Covid-19 - the Maltese Response: Slow at First but Steady and Effective

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Malta officially registered its first three Covid-19 cases on the 7th of March 2020. Prior to that date, the Maltese authorities, although aware of the situation in other European countries – particularly Italy, with regular air and sea connections with Malta – had refused to consider any restriction on travel, choosing to await developments in other countries and guidance from the World Health Organisation as to the way forward, as well as conducting tests at sea and air ports on people coming from, or who had been to, affected areas. By that date, Italy had already recorded a total of 1,247 infected persons, with 37 deaths, mostly in the north – the Lombardy region in particular – of that country. On the 7th of March, with the announcement of the first three cases, the health experts and the politicians read from the same score: business as usual, keep calm, take normal precautionary measures, while assuring the public that preparations were in hand for an outbreak. The Prime Minister, Robert Abela, in office only since the 13th of January, added his call that the morrow would be a normal work and school day. As I write – 24th of April – Malta has registered a total of 444 Covid-19 cases, and there have been three deaths from the virus – on the 9th, 10th and 12th of April.

The Geography

The Maltese Archipelago consists of the Islands of Malta and Gozo and the largely uninhabited island of Comino – collectively the Republic of Malta. With Sicily to the North 80 km away, Tunisia to the East (284 km) and Libya to the South (333 km), it has in recent years been heavily affected by the migratory flows of people, mainly but not exclusively from sub-Saharan Africa, attempting to reach the European mainland. With a total surface area of 316 km^2 and a population of over 490,000, Malta is the most densely populated member state of the European Union. Free medical and hospital care is available to all citizens of Malta and EU residents with a European Health Insurance Card and generally to all persons lawfully resident in Malta.

The Laws in Place at the Start of the Emergency

Four laws in particular, and one provision of the Criminal Code, could be seen as being relevant at the start of the Covid-19 crises and could still effectively be used even now – for the purpose of this report I shall be taking the date of the 7th of March as the start date.

1. The 1964 Independence Constitution speaks of both a "public emergency" and, on the side as it were, also of an "emergency *or* calamity that threatens the life or well-being of the community". These expressions are used in Chapter IV of the Constitution which contains the provisions dealing with fundamental rights and freedoms, provisions mirroring, but in some instances diverging substantially, from the provisions of the European Convention on Human Rights. Article 47(2), which is the very last provision in Chapter IV, provides that for the purposes of that chapter "a period of public emergency" means any period during which (a) Malta is engaged in any war; or (b) there is in force a proclamation by the President that a state of public emergency exists; or (c) that there is in force a resolution of the House of Representatives, supported by the votes of not less than two-thirds of all the Members of the House declaring that democratic institutions in Malta are threatened by subversion.

The Constitution gives no indications of what would constitute a "public emergency" for the purposes of the Proclamation, although if one were to

apply the *eiusdem generis* rule, such a public emergency for the purposes of the Constitution would appear to require a situation directed more against territorial or political integrity rather than mere issues of health, however grave. Such "a period of public emergency" may be invoked by way or derogation from, or limitation to, three of the fundamental rights protected by the Constitution: the right to protection from arbitrary arrest or detention (Art. 34(5)), the right to protection from forced labour (Art. 35(2)(d)) and the right to protection from discrimination (Art. 45(4)(e)).

Of particular interest in the context of a public health emergency is Art. 35(2)(d). Art. 35(1) provides that no person shall be required to perform forced labour. The Constitution then lists four instances of labour which are *expressly* excluded from the notion of "forced labour" for the purposes of that article, the fourth instance being "any labour required during a period of public emergency *or in the event of any other emergency or calamity that threatens the life or well-being of the community*" (emphasis added). The similarity of this exclusion with Article 4(3)(c) of the European Convention on Human Rights (incorporated into domestic law by the European Convention Act) is all too obvious. Here the reference is to an emergency or calamity even when there is no period of public emergency as defined in Art. 47(2). Unlike some other member States of the Council of Europe, Malta has not invoked, nor does it appear to have any plans for invoking, any derogation under Article 15 of the Convention; nor has it formally invoked a "period of public emergency" under the Constitution, and the measures which have been taken appear to be well covered both by the Convention and by the human rights provisions of the Constitution.

