

VIII. THE STATE OF THE CONSTITUTION

1. *Progressive* De-constitutionalization

Mexico is gradually entering the unknown territory of an evanescent Constitution.

The State's legal system experienced the health crisis after successive government measures had affected the health system by reducing its budget, hindering the supply chain of medicines, eliminating a health care system without immediately replacing it with another capable of functioning, and the medical profession was stigmatized, including a decrease in the already meager emoluments granted to thousands of doctors in their specialization process.

This adverse situation was compounded by an erratic information mechanism, restrictions on the application of tests, and numerous deficiencies in the supply of health security inputs for the medical corps. In terms of political symbols, the President of the Republic tried to attenuate the negative impact of the pandemic through casual expressions that were poorly received, because instead of conveying certainty regarding the quality and timeliness of decisions, he projected an impression of denialism and superficiality.

The combination of these factors damaged public confidence, which rightly questioned the veracity of the information and the consistency of the measures adopted by the authorities. In such a context, the sanitary emergency measures imposed limitations on the freedom of transit, work and commerce, without the constitutional provisions foreseen for such cases having been applied. Despite the atavistic resistance to the application of the

state of emergency provided for in Article 29 of the Constitution, the conventional expedient of unilateral administrative decisions was chosen.

The Article 29 mechanism involves congressional consent, and a constitutional addition in 2011 introduced extensive safeguards for fundamental rights, making it a very secure institution for the preservation of the legal order. Moreover, congressional participation would have provided an opportunity for the majority and minority political forces to act by consensus, offering the country an example of harmony that would have contributed to attenuating the widespread tension, and would have put the Constitution at the center of decisions.

It opted for the exclusion of Congress, of a segment of political opinion and, most damagingly, it avoided applying a constitutional provision that for reasons of strategy had been relegated during the period of party hegemony. The perception that vertical power is exercised outside of constitutional assumptions is erosive of Mexico's supreme norm. The formulation and implementation of official policy related to labor protection also lacked congressional involvement. The magnitude of the economic downturn and its impact on the daily life of every Mexican will only be measurable as time goes by. This does not preclude the inference that it represents a setback in terms of employment and social benefits, including education, health, food, housing, public services, and security. To alleviate this situation, on May 8, 2020, at the height of the health crisis, an addition to Article 4 of the Constitution was published. Understandably, the publication went unnoticed.

In the area of health, the following was added to the Constitution: "The law shall define a health system for well-being, with the aim of guaranteeing the progressive, quantitative and qualitative extension of health services for the comprehensive and free care of people who do not have social security". The credibility of this reform was tarnished by the intensity of the pandemic and the direct confirmation, through family members and ac-

quaintances, and through the media, of the difficulties in providing care and the inaccuracy of the official figures in terms of the number of sick and dead people. This reform also meant the disappearance of a care program called “Seguro Popular” which, despite uncorrected deficiencies, was producing reasonable results. The disappearance of this program created a vacuum that could only be explained by the haste with which the new system was designed, but the crisis prevented its implementation and, in addition, highlighted the acute organizational, operational, and financial shortcomings of the country’s health institutions.

The constitutional amendment also brought in three new paragraphs, which are confusing and even contradictory in their wording. The first provides:

The State shall guarantee the delivery of economic support to people with permanent disabilities under the terms established by law. Priority for receiving this benefit will be given to children under the age of eighteen, indigenous people and Afro-Mexicans up to the age of sixty-four, and people living in poverty.

The direct reading of this new provision indicates that the benefit will cease upon reaching 64 years of age, except for those who are in poverty. There is no indication of the periodicity of the “support”, which, given the wording, could be either annual or daily. It is also unclear whether the law will determine the form of the support or the permanent disability of individuals.

The following paragraph states: “People over the age of sixty-eight are entitled to receive a non-contributory pension from the State under the terms established by law. In the case of indigenous people and Afro-Mexicans, this benefit will be granted from the age of sixty-five”.

There are also drafting problems here because there is a repeated lack of concordance when reference is made to “Afro-Mexicans”. However, the fundamental question is how to introduce an ethnic criterion to determine the beneficiaries of a

pension. In the case of indigenous people, Article 2 of the Constitution includes the criterion of self-ascription by determining that “awareness of their indigenous identity shall be a fundamental criterion for determining to whom the provisions on indigenous peoples apply”. If, in the terms of section C of that same precept, the same power of self-ascription is conferred on the Afro-Mexican population, in principle the problem will have been resolved, except for cases in which that unilateral ascription is questioned or disregarded, or in which, conversely, persons who participate in a scheme of collusion that fosters new forms of administrative corruption are considered to be indigenous or Afro-Mexican.

