

# The Constitutionalized State of Emergency

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2020-04-15T10:46:57

The late Giovanni Sartori once said that we lacked a general theory of [dictatorship](#). It is very likely that we are also short of a theory of emergency. As the current pandemic has come to show us, not only we still have difficulties to include emergency into our conception of constitutional law; we seem to differ on what emergency means and necessitates and on what should be its place in the functioning of the democratic State.

Since the early years of this century, emergency has been the recurrent approach in many democracies to our most divisive collective issues, be it [national security](#) or the [financial crisis](#). For some, we have been living in a “[permanent](#)” [state of emergency](#) where sensitive questions are treated as existential threats urging democracies to fiercely defend themselves. The use of emergency as an overarching concept has served the opposite sides of the political setting, who seem to have accepted [the normalization of the emergency](#) in their conflicting agendas either for open reform or contestation.

It is not certain, however, that this view helped to understand how emergency fits into democratic orders increasingly exposed to internal and external fractures. And as the pandemic outbreak forces us to close down our economies and societies for an indefinite period, our position is now somewhat of hesitation. Are we in a ‘d’*é*jà vu’ mode, or must we actually say that ‘this time is different’?

## The declaration of emergency in Portugal

As already detailed [here](#), the Portuguese President has [declared the state of emergency on 18 of march](#), based on the existence of a public calamity and referring to the WHO announcement of Covid-19 as a pandemic. The President has justified the state of emergency with a view to reinforcing the legal certainty of the overall emergency framework, as well as with the need of new restrictive measures that are necessary to contain the spread of the virus.

According to the Portuguese Constitution, the state of emergency may only last for 15 days, although it can be renewed for equal periods. The presidential decree has enacted the “partial suspension” of certain fundamental rights: the freedom of movement and settlement in the territory, property and economic freedom, right to strike and some other workers' rights, cross-border circulation, rights of assembly and demonstration, freedom of collective worship and right of resistance. In line with what is stated in the Constitution, the decree has also defined that the emergency could not affect the rights to life, integrity, personal identity, civil capacity and

citizenship, non-retroactivity of the law and due process and freedom of conscience and religion, adding to the list the freedoms of expression and information.

Following the emergency decree as defined by the President, the Government, which is a separate body from the President, [approved a decree on 20 of march](#) that aims to implement the declaration. The government decree places different groups of citizens under the duties of: i) *compulsory confinement* (e.g patients with COVID 19 and SARS Cov2 and citizens under active surveillance by health authorities), ii) *special protection* (those over 70, and immunodepressed or persons suffering from chronic diseases) and iii) *home retreat* (all the other citizens allowed to move and circulate only for specific purposes). Services, retailers (other than supermarkets and groceries), and stores have been forced to close doors; telecommuting has been made mandatory whenever functionally possible; transports were restricted or in some cases suspended.

Given its limited duration, the President decided to renew the state of emergency [by passing a new decree that was published on 2 of April](#). Besides extending the declaration of emergency for more 15 days, the President has also authorized the suspension of other rights (the freedoms to learn and teach and the right to data protection), and reinforced the restrictions on freedom of movement due the Easter period. This time, the movement of people and the risk of contagion were the only immediate causes for the declaration. Among the reasons also mentioned by the President are the need to ensure the capacity of the National Health Service, the supply chains of essential goods and the well-functioning of the economy. Similarly, the Government [approved a second decree implementing the prorogation of the emergency](#), which was published in the same day of the presidential decree.

At the time of writing, both [the President](#) and [the Government](#) have announced they will renew the state of emergency until may.

## **Constitutionalizing emergency in the Portuguese Constitution**

Leaving behind a 48-year-old dictatorship, the democratic [Portuguese Constitution of 1976](#) has sought to define within the constitutional order itself the procedural and material preconditions that would enable the suspension of rights and the declaration of the state of siege or the state of emergency.

According to Article 19 of the Portuguese Constitution, the two states, siege and emergency, may only be declared “in cases of actual or imminent aggression by foreign forces, a serious threat to or disturbance of constitutional democratic order, or public calamity”. The difference between both relates to the intensity and seriousness of the factual preconditions. The state of emergency shall apply when such contexts are less serious and shall only cause the suspension of some rights and freedoms.