2. Another law which could have been used for the purposes of the current emergency is the Emergency Powers Act. This law dates to the year before the granting of independence to Malta in 1964. When enacted in 1964 with the Nationalist Party in Government, it was intended to ensure internal security against the possibility of riots and insurrection which both the Maltese and the Colonial authorities believed could be instigated by the opposition Malta Labour Party. The Act has only eight provisions, grating sweeping powers to the Executive. Article 3(1) of the act provides that

> *"If the President of Malta, acting in accordance with the advice of the Prime Minister, is satisfied that a public emergency exists, he may by Proclamation declare that the provisions of Part II of this Act shall come into operation, and thereupon those provisions shall come into operation accordingly; and they shall continue in operation until the President of Malta, acting in accordance with the advice of the Prime Minister, by a further Proclamation directs that they shall cease to have effect, whereupon they shall cease to have effect except as respects things previously done or omitted to be done."*

The Proclamation is then "communicated" to the House of Representatives within seven days if the House is in session, and if it is not in session it is communicated "as soon as practicable". Once the Proclamation is made, Part II of the Act, which deals with the making of "regulations", kicks in. Article 4(1) provides as follows:

> *"The President of Malta, acting in accordance with the advice of the Prime Minister, may, subject to the provisions of the Constitution of Malta, make such regulations as appear to him acting as aforesaid to be necessary or expedient for securing the public safety, **the public health**, the defence of Malta, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community." (emphasis added)*

The words in bold were not part of the original Act, but were introduced in amending legislation quickly passed by the House of Representatives in the latter part of March of this year, and which received the Presidential assent on the 25th of that month – Act X of 2020. Although intended principally to amend the law that is in effect being used by the health authorities in the current crisis (and which was found to be defective in one crucial aspect which will be explained later), the authorities did not want to take any chances, and they

very quietly slipped in the words "the public health" into Art. 4(1) of Cap. 178. Any "regulation" made under this Act would be valid for two months unless, before the expiration of that period, it has been approved by resolution of the House of Representatives; moreover the House of Representatives may at any time amend or revoke such a "regulation" (Art. 6). To date, no regulations have ever been made under the Emergency Powers Act.

3. The third instrument in the arsenal – as the use of the word "ordinance" suggests – the Prevention of Disease Ordinance is one of the oldest extant laws on the statute book, having been enacted in 1908, with amendments down the years, as shown in the title page. This Ordinance is earmarked to be repealed by virtue of Article 45 of the Public Health Act, Cap. 465 (see below), but the repealing article has not yet been brought into force. The declared purpose of this law is to prevent "the introduction and spread of infectious, contagious and epidemic diseases affecting either mankind or animals". The general provision for the epidemic diseases is Article 44. The problem with this law is that, in so far as it refers to diseases transmissible between humans, it attempts to regulate in minute detail situations which no longer correspond to the realities of modern life in Malta. While the Ordinance has remained useful in some respects in connection with diseases affecting animals – and subsidiary legislation, made under this Ordinance, exists dealing with things like poultry breeding and slaughterhouses, beekeeping, milch animals, swine fever and "foot and mouth disease" – the last time that any subsidiary legislation dealing with human diseases was published was in 1989 with the Vaccination for Rubella Regulations. This Ordinance has not to date been invoked in the present pandemic since the Public Health Act (see below) gives more effective and flexible powers to the health authorities in a crisis like the present one.