Regarding the third paragraph, which reads: “The State shall establish a system of scholarships for students at all levels of the public education system, giving priority to students from families living in poverty, to guarantee the right to education on an equitable basis”.

In this paragraph it would have been possible to avoid the cumbersome and unproductive gender language in Spanish; but what is relevant is that the wording makes it clear that it is, once again, a long-term promise because if a priority is determined it means that it is not a universal system of scholarships, with immediate effects.

All of the above is brought up to exemplify how the content of a constitution has been deteriorating, which for some time now has been suffering from the overload of obligations to be provided by the State, repeatedly unfulfilled to the detriment of the prestige of the supreme norm. This is the case with the right to work, without unemployment insurance; with the right to food that coexists with the multiplication of hunger; with the right to a healthy environment, accompanied by the high pollution of large cities, rivers, and coastal areas. The new benefits are in addition to a series of previous reforms that, in the circumstances of the publication, did not even could receive the usual series of ephemeral recognitions.

The gradual *de-constitutionalization* of the State stems from the loss of harmony between the operation of a highly concentrated presidential power and its various consequences, accentuated in the midst of the health crisis. In these circumstances, problems such as the unipersonal nature of the government and its inherent verticalism, the patrimonial exercise of power, the congressional dismissal, the lack of political controls, the military presence in civilian affairs and the federal tension, which are issues frequently analyzed in the media and in national and foreign academic spaces, have surfaced with intensity.

2. *The Misunderstandings of Power*

The lexicon of the constitutions contains numerous polysemies that, over time, have nourished the political discourse.

From its inception, the U.S. Constitution established liberty and equality as basic principles. Both were part of the argument for the country's independence. However, in 1790 its population, approaching four million, included just over a million white women, free but not equal in rights, and about three-quarters of a million slaves, therefore neither equal nor free. This did not affect the universal tone of the normative statement.

The celebrated Declaration of the Rights of Man and of the Citizen, also the source of contemporary constitutionalism, did not include women or slaves either. In the French Caribbean colonies, slavery was only definitively eliminated in 1848, and it was not until 1890 that the major European powers and the United States agreed to abolish the slave trade through the Brussels Convention.

In the America emancipated from Spain and Portugal, the same thing happened. Liberty and equality were present from the first constitutional elaborations, with the same limitations mentioned in the previous cases. At no time has the use of these words in the constitutions been questioned, despite their contrast with reality.

These contradictions have been resolved as other institutions have evolved. In the 21st century, there are still outstanding debts in terms of equality and freedom. For example, the legal situation of women continues to be deficient in terms of labor equality and many efforts have been required for them to occupy spaces in the political arena. In terms of freedom, women continue to be denied full sexual and reproductive rights.

In the general area of freedoms, it is obvious that their absence also has a negative impact on the dignity of persons who, for various reasons, wish to have the necessary assistance to end their lives in the least traumatic way possible. This factor also affects the secularity of the State.⁵⁶

While the constitutions have not changed their basic wording, what has occurred is a change in the scope of the words. Liberty and equality mean different things over time. The meaning of both words is much broader in the 21st century than it was in the 18th century. Of the polysemies that appear in the constitutions, there are two whose content is still the subject of questions: democracy and people. The principle of democracy is cohesive even though there is no uniformity in the way it is practiced. It is common to postulate adherence to democracy, although each supporter may understand it in his or her own way. Nor is the concept of the people univocal. All this, even though contemporary constitutionalism is based on the sovereignty of the people and aspires to build democratic systems.

The conceptual problem is clarified through institutional developments, which imprint specific contents on each of the basic concepts. However, the struggle for power and its very exer-

⁵⁶ On September 23, 2020, amid the pandemic crisis, the Congregation for the Doctrine of the Faith published the letter *Samaritanus bonus*, authorized by Pope Francis the previous June 25. This document reiterates the condemnation of euthanasia and adds: “Those who pass laws on euthanasia and assisted suicide make themselves accomplices in the grave sin that others will carry out. They are also guilty of scandal because such laws contribute to the deformation of conscience”.

