

Portugal: fighting CoViD-19 in the edge of Europe

Vera Lúcia Raposo

Associate Professor at the Faculty of Law of Macau University, China; Auxiliary Professor at the Faculty of Law of Coimbra University, Portugal.

Mail: vraposo@um.edu.mo; vera@fd.uc.pt.

Portugal has been praised, amongst its European pairs¹ and outside Europe², for its answer to the CoViD-19 pandemic.

The key – or one of the keys – for the Portuguese (moderate) success was the timely declaration of the state of emergency, done in a moment in which the country was not yet in a real public health crisis. Curiously, social distancing and even confinement was effected by the community (some schools and companies) even before the government realized how serious was the ongoing health crisis.

On March 18, 2020, the President of the Republic declared the state of emergency, to start at midnight of March 19. It was the first time this was even done in the democratic era in Portugal.

The declaration was made through Decree n. 14-A/2020³, of March 18, based on a situation of public calamity, as established in Article 19 of the Constitution of the Portuguese Republic (CRP)⁴.

¹ A. SMOLTZYK, *How Lisbon has managed the Corona Crisis*, in *Spiegel International*, 9/04/2020, available at: <https://bit.ly/3bUnuzB>.

² XINHUA, *Portuguese miracle amid pandemic*, in *Khmer Times*, 20/04/2020, available at: <https://www.khmertimeskh.com/50714670/portuguese-miracle-amid-pandemic/>.

³ Decreto do Presidente da República n. 14-A/2020, available at: <https://dre.pt/web/guest/home/-/dre/130399862/details/maximized>.

⁴ <https://dre.pt/part-i>.

⁵ Decreto n. 2-A/2020, available at: <https://bit.ly/3d1hjLC>.

The decision is not only in the President's hands; it is decreed by the President of the Republic, after hearing the Government and having the approval of the Parliament. Following this Declaration, Decree n. 2-A/2020⁵, from March 20, came to regulate the application of the state of emergency.

Since the State of emergency can only last for 15 days, the Decree of the President of the Republic n. 17-A/2020⁶, from 2 April (Decree n. 2-B/2000⁷, from 2 April), renewed the state of emergency for 15 more days, until 17 April, and included some additional provisions to the existing situation of suspension.

At midnight of April 18, 2020 started the third renovation of the state of emergency, imposed by the Decree of the President of the Republic n. 20-A/2020⁸, from 17 April, and regulated by Decree n. 2-C/2020⁹, from 17 April. This renovation keeps the basic notes of the previous model, but brings some flexibility intended to be a preparation for the gradual relaunching of the economy announced for May.

Basically, a large set of acts have been issued, not all of them clear enough, making it difficult to assess the regime under the State of Emergency in Portugal¹⁰.

The decision to impose the state of emergency was very debated among Portuguese

⁶ Decreto do Presidente da República n. 17-A/2020, available at: <https://dre.pt/web/guest/home/-/dre/131068115/details/maximized>.

⁷ Decreto n. 2-B/2020, available at: <https://bit.ly/2WTBF3x>.

⁸ Decreto do Presidente da República n. 20-A/2020, available at: <https://dre.pt/web/guest/pesquisa/-/search/131908497/details/normal?l=1>.

⁹ Decreto n. 2-C/2020, available at: <https://bit.ly/2TtNITE>.

¹⁰ T. VIOLANTE, R.T. LANCEIRO, *Coping with Covid-19 in Portugal: From Constituional Normality to the State of Emergency*, in *Verfassungsblog*, 12/04/2020, available at: <https://bit.ly/2LNsZ27>.

constitutionalists¹¹. Some argued that the Constitution does not provide legal grounds to impose compulsory isolation and compulsory quarantine, therefore, such measures could only be imposed under the state of emergency. This thesis is based on the constitutional text, namely in Article 27 CRP, that lists the cases in which it is possible to deprive someone of liberty; the norm refers to several situations but omits confinement for epidemic reasons. Other scholars argued that even though the CRP is silent in this regard, compulsory isolation and compulsory quarantine find constitutional grounds in the State's duty to protect some of the rights guaranteed in the Constitution, namely the right to physical integrity (some others invoked the right to health, but since this is a social right I find it doubtful that it could ground any State duty of protection in this particular context). I believe that the latter position is correct. Indeed, an interpretation of the CRP that goes beyond its strict wording provides constitutional grounds to measures aimed to protect public health, even if they involve limitations in personal liberty. Constitutions are much more than their words, otherwise they would get useless pretty fast, given that life changes very quickly, while legal texts (especially Constitutions) rarely change their wording. Nonetheless, for reasons of legal certainty and legal clarity, a solid legal basis is recommended and thus the relevance of a presidential act declaring the state of emergency.

