

The Response to the COVID-19 pandemic in Portugal: A success story gone wrong.

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1. A Year in Review

Following an initial comparatively [successful](#) handling of the pandemic, infection numbers began increasing consistently after September in Portugal and reached an [alarming rate](#) at the beginning of 2021. A [second lockdown](#) started on January 14, 2021, with [record infection](#) and mortality rates and the National Health Service near [breakdown](#). On 21 January, the measures were tightened and included the closure of schools and universities. A year later, Portugal is back to square one, and, as the failure to control the growth of the pandemic seems evident, medical and moral despair dominate. The impact of the restrictions on the freedom of movement contributed to a decline in the country's overall score of [The Economist's Democracy Index 2020](#), that now qualifies it as a "democracy with flaws".

In this contribution, we cover the use of emergency powers by the Portuguese government in response to the pandemic, as well as the regional and local responses and the effectiveness of judicial and legislative scrutiny and oversight. We conclude by outlining the major challenges the pandemic has presented to the rule of law and align proposals to increase executive oversight and public expenditure scrutiny.

2. The Executive and Use of Powers in Response to Emergency

Portugal is a semi-presidential system, and both the Parliament and the Government enjoy legislative power. The Government led the fight against the pandemic, making use of its double hat as executive and legislator. Between 2-18 March 2020, the Government adopted strict [restrictive measures](#) to contain the epidemic based on previous legislation, such as the [Framework Law of Civil Protection](#), the [Framework Health Law](#), and the [Law on Public Vigilance of Health Risks](#). The restrictions included the closure of schools, limited access to restaurants and bars, and mandatory teleworking. The country initiated a first lockdown on 16 March, 2020, when it recorded only [62 cases of Covid-19 per million inhabitants](#) and reported no deaths.

The extensive powers deployed by the Government raised concerns of legality and constitutionality. Those concerns prompted the President to declare, for the first time under the democratic constitution, a [constitutional state of emergency](#) under Article

19 of the Constitution. The state of [emergency](#) can only be declared for 15 days, subject to renewals following Government consultation and binding parliamentary authorization. With the initial declaration and two renewals, it lasted between 18 March and 2 May 2020. Stricter suspensions of fundamental rights were enforced. A generalized ban on movement and *cordons sanitaires* was applied to the most affected municipalities, and an extensive list of economic activities were shut down, including shops, cultural and sporting facilities.

The state of emergency [expired](#) at midnight on 2 May, 2020. It was replaced with a less severe [state of \(administrative\) calamity](#), governed by the abovementioned Framework Laws on Civil Protection and Health and the Law on Public Vigilance of Health Risks. This transition did not entail significant substantial changes at first. Still, it allowed the Government to regain ownership of the situation, not being bound by the initiative and the framework defined by the President and the need to present periodic reports to the Parliament.

A “civic duty” of confinement replaced the ban on movement. Still, the remaining restrictions of fundamental rights were mostly maintained through regulatory instruments that are not subject to parliamentary oversight nor presidential promulgation. As the first to third renewals of the state of calamity were declared (encompassing the period between 3 May – 28 June), it became clearer that deconfinement was gradually in motion. The Government was slowly but steadily lifting the restrictions.

From September onwards as the infection rates increased, the Government was forced to abandon its deconfinement strategy. Restrictions on social gatherings, cultural events, and the working hours of restaurants and bars were reintroduced. In October, the use of masks or visors in public spaces was made compulsory by [law](#). The Government also intended to render the contact tracking smartphone application ([Stayaway Covid](#)) mandatory. Still, it could not reach parliamentary consensus in the face of constitutional concerns over privacy issues.

On November 6, 2020, a new constitutional state of emergency was declared, and stricter restrictions implemented. During December, curfews were imposed from 11 PM to 5 AM during working days and from 1 PM to 5 AM during the weekends as an attempt to “save Christmas”. The Covid-19 vaccination program [began in late December](#), in line with the other EU Member States.

After an unsuccessful end of year strategy, the cases exploded in the beginning of 2021, and Portugal became the country with the highest number of infections per million inhabitants. On January 15, 2021, a new lockdown was adopted. Some exceptions for political activities were carved out because of the presidential elections scheduled for [January 24](#). The number of new cases and Covid-related deaths continued to rise alarmingly, [reaching 16,432 new daily cases](#) and [303 further daily fatalities](#) on 28 January, setting new national records, as Portugal weathers [one of the worst pandemic surges in the World](#).

