

I. CONSTITUTIONAL REFLECTIONS ON COVID-19

1. *Public Health and Institutional Health*

The COVID-19 pandemic also affected the health of the world's political institutions and economy.

When the emergency is over, in addition to the scientific assessment, it will be natural for the different countries to take stock of what happened and of the adjustments they should make to fine-tune, correct, or strengthen their institutional apparatus.

This crisis meant that for the first time in history, the inhabitants of a large part of the planet were simultaneously secluded in their homes, protecting themselves from the same threat. A sense of fear crossed every household in the world, regardless of socio-economic levels. This generated an awareness of global empathy never before recorded. The news coverage of the spread of the virus was accompanied by the different health, legal, economic, and political measures that were taken in the affected countries.¹

One striking aspect was the drastic nature of the measures adopted in China, of which Wuhan became the emblematic point. The question of whether it would be possible to impose

¹ The legal analysis was enriched by various contributions. The UNAM's Legal Research Institute México produced an extensive series of volumes coordinated by Nuria González Martín, under the general title of *Emergencia sanitaria por COVID-19*. The Peruvian Association of Constitutional Law published *Emergencia sanitaria por COVID-19. Retos al constitucionalismo peruano*, coordinated by Blume Fortini, Ernesto, and Sáenz Dávalos, Luis R., Lima, Adrus D&L Editores, 2020. *COVID-19 y parlamentarismo*, coordinated by Barceló Rojas, Daniel *et al.*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 2020.

such restrictions in democratic societies was answered in the affirmative, as witnessed in the streets and squares of Spain and Italy, for example. Although the reaction times were not similar, the magnitude of the stoppage was. It did not take long for another unusual event to occur: the closure of borders between neighboring countries and of national and international flights.

Once the pandemic arrived in the United States, four types of measures were put in place: those internal to each state, those shared between two or more states, those agreed between the federal state and one or more states, and those dictated for the whole country. Provisions agreed upon by the authorities at the municipal level were added. The multiplicity of actions exhibited the coordination problems caused by design errors in a composite state. The unitary States operated their decisions in a more homogeneous manner. The convenience of a particular analysis was raised after the crisis was overcome to appreciate the results, according to specialized health measurements, in the decentralized, federal or regional systems, and in the unitary ones.

2. *The Crisis in Mexico*

In the case of Mexico, COVID-19 has subjected the State to enormous stress. The nature of the evil was associated with multiple factors that put society and the authorities under unusual tension. It is too early to recapitulate on the successes and errors of the measures applied; only the perspective of time will allow for an evaluation stripped of subjectivity. The results will be assessed empirically in terms of health and in terms of the impact on employment, poverty, and national product. In addition, it will be possible to measure the effectiveness of the institutions, the trust they inspired and the social appreciation for the leaders and the policies they adopted.

In Mexico, two levels can be distinguished: that of conjunctural politics, where the polarization that had already existed for some time, was accentuated, and that of the institutional re-

sponse capacity, which was conditioned by governmental verticalism combined with the weakness of the representative and federal systems. The institutional aspect is called to occupy the post-crisis spotlight and will require constructive solutions.

An initial denialist impulse in Mexico and in some other countries tried to minimize the pandemic by arguing that other diseases cause a higher number of deaths and that several previous pandemics were more lethal than the current one claims to be. It is true that this has not been the most lethal in history, not even in contemporary history (remember, for example, the misnamed *Spanish flu*), but it is the one that has caused the greatest commotion. This denotes the emergence of a planetary society that, in addition to sharing directly and simultaneously an adverse experience, raises common expectations. To satisfy them, it will be necessary to have more responsible and better built institutions to provide accurate and timely responses, and to have scientific, economic, financial, and technological resources capable of meeting unforeseen demands of exceptional magnitude.

All the above requires an operational and functional constitutional State. To the extent that everything involved in the solution of an emergency requires coordination and execution capacity, only the democratic State can provide reasonable responses, since it is the only organized entity with legitimate coercive attributes that exists.

