

VII. AUTHORITARIANISM AND *VERTICALISM*

1. *The Errors of the Governed*

In the reality of state life, we, the people, are less than what the Constitution attributes to us. However, the construct of popular sovereignty must be maintained as the argumentative axis of liberties and equality, and of the commitment of the rulers to justice and well-being.

Democratic disillusionment tends to occur when the grandiloquence of political proclamations generates expectations that are then overshadowed by a normality that is sparser than words. In the games of power, the discourse does not always aim to inform or guide, but rather the opposite: to illusion and distract. Throughout electoral campaigns, a dual language is adopted: that of rudeness to degrade opponents, and that of sophistry to trap voters.

In personalist presidential systems, this language can reach paroxysm; in parliamentary systems, there are usually certain precautions since, once the race is over, the adversaries may need each other to form a government, in addition to the fact that in the ordinary debate, the defeated parties will be able to throw their unfulfilled campaign promises in the winner's face. For this reason, among others, the fights for the presidency are fiercer. This proclivity is accentuated when, in addition, there is no professional civil service and administrative positions are seen as a potential trophy by the members of each faction.

In pre-constitutional monarchies, power was subject to dynastic transmission. In that scenario there were also agonistic

situations, but with other biases, because except in very disputed cases they did not involve society. Democratic constitutionalism brought about a radical change, turning the citizen into the giver of power and therefore the recipient of slogans designed to captivate him. If for a candidate and his group the triumph means power and its benefits, for the citizen the victory is a prefiguration of prosperity, welfare and justice, sometimes also vindication and revenge.

The problems of electoral democracy are secular. The literature on this subject is very extensive, but I will stop at an analysis by Jaime Labastida that deserves attention because in addition to its elegance and erudition, the philosopher raises the democratic difficulty in all its rawness.⁴⁹ Since, in accordance with political correctness, democracy is assumed to be “the universal solution to all conflicts”, Labastida addresses the implications of democracy as a technique for the attribution of power, but without the garb that tends to make it an unfading object.

Labastida argues that the democratic act implies a social split that is resolved when a majority imposes itself on a minority, to which it can be added that it imposes itself even on a fragmented majority. It often happens that the formal majority is only a portion of the total number of inhabitants of a State. The essence of the democratic difficulty lies not in how to settle the ownership of power, but in the fact that the objectives of the triumphant social segment become the reasons for power. This is accentuated in personalistic presidential systems, where whoever wins, wins everything.

The paradox is that to achieve victory, reasons count less than emotions. For this reason, it sometimes happens that “the people” (or rather, the portions of the electoral mass that vote) make mistakes when electing their rulers... they do not always elect the best... they elect the one who is perceived... as “the one

⁴⁹ Labastida, Jaime, “Democracia y error”, in *Revista de la Universidad de México*, Mexico, UNAM, nueva época, num. 30, August 2006, pp. 22 *et seq.*

who represents the best option”, perhaps “the least bad”. Of course, Labastida does not present the problem with the intention of disqualifying democracy, but rather to contribute to its discussion since he concludes that “modern democracy is, in spite of everything, the best of the systems of government that have been invented up to now”.

In summary, Labastida raises four major issues: the influence of propaganda on the perception of political options, the risk of error on the part of voters, the exclusion of minorities, and the difference between authoritarianism and democracy.

As for the influence of propaganda on the perception of political choices, no effective remedies have been found to counteract it. This is a difficult undertaking because one of the most cherished fundamental rights —freedom of expression— is involved. In systems where attempts have been made to restrict political propaganda and advertising, constitutional courts have ruled in favor of the broadest freedom.

This problem, which accompanies liberal constitutional systems, tends to be solved by a constructive interpretation in the sense that the parties are entities of public interest, and that this interest is incompatible with negative propaganda actions that encourage fears and distrust about democratic institutions and one of their fundamental instruments: the electoral system. This is not a practical solution, but it points to it. The remedy is long term and consists in the development of the political culture. The subjectivity of the voter is subject to the propaganda impacts, but it also happens that people tend to decode the political messages according to their own conceptions or expectations, so that there may be errors in the perception of the receiver induced by the sender of the message.