The necessity to impose the state of emergency in Portugal had a very clear purpose: to provide legal grounds for the suspension of some

individual rights and liberties¹², as required to deal with the pandemic.

These are the rights partially suspended in Portugal during the state of emergency:

a) The right to move and settle (Article 27 CRP)

Under the previous rules of the state of emergency citizens were under mandatory home confinement, only allowed to leave their home for strict purposes, such as attending work (essential activities not able of being performed by telework keep running), purchasing food, providing assistance to someone in need, or exercise during a limited period of time. A particularly problematic measures imposed under this item were sanitary fences¹³ in municipalities with higher number of infected cases, limiting even more severely the displacements out of the included villages.

During the Easter period (between 9 and 10 April) measures became particularly restrictive, to prevent touristic escapes during this festivity and traditional family gatherings. Therefore, during these days, with very limited exceptions, people were not allowed to leave their area of residence, and all airports were closed, except for State flights, cargo flights and humanitarian flights.

However, the Decree from April 17, 2020 brought some flexibility. It states that symmetrical or asymmetric restrictions on movement may be imposed by the competent public authorities, based on the age or place of residence, without discriminatory nature. Even though it still refers the hypothesis of confinement, it is

¹¹ A.P. SANTOS, *Estado de emergência divide constitucionalistas*, in *Expresso*, 16/03/2020, available at: <https://expresso.pt/politica/2020-03-16-Estado-de-emergencia-divide-constitucionalistas>.

¹² V. DE ALMEIDA, *Coronavirus. Portugal State of Emergency*, available at: <https://bit.ly/3e2iOZY>.

¹³ M.S. CARRAPATOSO, *Governo cria cerca sanitária em torno de Ovar*, in *Expresso*, 17/03/2020, available at: <https://expresso.pt/coronavirus/2020-03-17-Governo-cria-cerca-sanitaria-em-torno-de-Ovar-1>.

expected that some people will be able to circulate under some restrictions. Curiously (and unjustifiably) it allows the celebration of the Labour Day (1st May), though with restrictions.

b) The right to property and to private economic initiative (Articles 61 and 62 CRP)

Limitations in this regard can be materialized in requests to use movable and immovable property, health care units and commercial and industrial facilities. Public authorities can also demand the mandatory opening or closure of stores, services and factories. Moreover, some further measures are allowed: limitations to the production of goods (regarding their quantity, nature and price), their distribution and commercialization; the imposition of legal measures aiming the centralized acquisition of goods deemed essential, with priority or even with exclusivity; the introduction of measures to combat speculation or hoarding of some products or materials.

One of the measures that has caused some commotion is the rigid limitation of dismissal during this period, a rule that can be difficult to follow for small and medium companies¹⁴, struggling to survive in such difficult times.

However, the Decree of the President of the Republic n. 2-A/2020 foresees the gradual, phased or alternate opening of services, companies and stores, with adapted opening hours. The reopening will not take place at the same time for all services and companies. The full opening will only be possible if the epidemiological data continues to show that the level of infection is decreasing and if the national health service maintains its capacity to deal with serious cases.

¹⁴ Conselho Regional de Lisboa OA, *Online Conference Covid 19*, 3/04/2020, available at <https://bit.ly/3e5gtxa>.

c) Labour rights (Articles 47, 57, 58, 59 CRP)

Public authorities are allowed to demand to any employee (of the public, private or social sector, and regardless of the type of labour bond) to report to service and, if necessary, to perform different functions, in a different place, with different hours, or for a different entity. Some professional domains were specifically mentioned in the Decree as possible targets for this intervention: health, civil protection, security, defence and assistance of vulnerable populations.