In its attempt to constitutionalize emergency, the Constitution has devised a negotiated mechanism between the three political institutions to ensure that none

could unilaterally decide on the suspension of rights. This mechanism of mutual control can be analysed in two moments. The first consists in the fact that, under Article 138 of the Constitution, the declaration by the President of the state of emergency requires prior consultation of the Government and authorisation by the Parliament. The second is that, while Article 19 constitutes the first level of self-control, the Constitution also requires that the procedure for declaring and executing the state of emergency be regulated in a special law, approved by a qualified majority. [This particular law](#) reinforces the normative framework by prescribing the necessary content and limitations of the extraordinary measures, as well as the division of competences between the President, Government and Parliament. Leaving aside the question of whether the Portuguese case fits in the [neo-Roman model](#), it is as if the state of emergency, briefly put, would be governed under the typical formula: the President declares, the Government executes and the Parliament oversees.

## **How “open” can the emergency mandate be?**

This formula, however, would be an over-simplification of the practical issues posed by the state of emergency. In Portugal, the declaration on the state of emergency must comply with a predetermined content, including the characterization of the emergency and the specification of the rights that are affected. The presidential decree provides the framework under which the Government will intervene. It is not just a political act, but a normative one. Such framework cannot be too general, as it is supposed to identify the purposes and necessary restrictions that will be imposed on the selected rights.

At the same time, it would not be possible or desirable to anticipate all the restrictive measures the Government shall be allowed to take in order to achieve the intended purposes behind the emergency. The power of the President is not solely declarative, and the Government's position is also not of just of an executor. In its constructive, selective, often tailor-made activity of transposing the presidential framework into the reality of the concrete emergency, the Government has a large capacity to choose the best means of intervention.

A close comparison in Portugal between the declaration of emergency by the President and the implementing decrees by the Government, as well as the emergency legislation that has been adopted, would provide useful lessons in this regard. For example, while the declaration of emergency has broadly permitted the shutdown of businesses, units or economic activities, the Government has reinforced that the shutdown cannot be used as a basis for termination of non-housing lease agreements or other contracts related to the buildings. In another example, the President has decreed on the suspension of freedom of movement and cross-border circulation, while the Government came to identify the situation of each means of transportation, by ordering the reduction of the number of passengers to one third of the seats.

It would be easy to continue with more examples. The initial decree by the President made no reference to the closure of elementary and secondary schools, but still the

Government has decided to take the measure. On the other hand, the declaration has authorized the possibility of requesting buildings, goods or equipment from the private sector, which the Government so far has not used. Also, due to the severe impact that the suspension of economic activity brings to companies and families, the Government has been adopting various forms of social and economic support, which don't entirely fit within the walls of the legal emergency.

The question then is not how open the presidential declaration of emergency can be, because it has to be inherently open. What needs to be asked is how are we able to cope with the extensive emergency powers that must necessarily be granted to the Government. Of course, the intervention of the executive in responding to the state of emergency cannot be the product of unlimited power and must be appropriately conformed by limitations and constitutional principles.

## **Between the restoration and recreation of normality**

In the model of the constitutionalized emergency, the whole purpose is to tie up both its declaration and implementation to a paradigm of constitutional self-defence, which explains the limitations that apply to it: its temporary nature, the fact that the most basic rights may not be affected, the respect for the principle of proportionality and the division of powers, and the duty stated in the Constitution to promptly restore the constitutional normality. In legal terms, the restoration of constitutional normality would have a precise meaning: once the suspension of the right ceases, the norm of fundamental rights returns to its original effects and citizens are again in possession of the right without the limitations. Once the anomalous fact disappears or is eliminated, normality may return.

This idealized view of the state of emergency in Constitutional law suffers, however, from two related problems. As already discussed, it is misleading to describe the emergency lawmaker as a mere restorer. There's no normality when the emergency generates a loss that cannot be restored. The suspension of freedom of movement affects the freedom to produce and the freedom to work. Businesses and workers are prevented from returning to a normality that has been profoundly altered in the course of the emergency. This doesn't mean the emergency requires forms of action outside the Constitution. On the contrary, it is the basis for providing support to citizens and companies in order to protect other fundamental rights and principles.

Because of this, despite being contained by the constitutional arrangements and the separation of powers, emergency is never simply defensive. It is protective and creative. States are not limited to suspending rights. They are expected to increase the protection of citizens, secure rights, empower their positions, and they often try to accomplish these things through the creation of exceptional rules and inventive procedures. How transformative can states be in dealing with the emergency under the emergency, that is, with the abnormality that penetrated the lives of citizens as a result of the pandemic? Which rescue or protection measures to be taken? Soon, as the situation of the disease improves, stronger measures will be replaced by lighter ones, thus ending with the state of emergency. However, many exceptional measures that have been adopted will remain and they will derive their validity

from other norms. These are questions that illustrate why states acting under the emergency require a permanent justification that preserves its legitimacy. It is also a reminder that the creative emergency is to be legally addressed, and not forgotten.

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