on the need to adopt measures to prevent Covid-19 "rampaging through places of detention" have also prompted legislative action. A Government's proposal detailing exceptional and urgent measures for detainees was discussed and approved by the Parliament on April 8 and includes pardons and early releases.

There is a low risk of emergency action becoming a permanent fixture when Portugal returns to normality in the future. The Government has made clear that democracy is not and cannot be suspended and that emergency measures must cease as soon the crisis ends. It has assured that no restrictions to freedom of expression and freedom of the press will be allowed during the crisis. There is a prevailing political consensus that the state of emergency will not be used as a gateway to authoritarian arrangements ("democracy is not suspended"), and this may also explain why Portugal has not derogated from any of its international human rights obligations.

Still, there are reasons for concern, first, at the level of checks on executive action.

The ingenious constitutional design of the state of emergency relies heavily on inter-branch coordination and promotes strong political consensus. This may be difficult to achieve under the pandemic. The Parliament adopted a deliberation maintaining face-to-face meetings but only once per week, and is operating with

just one-fifth of the members (the quorum limit). However, deliberating with that reduced number is problematic because of the constitutional deliberative quorum of half plus one of the members present and the individual rights of the parliamentarians.

Furthermore, the reduced role of Parliament and the increasing use of fast-track legislative proceedings endanger political deliberation. The symbolism of maintaining the Parliament's doors open comes at a democratic cost: by reducing meetings and the committees' works, the Parliament's oversight role is curtailed. A *de facto* supremacy of the executive over the legislature can emerge as the democratic process is increasingly reduced to rubber-stamping executive action against a dominant narrative that there is no alternative but to defer power to the Government at this moment. Setting up a dedicated oversight committee with a majority of seats assigned to the minority parties (Bruce Ackerman) might reduce this danger. Due to institutional design, it is unlikely that the Constitutional Court will be called anytime soon. Moreover, judicial review by ordinary courts has not been triggered yet. The Ombudsperson remains the most relevant check on emergency measures, having issued several requests for information and recommendations to the executive authorities.

Second, the chaotic body of law and administrative orders raises issues of legal security and uncertainty, as doubts on the interpretation of poorly drafted provisions and successive amendments grow. Finally, this feeling of insecurity is also induced by reports on loose and erroneous interpretations of the emergency framework by the authorities enforcing the ban on movement.

Conclusion

The constitutional design of the Portuguese state of emergency requires coordination and agreement between the President, Parliament, and Government in the initial declaration and further prorogations. It also entails substantive limits to assure that the rule of law and core human rights are not affected, thus preserving constitutional integrity in the long run. However, the Covid-19 crisis presents risks that were not envisaged by the Constitution's framers. The conditions under which the Parliament is working lead to weakened oversight of the executive. Moreover, reduced social contact prevents robust checks from civil society. New tools for checks and balances should be developed, and now, more than ever, institutional imagination is a priority.

In the long-run, the main challenge will be to minimize the unequal impacts of the expected economic crisis. In the sixth most unequal country of the EU, where 6% of the population suffers from severe material deprivation (pre-Covid-19 data), this is, indeed, a tremendous challenge for the political system.

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