cise are a source of misunderstandings. These are the loopholes through which hypothetical solutions slide and can give rise to problems. The representative democracy that characterizes the prevailing constitutionalism is based on two fundamental pillars: the party system and the electoral system. However, parties and universal elections were the object of harsh criticism by conservative thought. Originally, parties were seen as promoters of social fracture and universal suffrage was rejected as an instrument that equated the “able-bodied” citizen with one who was supposed to be incapable of understanding the complexities of government. These prejudices were so widespread that selective suffrage, based on education, wealth, race, and sex, was maintained for centuries. So much so that just a century ago women had no electoral rights in almost all the world.⁵⁷

There are still signs adverse to the idea of the people. For example, the word *populism* has a strong pejorative charge and is often used as a synonym for *demagogy*. The academic definition of demagogue is striking because it alludes to the identification with the “plebs” or the “popular faction” of a society. *Plebs*, in turn, means “the lowest social class”. This discriminatory bias also extends to the word “people”. The negative charge of the word “*people*” remains in our time in expressions such as *populism* and *populacho*.⁵⁸ The simplest thing, instead of *populism*, would be to allude to those who seek to connect with the marginalized by means of devices to win their votes, or to those who adopt policies that appear to satisfy short-term social demands, as *op-*

⁵⁷ For example, in Europe the first country to grant women the right to vote was Finland, in 1907. In Latin America it was Ecuador, in 1924. In France, women began to vote in 1945 and in Italy in 1946.

⁵⁸ In the *Diccionario de la Lengua Española*, “plebe” is the “lowest social class”, and “populacho” corresponds to an even lower category: the “lowest part of the plebs”. The *Diccionario de Autoridades* (1737) defined “pueblo” as “the common and ordinary people”, which coincided with the first edition of the *Encyclopaedia Britannica* (1771), which did not include the word *people* but *popular*: “that which relates to the common people”.

portunists, those who take advantage of “the circumstances to the maximum” to take advantage of them. The so-called *populists* do not act in favor of the *people*, since they do not do so without caring about generating further problems for the social collective.

In the United States, for example, the connotations of *populism* are different. Presidents such as Lyndon B. Johnson, James Carter or Barak Obama declared themselves populists because, in the political tradition of their country, that means identification with the problems and needs of the common people. The generalization of the word *populism* as a stigma involves a position adverse to the concept of the people, which in turn contrasts with the very content of *democracy*, which is nothing but the government of the people. The concept of *populism* is present in doctrine and in the media, although, since the age of Pericles, there is another one about whose use there is a univocal understanding: *demagogy*. Thucydides was, perhaps, the first to use the noun and its corresponding adjective, *demagogue*, in the sense of the orator who exalts the passions of the multitude and flatters them by offering objects that are beyond what is reasonable and even beyond what is possible.⁵⁹ The expressions multiplied and there are indications that in the time of Aristotle and Xenophon they were already in frequent use.⁶⁰

Aristotle identified corruption and law-breaking as precursors of demagogy, which he likened to tyranny “because both are a despotic exercise of power” based on flattery of the crowd. This is the crux of the problem: demagogy in the Athenian world did not imply a disdain for the people; it reflected a fragmentation of the people, dividing the least, the rich and the most cultivated,

⁵⁹ Thucydides, *Historia de la Guerra del Peloponeso*, IV, 21, and VIII, 55.

⁶⁰ Xenophon, *Helénicas*, V, 2, vii; Aristotle, *Política*, 1292 a. In this fragment Aristotle mentions a verse of Homer in which Homer states, “not good is a majority leadership”, after which the poet adds, “one leader be; one king” (*Iliad*, II, 204-205). The philosopher found these ambiguous expressions to be contrary to democracy, but they could be understood as a criticism of demagogy.

from the rest of the population. This separation was conducive to the formation of factions.⁶¹

The effects of demagogy have been rejected since its inception. In what is perhaps the first staging of a political debate, Aristophanes presents two demagogues arguing before the people (the character that symbolizes it is called Demos), in a real political bid to win their sympathy and support. When one offered flour for all, the other surpassed him by promising biscuits; when one spoke of chairs, the other of tables; if one mentioned fish, the other replied with meat; one assured that he would give everyone “sustenance, without having to earn it”, and the other that he would provide them with an ointment for fatigue. And so on, till from the chorus came this call: “Demos, thy power is good: all the world reveres thee as if thou wert a king! But it is easy to handle you, carrying you about like a child. You like to be flattered and made a fool of. Every speaker with his foul mouth dupes you”.⁶²