The right to strike is suspended in the cases in which it can compromise the functioning of critical infrastructures, health care units, public services, economic sectors vital to the production, distribution and supply of essential goods and services for the population. Basically, the suspension covers pretty much every single domain of activity.

The Decree of the President of the Republic n. 2-A/2020 gives back to workers' commissions, unions and employers the right to participate in the drafting of labour laws, a right that was suspended by the previous Decree. Under the Decree of the President of the Republic n. 17-A/2020 the Government had power to act alone in the drafting of labour laws, while now employers' associations and union regained the right to participate in the drafting.

d) International circulation (Article 44 CRP)

Border controls on people and goods are in force, including sanitary and phytosanitary controls in ports and airports, all in strict compliance with European law. Even though the free circulation of people, goods and services (and capitals) is the keystone of the European internal market, Article 8 of the Schengen Borders Code¹⁵

¹⁵ Regulation (EU) 2016/399 of the European Parliament, and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of

recognises that member states can reintroduce internal controls at their national borders, so long as they are restricted in time and geographical area, and justified by a serious threat to public health, public policy or internal security.

Portugal and Spain decided in common agreement to close the borders early in the pandemic. Arguably, this was one of the measures that greatly contributed to the reduced number of infected people in Portugal when compared with neighbour jurisdictions, Spain in particular. Actually, the fact that Portugal has only one neighbour – and therefore only one country to be concerned with – certainly helped the containment of the virus.

e) Right of assembly and manifestation (Article 46 CRP)

Restrictions in this regard can be imposed, namely the prohibition to hold meetings and manifestations.

f) Freedom of religion, in its collective dimension (Article 41 CRP)

Religious celebrations involve an agglomeration of people; thus, they are not allowed (in alternative some of them are taking place online). There have been reported episodes of catholic priests that insisted in celebrating masses with the physical presence of people in the church, who persisted with the conduct in spite of the warning from police forces, and only stopped under the threat of a possible crime of disobedience (Article 348 of the Portuguese Criminal Code¹⁶), given that they were violating an order from a public authority¹⁷.

persons across borders, available at: <https://bit.ly/2WTCQ37>.

¹⁶ Available at: <https://bit.ly/2A421Hm>.

¹⁷ *Padre celebrou missa em Mangualde e a GNR foi chamada ao local*, in *JN*, 22/03/2020, available at: <https://bit.ly/3cQubUy>.

g) Freedom to learn and teach (Article 43/1 CRP)

In order to prevent children gathering in a small place, Easter holidays were anticipated in the end of March, with the support of online education. After the holidays, when students were supposed to resume classes, all lectures were suspended. It was announced that during this academic year only students from the 11th and 12th grades (the two last ones of secondary school) will be allowed to have classroom classes and only for some courses¹⁸. In order to allow students to continue with their education, several options were considered, including online teaching, but the conclusion was that this option was unviable since many students do not have internet and not even a computer. Consequently, this teaching mechanism was complemented by lectures on television, under the assumption that most students have access to it. Obviously, this measure still raises many difficulties since not all of the students have the home environment (computer, internet, parents able to help them) required to learn at home. The problem is especially stressing for students finishing secondary school, since it is still unclear how and when the exams to access university will be held.

h) Right to the protection of personal data (Article 35 CRP)

Public authorities are allowed to request data telecommunication operators to send their customers written messages (SMS) with alerts related to the fight against the pandemic.

¹⁸ I. PAULO, A.M. CORREIA, *Covid-19. Um terceiro período como nunca o vimos (aula, exames, máscaras, telescola e as incógnitas*, in *Expresso*, 9/04/2020, available at: <https://bit.ly/2AT1nwE>.

All Decrees state very clearly, that the state of emergency cannot affect the right to life, the right to personal integrity, the right to personal identity, the right to civil capacity and citizenship, the principle of non-retroactivity of criminal law, the rights of the defendants, the freedom of conscience and religion (although its collective dimension is actually limited by the Decree), the freedom of expression and the freedom of information. These safeguards come as an imposition of Article 19/6 of the CRP.

