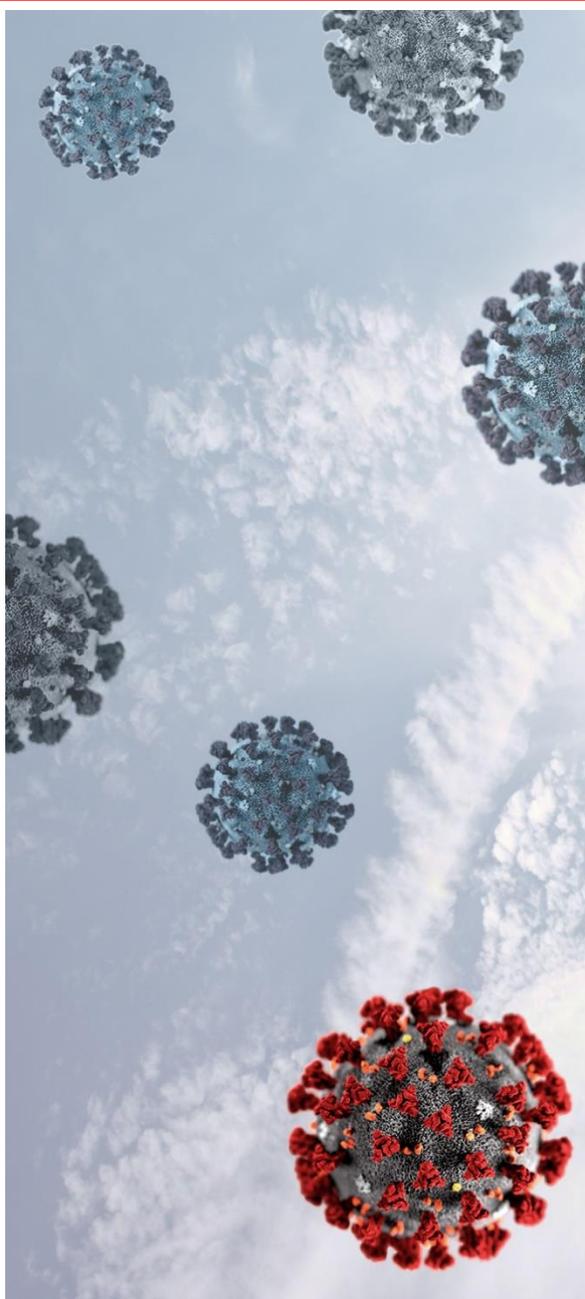

COVID-19: State of emergency and situation of calamity

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- > **The state of emergency, the situation of calamity, and the restrictions on rights, freedoms, and guarantees**



The state of emergency, the situation of calamity, and the restrictions on rights, freedoms, and guarantees

I. The state of emergency

The public health emergency caused by the COVID-19 virus, classified as an international pandemic by the World Health Organization, forced all States to take numerous measures to prevent its spread.

In Portugal, like in the rest of the world, national authorities faced the need to take many exceptional measures that strongly restricted many rights, freedoms, and guarantees, which certainly questioned the lawfulness of many of them.

After an initial period, when they were adopted under the Act on the Bases of Civil Protection (Law 27/2006 of July 3), the Portuguese sovereign bodies seem to have unanimously agreed that the situation and the exceptional nature of many of the measures taken or to be taken, justified (and required) **declaring the state of emergency** (section 19 of the Constitution of the Portuguese Republic), under the Constitution.

That declaration (which had never before been issued under the current Constitution) allows for changing, on the terms stipulated, “constitutional normality” and suspending many rights, freedoms, and guarantees, granting the government, i.e., the competent body to implement it, the power to take the measures regarded as necessary to face the country’s exceptional situation.

The fact that the declaration of the state of emergency is expressly foreseen in the Constitution, and its issuance involves the President of the Republic (who is competent to issue it), the Assembly of the Republic (which had to authorize and confirm the declaration) and the Government (whose prior hearing was necessary, in addition to the declaration needing ministerial endorsement) made it possible for many measures that had never been previously taken to be accepted almost with no opposition.

The President of the Republic started by issuing the first declaration of the state of emergency, based on a situation of calamity, through Presidential Decree 14-A/2020 of March 18, regulated by the government through Decree 2-A/2020 of March 20.