3. Regional and Local Response and Coordination

Portugal is a unitary state with two autonomous regions in Madeira and Azores' archipelagos with self-governing bodies and legislative, executive, and international powers. In these regions, health and civil protection matters have been devolved, although within the powers provided by the [Framework Law of Civil Protection](#), the [Framework Health Law](#), and the [Law on Public Vigilance of Health Risks](#).

Because of their geographical characteristics and frailty of the regional health services, the regional governments quickly reacted at the beginning of the pandemic. Their attempt to ban travel from continental Portugal was dismissed as exceeding their constitutional powers, but they successfully implemented mandatory quarantines and tests for incoming passengers. Some measures to address the pandemic were stricter in Madeira and Azores than in continental Portugal. For instance, in Madeira, the use of protective masks in all public spaces (indoors and outdoors) [was imposed](#) in July 2020. This means that the regulatory framework response to the pandemic in the regions was differentiated from continental Portugal.

As regional powers are limited, and most of the measures were adopted through executive regulations, there are well-founded doubts about their constitutionality. The Constitutional Court considered the regional mandatory quarantines unconstitutional because they exceeded the powers of the autonomous regions.

The implementation of the state of emergency in the regions is also problematic. According to the [state of emergency law](#), the Representatives of the Republic in the regions (who are public officials, appointed by the President) are the competent authorities. They should act under the guidelines of the Government in cooperation with the regional governments. However, this statutory provision, after the constitutional amendment of 2004, which increased the powers of the self-governing bodies of the regions, is functionally inadequate and can be considered an [option of dubious constitutionality](#). In practice, the declarations of state of emergency have been implemented by the regional governments, through administrative regulations, in the face of inertia by the Representatives of the Republic.

In continental Portugal, the national health system is centralized. The Minister of Health thus leads the response to the pandemic. However, local authorities have some devolved powers on primary health care and significant powers on civil protection, such as closing parks and other public areas. The social safety net against the economic hardship was also partly secured by them.

4. The Effectiveness of Judicial and Legislative Scrutiny and Oversight

The Parliament remained operative and never shut down throughout this period. Parliamentary works were reduced during the first and second lockdowns and fast-track procedures have been adopted but only to governmental initiatives. The symbolism of maintaining the Parliament's doors open came at a democratic cost:

by reducing meetings and the committees' works, the Parliament's oversight and deliberative roles were *de facto* curtailed. Despite this, the [Law on the State of Emergency](#) obliges the Government to present a report to the Parliament detailing the use of the emergency powers it received.

During the pandemic's early stage, courts were also subject to restrictions, albeit their supervisory role over emergency action remained intact. Judicial review of emergency measures has validated limitations on [inter-municipal circulation](#) and restrictions to [freedom of assembly](#). However, courts have censored [regional regulations](#) imposing [mandatory confinements](#) and criminal prosecution in cases of [disobedience](#) for breach of emergency requirements for lack of parliamentary delegation. There are pending cases at the courts, including the Constitutional Court, and many more are expected in the months (and perhaps years) to come.

The Portuguese [Ombudsperson](#) is appointed by the Parliament and is competent to handle complaints of all persons who feel harmed by unfair or illegal public administration's acts, or who claim infringements of their fundamental rights. During the pandemic, the Ombudsperson has also remained vigilant and acted swiftly in several cases such as [tax complaints](#), social protection of individual [workers](#), assistance to the family of [Covid-19 patients, and deceased](#).

The need for a fast response to the challenges presented by the pandemic provided a setting where the Government enjoyed limited checks on its powers. However, the parliamentary debates on the state of emergency reports have provided a degree of a political ex-post scrutiny, but only during the periods when a state of emergency was declared. The courts and the Ombudsperson have also proved to be a tool of oversight; however, the effectiveness of their response has been compromised by the lengthy decision-making procedures.

5. Human Rights and Civil Liberties Considerations

Apart from the limitation of the freedom of movement during the lockdown, the right to private property and freedom of economic activity, as well as the right to work, have been severely impinged as many economic activities had to shut down or operate under restrictions. Collective religious celebrations were also suspended during the first lockdown, and no demonstrations or protests were authorized during this period except for Labor Day celebrations. Cultural activities were limited. The closure of schools may have long-lasting detrimental effects on the right to learn. Funerals were subject to strict limitations to avoid accumulation of people.