The second problem is the risk of error of voters. There are some tools to mitigate the error. The exposure of citizens to propaganda messages and the frequency with which excessive promises are made leads many voters to opt for candidates who mislead them. An additional vulnerability factor is present in so-

cities, such as Mexico's, affected by serious inequalities, where demagogic discourse tends to find an echo.

The instruments adopted by constitutional systems to mitigate the risks of error are as follows:

- A. *Re-election.* This is a very sensitive issue in Mexico, especially regarding presidential reelection, but in most democratic and representative systems it is one of the instruments available to the citizenry to evaluate the performance of the holders of the organs of power (government and congress or parliament).

In presidential systems, the rule of limited re-election prevails (for a single period, or discontinuously). There are few cases of absolute prohibition, as in Mexico, or, conversely, of successive indefinite re-election. In parliamentary systems the rule is the unlimited re-election of the head of government, so that in most cases the re-election is interrupted when he loses the support of his party, his coalition, or the electorate. In parliamentary systems, the term of office of the head of state is less important, and there are even cases in which hereditary succession is preserved.

As for the representative system, there are few cases that prevent the re-election of representatives. In some systems, very few, limitations on the re-election of representatives have been adopted; the possibility of successive and unlimited re-election prevails. This is a procedure that has been considered useful to compensate for election error as it makes perpetual cheating more difficult. Moreover, the longer duration of the representatives generates certain balances in the face of the power of the executive.

- B. *Political control.* Constitutional systems contain instruments that allow political control of the rulers, which, without being infallible, obliges the members of the government

to develop minimum political skills to face the demands of an inevitable debate. The most commonly used instruments of political control are: discussion and approval of government programs; confirmation of cabinet appointments; regular appearances of government ministers before the bodies of political representation; attention to questions and interpellations formulated to ministers by representatives; accountability of ministers (votes of confidence and motions of censure); freedom of the bodies of political representation to approve budgets; and powers of investigation by minorities. For more than a century, these instruments of control were exclusive to parliamentary systems. Since the second post-war period they have become widespread in presidential systems. In well over half of these systems, some, or most of the above forms of control are already in place.

- C. *Guarantee of fundamental rights.* Among fundamental rights, those of a political nature occupy a prominent place. Their guarantee, that is, the availability of jurisdictional instruments to assure their application, has been divided since the second post-war period, in national and international organs. The defense of the rights of political participation, which includes those of electoral and control nature, has more effective mechanisms than those provided by the traditional constitutionalism. When the democratic error consists of having elected people who, once installed in power, affect individual or public freedoms, there are means of defense that, in a good number of cases, are functional. The evolution of these instruments is still in progress and is based on the inclusion of dignity as a principle comparable to fundamental rights. In 1945, the Charter of the United Nations gave dignity a global dimension. It was then adopted by the German Constitution of 1947, and now forms part of most of the constitutions drafted or reformed since then.

The exclusion of minorities is one of the problems that contemporary constitutionalism has sought to overcome. Measures adopted include:

- A. *Minority rights*. This is a growing aspect of contemporary constitutional systems. Although it is present in international human rights instruments adopted since the post-World War II and decolonization processes, its incorporation into constitutional systems became more pronounced after the fall of the Berlin Wall. The defense of minority rights consists, in general terms, of ensuring that minority groups are not affected by the oppression of the majority. The main responses are to extend the fundamental rights that are protected, to protect individuals and groups. It is possible to interdict the most well-known forms of exclusion, such as those related to language, illness or physical limitations, race, religion, sex, or sexual preference. Some sensitive issues are still missing, such as age and appearance, since in many places the elderly and people are discriminated against because of their physical appearance, their dress, or their personal grooming, e.g., because of the use of rings or tattoos. This expansive trend in the protection of fundamental rights is part of what can be called cultural pluralism.
- B. *Political rights*. This category includes the rights of political minorities, known as *opposition rights*. It is a matter of the constitutional systems in progressive development. These rights include those conferred on minority political parties to have access to privileged information, funding for their activities and the power of initiative to set up commissions of inquiry into government activities, for example.
- C. *Guarantee of fundamental rights against private individuals*. This is also an instrument of defense whose presence is increasing in contemporary constitutional systems. The first expressions of what is known by the German name *Drittwirkung*, which in Spanish doctrine is identified as *horizontal defense*

of rights, or defense of fundamental rights before third parties, were recorded in German and Argentine jurisprudence in the 1950s, in Spanish and Japanese jurisprudence at the end of the 20th century, in the constitutions of Colombia and some Argentine provinces. Gradually it is becoming generalized. *Drittwirkung* seeks to find a solution to the problem of oppression by majority groups or corporations that, in the exercise of their economic power or social influence, affect the rights of individuals or vulnerable groups.