There is a need for a State that can respond to the growing demands for welfare and security while promoting human rights and meeting the democratic aspirations of societies. COVID-19 is only one of the phenomena that will test humanity. The lack of serious commitments by major economies to reduce the growing risks of climate change portends a period of mishaps such as floods and droughts, cyclones, and fires, which will lead to hunger, unemployment, disease, death, displacement and possible social backlashes of exacerbation.

All of this can be remedied if democratic institutions are designed and adopted in time to limit the discretion of those in

power. As we have seen in the experience of COVID-19, in systems with a strong concentration of power, solutions became personal and unappealable. In democratic systems, power is deconcentrated, so social and political sensors are multiplied. This makes them more receptive and sensitive and, therefore, more likely to provide accurate and timely responses.

In Mexico, as in almost all countries, opinion about the handling of the health crisis was divided. This is not relevant. What does count is that the bodies of political representation, federal and local, had a minor presence. There was no deliberation about the health measures and therefore they ended up being decisions dictated in a vertical way, not seconded by the political forces, unlike what happened in the reformed presidential systems and in the parliamentary systems. The Congress of the Union also did not intervene in the approval of economic measures to preserve jobs. At a time of maximum visibility of the performance of power, the Mexican representative system was blurred.

Another factor that became ostensible was the prevailing insubstantiality of high-level positions and the absence of a quality professional administrative service. The model of silent, sometimes even transparent, civil servants predominates, symbolizing the paradox of being public servants resisting the public. In democratic constitutional systems, the members of governments are figures with an opinion and position, exposed to contact with the media and with the political representatives of the nation, obliged to render a permanent account of their activity. In a democratic system, the reasons for power must always be explicit, and the suitability of the principal officials must be assessed by the governed and their representatives, not only by those who appoint them.

Regarding the civil service, its lack is typical of patrimonialist systems where elections serve to choose conquerors. The victors assume themselves as usufructuaries of the administrative apparatus and distribute it according to affections, affinities, interests, or pacts. Colonized administrations exhibit their dysfunctionality

when they find themselves amid exceptional pressures such as the health emergency.

During this difficult period, the opposition was conspicuous by its absence. Except for some political figures, the parties showed their irrelevance. This is also part of the institutional deficit because the parties are the basis of any representative democracy. Their weakness is not due to electoral results or to the capacities of their leaders, but to the institutional design of the system. In Mexico, political minorities have very few rights. The electoral system is neat and efficient, but it is not enough by itself to ensure institutional democracy. While in a well-constructed democracy the majority governs and the minority controls, the Mexican Constitution still does not incorporate efficient political controls that allow minorities to fulfill their functions.

The health crisis provided an opportunity for the citizens of the world to witness foreign realities and make them their own. While a large part of the world's population had to confine themselves to their domestic spaces, a significant percentage had the time to learn about events in other parts of the world. By becoming aware of the different systems and styles of government, they have learned, or at least sensed, that without a powerful state their rights are at risk.

3. *Tasks for the Return to Normalcy*

The return to normalcy will not be smooth or routine. The reconstruction of economies will require decisive state intervention. The challenge is to ensure that the Leviathan of our time is the object of a good constitutional design that makes it effective and controllable. It depends on the possibility of building satisfactory democratic political controls to ensure that the State has the instruments to foster development, guarantee security and promote well-being, without running the risk of sliding down the slope of corruption, arbitrariness, and paternalism.

Another challenge facing the constitutional State of the twenty-first century is to accelerate the construction of administrative, legal, political, and technical instruments capable of dealing with a new global health or environmental contingency. The World Health Organization is functioning adequately, but the global environmental agenda remains small and has been hampered by the parsimony of the larger economies. It is essential to apply all the resources of diplomacy and politics to consolidate this organization, which has been in existence for a very long time.

In the same way, global and regional human rights instruments will have to be reviewed to incorporate new concepts. One of them, crucial for international and national democracy, is secularism. The health contingency had revived superstitions and fundamentalisms to the detriment of the secular State, and the secularity of the State was a prerequisite for democratic freedoms, equality, and pluralism.

