

II. THE NORMATIVE FORCE OF CRISES

1. *The Normative Force of the Facts*

Jellinek's approach to the normative force of facts has influenced constitutional research for more than a century. In his words: "Fundamental knowledge of the normative significance of facts is of great benefit to the doctrine of the state. Thanks to this it receives a solid basis and becomes intelligible as regards the social theory of the relations of state and society".²

Now this thesis is also useful to analyze what is happening with the COVID-19 pandemic from an institutional perspective, and what may happen to the State because of an unprecedented planetary shake-up. It is the first time that a phenomenon has reached the current magnitude and has been experienced globally at the same time.

References have been made to two previous shocks: the depression of 1929, because of the extent of its impact, and the world conflagration of 1939-45. Both events had consequences in shaping the economic, legal, and political institutions of their time. These serious chapters of history were intertwined, and their combined duration lasted for several years, whereas the pandemic is so far an isolated event and, barring the risk of recurrence, will last for a shorter period of time.

Although I am writing these pages amid a health crisis, its foreseeable magnitude does not point to the figures of other pandemics. The misnamed Spanish flu of 1918, for example, produced between 50 and 80 million deaths. At the most conser-

² Jellinek, Georg, *Teoría general del Estado*, Buenos Aires, Albatros, trans. Fernando de los Ríos, 1954, p. 255.

vative estimate, 50 million deaths equal to 2.7% of the world's population in 1920 (1.8 billion). Not even the First World War caused such a death toll; it is estimated that around 22 million people died because of this conflict.

The lethality of that pandemic was less than that caused by the Plague of Justinian in 542. In 1969 T. H. Hollingsworth, an expert in historical demography, concluded that 244,000 of Constantinople's 508,000 inhabitants died (48%).³ From the testimonies of the historian Procopius and the jurist Agathias it is known that the emperor, like almost the entire population, suffered from the disease. Centuries later the Black Death (1347-53) caused the death of 40-60% of the Eurasian population. It is considered the greatest biomedical disaster in history and gave rise to what Jaen Delumeau has called "the Fear in the West", with its long chain of implications leading up to the Thirty Years' War.

The intensity of pandemics has decreased thanks to advances in life sciences and technology. Today it is possible to work, study and stock up remotely, and it is unimaginable that a disease would wipe out half the population; not even the 2.7% of a century ago. To reach .1 we would have to reach the calamitous figure of almost eight million deaths in the world.

Although it is too early to trace the route that public institutions will take, there are enough elements to hypothesize that the normative force of the crisis will be projected, among other sensitive areas of the State, to the representative system, international relations, and secularism.

2. *The Health Crisis, the Representative System, and International Relations*

Among the characteristics of COVID-19 are its speed of dissemination and the global synchronization of health and econo-

³ Rosen, William, *Justinian's Flea*, London, Viking, 2007, p. 209.

mic measures to mitigate its effects. There have been differences in restrictions on the movement of people, the conditions of health systems, and support programs for families, workers and employers, as well as in the political and legal procedures and instruments used. These measures have to do with forms and styles of government, especially the functionality of the representative system.

Democratic constitutional systems provide for the concentration of decision-making powers in exceptional situations to make the responses of power more agile and effective. The temporary suspension of standard procedures is allowed to make room for modalities as extraordinary as the very phenomena being confronted. This is a dynamic form of reaction that has been known as dictatorship since the Roman Republic; nowadays it can be framed as an ephemeral, regulated, and controlled form of constitutional dictatorship. Up to this point nothing generates any shocks because there are constitutional provisions for such circumstances.

The problems begin when the exceptional legal measures are exercised arbitrarily, or when instead of applying the normative provisions, improvised decisions are taken that are outside the legal framework. Even a combination of compliance and contempt is not satisfactory since partial compliance with the law does not validate irregularities.

At that point the authority separates from the order and begins a drift whose destiny is conjectural. When the contingency ends and normality is reestablished, attention will turn to the faults committed and options will open up, such as continuing along the route taken and accepting authoritarianism as a permanent situation; calling to account, clarifying facts and determining possible responsibilities, or seeking an institutional design that addresses the future, without accepting the perpetuation of anomalies or punishing those who, through diligence or negligence, acted against or outside the norm.

What is most feasible is that the time comes for innovation, whether radical or progressive. Institutional creativity always in-

volves imagination. Jacob Burckhardt identified the modern State as a work of art for having constructed an order of equilibrium in power relations. Without proposing it or going into the subject at length, the historian offered the key to the systematic fine-tuning required by constitutional instruments, which are exposed to constant tensions, distortions, and manipulations.

Every crisis leaves consequences. To state that the pandemic will lead to institutional adjustments is neither wishful thinking nor premonition. Identifying regularities is characteristic of the sciences, including the social sciences, and one of these regularities is the one that associates crises with changes. What is special about the changes that will occur is related to the extraordinary nature of the crisis. Previous global crises concerned economic, financial or coexistence problems, and generated multiform responses.

The most recent major experience was the Second World War, which resulted in a plurality of international organizations whose paradigm is the United Nations system. The countries most involved in the war also undertook internal modifications of varying degrees. Germany, France, Italy and Japan, for example, changed their constitutions and political systems; Great Britain and other powers saw their colonial hegemony altered; the United States developed institutions of expansion and intrusion such as the Central Intelligence Agency, and limited the re-election of its presidents; the extinct Soviet Union accentuated the internal harshness of its dictatorship, colonized a part of Europe and Asia, and multiplied its political actions in other continents, unleashing the phenomenon known as the Cold War. In addition, China underwent a second revolution, the political map of the Middle East was altered, and many colonized countries became sovereign states.