It was then renewed, in a slightly different form, through Presidential Decrees 17-A/2020 and 20-A/2020 of April 2 and 17, respectively, which were subsequently regulated by Decrees 2-B/2020 and 2-C/2020 of April 2 and 17, respectively.

As the President of the Republic stated in the first declaration, he understood that issuing that declaration was “*necessary to reinforce the constitutional coverage of more extensive measures [than those that had then been taken] required to fight this public disaster.*”



II. The situation of calamity

Surprisingly, even though all bodies are convinced that, despite the current situation having stabilized, it still advisable to adopt several measures that restrict rights, freedoms, and guarantees (although they are less intense), the Portuguese authorities understand that extending the state of emergency is not justified (unlike in other countries such as Spain).

The government opted, under the Act of the Bases for Civil Protection, to declare the **situation of calamity** (see Resolution of the Council of Ministers 33-A/2020 of April 30) and implement, under the Act on the Public Health Surveillance System (Law 81/2009 of August 21), a set of exceptional measures regarded as necessary to control the ongoing pandemic.

The following day (May 1), the government passed Decree-Law 20/2020, which modified the exceptional, temporary measures regarding the COVID-19 pandemic specified in Decree Law 10-A/2020, which integrated *“the rules in the government decrees regulating the state of emergency, which can be admitted here”* (see introduction to the decree).

On May 16, through Decree-Law 22/2020, the government amended Decree-Law 10-A/2020 again, introducing *“amendments”* and *“additions”* to the *“exceptional measures that the government has approved (...) based on the new issues identified regarding workers, businesses, economic operators, and citizens in general.”*

Through the Resolution of the Council of Ministers 38/2020 of May 17, the government extended the declaration of the situation of calamity by another 15 days, establishing exceptional measures applicable to this new period, described as *“a set of less intense restrictions, suspensions and lockdowns than those that were previously in force.”*

III. Differences between the state of emergency and the situation of calamity - lawfulness of the restrictions of rights, freedoms, and guarantees

The option, expressly selected by the government, of losing the constitutional coverage conferred by declaring the state of emergency, replacing it by the declaration of the situation of calamity, and proceeding under it to implement many laws and regulations affecting rights, freedoms, and guarantees (as specified in Decree Law 10-A/2020, its successive amendments and the Resolutions of the Council of Ministers 33-A/2020 of April 30 and 38/2020 of May 17) has given rise to strong reservations regarding the constitutional nature of many of the measures now in force.

This causes great legal uncertainty, which makes it possible to anticipate that many issues will be subject to the courts' scrutiny.

The state of emergency, expressly defined in the Constitution of the Portuguese Republic (like the state of siege) is the adequate instrument to suspend rights, freedoms and guarantees, and allows limiting, under the principle of proportionality, the rights, freedoms and guarantees enshrined in the Constitution (with the exceptions established in article 19.6 of the Constitution).



The situation of calamity, however, is enshrined in the Act on the Bases of Civil Protection, and may be declared when, given the occurrence or threat of occurrence of a serious accident or disaster and its foreseeable intensity, there is a need to take exceptional measures aimed at preventing, reacting or restoring normal living conditions in the areas affected by its effects. However, when a situation of calamity is declared, the law does not provide that rights, freedoms and guarantees can be suspended.

Any restriction of rights, freedoms and guarantees must meet all the constitutional requirements, and particularly those enshrined in articles 18 and 19 of the Constitution of the Portuguese Republic, which expressly provided that *“the sovereign bodies cannot, jointly or individually, suspend the exercise of rights, freedoms and guarantees, except in the case of a state of siege or state of emergency, declared as provided in the Constitution.”*

Therefore, given that, in periods of constitutional normality, the government, unless expressly authorized by the Assembly of the Republic, is not competent to restrict rights, freedoms and guarantees, the constitutional nature of many of the measures taken is dubious, which will allow private individuals to challenge them in court.



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Cuatrecasas has set up a Coronavirus Task Force, a multidisciplinary team that constantly analyses the situation emerging from the COVID-19 pandemic. For additional information, please contact our taskforce by email TFcoronavirusPT@cuatrecasas.com or through your usual contact at Cuatrecasas. You can read our publications or attend our webinars on our [website](#).

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