Looking at the list of rights susceptible of being suspended (many of them effectively suspended), it is noticeable that some rights were not included in the Decrees. Their “absence” cannot be seen as a mere detail. From a constitutional perspective, the state of emergency is a truly exceptional situation, susceptible to affect some fundamental rights, but – as clearly stated by the Portuguese Ombudsman, «it does not suspend the Constitution»¹⁹, and thus only the rights expressly mentioned in the declaration of the state of emergency can be partially suspended.

A clamorous absence from this list is the right to personal freedom (Article 27 CRP), an absence that divided the constitutionalists, especially because this is the right mostly at stake in all the restrictions involved in the state of emergency. As pointed out by Jorge Reis Novais²⁰, the restrictions to travel, the imposition to stay in home confinement, the changes in labour duties, they all involve, even if only indirectly, a

limitation to the right of personal self-determination. But they become problematic if personal freedom is not referred as a right under suspension. Differently, José de Melo Alexandrino²¹ sustains a different perspective, that seems more reasonable. He states that rights can be object of different types of limitations, that do not equate to a proper suspension, even if not expressly enacted by law, as long as proportional and necessary to safeguard constitutional interest.

Also absent from the declaration of emergency is the right to access to justice and to courts (Article 20 CRP). The non-suspension of this right is in conformity with Law n. 44/86²², of 30 September, the law regulating the state of siege and the state of emergency (Portuguese law clearly distinguish the two, unlike some other foreign laws). This law clearly states: «[i]n the event of a state of siege or a state of emergency, citizens fully maintain their right of access to the courts, in accordance with the general law, to defend their rights, freedoms and guarantees that have been harmed or threatened with injury by any unconstitutional or illegal measures» (Article 6 of Law n. 44/86). Curiously, several courts proceedings have been postponed in the last couple of weeks, which might constitute a violation of Article 20 CRP and Article 6 of Law n. 44/86.

Not every measure carried out during the pandemic involves the restriction of rights.

Some of them intend to provide assistance to the community, assuring that people won't be deprived of basic goods. For instance, all patients

¹⁹ *Declaração da Provedora de Justiça sobre o estado de emergência*, 20/03/2020, available at: <http://www.provedor-jus.pt/?idc=136&idi=18228>.

²⁰ J. REIS NOVAIS, *Estado de emergência – Quatro notas jurídico-constitucionais sobre o Decreto Presidencial*, in *Observatório Alameda*, 19/03/2020, available at: <https://observatorio.alameda.net/index.php/2020/03/19/estado-de-emergencia-quatro-notas-juridico-constitucionais-sobre-o-decreto-presidencial/>.

²¹ J. MELO ALEXANDRINO, *Devia o direito à liberdade ser suspenso? – Resposta a Jorge Reis Novais*, in *Observatório Alameda*, 7/04/2020, available at: <https://observatorio.alameda.net/index.php/2020/04/07/devia-o-direito-a-liberdade-ser-suspenso-resposta-a-jorge-reis-novais/>.

²² Lei n. 44/86, Regime do estado de sítio e do estado de emergência, available at: <https://bit.ly/36oVnYk>.

with CoViD-19 will be exempt from paying the usual hospital fees²³, either for diagnostic or for treatment.

One of the most controversial measures based on Decree 17-A/2020 (Article 6) is the early liberation of inmates. The idea did not come out of the blue. On 25 March 2020, the UN High Commissioner for Human Rights appealed to the member states to initiate procedures for the early release of prisoners²⁴, in order to slow the transmission of the new coronavirus.

In spite of the many critics – mostly coming from the populist party²⁵, always eager to distort information to get votes –, this measure is essential to protect the health of the inmates²⁶. Even though jail sentences involve the loss of some rights, the right to health is not among them. The singularities of life in prison – especially in prisons that are in their maximum capacity, such as it happens in Portugal²⁷ – create the perfect scenario for a health disaster, not only for the ones serving time, but also for the ones who work in the penitentiary system, such as prison guards, health personnel and technicians in social reintegration.

In particular, the measures involve²⁸:

(a) The pardon of some jail sentences

The pardon involves sentences of two years or less, or longer sentences whose remaining

period is less than two years. This measure only involves less serious crimes, thus excluding the crimes of homicide, domestic violence, crimes against sexual freedom and sexual self-determination, robbery, criminal association, corruption, money laundering, arson and drug trafficking (except for less serious trafficking). Also excluded are the crimes committed by people in situations of particular public trusts, such as holders of political offices, members of the police and security forces, prison officials and guards.