The resoluteness of the economic measures implemented by many states once again made the apparatuses of political power the rulers of the economy. Keynesian decisions show their potential whenever they are put into practice, but J. M. Keynes also recommended strengthening democratic instruments. To invigorate democracy, parliamentary systems should solve problems such as the investiture of government, and presidential systems should solve the problem of the personal concentration of power and the political irresponsibility of governments.

The presidential system has its strongest points in the unalterable periodicity of the mandate and in the certainty of investiture, which avoids situations such as those suffered in Belgium (2010-2011, 2018-2020), Spain (2015-2016, 2019-2020) and Israel (2019-2020), also frequent in Italy and other countries. The prolongation of incumbent governments is supported by robust civil service systems. Even so, it makes society uncomfortable, exposed to frequent elections and the consequent political tension that accompanies them. Secure investiture and predictable continuity of government are the best solutions provided by the

presidential system and where some parliamentary systems could be heading. Constructive censorship, of German origin, is a step in that direction.

Conversely, presidential systems tend towards parliamentarism through the constitutional inclusion of cabinets, where members discuss and approve government plans and actions. Their members are subject to the confidence of Congress and attend periodic and systematic control sessions. Electoral regularity and the permanence of the head of government help to avoid the unrest and animosity generated by recurrent elections, as happens in parliamentary systems. It is foreseeable that constitutional states will tend towards the flexibility offered by the hybridization of basic systems. The plasticity of contemporary constitutional designs is conducive to creative combinations. When mixed systems are well balanced, they enhance the advantages and mitigate the shortcomings of classical models.

In Mexico, it is necessary to resume the debate on institutional renewal in the federal and local spheres. The lack of democratic political controls by the congresses perpetuates the incompetence of the rulers and the irresponsible exercise of power; the caciques are an expression of arbitrariness and corruption. It is convenient to introduce a social council because the lack of institutional spaces for deliberation maintains the insularity of the economic, social, and professional areas of the country, to the detriment of possible understandings and agreements that dynamize our scientific, cultural and economic life. The deprivation of instruments of access to justice and a highly professional and rigorous civil service career at all levels of government are an alibi for patrimonialism and corruption. The marginalization of the representatives of the nation in the definition and evaluation of public policies, and the limitation of parliamentary minorities, diminish the role of the representative system and its credibility, and the concentration of presidential power is an archaism that hampers the State as a whole.

In addition to reconfiguring power to rationalize its exercise and defend democracy, and to innovate international governance for the environmental security of the planet, a new scheme of social organization is foreseeable. Trade unions have been marked by their gradual decline; the social sectors favored by basic income policies lack organization and cohesion, and non-governmental organizations dedicated to the promotion and defense of human rights act in segmented and uncoordinated fields. Dispersion has caught workers, both salaried and non-salaried, at a time of maximum vulnerability. It is likely that the wave of unemployment and wage sacrifices will bring about the resurgence of the concept of class and generate the reorganization of the proletariat, with a global perspective. Its best form of struggle will be through electoral and parliamentary democracy, as Ferdinand Lassalle foresaw since the 19th century.

In addition to profound conceptual and institutional revisions, COVID-19 has provided a large-scale example of how emergency conditions cause societies to privilege life over liberties. These exceptional situations can be frequent (environmental calamities, cyclones, epidemics, volcanic eruptions, fires, floods, earthquakes, etc.) and there are cases in which they can become chronic, such as criminal violence. For such circumstances, institutional instruments must be available that, in addition to facilitating the appropriate responses to the circumstances, guarantee democratic continuity, so that the defense of freedoms is always a priority.

The experience of COVID-19 should lead to social and political pacts that will bring about a new rationality of power in its national and international spheres. These reflections on the potential effects of COVID-19 are preliminary. At the end of the critical stage, it will be necessary to integrate an agenda to examine the dimension, organization, and function of the constitutional state. It will be part of a democratic debate for which we must be prepared. In Mexico we entered the gale under deficient institutional conditions, and we have to learn the lesson.