Now, for the first time, there is a global public opinion that demands effective health measures to combat the pandemic and economic aid policies. Each segment of this opinion processes the responses of its authorities and contrasts them in real time

with those of other legal-political spaces, be they cities, regions, or countries, generating an awareness based on the comparison of government actions and their results. The world crisis caused by COVID-19 has brought about a citizenry versed in science and in a new scale of politics. A globalized society will be more sensitive to the problems of climate change, since it already has a direct experience of what a global calamity implies, and of the anguish caused by poverty, hunger and war suffered in different parts of the world.

Forced confinement has affected all the associative nuclei, so it is inevitable that their members exchange experiences, reflections, and projects. From this set of common perceptions and experiences will emerge the satisfaction or dissatisfaction with what the authorities have done or not done. The collective maturity produced by such traumatic situations as isolation, fear of illness and the daily alarm caused by data on the sick and the dead all over the world, may well translate into demands for more truthful and systematic information, for the proscription of state arbitrariness, for better quality of governors and civil servants and for greater involvement in the decisions of political, social, and professional representatives. In short, it is foreseeable that it will tend to increase the need for more democratic institutions.

Even if the duration of the pandemic is shortened, the intensity of personal suffering and the aftermath of job destruction and income degradation will keep global society at a level of alert of which there are no previous records. In general, institutional responses were better articulated and implemented where the system facilitated consensus and shared decision-making and were more questionable where personalism imposed vertical decisions. In this context it is possible to predict the inevitability of the changes and even their orientation, which will naturally identify the core of the juridical-political problem in the concentrated exercise of power and the key to its solution in the representative system.

The preservation of civil and political rights will be present in the demand for change. The foreseeable economic collapse

will force States to undertake recovery actions on an exceptional scale. It will be the only option to avoid a social turbulence of unpredictable magnitude. To prevent this from leading to a resurgence of encroaching statism, it will be crucial to reinvigorate representative democracy and to promote a new range of international cooperation modalities.

The breakdown of many national economies will open spaces for the expansion of large corporations and even companies bailed out with public capital in their home countries. States whose economies are supported by outside investors will be at their mercy unless they adopt democratic institutions to reduce internal corruption and avoid the external subjugation that accompanies such processes.

3. *The Health Crisis and the Secular State*

The magical explanation of the plagues, present throughout the sedentary life of mankind, led to the conception of deities whose wrath had to be appeased by sacrifices. In Aramaic, Egyptian and Phoenician antiquity Rešep was venerated as the god of plague; in the Greek universe this place was occupied by Apollo.⁴ This son of Zeus was also god of health and procreated with a mortal no less than Asclepius or Aesculapius.

The plagues were also a contributing factor to the consolidation of Catholicism in the late Roman Empire. When Constantine made the Catholic religion official (edict of Milan, 313) he must have calculated that if he made Catholics his own he would reduce resistance to his empire and could avoid a battle front, saving financial and military resources for the western front. He also knew that the nascent ecclesiastical hierarchy would not tax the public treasury because, during the centuries of adversity, almsgiving by the parishioners had become widespread. An additional reason, perhaps the most important, was that Catholicism

⁴ Burkert, Walter, *Greek Religion*, Singapore, Blakwell, 2012, pp. 145 *et seq.*

pacified the population by offering the immortality of paradise to those who behaved with obedience and resignation before authority. There could not be anything more functional for political power than a creed that did not involve expenditures, avoided tax increases, and allowed the reduction of troops because it associated the afterlife with obedience to imperial authority.

According with Apollonian treachery, in the early stage of Christianity the plagues were regarded as a punishment of the peoples, attributable to the presence of ungodly rulers. When the conversion of the emperors took place, the responsibility began to shift to the devil. Political and religious hierarchs made common cause and participated in exorcisms to repel Satan. This was most conspicuous during the Justinian plague. In Paris, for example, a clash between paganism and Catholicism was staged in connection with this epidemic. While the bishop of the city led a procession to drive out the devil, King Chilperic, in defiance of the empire, ordered sacrifices in honor of Apollo.⁵ But if the confessional state facilitated governance in the late empire, the situation was reversed from the high Middle Ages onwards when the hierarchy increased in size and wealth, and disputed the temporal power of the monarchs.

Now the secular state, the product of a long and difficult journey, may be at risk. From the beginning of the health crisis, information abounded regarding the origin of the pandemic and the strategy to confront it. In this case the demonic argument was absent. Even so, there were appeals to miracles by political leaders who, in the manner of Roman monarchs, found in religious beliefs a diverse strategy to mask their mistakes or deficiencies, and tried to transfer the pandemic's remedy to divine will. In some States, this phenomenon may lead to a confessional relapse, accompanied by the tightening of policies related to sexual and reproductive rights and euthanasia.

⁵ Stoclet, Alain J., "Consilia humana, ops divina, superstitio", in Little, Lester K., *Plague and the end of Antiquity*, N. York, Cambridge University Press, 2007, pp. 137 *et seq.*

Keeping the secular State under conditions of simulation would erode the Constitution at a time when it should inspire maximum confidence, as the axis of social cohesion and public freedoms. Society has only one instrument at its disposal to control power: the law.

As will be emphasized below, it is foreseeable that the upheaval experienced by humanity will translate into new agendas for change. The crisis will precipitate postponed demands and will give rise to emerging demands. A shock of this dimension will have inevitable effects on the institutional and cultural environment of each nation and of the entire world.