(b) A special pardon for vulnerable inmates

Inmates with 65 years or older, who suffer from physical or mental diseases, or that have a degree of autonomy incompatible with the normal staying in prison (non-cumulative requisites) can receive a special pardon.

(c) A special administrative leave

This is a leave for a period of 45 days, renewable, under the filling of some requisites.

(d) The anticipation of release on parole.

A measure for which Portugal is being highly praised is the regularization of immigrants. Based on Order 3863-B/2020²⁹, from 27 March, all foreign citizens who have presented their legalization request at the moment the state of emergency was declared (18 March 2020), and

²³ Covid-19: Governo isenta de taxas moderadoras todos os doentes infetados, available at: <https://www.saudemais.tv/noticia/10839-covid-19-governo-isenta-de-taxas-moderadoras-todos-os-doentes-infetados>.

²⁴ United Nations Human Rights – Office of the High Commissioner, *Urgent action needed to prevent COVID-19 “ramping through places of detention”*, available at: <https://bit.ly/36lyyV6>.

²⁵ Covid-19: Chega rejeita “pandemónio” e garante “não aceitar a libertação de preso”, in *Sábado*, 2/04/2020, available at: <https://bit.ly/3geiKrX>.

²⁶ A. LAMAS LEITE, *Soltem os prisioneiros?*, in *Público*, 9/04/2020, available at: <https://bit.ly/3eaXxNH>.

²⁷ M. CERQUEIRA, *Prisão de Caxias é uma das mais lotadas do país*, in *Jornal i*, 19/02/2017, available at: <https://bit.ly/2zdF98h>.

²⁸ *Medidas excecionais protegem reclusos e funcionários das prisões*, in *JUSTICA.GOV.PT*, 2/04/2020, available at: <https://bit.ly/2ZnXPg6>.

²⁹ Despacho n. 3863-B/2020, available at: <https://bit.ly/36kP1ck>.

whose request is now pending in the Portuguese Immigration Service, will have their situation regularized in Portugal. This allows to a vulnerable population (and especially vulnerable during a pandemic) to have access to some essential services, as health, social security and stability in employment (actually, under Portuguese law, any illegal immigrant is entitled to receive healthcare by the national health service, and in cases of threat to public health, such as a pandemic, only pays a small fee³⁰).

In spite of the many praises the measure has received internationally, the regularization of illegal immigrants might be less sensational than it appears. The wording of the Order is imprecise (a clear case of poor legal writing), but it might be the case that the regularization is only valid until the 30 June, thought susceptible of subsequent renovations.

However, it's not all rainbows and butterflies. Portugal can still be a target of criticism. Bottom line, the country has one of the highest mortality rates³¹. The absolute number might not be overwhelming, but our percentage of fatalities per million of habitants³² is concerning.

This frustrating result might be due to the failure of some measures:

1. Legal proceedings for the crime of disobedience – applied to people who disobey the

order for home confinement imposed by the public authority – are sometimes terminated because (some) Public Prosecutors and judges seem to understand that the existing regulations do not foresee the crime of disobedience for all situations³³ where home confinement is violated. It is difficult to combat a pandemic when there is no effective way to make people comply with the measures in places.

2. Social distancing is not being respected by everyone. A deeply religious population and a frustrating ignorance in what regards the modes of infections (in spite of the massive information in place in the media) led to situations of severe risk, especially during the Easter celebration. People gathering together, moreover all kissing the sacred Cross³⁴, are fertile soil for the infection.
3. Hospitals struggle with the lack of material (for instance, protection for health care staff, ventilators) contradicting the words of the Executive guaranteeing that healthcare staff and hospitals are well equipped.³⁵
4. The modus operandi of the Directorate-General for Health, the highest health authority in Portugal, does not arouse confidence in the population: it started by devaluating the importance of the virus,³⁶ even against scientific evidences; there is an evident lack of

³⁰ <https://bit.ly/3cQuONU>.

³¹ *How Europe is responding to the coronavirus pandemic*, in *Político*, 3/13/2020, available at: <https://www.politico.eu/article/how-europe-is-responding-to-the-coronavirus-pandemic/>.