To cushion the economic effects of the pandemic on families and individuals, both the Government and Parliament have adopted significant measures such as the suspension of evictions until 30 June 2021, and the possibility of delaying the payment of rents. Tenants in shopping malls have been exempted from the payment of minimum rents – a controversial measure [challenged by the Ombudsman](#) near the Constitutional Court for breach of the rights to property and private enterprise. A special layoff compensation of 70% was implemented to support companies under

distress and prevent the increase in unemployment. Other support measures include financial compensations and exemption or delay of tax and social security payments.

Temporary Regularization of Migrants and Early Release of Inmates

In a [remarkable decision](#), the Portuguese Government decided to grant temporary regular status to all migrants with precarious situations who had previously started their regularization procedure. This temporary regularization gives them full access to social benefits, including healthcare, in the same conditions as nationals.

Following the UN High Commissioner on Human Rights' [call](#) on governments to take urgent action to protect the health and safety of people in detention and other closed facilities, as well as the [recommendation](#) of the Portuguese Ombudsman, the Parliament approved a legal regime aimed at the early release of inmates ([Law 9/2020, of April 10](#)). The measures included the pardon of some jail sentences, the anticipation of release on parole, special administrative leaves, and special pardons for vulnerable inmates. In total, 2,031 individuals benefitted from an early release. The implementation process was met with [criticism](#) for providing a surreptitious justification to permanently reduce the inmate population and thus decrease the incarceration rate, which is among the highest in the European Union. The Government has already [announced](#) that no similar measures will be adopted during the second and third waves of the pandemic, although cases of infections are increasing in prisons.

Presidential Elections

The [presidential elections](#) were held on 24 January 2021, during the second lockdown, despite the debate over whether they should have been postponed. Infected individuals, as well as individuals who have been declared under active surveillance after 14 January, [were unable to register to vote at home](#), being therefore prevented from voting. This was an infringement of their fundamental right to vote and lead to a [high number of complains to the electoral administration](#) which was unable to remedy the situation. Despite the pandemic, the electoral administration failed to ensure that enough ballots were available for the anticipated voting, and long queues were reported. The electoral campaign has not been suspended, but it was subjected to the guidelines of the health authorities and severely constrained by the lockdown. The elections were [won by the incumbent, the moderate Marcelo Rebelo de Sousa](#), but the major winner was the low turnout ([60% of voters abstained – the highest figure in Portuguese history](#)), as people feared going to the polls amid record coronavirus infections. As voters wearing masks formed socially distanced queues at polling stations, health officials reported 275 Covid-19 deaths in the previous 24 hours, the country's highest daily number of fatalities since the beginning of the pandemic.

6. 2021 Outlook

The most significant challenges for the rule of law remain within three constellations: separation of powers, legal security, and increased corruption risks. Governmental

circumvention of Parliament on the restriction of fundamental rights during the administrative state of emergency raises the constitutionality of the executive action. [Leaked emails](#) show uneasiness with this topic, even within the political majority supporting the Government.

A chaotic [body of law and administrative regulations](#) comprising the “Covid-19 Law” adds to legal security concerns. Covid-19 litigation is still in its early days, but it will inevitably flood the judicial system for years to come, much like the previous [economic and financial crisis](#). The enactment of a Sanitary Emergency Law can provide an adequate framework to the executive action without jeopardizing the constitutional demands, namely parliamentary authorization for the affection of fundamental rights, and reduce the constraints related to accessibility and intelligibility of the measures.

Flexibilization of public procurement rules has reduced oversight for public expenditure, increasing risks of corruption and inefficiency in a country already suffering from [structural deficits](#) in public-sector accountability. Recently, the President of the Republic [vetoed](#) a parliamentary bill that introduced amending procedures in public procurement legislation related to EU funds under the argument that the pandemic emergency’s desired flexibilization cannot jeopardize scrutiny over the legality and regularity of public expenditure. Increased scrutiny of public spending should be a priority through, for example, publicly accessed monitoring tools.

Most importantly, the expansion of parliamentary oversight of Covid-19 executive action should be a strategic priority. Implementing a specially convened parliamentary committee could provide an efficient platform to enhance executive scrutiny and accountability.