Demagogy has multiple effects. Those who make unfulfillable promises when they seek power know that, once they have achieved their goal, they will be able to attribute the impossibility of fulfilling their commitments to the diminished capacity of the treasury, attributable to their predecessors or to any other external factor, national or international. Most often, even so, some short-term expectations are met, to strengthen alliances or to placate the disappointed spirits due to unresolved issues. As for the exercise of power, it is generally based on a great concentration of power, which is explainable since the demagogic call is always personal. The parties cannot sustain this type of platform for long because they exhaust the various alibis used to justify the lack of promised results. Therefore, personalist parties, formed around the charismatic presence of a caudillo, tend to have an

⁶¹ Cf. Finley, M. I., *Democracies Ancient and Modern*, N. Jersey, Rutgers University Press, 1996, pp. 38 *et seq.*

⁶² Aristophanes, *Los caballeros*, translation by Ángel Ma. Garibay, Mexico, Porrúa, 1967, p. 55.

ephemeral life,⁶³ unless, as happened with the Peronist Party, it becomes a stable political organization with an identifiable program.

Another negative consequence of the triumph of demagoguery consists in re-establishing or, if already present, deepening the most archaizing characteristics of the systems. If we follow Weber on this point, we can see that the source of legitimate charismatic power is opposed to that of rational power. The demagogue who gains access to power through democratic procedures is legitimate; however, his presence reproduces forms of exercising power that make democracy regress. This is a paradox that can be explained when democratic constitutionalism has not managed to resolve its own evolution.

Generally, the acceptance of personalist political solutions is preceded by a breakdown of social trust in parties, with the consequent weakness of the representative system, and by a governance deficit that encourages the multiplication of social inequality, corruption, violence, or all these together. These scenarios are usually precursors of the personalisms anointed by the voters through democratic electoral instances. Majority preferences can oscillate between opting for demagogic expressions that offer demands, or for those of coercive force that promise order. The vulnerability of societies beset by mistrust, poverty and other basic deprivations exposes them to this kind of choice, which, in essence, involves the use of legitimate procedures.

Despite its widespread acceptance, in such a context I find it inadvisable to use terms that, like *populism*, accentuate the reference to the presumed social support of those who gain power by using the hopes of the disadvantaged. I know that this is a widely accepted concept, but semantic associations have relevance and discrediting what is popular sponsors an elitist, even classist dis-

⁶³ See, for example, the case of Silvio Berlusconi: Calise, Mauro, *Il partito personale. I due corpe del leader*, Bari, Laterza, 2010, pp. 149 ff, and Calise, Mauro, *La democrazia del leader*, Bari, Laterza, 2016, pp. 20 et seq.

course. This can be deduced from the tendencies that are formed when the so-called *populisms* arouse and even “justify” very primary political responses, consisting of personalisms of the opposite sign, that is, contrary to popular interests. When populism is denounced, allusion is made to the person who embodies it and to the *people* who anoint him.

One should not underestimate “the desire of the masses to live better”, as Burckhardt pointed out, despite his moderate conservatism, at the conclusion of his considerations on universal history.⁶⁴ He himself denounced the presence of the “terrible simplifiers”,⁶⁵ by allusion to demagogues, accusing them of taking advantage of desperate situations or, conversely, of the final hopes of the people who supported those who in a simple, intelligible, persuasive way, knew how to stir the heartstrings of the people to conquer popular confidence.

The concept of the people is multifaceted.⁶⁶ It is used in a disparaging sense when it is associated with criticisms of *populism*, and it is used as a pretext in the deconstruction of the constitutional state by labeling as *popular* the ideas, acts and works of those who use the people as an alibi for dispensing with democratic practices. It is advisable to avoid the degrading use of “people”. That voice requires care in all its derivations. The legitimacy of the constitutional state is based on the people.

⁶⁴ Burckhardt, Jacob, *Reflexiones sobre la historia universal*, Mexico, Fondo de Cultura Económica, 1961, p. 308.

⁶⁵ Cited by Loewenstein, Karl, *Brazil under Vargas*, N. York, Macmillan, 1942, p. 365.

⁶⁶ See Badiou, Alain *et al.*, *¿Qué es un pueblo?*, Buenos Aires, Eterna Cadencia, 2014. The set of essays contained in this work offers an enriching overview of the concept of *people* from anthropological, historical, philosophical, literary, political, and sociological perspectives. However, the juridical one was missing.