³² P. CAETANO, *Visão Factual Epidemiológica: Portugal é um dos países mais perigosos do mundo na Covid-19*, in *Observador*, 15/04/2020, available at: <https://bit.ly/2WVbGJd>.

³³ M. OLIVEIRA, S. TRIGUEIRÃO, A. HENRIQUES, *Covid-19: há 175 detidos por desobediência, mas só 18 julgamentos*, in *Público*, 10/04/2020, available at: [https://www.publico.pt/2020/04/10/sociedade/noti](https://www.publico.pt/2020/04/10/sociedade/noticia/covid19-ha-175-detidos-desobediencia-so-18-julgamentos-1911767)

[cia/covid19-ha-175-detidos-desobediencia-so-18-julgamentos-1911767](https://www.publico.pt/2020/04/10/sociedade/noticia/covid19-ha-175-detidos-desobediencia-so-18-julgamentos-1911767).

³⁴ J.F. GOMES, *Lares promovem "beijar da cruz" entre idosos apesar da suspensão decretada pela Igreja*, in *Observador*, 13/04/2020, available at: <https://bit.ly/2TtPgN2>.

³⁵ J. PEREIRA BASTOS, *Costa diz que não falta nada, mas nos hospitais diz-se que falta o básico*, in *Expresso*, 23/03/2020, available at: <https://bit.ly/2TvFdqz>.

³⁶ *Quando a diretora-geral da Saúde desvalorizou o impacto do coronavírus*, in *Sábado*, 12/03/2020, available at: <https://bit.ly/36lDadY>.

communication with local authorities,³⁷ and basic mistakes in the assessment of the number of infected individuals³⁸ are recurrent. One of the most stringent flaws is the fact that the Directorate-General for Health insisted until recently in discouraging people from wearing facial masks,³⁹ even with the strong opposition of the Portuguese medical community⁴⁰ and defying the practices been followed in the countries that have been more successful in fighting the pandemic⁴¹.

Moreover, home confinement is aggravating the cases of domestic violence⁴² (even though the numbers of complaints decreased); children at risk⁴³ are being sent back to their families (to where they were removed for self-protection)

and surprise home visits to their homes is suspended during the state of emergency. The State of Emergency partially suspends some rights, but cannot suspend the protection due to the weakest ones.

What does the future hold? The current state of emergency will cease on May 2, 2020, at 11.59 pm.

It is uncertain whether the state of emergency will be renewed one more time, until mid-May. Authorities seem to believe it won't, but it all depends on the evolution of the pandemic. The future is uncertain, so one can only hope the pandemic has a satisfactory evolution. In such desperate times only hope, and above all science, can help us.

(23 April 2020)

³⁷ *Covid-19: Câmara do Porto não reconhece autoridade à DGS e rejeita cerco sanitário*, in *Visão Saúde*, 30/03/2020, available at: <https://bit.ly/2TxzBwd>.

³⁸ *DGS admite dupla contagem de casos de covid-19 no Porto*, in *Diário de Notícias*, 31/03/2020, available at: <https://bit.ly/2WScoXB>.

³⁹ J. CÉU E SILVA, *Máscaras dão "falsa sensação de segurança", diz Graça Freitas, mas China envia-as para Portugal*, in *Diário de Notícias*, 22/03/2020, available at: <https://bit.ly/3eblcfW>.

⁴⁰ *Covid-19: Conselho de Escolas Médicas critica DGS pela posição sobre máscaras*, in *Publico*, 3/04/2020, available at: <https://bit.ly/2Xh7L8g>.

⁴¹ S. O'DWYER, *You don't have to be Asian to wear a face mask in the epidemic*, in *The Japan Times*, 17/03/2020, available at: <https://bit.ly/36kPtHy>.

⁴² *APAV teme aumento da violência doméstica com prolongar da quarentena*, in *Sabádo*, 26/03/2020, available at: <https://bit.ly/2LN1vQg>.

⁴³ R. PENELA, *Crianças e jovens vítimas de maus tratos enviadas de regresso a casa e sem visitas de rotina dos técnicos*, in *Observador*, 1/04/2020, available at: <https://bit.ly/3gdWpul>.