- D. *Prohibition of arbitrariness.* In many cases, the mere application of norms does not resolve the problems of equity and justice sought by legal systems. For this reason, some constitutional systems find that the State must ensure that its power of coercion, in addition to being legal, is reasonable. This trend is at an early stage. The subject is discussed in greater detail in the chapter “Constitutional Problems of Emergency States”.
- E. *Non-application of the rule in special circumstances.* This is one of the most hotly debated issues in the rule of law, although it is a long-standing one. In the contemporary State, the unrestricted application of the rule adopted by a majority decision may generate conditions of oppression that are incompatible with the purposes of a constitutional State. For this reason, it is possible that it may not be applied when it is realized that, if it were strictly enforced, greater harm could be caused than by omitting to apply it. However, in this case, among others, the problem of discretion in the application of the law arises. This is an issue that has been discussed, without a satisfactory general solution so far. To overcome the problems of discretion, the mechanisms of political control over government decisions should be strengthened, among other measures.⁵⁰

⁵⁰ See Valadés, Diego, *Problemas constitucionales del Estado de derecho*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 2010, pp. 45 *et seq.*

- F. *Other institutions* of contemporary constitutionalism to prevent the exclusion of minorities are the popular initiative, the popular action, the *ombudsman* and collective actions.

Jaime Labastida includes a series of problems of modern democracies: political weariness, the agonistic nature of politics, the risk of transforming credibility into credulity, and the possibility of amendment when the citizen makes a mistake in the election, in a democratic system.

Trust is the basis of political relations in a democratic system. But trust, deeply studied by Niklas Luhmann, is very fragile. Corruption or the defrauding of expectations often has a damaging effect on trust. When the process of distrust is unleashed, democratic societies are exposed to authoritarian options, based on the predominance of the will of a person, a group or a party, which offer to meet the needs of welfare, stability and security in social relations, and efficiency in the decisions of the organs of power. To prevent this contingency, Luhmann himself points out that mistrust also plays a relevant role in social relations.⁵¹

All forms of organization of the State include the exercise of its coercive functions; but one of the differences between the democratic State and the authoritarian State is that in the former there are political and jurisdictional controls, while in the latter the levels of control are lower and, in certain cases, unfeasible. That is why Labastida is right when he concludes that democracy is the best system of government and that “the error committed in electing inept or corrupt rulers has in itself, in a democratic system, the possibility of being corrected”.

Democracy has many problems, but it is the only system that offers possibilities for amendment, however partial. Corrective actions can come from the citizen body and from the institutions themselves. When a system is well constructed, the institutional

⁵¹ Luhmann, Niklas, *Confianza*, Mexico, Universidad Iberoamericana-Anthropos, 1996, pp. 149 *et seq.*

interrelationship complements citizen action and self-generates responses for its preservation. This is what Luhmann calls *auto-poiesis*, borrowing the term from the scientists Humberto Maturana and Francisco J. Varela. It is not an automatic reaction but a form of adaptation that allows institutions, within certain limits, to find a reasonable level of equilibrium. The person who best noticed this function in antiquity was Polybius,⁵² which is why he favored mixed forms of political organization. Polybius warned that there is no true democracy where the majority is free to do what it wants and where it imposes itself by reason of numbers alone.

The mixed forms postulated by Polybius consisted of a combination of the three basic varieties, monarchy, aristocracy and democracy, already identified since Thucydides⁵³ and which later became classical models from Aristotle onwards, with their corresponding pathological expressions: tyranny, oligarchy, demagoguery. Nowadays the combinatory levels are different. Democratic systems are divided into direct and representative democracy; unitary or decentralized [federal or regional] democracy; and parliamentary or presidential democracy. These six forms of democratic organization admit various combinations that, following the classical guidelines formulated by Thucydides and Polybius, characterize the contemporary democratic constitutional State and allow us to solve some of the problems raised by Labastida. The pathologies of the State have other derivations and also present a wide range of modalities.