4. In 2002 the Legislature introduced a new crime into the Criminal Code. Article 244A provides for a punishment of imprisonment from 4 to 9 years for the wilful transmission of certain diseases to a person not otherwise infected; and up to 6 months imprisonment or a fine in the case of negligent transmission. The latter is defined as transmission or communication "through imprudence, carelessness or through non-observance of any regulation by the person who knew or should have known that he suffers therefrom or if afflicted thereby". This provision of the Criminal Code applies only to those diseases or conditions specified by subsidiary legislation made by the Minister responsible for justice, and to date only HIV, AIDS, Hepatitis B, Hepatitis C and Tuberculosis have been specified by the Communicable Diseases and Conditions Regulations 2005 (although according to some sources the addition of Covid-19 to the list was at one point being mooted by the Ministry of Justice).

The Cheval de Bataille

Virtually all the measures taken to date to control the Covid-19 pandemic, including all forms of social distancing, bans on travel (including restrictions on travelling between the two islands), closing of non-essentials shops and home quarantine, have been by virtue of subsidiary legislation made pursuant to the Public Health Act. The first of a raft of such regulations was published on the 12th of March. The *pointe de lance* in this law is Article 27(c)(v), which allows the Superintendent of Public Health to make, vary and revoke orders prescribing measures "to guard against or to control dangerous epidemics or infectious disease". At the start of the pandemic and prior to Act X of 2020 (see above), this provision authorised the making of orders for *inter alia*:

> ....
> *(v) prescribing such other matter as the Superintendent may deem expedient for the prevention or mitigation of such disease.*

However, when on the following day the Superintendent, by two separate legal notices – L.N. 61/2020 and L.N. 65/2020 ordered the closure of the courts and purported to provide for the suspension of legal and judicial times, doubts began to be raised about the *vires* of this and possibly other subsidiary legislation. A number of corrective measures were taken, including the addition, by virtue of Act X, of the following proviso to paragraph (c)(v) of Article 27:

> *Provided that the power of the Superintendent to prescribe such other matter as the Superintendent may deem expedient for the prevention or mitigation of such disease shall include and shall be deemed to have always included the power to provide for any matter which is ancillary or consequential to an order issued under this paragraph including the suspension of any time limits including, but not limited to, legal or judicial time limits, which shall be deemed to include periods of prescription, and any peremptory time limits provided for in any other law as a consequence of the order for the closure of government departments or other places from where public services are provided or of any other order issued under this paragraph as the Superintendent deems expedient. (Emphasis added)*

After a period of confusion and pressure from the Chamber of Advocates, the matter was finally resolved by direct intervention of the House of Representatives which, on the very day that it rose for the Easter recess, approved the Legal and Other Time Periods (Suspension and Interpretation) Act. The last provision of this Act validates retroactively any subsidiary legislation made under the Public Health Act. Of particular importance in Legal Notice 61 of 2020 is regulation 3(2) which provides that any order by the Superintendent of Public Health ordering the closure of the courts or their registries

> *shall not prejudice the power of an court to order the opening of its registry, the hearing of any case and anything consequential and incidental thereto in urgent cases or in cases where it deems that the public interest in having the case heard should prevail, subject to any specific arrangements for the guarding against and, or controlling dangerous epidemics or infectious disease as the court may determine.*

The ultimate decision in such matters, therefore, rests with the judge or magistrate concerned. This has enabled the courts of justice, in both civil and criminal matters, to continue to deal with all urgent matters, including arraignments and bail proceedings and urgent human rights cases, as well as to continue to deliver judgments, albeit to a courtroom with only lawyers and court staff in attendance. Penalties for infringement of orders issued by the Superintendent of Public Health are recoverable as a civil debt before Commissioners for Justice sitting in Local Tribunals. These Local Tribunals have also been temporarily closed, with all time limits suspended.

Conclusion

Notwithstanding some initial hesitation, the way in which the health authorities have so far handled the emergency has been well received by the general public. Measures were introduced gradually, with daily press conferences explaining the reason for each new measure or variation thereof, whilst providing statistics on the number of daily swabs, patients infected, patients recovered, and fatalities. This approach has been fully supported also by the Archdiocese of Malta, a fact which contributed in no small measure to the overall acceptance of, and compliance with, the measures and restrictions imposed by the civil authorities.

ABOUT THE AUTHOR

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