In the design of constitutional systems, the relativity of solutions must be accepted. There are no instruments that solve all problems completely, for all time. What is important about constitutional institutions is their dynamic nature, which allows them to adapt to changing conditions in the environment, or to transform them when necessary, in order to protect fundamental

⁵² *Historias*, VI, 4.

⁵³ *La guerra del Peloponeso*, VIII, 97, 2.

rights, satisfy expectations of justice, welfare and equity, and balance the relationships between the organs of power.

2. *The ruler's mistakes*

Constitutionalism has been enriched by offering remedial options for democracy. The complexity increases when faced with a semblance of democracy.

Political systems show their strength or exhibit their weaknesses during critical periods. Institutional response capacity reveals its true aptitudes when faced with unforeseen phenomena of significant magnitude. The COVID-19 pandemic made it possible to identify the latent features of many systems or to corroborate those already identified.

The way in which problems were processed and decisions were articulated varied according to whether the systems were democratic or authoritarian. The experience also revealed the presence of a modality that, while not democratic, does not fit the authoritarian model either.

Although the characterizations are highly conventional, it is generally accepted that a democratic system exists where access to power takes place through periodic and free elections, its exercise is for a peremptory period, it is distributed among various bodies that are balanced and controlled by each other, and its incumbents are subject to constant scrutiny and evaluation. There are democratized systems that, without reaching the desired fullness, present in varying degrees the main features of democracy and maintain a path that guides them in that direction.

In contrast, there are other systems, which are identified as authoritarian, where elections are limited, power is highly concentrated and is exercised irresponsibly. Burdeau defines it as “the regime of the boss”,⁵⁴ because personal will prevails, and Linz

⁵⁴ Burdeau, Georges, *Traité de science politique*, t. V, *Les régimes politiques*, Paris, LGDJ, 1985, pp. 192 *et seq.*

adds the presence of a controlled pluralism that subsists with the acquiescence of the armed forces.⁵⁵ There are other categories of non-democratic power, such as totalitarianism, which suppresses all margins of freedom and imposes an ideology, or the multiple expressions of dictatorship, in which power is monopolized, without term, by a person or a group, and is exercised with mere appearances of legality, or even without them.

In authoritarian systems there are some formalities designed to cover up the extreme concentration of power, and ritual acts with a democratic aspect are staged, such as directed and conditioned elections in terms of the number, quality and attributions of the competing parties. This is what Linz refers to as controlled pluralism.

In addition to these modalities of access to and exercise of power, there is another whose identifying features differ from democracy and authoritarianism, and which can be identified as *verticalism*. It is a regime of government in which some elements of authoritarianism, such as the concentration of presidential power and the political irresponsibility of those who assist him in the tasks of government, coexist with some democratic elements, such as free elections and open pluralism. Although the manifestations of this type of regime have been registered for decades in the Mexican political system, during the health crisis of 2020 they became evident through multiple decisions.

Verticalism exists where political power is legitimized by free and plural elections and autonomous jurisdictional bodies are present, but the exercise of power is highly concentrated and is practiced in a patrimonialist manner. For this last reason, the incompetence of the higher administrative cadres is exacerbated,

⁵⁵ Linz, Juan, "Opposition in and under an Authoritarian Regime: The Case of Spain", in Dahl, Robert A., *Regimes and oppositions*, N. Haven, Yale University, 1973, pp. 190 *et seq* and Linz, Juan, "Fascism, Breakdown of Democracy, Authoritarian and Totalitarian Regimes: Coincidences and Distinctions", working paper ("Geneva Paper"), October 22, 2001.

since hierarchical subordination distances the most prepared from the performance of public tasks, which are assumed by those who obey in a mechanical way, without their own criteria. By holding power amid a democratic deficit and by preventing or postponing the reform of the State, there is a negative impact on the quality of the collective and individual life of the governed, which can translate into corruption, insecurity and poverty.